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## Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption

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## COMMENTS

# CRIMINALIZING KLEPTOCRACY? THE ICC AS A VIABLE TOOL IN THE FIGHT AGAINST GRAND CORRUPTION

BEN BLOOM\*

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## I. INTRODUCTION

Government corruption is a global problem that impacts both rich and poor nations.<sup>1</sup> Since the end of the Cold War, the transnational consequences of corruption have become increasingly apparent for state actors, international organizations, and civil society groups alike. Corruption impoverishes national economies, threatens democratic institutions, undermines the rule of law, and facilitates threats to human rights and security through organized crime and

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1. See *Frequently Asked Questions About Corruption*, TRANSPARENCY INT'L, [http://archive.transparency.org/news\\_room/faq/corruption\\_faq](http://archive.transparency.org/news_room/faq/corruption_faq) (last visited Mar. 5, 2013) (defining corruption broadly as “the abuse of entrusted power for private gain”); *Glossary of Statistical Terms: Corruption*, ORG. FOR ECON. CO-OPERATION & DEV. (Aug. 6, 2002), <http://stats.oecd.org/glossary/detail.asp?ID=4773> (defining corruption similarly as “active or passive misuse of the powers of Public officials (appointed or elected) for private financial or other benefits”); see also BLACK'S LAW DICTIONARY 397 (9th ed. 2009) (explaining that corruption involves “a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others”).

terrorism.<sup>2</sup> The financial costs associated with corruption are also vast: in 2004, the World Bank estimated that both rich and poor economies pay over \$1 trillion U.S. dollars in bribes each year.<sup>3</sup> Between 1995 and 2001, Haiti, Iran, Nigeria, Pakistan, the Philippines, Peru, and the Ukraine all claimed losses ranging from \$500 million to \$35 billion due to the corruption of former leaders and senior officials.<sup>4</sup>

For resource-rich developing countries specifically, corruption poses a particularly devastating problem due to what many scholars have termed the “resource curse.”<sup>5</sup> Rather than enabling socio-economic development and fostering the entrenchment of democracy, the endowment of natural resources regularly provides the material basis for the misappropriation of public finances, fuels the demand for bribery, and fosters other forms of abuse of power and government corruption.<sup>6</sup> Resource-rich countries generally have lower economic growth, are less likely to be democratic, are more likely to be corrupt, and are more prone to attempted government

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2. See Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT’L ECON. L. 191, 192 (2005) (outlining the international community’s response to the increasing awareness about the consequences of corruption).

3. *The Costs of Corruption*, WORLD BANK (Apr. 8, 2004) <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (advancing that costs of corruption have additional, indirect detriments on reducing poverty, infant mortality, and inequality).

4. See Webb, *supra* note 2, at 207 (noting that economists generally agree on the strong correlations between high levels of corruption and negative economic consequences, including market inefficiencies, reduced levels of foreign investment, and distorted public expenditures).

5. See, e.g., Macartan Humphreys et al., *Introduction: What Is the Problem with Natural Resource Wealth?*, in ESCAPING THE RESOURCE CURSE 1–3 (2007) (explaining that resource-rich exporting countries generally have lower economic growth rates); Keith Slack, *Sharing Riches of the Earth: Democratizing Natural Resource-Led Development*, 18 ETHICS & INT’L AFF. 47, 48 (2004) (discussing how the “resource curse” undermines the comparative advantage associated with the abundance of natural resources); James C. Owens, *Governmental Failure in Sub-Saharan Africa: The International Community’s Options*, 43 VA. J. INT’L L. 1003, 1006 (2003) (advancing that grand corruption and abject governance exacerbate poverty in sub-Saharan Africa).

6. See Humphreys et al., *supra* note 5, at 1–2 (noting that the international market for resources from the developing world fuels corruption and the abuse of power in developing states).

coups.<sup>7</sup>

The direct connection between underdevelopment, the resource curse, and widespread corruption raises issues pertaining to the role of the international anti-corruption regime in addressing the problem of “grand corruption” in the developing world.<sup>8</sup> International anti-corruption laws increasingly have been used to prosecute corporations and individuals that bribe foreign public officials.<sup>9</sup> These laws, however, have had limited impact on corrupt government officials who have benefited to the detriment of the citizenry.<sup>10</sup> For example, the most frequently used tool to fight international corruption, the United States Foreign Corrupt Practices Act (“FCPA”), focuses entirely on the supply side of bribery and does not create liability for foreign government officials who solicit or accept bribes and rule by systemic corruption.<sup>11</sup> Other anti-bribery statutes enacted pursuant to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business

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7. See *id.* at 1 (advancing that natural resources can prevent sustained growth); see also Thomas Pogge, *WORLD POVERTY AND HUMAN RIGHTS* 169 (2008) (articulating that the revenue stream from a developing country’s resource endowment impedes democratic stability and encourages coup attempts); Xavier Sala-i-Martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria* (Nat’l Bureau of Econ. Research, Working Paper 9804, 2003), available at, <http://www.nber.org/papers/w9804.pdf> (providing an overview of the empirical literature that posits a strong correlation between corruption and resource-rich countries).

8. See discussion *infra* Part II.A (distinguishing “grand corruption” from “corruption” by defining “grand corruption” as pervasive throughout society, involving high-level government officials, and ultimately leading to a broad erosion of confidence in good governance, the rule of law, and economic stability).

9. See Mike Koehler, *Keeping FCPA Enforcement Statistics in Perspective*, FCPA PROFESSOR (Jan. 23, 2013), <http://www.fcprofessor.com/keeping-fcpa-enforcement-statistics-in-perspective> (providing an overview of corporate FCPA enforcement data, which highlights the overall efficacy of U.S. prosecution of foreign official bribery).

10. See, e.g., Sonja B. Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1291 (2007) (advancing the international anti-corruption regime as fundamentally limited to the supply-side of bribery).

11. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1998); see also *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (holding that the United States could not use the FCPA to prosecute foreign officials for taking bribes); Starr, *supra* note 10, at 1291–92 (concluding that no effective means exist to acquire assets illicitly obtained by corrupt officials as a result of the narrow supply-side focus).

Transactions treat bribery in much the same manner.<sup>12</sup> Moreover, while the United Nations Convention Against Corruption (“UNCAC”) contains broad prohibitions on government-side corruption, it fundamentally lacks the necessary enforcement mechanisms to secure compliance.<sup>13</sup> As a result, application of the current legal regime has not effectively curtailed grand corruption and is limited by glaring enforcement gaps.<sup>14</sup>

Still, an effective legal alternative to address the enforcement gap may exist. As will be argued below, the crippling impact of grand corruption in certain developing states may properly be considered a crime against humanity under Article 7 of the Rome Statute of the International Criminal Court (“ICC”).<sup>15</sup> This characterization would engage Article 7(1)(k) of the Rome Statute and allow for the prosecution of government officials who perpetrate grand corruption.<sup>16</sup> In contrast to those who have arrived at a similar

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12. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999), available at [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf); see also *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34 (Can.) (outlawing the bribery of foreign public officials); *Bribery Act*, 2010, c. 23 (U.K.) (criminalizing a wide variety of bribery-related offenses).

13. See generally *United Nations Convention Against Corruption*, G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003) [hereinafter *UNCAC*] (encouraging, but not mandating, the criminalization of domestic corruption).

14. See, e.g., *Webb*, *supra* note 2, at 193–204, 218–22 (explaining the shortcomings of the implementation mechanisms in the current international anti-corruption regime). See generally Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT’L L. 149 (2000) (calling for the classification of grand corruption as an international economic crime).

15. *Rome Statute of the International Criminal Court* art. 7, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

16. See, e.g., *Starr*, *supra* note 10, at 1259 (arguing, as a general matter, that grand corruption may be classified within the category of “other inhumane acts”); Ilias Bantekas, *Corruption as an International Crime and Crime Against Humanity: An Outline of Supplementary Criminal Justice Policies*, 4 J. INT’L CRIM. JUST. 466, 474–76 (2006) (suggesting that in certain circumstances corruption can constitute a crime against humanity); Chile Eboe-Osuji, *Kleptocracy: A Desired Subject of International Criminal Law That Is in Dire Need of Prosecution by Universal Jurisdiction*, in *AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 132 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005) (arguing that the Rome Statute should be amended to include corruption as a crime against humanity); Paul D. Ocheje, *Refocusing International*

conclusion, however, this comment considers the legality of prosecuting grand corruption under existing international criminal jurisprudence and assesses its application to a specific factual scenario.<sup>17</sup> Accordingly, this comment uses the regime of former Nigerian governor Peter Odili as a case study to assess circumstances when grand corruption should be elevated to international criminal status and prosecuted by the ICC. In making this argument, this comment asserts that ICC prosecutions against the most egregious forms of systematic government corruption, including widespread taking of bribes, significant theft of public finances, and manipulation of state bureaucracy for private gains, would advance the global anti-corruption regime.<sup>18</sup>

Accordingly, this comment will proceed as follows. To provide the necessary background information, Part II contains three elements. Part II.A offers a working definition of “grand corruption.”<sup>19</sup> Part II.B provides an overview of Article 7 of the Rome Statute of the ICC in the context of the enforcement gap in the international anti-corruption regime.<sup>20</sup> Part II.C then introduces the problem of grand corruption in Nigeria, focusing on the former regime of Peter Odili, Governor of Rivers State.<sup>21</sup>

Part III demonstrates that grand corruption constitutes a crime against humanity pursuant to Article 7(1)(k) of the Rome Statute,

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*Law on the Quest for Accountability in Africa: The Case Against the “Other” Impunity*, 15 LEIDEN J. INT'L L. 749, 777–79 (2002) (advocating for the elevation of corruption and looting of public funds to the status of an international crime); 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, 200–04 (2000) (contemplating the ICC's role in the fight against corruption).

17. See Harms, *supra* note 16, at 203 (noting scholars who make similar arguments).

18. See Starr, *supra* note 10, at 1259 (noting that international criminal tribunals could be particularly effective due to their considerable power to “trace, freeze, and seize stolen funds, and . . . exercise jurisdiction where other domestic or international remedies are unavailable”).

19. See discussion *infra* Part II.A (distinguishing grand corruption from more routine forms of corruption).

20. See discussion *infra* Part II.B (highlighting the scope of “crimes against humanity” under Article 7 and contemplating its broader application).

21. See discussion *infra* Part II.C (outlining Odili's role in the widespread perpetration of financial and electoral corruption in Rivers State).

and that Article 7(1)(k) should be used to prosecute Governor Odili.<sup>22</sup> Part III.A analyzes the text and jurisprudential application of Article 7(1)(k), concluding that it has the appropriate breadth to apply to the commission of grand corruption.<sup>23</sup> Part III.B then assesses the corrupt activities of Governor Odili in the context of the interpretation of Article 7(1)(k) set out in Part III.A. In doing so, it becomes clear that the Odili regime perpetrated grand corruption, in contravention of the Rome Statute.<sup>24</sup>

Finally, Part IV recommends that prospective ICC prosecution of grand corruption would be bolstered by (1) amending the Regulations of the Office of the Prosecutor (“OTP”) to include prosecutorial discretion guidelines that focus on egregious international crimes occurring on a systemic basis; and (2) establishing an Anti-Corruption Advisory Board to solicit evidence, conduct hearings, and make formal recommendations to the OTP for grand corruption prosecution.<sup>25</sup>

## II. BACKGROUND

### A. “GRAND CORRUPTION” DEFINED

In contrast to “petty” forms of corruption, “grand corruption” involves deep-rooted corruption at high levels of government that results in the significant misappropriation of wealth and widespread societal distortions.<sup>26</sup> While systemic abuse of power can take

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22. See discussion *infra* Part III.A (arguing that, as a general principle, grand corruption constitutes a crime against humanity under Article 7).

23. See discussion *infra* Part III.B.1 (emphasizing that Article 7 encompasses systemic crimes with long-term consequences, extending beyond armed conflict and mass atrocities).

24. See discussion *infra* Part III.B (concluding that Odili perpetrated grand corruption in contravention of Article 7).

25. See discussion *infra* Part IV (recommending that despite significant political barriers, the ICC offers a functional legal tool to punish corrupt leaders, deter future grand corruption, and provide effective mechanisms for the recovery of corrupt assets).

26. See *FAQs on Corruption*, TRANSPARENCY INT’L, [http://www.transparency.org/whoweare/organisation/faqs\\_on\\_corruption](http://www.transparency.org/whoweare/organisation/faqs_on_corruption) (last visited Jan. 20, 2013) (distinguishing grand corruption, which “consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good,” from petty corruption, which refers to “everyday abuse of entrusted power



various forms and can be committed by a range of highly-ranked public officials, the impact of “grand corruption” is vast, causing broad erosion of confidence in government, undermining of the rule of law, and encouraging persistent economic underdevelopment.<sup>27</sup> Therefore, for the purpose of this comment, “grand corruption” is distinguished by (1) the involvement of high-level public officials, and (2) the significance of its impact, usually in terms of gross abuses of power or misappropriation of significant public wealth for private gains.<sup>28</sup>

#### B. THE SCOPE OF ARTICLE 7 OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Established to bring justice to “the most serious crimes of concern to the international community,” Article 7 of the Rome Statute criminalizes four broad categories of crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>29</sup> To accomplish this, the Rome Statute provides the ICC with broad universal jurisdiction to investigate and prosecute anyone who perpetrates an international criminal act, so long as the perpetrator’s

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by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies”); *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators*, UN OFF. DRUGS & CRIME 23–24 (2004), available at <http://www.unodc.org/pdf/crime/corruption/Handbook.pdf> (noting that grand corruption involves the distortion of the central functions of government).

27. See Simeon Aisabor Igbinedion, *A Critical Appraisal of the Mechanism for Prosecuting Grand Corruption Offenders Under the United Nations Convention Against Corruption 2003*, 6 MANCHESTER J. INT'L ECON. L. 56, 58 (citing George Moody Stuart, GRAND CORRUPTION: HOW BUSINESS BRIBES DAMAGE DEVELOPING COUNTRIES (1997); Susan Rose-Ackerman, *Democracy and 'Grand' Corruption*, 48 INT'L SOC. SCI. J. 365 (1996)) (explaining that grand corruption is more extreme than petty corruption because grand corruption is perpetrated by “presidents, heads of States and governments, prime ministers, or other highly-placed government officials” and results in a lack of public confidence in government, the rule of law, and economic stability).

28. See Sanjeev Gupta et al., *Does Corruption Affect Inequality and Poverty?* 7–8 (Int'l Monetary Fund, Working Paper WP/87/76, 1998), available at <http://www.imf.org/external/pubs/ft/wp/wp9876.pdf> (concluding that systemic corruption has significant distributional consequences, as it affects budgetary revenues and expenditures, increases inequality and poverty, and decreases economic development).

29. Rome Statute, *supra* note 15, pmb., art. 5(1).

state is a party to the Statute and the acts were committed after the Statute entered into force on July 1, 2002.<sup>30</sup> ICC prosecution is restricted by the complementarity principle of the Rome Statute, which limits ICC jurisdiction to crimes that the host state is unwilling or unable to actively pursue.<sup>31</sup> To these ends, many states have enacted implementing legislation that provides for the investigation and prosecution of crimes that fall under the jurisdiction of the ICC.<sup>32</sup>

As the scope of “crimes against humanity” under the Rome Statute is at the root of this comment, a close reading of Article 7 is necessary to articulate its breadth and applicability to crimes of grand corruption as “other inhumane acts.”<sup>33</sup> Article 7(1) states:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe

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30. *Id.* arts. 11, 24 (establishing the non-retroactivity principle, which temporally limits the ICC’s jurisdiction to after the Rome Statute came into force); *id.* arts. 12–13 (establishing universal jurisdiction); *Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction*, U. MINN. HUM. RTS. LIBR. principle 1(1) (2001), <http://www1.umn.edu/humanrts/instate/princeton.html> (defining universal jurisdiction as criminal jurisdiction concerned only with the nature of a particular crime that disregards any other jurisdictional issues such as “where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”).

31. *See* Rome Statute, *supra* note 15, pmb. (“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”); *id.* art. 1 (noting that the ICC “shall be complementary to national criminal jurisdiction”); *id.* art. 17 (limiting the ICC jurisdiction to circumstances where the host states are unwilling or unable to carry out investigation and/or prosecution).

32. *See, e.g.,* Implementation of the Rome Statute of the International Criminal Court Act 2002, Government Notice (GN) 23642, § 3 (S. Afr.) (enabling the government “as far as possible and in accordance with the principle of complementarity . . . the national prosecuting authority of the Republic to adjudicate cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances”).

33. *See* Rome Statute, *supra* note 15, art. 7; *see also* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Oct. 2, 1995) (recognizing that crimes against humanity under customary international law extend well beyond international armed conflict so long as they comport to the principle of *nullum crimen sine lege*).

deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>34</sup>

Under Article 7(1)'s *chapeau*, the prohibited crimes of Article 7 reach international criminal status only if they meet certain threshold contextual requirements.<sup>35</sup> First, crimes against humanity must be the result of an "attack."<sup>36</sup> Article 7(2) defines "attack" broadly as the commission of any prohibited act that is "pursuant to or in furtherance of a State or organizational policy."<sup>37</sup> As such, the notion of an "attack" is not confined to armed conflict or State infliction of violence.

Under the *chapeau*, the attack also must be "widespread or systemic"—not a random act of violence—and must occur either on a grand scale against a multiplicity of victims or as part of a regular policy scheme.<sup>38</sup> Further, the attack must target a "civilian

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34. Rome Statute, *supra* note 15, art. 7(1).

35. See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 646 (May 7, 1997) (explaining that crimes unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity).

36. Rome Statute, *supra* note 15, art. 7(1).

37. *Id.* art. 7(2)(a); see also Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-T, Judgment, ¶ 122 (May 21, 1999) (holding that an attack must be connected to the crime); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 581 (Sept 2, 1998) (finding that the concept of an "attack" can be defined as an unlawful act pursuant to the enumerated provisions of the statute and noting that an attack also may be non-violent in nature).

38. Akayesu, ICTR-96-4-T, Judgment, ¶¶ 579–80 (defining "widespread or systemic"); Kayishema & Ruzidana, ICTR-95-1-T, Judgment, ¶ 123 ("The attack must contain one of the alternative conditions of being widespread or systematic. A widespread attack is one that is directed against a multiplicity of victims. A systematic attack means an attack carried out pursuant to a preconceived policy or plan. Either of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons.").

population.”<sup>39</sup> As a result, in order for Article 7 to be implicated, the attack must victimize members of the population not playing an active role in any hostilities or armed conflict underway.<sup>40</sup>

Perhaps most importantly, the *chapeau* of Article 7 mandates that perpetrators of crimes against humanity have a sufficient level of knowledge about the attack.<sup>41</sup> Article 30 of the Rome Statute provides clarification that the *mens rea* for ICC offenses, unless otherwise provided, includes direct and constructive forms of “intent and knowledge.”<sup>42</sup> As a result, the cumulative effect of these provisions render perpetrators liable in circumstances where they did not intend to bring about the objective elements of the crime, but nevertheless knew that the consequence would occur in the ordinary course of events.<sup>43</sup>

This comment focuses on the residual criminal law power in Article 7(1)(k), which prohibits “other inhumane acts” that are similarly grave to those expressly enumerated in Article 7(1).<sup>44</sup> In

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39. *Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 638 (clarifying that the targeted population must be predominantly civilian, but that the presence of non-civilians does not create a per se exclusion of the population).

40. *See Akayesu*, ICTR-96-4-T, Judgment, ¶ 582 (defining “civilian population”); *Kayishema & Ruzidana*, ICTR-95-1-T, Judgment, ¶¶ 127–30 (noting that “civilian” and “civilian population” are terms to be understood as applying within the context of war as well as relative peace); *see also Tadic*, IT-94-1-T, Opinion and Judgment, ¶ 644 (noting that attacking a “civilian population” does not mean the perpetrator must target or victimize the entire population; rather, so long as an individual or collective is attacked because of his membership in the targeted civilian population, the attack will be deemed against the “civilian population”).

41. *See Rome Statute*, *supra* note 15, art. 7(1) (requiring that the perpetrator have contextual knowledge of the “attack”).

42. *See id.* art. 30(2) (defining “intent” as when a person “means to engage in the conduct . . . [or] means to cause that consequence or is aware that it will occur in the ordinary course of events” and “knowledge” as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”); *see also Kayishema & Ruzidana*, ICTR-95-1-T, Judgment, ¶ 133 (concluding that the “knowledge” requirement in the ICTR statute conforms to that of Article 7 in the Rome Statute).

43. *See, e.g., Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 525–39 (Sept. 30, 2008) (advancing that intention and knowledge can be inferred from participation in a common plan that results in the commission of prohibited acts).

44. *See Rome Statute*, *supra* note 15, art. 7(1)(k) (criminalizing “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”); *id.* Elements of Crimes,

addition to satisfying the *chapeau*, Article 7(1)(k) requires that the act or omission must be inhumane.<sup>45</sup> The consequences of the attack must also be intentional, either explicitly intended or inferred from their predictable effect.<sup>46</sup> Under Article 25, this includes intending to oversee a chain of command or intending to play a role in a common plan.<sup>47</sup> Finally, since the harm must be “of similar character” to those crimes listed in Article 7(1), it must be the cause of “great suffering or serious injury to mental or physical health of the victim.”<sup>48</sup> As

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art. 7(1)(k) (elaborating on the Article 7(1)(k) requirements); *cf.* Charter of the International Military Tribunal of Nuremberg, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(i), U.N. SCOR, 48th Sess., 3217th mtg. at 1–2, S.C. Res. 827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 3(i), U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955, SC res. 955 (Nov. 8, 1994) (prohibiting “other inhumane acts” as crimes against humanity). *See generally* Terhi Jyrkkö, ‘Other Inhumane Acts’ as Crimes Against Humanity, 1 HELSINKI L. REV. 183, 203 (2011) (arguing that although the term “other humane acts” is a constant in international criminal law statutes, the scope of the term is contingent on the expressly enumerated crimes listed in each particular statute); Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 56 (1999) (explaining that Article 7(1)(k) language was included in the Rome Statute as a compromise to those who wanted to preserve the “other inhumane acts” provision and those who were concerned about its open-ended nature).

45. Rome Statute, *supra* note 15, art. 7(1)(k); *see* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 366 (Mar. 22, 2006) (requiring that “inhumane acts” include proof of an act or omission that causes serious mental or physical suffering or injury, or an act that constitutes a serious attack on human dignity).

46. *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 137 (June 15, 2009) (“[E]xistence of intent and knowledge can be inferred from relevant facts and circumstances.”); Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, ¶ 40 (July 7, 2006) (emphasizing that, absent a rare admission from the accused, intent must be inferred).

47. *See* Rome Statute, *supra* note 15, art. 25(3) (establishing criminal liability for jointly-perpetrated offenses).

48. *See* Prosecutor v. Vidoje Blagojević & Dragan Jokić, Case No. IT-02-60-T, Judgment, ¶ 645 (Jan. 17, 2005) (summarizing the ICTY’s case law as specifying that an admissible injury “need not be permanent or irremediable, but it must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”) (internal quotations omitted); *see also* Starr, *supra* note 10, at 1300 (citing Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 102 (Roy Lee ed., 1999)) (noting that the “of similar character” requirement was inserted to quell concerns about Article

such, to satisfy this causation element, the “inhumane act” must be sufficiently connected to the resulting harm.<sup>49</sup> Under Article 7, however, the injury need not be the immediate consequence of the “inhumane act” and can result from general actions that cause collective harm to a population.<sup>50</sup>

Although used only sparingly to date, Article 7(1)(k) jurisprudence indicates that the ICC has broad discretion to charge individuals with crimes that are not listed expressly in the Rome Statute.<sup>51</sup> Likewise, *ad hoc* tribunals (namely, the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”)) also have prosecuted “other inhumane acts” as crimes against humanity in a similar manner.<sup>52</sup> Therefore, Article 7(1)(k) must be viewed as

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7(1)(k) being too vague).

49. See *Prosecutor v. Kayishema & Ruzidana*, Case No. ICTR-95-1-T, Judgment, ¶¶ 148–54 (May 21, 1999) (“These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.”).

50. See Rome Statute, *supra* note 15, art. 7(1) (criminalizing systemic conduct that causes collective harm).

51. See, e.g., *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 456, 461 (Sept. 30, 2008) (advancing that these actions constituted the type of suffering that falls under the purview of Article 7(1)(k) even though the Chamber refused to convict on the basis that the same alleged acts could not be simultaneously prosecuted as murder and “other inhumane acts”); *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen*, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8th July 2005 as Amended on 27th September 2005 (Sept. 27, 2005) (charging “other inhumane acts” for the infliction of “serious bodily injury and suffering” against civilian residents of an internally displaced persons camp). See generally WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 181–86 (2010) (providing an overview of Article 7(1)(k) application).

52. See Statute of the International Criminal Tribunal for Rwanda, art. 3(i), U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/Res/955 (Nov. 8, 1994) (prohibiting “other inhumane acts” if committed “as part of a widespread or systematic attack against any civilian”); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5(i), U.N. SCOR, 48th Sess., 3217th mtg. at 1–2 (May 25, 1993) (barring “other inhumane acts” if committed “in armed conflict, whether international or internal in character, and directed against any civilian population on national, political, ethnic, racial or religious grounds”); see also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 688–97 (Sept 2, 1998) (interpreting the “other inhumane acts” provision of the ICTR Statute to include coerced nudity of Tutsi women); *Blagojević & Jokić*, IT-02-60-T, Judgment, ¶¶ 623–30 (recognizing as “other inhumane acts” under the ICTY

encompassing a broad array of unenumerated criminal acts so long as they are similarly grave to the enumerated crimes against humanity and satisfy the *chapeau* requirements in Article 7(1).<sup>53</sup>

### C. CORRUPTION IN NIGERIA: THE CASE OF PETER ODILI

Nigeria presents a useful case study to demonstrate the need for ICC prosecution against grand corruption.<sup>54</sup> Since the discovery of oil in the 1950s,<sup>55</sup> the Nigerian government has ruled by way of

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Statute the forced bussing of thousands of women, children, and elderly on the basis that they were not told where they were going, that they were abused by Serb soldiers, and that they were subjected to unbearable conditions). *But see* Rome Statute, *supra* note 15, art. 22 (mandating that the “definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”). *See generally id.* art. 21(2) (“The Court may apply principles and rules of law as interpreted in its previous decisions.”); SCHABAS, *supra* note 51, at 396 (noting and providing examples of regular ICC invocation of *ad hoc* tribunals on matters of substantive law).

53. *See, e.g., Kony*, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8th July 2005 as Amended on 27th September 2005 (charging “other inhumane acts” for the infliction of “serious bodily injury and suffering” against civilian residents of an internally displaced persons); *Prosecutor v. Ahmad Muhammad Harun*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007) (charging “other inhumane acts” for directing Sudanese Armed Forces and Militia/Janjawee to carry out attacks against the populations of Bindisi and Arawala); *Blagojević & Jokić*, IT-02-60-T, Judgment, ¶ 627 (concluding that it should assess “similar seriousness” in light of the factual circumstances, including the context of the attack and the physical, mental and moral effects on the victim(s)); *see also* SCHABAS, *supra* note 51, at 185 (noting serious physical and mental injuries that fall short of murder fall under Article 7(1)(k), including mutilation and other forms of “severe bodily harm, beatings and other acts of violence, serious physical and mental injury, inhumane and degrading treatment, forced prostitution, forced disappearance, sniping at civilians, and forced marriage”).

54. *See, e.g., T.B. Bamidele et al., Corruption in Nigeria: An Impediment to Achieving the Millennium Development Goals*, 4 J. ECON. & SUSTAINABLE DEV. 10, 16 (2013) (finding empirical evidence of corruption reducing life expectancy and economic growth in Nigeria); Adetokunbo Mumuni, *Request to ICC on \$6bn Fuel Subsidy Loot*, SOCIO-ECON. RTS. & ACCOUNTABILITY PROJECT (Apr. 20, 2012), <http://serap-nigeria.org/request-to-icc-on-6bn-fuel-subsidy-loot/> (requesting that the ICC investigate allegations of crimes against humanity as a result of massive corruption and theft of more than \$6 billion in the fuel subsidy scheme over three years).

55. *See* Emeka Duruigbo, *The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty*, 21 GEO. INT'L ENVTL. L. REV. 395, 402–03 (2009) (explaining the origins of oil discovery

kleptocracy and currently is one of the most corrupt countries in the world;<sup>56</sup> it suffers from systemic corruption, including pension fund theft, significant daily losses of oil due to illegal bunkering, and an ineffective judiciary.<sup>57</sup> In addition, although widespread corruption in Nigeria is commonly recognized, corruption remains largely unaffected by domestic anti-corruption initiatives, and international commitments under UNCAC and the African Union Convention on Preventing and Combating Corruption.<sup>58</sup>

While examples of corruption in Nigeria abound, this comment focuses on the regime of Peter Odili, former governor of Rivers State, to illustrate the grand scale of Nigerian corruption and the need for ICC prosecution. As a lifelong politician and leader of the People's Democratic Party ("PDP"), Odili governed the oil rich region of Rivers State between 1999 and 2007.<sup>59</sup> During his tenure,

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in Nigeria).

56. See *Corruption Perception Index*, TRANSPARENCY INT'L (2012), <http://www.transparency.org/cpi2012/results> (ranking Nigeria 139th out of 174 countries); *Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers State, Nigeria*, HUM. RTS. WATCH 1 (Jan. 31, 2007), [http://www.hrw.org/sites/default/files/reports/nigeria0107\[1\].pdf](http://www.hrw.org/sites/default/files/reports/nigeria0107[1].pdf) [hereinafter *Chop Fine*] ("Nigeria has produced several hundred billion dollars worth of oil since independence in 1960, but ordinary Nigerians have derived appallingly little benefit from all of that wealth. This situation exists primarily because successive governments, both military and civilian, have stolen or misused much of Nigeria's tremendous oil wealth. The head of Nigeria's Economic and Financial Crimes Commission has stated that the country lost as much as \$380 billion to corruption and waste between 1960 and 1999, the year Nigeria's current government came to power.").

57. See, e.g., Igbinedion, *supra* note 27, at 60–62 (observing that despite the variety of laws enacted to fight government corruption, significant impunity remains for high profile offenders); Ocheje, *supra* note 16, at 753–57 (noting that grand corruption in Nigeria has resulted in significant accumulation of public wealth in offshore bank accounts and investments); Owens, *supra* note 5, at 1029–30 (2002) (observing that the concentration of oil wealth in Sub-Saharan Africa perpetuates political corruption and violence against minority factions).

58. See, e.g., *World Report 2012: Nigeria*, HUM. RTS. WATCH (Jan. 2012), [http://www.hrw.org/sites/default/files/related\\_material/nigeria\\_2012.pdf](http://www.hrw.org/sites/default/files/related_material/nigeria_2012.pdf) (noting that many corruption cases against senior political figures remain stalled in court and that foreign countries remain reluctant to pressure the Nigerian government on its human rights record); see also *Chop Fine*, *supra* note 56, at 95–102 (providing an overview of the faltering anti-corruption efforts in Nigeria).

59. See David U. Enweremadu, Conference Paper, *Ending the Vicious Circle: Oil, Corruption, and Violent Conflict in the Niger-Delta*, IFRA-NIGERIA (Nov. 17, 2009), [http://www.ifra-nigeria.org/IMG/pdf/David\\_U-\\_ENWEREMADU\\_-](http://www.ifra-nigeria.org/IMG/pdf/David_U-_ENWEREMADU_-)



Odili wielded vast political power within Nigeria's decentralized federal system; he also oversaw rampant corruption and a lagging standard of living, which largely contributed to the overall underdevelopment of the state.<sup>60</sup>

*1. Financial Corruption: The Looting of the Rivers State Treasury*

In January of 2007, the Economic and Financial Crimes Commission ("EFCC") issued a report of its investigation into the finances of the Rivers State government under then-outgoing Governor Peter Odili.<sup>61</sup> The report disclosed that "over 100 billion Naira of Rivers State funds have been diverted by the Governor" and contained substantiated allegations that implicated Odili for crimes of fraud, conspiracy, conversion of public funds, foreign exchange malpractice, money laundering, stealing, and abuse of oath of office.<sup>62</sup> Draft charges prepared by the EFCC, which became public in February of 2013, reached the same conclusion and provided further elaboration on the extent of Odili's corruption.<sup>63</sup>

Specifically, the EFCC Report and Draft Charges disclosed that

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Ending\_the\_Vicious\_Circle\_Oil\_Corruption\_and\_Violent\_conflict\_in\_the\_Niger\_Delta.pdf (noting that Governor Odili's tenure in office was plagued with corruption).

60. *Id.*; see also CONSTITUTION OF NIGERIA (1999), § 308 (providing civil and criminal immunity to elected officials in Nigeria while in office); *Human Development Report: Nigeria 2008-2009*, U.N. DEV. PROGRAMME (2009), available at [http://web.ng.undp.org/documents/NHDR2009/NHDR\\_SUMMARY\\_2008-2009.pdf](http://web.ng.undp.org/documents/NHDR2009/NHDR_SUMMARY_2008-2009.pdf) [hereinafter *Nigeria 2008-2009*] (outlining those socio-economic indicators in Rivers State indicative of abject governance and corruption).

61. See Economic and Financial Crimes Commission (Establishment) Act (2004), §§ 28, 37 (Nigeria) (providing EFCC the statutory mandate to investigate crimes and issue official reports).

62. See ECON. & FIN. CRIMES COMM'N, THE INTERIM REPORT ON THE INVESTIGATION OF A CASE OF ALLEGED CONSPIRACY, ABUSE OF OFFICE, FRAUDULENT CONVERSION OF PUBLIC FUNDS, FOREIGN EXCHANGE MALPRACTICE, STEALING AND MONEY LAUNDERING (2007), available at <http://www.pointblanknews.com/os1540.html> [hereinafter EFCC REPORT] (implicating Odili for looting over ₦100 billion of Rivers State funds).

63. *Draft Charges Against Dr. Peter Odili in the High Court of the Federal Capital Territory Holden at Abuja*, ECON. & FIN. CRIMES COMM'N (2007), available at <http://saharareporters.com/content/efccs-draft-criminal-charges-against-former-gov-peter-odili-500million-plunder-rivers-state> [hereinafter *Draft Charges*] (revealing that Odili manipulated a combination of government officials and personal companies to plunder over ₦100 billion in the 2004-2007 period).

Governor Odili engaged in concerted activities to loot the state treasury.<sup>64</sup> For example, the Report and the Draft Charges revealed that Odili collaborated with Johnson Arumemi-Ikhide, a prominent business executive, to use the Rockson Engineering Company Ltd. as a front for systematic theft from the Rivers State government treasury.<sup>65</sup> Arumemi-Ikhide had longstanding business ties to Odili dating back to the mid-1980s, when he served as intermediary between Negris Engineering and the Rivers State Government, securing two major energy contracts for Negris.<sup>66</sup> When Arumemi-Ikhide left Negris to form Rockson Engineering Company in 2000, Rockson provided Odili with an opportunity to plunder Rivers State's public resources.<sup>67</sup> For example, Rockson was at the forefront of the failed mass investment in gas turbines, which many regarded as a scam to siphon public sector money into the hands of Odili's allies.<sup>68</sup> Under Odili's supervision as governor, between 2004 and 2006 over ₦30 billion were channeled into Rockson's Zeinith Bank Plc account.<sup>69</sup> EFCC investigations further revealed that many of these funds were then transferred to third-party accounts, used to purchase foreign exchange, and exported out of the country.<sup>70</sup> In addition, the EFCC revealed that Rockson held a parallel account in which the Rivers State government made unexplained deposits,

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64. EFCC REPORT, *supra* note 62; *Draft Charges*, *supra* note 63.

65. EFCC REPORT, *supra* note 62 (implicating Odili for corrupt ties to additional companies, including: Arik Airlines, Courage Communications Ltd, Attn Ltd, Ragolis Water Ltd, M/S Wetland Health Services Ltd, Transky Ltd, Foby Eng. Ltd, First Medical/Sterile Company Ltd, Habila Resources Ltd, Ojemai Farms Ltd, Ojemai Investments Ltd, and Godsonic Oil Company Ltd, an Odili-owned oil company that also has business interests in the Nigeria/Sao Tome Joint Development Zone).

66. *See id.* ¶¶ 4.2–4.5 (establishing the Odili's historical ties to Arumemi-Ikhide).

67. *Id.*

68. *See id.* ¶¶ 4.1–4.16 (finding concrete evidence of Odili's outright budgetary theft and funneling of public funds into a variety of baseless public projects).

69. *Id.* ¶ 4.6; *see also Draft Charges*, *supra* note 63 (alleging that over the course of this period, Rockson received over ₦60 billion from Rivers State accounts).

70. EFCC REPORT, *supra* note 62, ¶ 4.14 (finding that Rockson also transferred over \$120 million to various banks overseas, through JM/JEM Air and Thomas Eggar, a UK law firm, and that over £2 million and €1 million were separately transferred in the same manner).

indicating that the account functioned as a government slush fund.<sup>71</sup>

Focusing on the 2006 Rivers State budget, Human Rights Watch investigations confirm the trend of financial corruption under the Odili regime.<sup>72</sup> Increases in the price of oil caused the budget to balloon, with enormous sums of money flowing into the governor's office.<sup>73</sup> Problematically, much of the money was allocated to Odili on vague terms, making it susceptible to abuse.<sup>74</sup> The 2006 budget also included gross expenditures on items that had little connection to state priorities, including lavish entertainment, accommodations, and transportation for members of Odili's inner circle.<sup>75</sup> Although one would expect that such a large budget windfall would have resulted in state investments in Rivers State infrastructure, the evidence suggests the majority of money was lost due to extravagance, waste, and corruption, all which proved common features of the Odili regime.<sup>76</sup>

As state governor, Odili also oversaw rampant corruption at the local government level, which directly perpetuated the deterioration

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71. See EFCC REPORT, *supra* note 62, ¶¶ 4.12 (discovering that between 2001 and 2002, over ₦12 billion were deposited and thereafter withdrawn, from Rockson's parallel UBA PLC account; according to the Report, this provided "clear evidence of direct looting of the treasury of Rivers state").

72. See generally *Chop Fine*, *supra* note 56, at 75–83 (providing a comprehensive overview of budgetary corruption in Rivers State).

73. See *id.* at 76–78 (finding that the size of the 2006 Rivers State budget dwarfed that of other African countries).

74. See *id.* at 77–78 (citing Rivers State 2006 Budget, Heads 412(9), 412(12A), 467B(1)) (noting that Odili was granted budgets for unspecified "Grants, Contributions and Donations" and "Grants for Women, Youths and Other Organizations" to be handed out by the Governor's Office at the rate of more than \$91,000 per day, or roughly ₦4.33 billion (\$33.2 million) over the course of the year; a Security Vote of ₦5 billion (nearly \$38.5 million); and ₦10 billion (\$77 million) for unspecified "Special Projects," which did not appear in the 2005 budget).

75. See *id.* (citing Rivers State 2006 Budget, Heads 468(C), 412(2A), 412(14), 470(B), 470(C), 467A(1)) (finding that transport and travel budgets totaled more than \$65,000 per day; budgets for catering services, entertainment, and visitor gifts totaled ₦1.3 billion (\$10 million); budgets for two helicopters and the construction of landing facilities totaled ₦5 billion (\$38.4 million), on top of ₦1.5 billion allocated for the purchase of two jet aircraft in 2005; and budgets for purchasing new vehicles for Government House totaled ₦1.5 billion (\$11.5 million), even though ₦800 million was budgeted for this same purpose in 2005).

76. See *id.* (emphasizing the comparative size of Rivers State's budget).

of social services in Rivers State.<sup>77</sup> Although Odili did not exercise immediate control over the carrying out of these acts, as governor he is implicated for the failure to adhere to his statutory duty to oversee all local government finances,<sup>78</sup> for the lack of transparency surrounding state oversight,<sup>79</sup> and for benefiting by being complicit in local corruption.<sup>80</sup> As such, local government corruption must be viewed as an important element of the widespread corruption under the Odili regime.

## 2. Electoral Corruption and the Use of Violence to Solidify Power

The role of high-level government officials in perpetrating systemic economic corruption is largely intertwined with massive electoral corruption, which is used to solidify political power and accrue financial benefits.<sup>81</sup> Odili repeatedly demonstrated his

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77. See *id.* at 32, 36, 56 (outlining specific instances of local level corruption: in 2005, when the chair of Khana's local government received an illegal allocation salary and allowances worth \$376,000, a sum that amounted to "nearly half the total amount allocated for the wages and allowances of Khana's 325 health-sector workers"; in 2006, when the chair of Tai's local government received an allocation by a security vote worth \$300,000, exceeding the council's total capital budgets for either health or education; and, in 2005–2006, when the chairman of Opobo Nkoro's local government awarded himself \$92,000 worth of construction contracts).

78. See *Chop Fine*, *supra* note 56, at 83–84, 90 (citing Rivers State Local Government Law, No. 3 of 1999, §§ 13, 114, 117) (describing the State's oversight power and failure to examine local government finances and sanction corrupt local officials).

79. See *id.* at 84 (describing that the State government ignores its oversight obligations with regard to local levels of government).

80. See *id.* at 102 ("[The] state has been extremely lax in holding those officials to account, in part because state-level politicians expect the chairmen to 'make returns' on their embezzled fund. Just as important, politicians . . . rely upon the chairmen to mobilize violence and otherwise manipulate the results of state and federal elections in their constituencies. As one prominent Port Harcourt-based activist put it, 'The governor never challenges the local government chairmen over their corruption because those chairmen are the governor's champions of violence.'").

81. See *Nigeria's 2003 Election: The Unacknowledged Violence*, HUM. RTS. WATCH 41–42 (2004), <http://www.hrw.org/reports/2004/nigeria0604/nigeria0604.pdf> [hereinafter *Nigeria's 2003 Election*] ("[C]onditions in Rivers State seemed to be in a different league from those observed by our teams in other parts of the country . . . there was serious violence, intimidation and vote rigging.") (quoting COMMONWEALTH SECRETARIAT, THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS IN NIGERIA, 12 AND 19 APRIL 2003: REPORT OF THE COMMONWEALTH

willingness to bribe interest groups and hire gangs to inflict violence on his political opponents during the 2003 election.<sup>82</sup> Led by Odili, the PDP contracted with two gangs at the forefront of violent crimes and militant activity throughout the River State: the Niger Delta Peoples Volunteer Force (“NDPVF”) and the Niger Delta Vigilante (“NDV”).<sup>83</sup> Despite Odili’s denials, admissions made by the leader of the NDV, Ateke Tom, clearly evidence Odili’s involvement in the dispatching of gangs to intimidate and attack his opposition.<sup>84</sup> Testimony of gang leaders in Port Harcourt also confirms Odili’s sponsorship of youth gangs to eliminate his political opponents.<sup>85</sup> To make matters worse, after the election, many of the promises to pay, arm, and create jobs for the armed youth groups never materialized, fueling a rapid deterioration in the relationship between the state government and armed groups, and propelling a new wave of violence.<sup>86</sup>

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OBSERVER GROUP (2003)); *see also* Rotimi Suberu, *The Nigerian Federal System: Performance, Problems and Prospects*, 28 J. CONTEMP. AFR. STUD. 459, 469–71 (2010) (exploring the connection between widespread economic corruption and electoral corruption in Nigeria).

82. *See Criminal Politics: Violence, “Godfathers” and Corruption in Nigeria*, HUM. RTS. WATCH 80–81 (2007), <http://www.hrw.org/reports/2007/nigeria1007/nigeria1007webwcover.pdf> [hereinafter *Criminal Politics*] (noting that Odili, along with Secretary to the State Government and Federal Transportation Minister Abieye Sekibo, reportedly played a central role in sponsoring violent activities, including those of the NDV under Ateke Tom); *see also Nigeria’s 2003 Election*, *supra* note 81, at 14–19 (recognizing the widespread use of violence to rig the 2003 election); *Rivers and Blood: Guns, Oil and Power in Nigeria’s Rivers State*, HUM. RTS. WATCH 2–6 (2005), <http://www.hrw.org/legacy/backgrounder/africa/nigeria0205/nigeria0205.pdf> (explaining the practice of driving out opposition supporters prior to elections).

83. *See Criminal Politics*, *supra* note 82, at 81 (finding direct evidence of Odili’s relationship with the NDPVF and the NDV).

84. *Id.* (discovering that Ateke Tom worked with Odili during the 2003 election: “Any place Odili sent me, I conquer[ed] for him. I conquer[ed] everywhere.”); Omololu Ogunmade, *Top Leaders Accused in Cult Killings*, THIS DAY (Jan. 28, 2008), *available at* <http://allafrica.com/stories/200801280077.html> (referring to affidavit filed in Suit No. PHE/75/2008 CR in Rivers State High Court, which named Odili as a sponsor of Ateke, who was responsible for killings and hostage taking in Rivers State).

85. *See Criminal Politics*, *supra* note 82, at 85–87 (citing HRW interviews, Port Harcourt, Apr. 12, 2007, which exposed Odili’s relationship with youth gang leaders and the million-Naira payments he made to disrupt the elections in 1999 and 2003).

86. *See id.* at 82 (“The armed groups, particularly the youth, felt betrayed by the kind of contracts they made with politicians in 2003. They felt that having

### 3. Judicial Corruption and the Accountability Deficit

Despite compelling evidence documenting Odili's corruption, the judiciary of Rivers State has demonstrated an unwillingness to take action against the former governor. As a result, important questions arise about the impartiality of Nigeria's judiciary, both during and after Odili's time in office.

Following the publication of the 2007 EFCC Report, for example, the judiciary granted Odili a series of favorable judicial decisions on procedural grounds, which culminated in a "perpetual injunction" against the EFCC from pursuing corruption charges.<sup>87</sup> The same injunction was upheld on appeal.<sup>88</sup> In addition to the lack of accountability for corruption, Odili won a number of more recent judicial decisions, further absolving him of any wrongdoing. In 2009, the Federal Court in Abuja issued another interim injunction preventing the EFCC from arresting, detaining, prosecuting or

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participated in rigging the election, they deserved a stake."); *The Security Situation in Rivers State: An Open Letter from Amnesty International to Peter Odili, State Governor of Rivers State*, AMNESTY INT'L (Sept. 15 2004), available at <http://www.amnesty.org/en/library/asset/AFR44/027/2004/en/e4eeb5db-d58c-11dd-bb24-1fb85fe8fa05/af440272004en.pdf> (describing the 2004 outbreak of violence in Rivers State).

87. See *Attorney-Gen. for Rivers State v. Econ. & Fin. Crimes Comm'n & Ors.*, [2007] FHC/PHC/CSI78/2007 (Nigeria) (granting all the declaratory and injunctive reliefs sought by Odili, including a declaration that the EFCC investigations are invalid, unlawful, unconstitutional, null and void; an injunction restraining the EFCC and other parties from publicizing the report of the investigation; and an injunction restraining the EFCC from any further action in relation to the alleged economic and financial crimes committed by Odili); *Petition to the National Judicial Council Against Justice Ibrahim N. Buba in Relation to Peter Odili*, SAHARA REPORTERS (Nov. 20, 2009), available at <http://saharareporters.com/petition/petition-national-judicial-council-against-justice-ibrahim-n-buba-relation-peter-odili?page=1> (denouncing the above-mentioned "acts of judicial misconduct" and calling for the removal of Justice Buba from office).

88. See *Econ. & Fin. Crimes Comm'n (EFCC) v. Attorney-Gen. for Rivers State & Ors.*, [2011] CA/PH/622/2008 (Nigeria) (holding that the subsisting judgment of March 2007 is binding on all parties and that a perpetual injunction prevents the EFCC from arresting, detaining and arraigning Odili); see also Nuruddeen M. Abdallah & Bashiru Abdullahi, *Nigeria: EFCC Drops Graft Case Against Odili*, Daily Trust (Aug. 7, 2012), available at <http://allafrica.com/stories/201208070256.html?viewall=1>; Sahara Reporters, *Peter Odili's Perpetual Injunction*, Ocnus Net (Dec. 8, 2009), available at [www.ocnus.net/artman2/publish/Africa\\_8/Peter-Odili-s-Perpetual-Injunction.shtml](http://www.ocnus.net/artman2/publish/Africa_8/Peter-Odili-s-Perpetual-Injunction.shtml) (providing a historical overview of the perpetual injunction that Odili obtained).

embarrassing Odili over a ₦189 debt owed to Finbank.<sup>89</sup> The same court also issued a separate order prohibiting the EFCC from auctioning or trespassing on Odili's property to realize security for his indebtedness to the bank.<sup>90</sup> Finally, while Odili secured numerous judicial victories, his wife was appointed to the judiciary and later promoted to the nation's highest court—raising further questions about the judicial system's impartiality and overall efficacy.<sup>91</sup>

While the available evidence does not directly implicate Odili in judicial corruption (e.g., judicial bribery), the unwillingness of the judiciary to prosecute Odili for perpetrating widespread corruption is certainly apparent.<sup>92</sup> In this respect, the accountability deficit in Nigeria underscores the lack of a functional domestic remedy for egregious corruption; it also highlights the availability and need for ICC prosecution.<sup>93</sup>

### III. ANALYSIS

This comment argues that the ICC should exercise its authority under the Rome Statute to prosecute government officials for perpetrating grand corruption. Advancing that grand corruption constitutes a crime against humanity under Article 7(1)(k), Part III.A develops the doctrinal basis for the crime, addresses the parameters

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89. See Ise-Oluwa Ige, *Ex-Gov Odili Gets Court's Relief on ₦189m Loan, Assets*, VANGUARD (Sep. 3, 2009), available at <http://www.vanguardngr.com/2009/09/ex-gov-odili-gets-courts-relief-on-n189m-loan-assets/>.

90. *Id.*; see also Idris Akinbajo, *Indicted Odili to Get 8 Police Security, 2 Houses, Exotic Cars as Retirement Benefit*, SAHARA REPORTERS (Apr. 10, 2012), available at <http://saharareporters.com/news-page/indicted-odili-get-8-police-security-2-houses-exotic-cars-retirement-benefit> (underscoring the lack of accountability for corrupt public officials in Nigeria).

91. See *Odili's Wife Ascends to the Supreme Court*, SAHARA REPORTERS (Feb. 8, 2011), available at <http://saharareporters.com/news-page/odilis-wife-ascends-supreme-court> (explaining Mary Odili's judicial rise).

92. See *Draft Criminal Charges Detail How Gov. Peter Odili Plundered Rivers States \$500million to Set up Arik Air and Buy up Media at AIT, Thisday, Newswatch and ChannelsTV*, SAHARA REPORTERS (Feb. 22, 2013), available at <http://saharareporters.com/news-page/draft-criminal-charges-detail-how-gov-peter-odili-plundered-rivers-states-500million-set-a> (alleging that Mary Odili ensured her husband received favorable judicial treatment).

93. See Rome Statute, *supra* note 15, pmb1. (“*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”); *id.* art. 1 (noting that the Statute shall be complementary to national criminal jurisdictions).

of its application, and establishes the legal basis for grand corruption as an international criminal act.<sup>94</sup> Part III.B then considers the Odili case study and outlines Odili's prospective liability under the Rome Statute for perpetrating grand corruption during his tenure as governor in Rivers State. In this context, it analyzes grand corruption under the Odili regime with regard to the *chapeau* requirements of Article 7(1), and the *actus reus* and *mens rea* elements of Article 7(1)(k).<sup>95</sup>

#### A. GRAND CORRUPTION CONSTITUTES A CRIME AGAINST HUMANITY UNDER ARTICLE 7 OF THE ROME STATUTE

To constitute a crime against humanity under Article 7(1)(k), the requirements set out in the Article 7(1) *chapeau* must first be satisfied.<sup>96</sup> Creating threshold contextual requirements for Article 7 crimes, the *chapeau* requires that the act be part of an attack directed against a civilian population, be either "widespread" or "systematic," and be perpetrated against a civilian population by someone aware that his or her act was connected to the broader attack.<sup>97</sup> Further, under Article 7(1)(k), "other inhumane acts" must be "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."<sup>98</sup> Accordingly, this subsection analyzes the required elements of Article 7(1)(k) in conjunction with features of grand corruption, concluding that Article 7 provides the appropriate authority for grand corruption to constitute a crime

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94. See discussion *infra* Part III.A (concluding that grand corruption constitutes a crime against humanity).

95. See discussion *infra* Part III.B (finding that Odili committed grand corruption in violation of Article 7).

96. See, e.g., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 77–209 (June 15, 2009) (evaluating the *chapeau* before the specific Article 7 crime).

97. Rome Statute, *supra* note 15, art. 7(1); see also KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 128 (2001) (defining the *actus reus* and *mens rea* for Article 7(1)(k) crimes).

98. Rome Statute, *supra* note 15, art. 7(1)(k); see also *id.* Elements of Crimes, art. 7(1)(k) (requiring that Article 7(1)(k) crimes include: (1) that the infliction of "great suffering, or serious injury to body or to mental or physical health, by means of inhumane act"; (2) that the act was of "similar character" or the acts enumerated in Article 7; and (3) that the perpetrator "was aware of the factual circumstances that established the character of the act").



against humanity under the Rome Statute.

*1. Grand Corruption Satisfies the Contextual Requirements for Article 7 Crimes Against Humanity*

Under Article 7, crimes against humanity must satisfy three *chapeau* elements: that the act was part of an attack directed against a civilian population; that the attack was widespread or systemic; and that the accused knew that his act was connected to the attacks.<sup>99</sup> Article 7(2) defines an “attack” broadly as “a course of conduct involving the multiple commission of acts referred to in paragraph one against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such act.”<sup>100</sup> As such, neither military nor armed conflict is necessary, nor does an attack require the infliction of violence.<sup>101</sup> Rather, this element is satisfied so long as the state’s policy is carried out in contravention of one of the listed criminal acts in Article 7(1).<sup>102</sup> Moreover, the jurisprudence from *ad hoc* tribunals and the history of negotiations for the ICC indicate that state policies need not be formal to be prosecuted.<sup>103</sup> While occasional engagement in corrupt practices would likely not be deemed to be pursuant to or in furtherance of state policy, deep-rooted corruption inextricably tied to abject governance would likely satisfy the requirement.<sup>104</sup> Budgetary diversions, siphoning of

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99. Rome Statute, *supra* note 15, art. 7(1) (“[C]rime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”).

100. *Id.* art. 7(2)(a); *see also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 581 (Sept 2, 1998) (finding that the concept of an “attack” can be defined as an unlawful act pursuant to the enumerated provisions of the statute); Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-T, Judgment, ¶¶ 122 (May 21, 1999) (holding that attack must be connected to the crime).

101. *See* SCHABAS, *supra* note 51, at 101–02 (citing Elements of Crimes, art. 7) (“The attack need not be a military attack.”).

102. *Id.*

103. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 653 (May 7, 1997) (“[S]uch a policy need not be formalized and can be deduced from the way in which the acts occur.”); Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 204–05 (Mar. 2, 2000) (“This plan . . . need not necessarily be declared expressly or even stated clearly and precisely . . . [and] may be surmised from a series of events.”); *see also* Starr, *supra* note 10, at 1305 (noting that the ICC jurisprudence and negotiating history indicate that illegitimate or unofficial uses of state authority can nevertheless constitute state “policy”).

104. *See* Starr, *supra* note 10, at 1304–05 (observing that grand corruption

government funds, and other abuses of government power, even if unauthorized, may constitute “attacks” on the basis that they are state “policies” directed against civilian populations.<sup>105</sup>

An attack must also be widespread or systematic.<sup>106</sup> Case law indicates that “widespread” refers to both the scale and nature of the attack, as well as the number of victims.<sup>107</sup> In contrast, “systematic” refers to the “organised nature of the acts of violence and the improbability of their random occurrence.”<sup>108</sup> Crimes that occur in non-accidental patterns are deemed systematic.<sup>109</sup> The impact and pervasive character of grand corruption likely satisfies both criteria. Grand corruption should be viewed as widespread due to its breadth and its detrimental impact on the lives of many.<sup>110</sup> Additionally, grand corruption should be viewed as systematic where it entails ongoing abuse of the budgetary process or outright theft of government funds.<sup>111</sup> Moreover, the involvement of high-level government officials in carrying out state policy to serve private interests confirms the widespread and systematic nature of grand corruption.<sup>112</sup>

The accused also must understand that his actions are connected to

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involves official state actions).

105. *Id.*; see Rome Statute, *supra* note 15, art. 7(2) (defining “attack” broadly as “a course of conduct involving the multiple commission of acts referred to in paragraph one against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”).

106. Rome Statute, *supra* note 15, art. 7(1); see also Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 82 (June 15, 2009) (noting that “widespread” and “systematic” are disjunctive and that both need not be present in actionable offense); Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 271 (July 15, 1999) (concluding that those crimes unrelated to widespread or systematic attacks on a civilian population do not constitute crimes against humanity).

107. See Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 427–28 (June 12, 2002).

108. *Id.* ¶ 429.

109. *Id.*

110. See Starr, *supra* note 10, at 1304–05 (describing the widespread nature of egregious grand corruption).

111. *Id.*

112. Cf. SCHABAS, *supra* note 51, at 149 (noting that “widespread” and “systematic” are to be construed broadly and often overlap).

the attack against a civilian population.<sup>113</sup> Under this requirement, perpetrators must have a baseline contextual awareness of the attack, but are not required to know all of its details.<sup>114</sup> As Article 7(1)(k) creates a more onerous *mens rea* element (intention, as discussed below), the “knowledge” requirement of the *chapeau* is somewhat redundant; however, if a government official intentionally orchestrates systematic corruption, he certainly also would have awareness of the broader context of his actions.<sup>115</sup>

## 2. Grand Corruption Is Inherently Inhumane as It Causes Great Suffering and Serious Injury

In contrast to less severe forms of corruption, grand corruption causes significant suffering and injury, similar to the crimes enumerated in Article 7; therefore, it must be regarded as inhumane.<sup>116</sup> ICC tribunals have broadly defined “great suffering, or serious injury to body” to encompass a wide variety of physical and psychological harms.<sup>117</sup> Further, they indicate that it must be assessed

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113. Rome Statute, *supra* note 15, art. 7(1); *see also* Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-T, Judgment, ¶¶ 133–34 (May 21, 1999) (noting that a perpetrator must “knowingly commit crimes against humanity in the sense that he must understand the overall context of his act,” i.e., that the perpetrator must act with knowledge of the broader context of the attack, “a view which conforms to the wording of the Statute of the International Criminal Court (ICC) Article 7”).

114. *See* Kayishema & Ruzidana, Case No. ICTR-95-1-T, Judgment, ¶¶ 133–34 (advancing that constructive knowledge suffices to meet the *chapeau* requirement).

115. *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 657, 659 (May 7, 1997) (holding that knowledge is to be determined objectively and can be implied from the circumstances); *see also* Starr, *supra* note 10, at 1305 (advancing that perpetrators of systemic corruption would easily satisfy this requirement).

116. *See* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, ¶ 362 (Mar. 22, 2006) (defining inhumane acts as those that cause “serious mental or physical suffering or injury” or constitute a “serious attack on human dignity”); Starr, *supra* note 10, at 1299–1300 (noting that the inhumane element is redundant in light of the harm and suffering requirement).

117. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 456–59 (Sept. 30, 2008) (asserting that non-fatal gunfire and machete attacks satisfied the *actus reus* element of Article 7(1)(k)); Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8th July 2005 as Amended on 27th September 2005 (Sept. 27, 2005) (charging perpetrators with infliction of “serious bodily injury and suffering” for attacks rendered against civilian residents of an internally displaced persons camp); Prosecutor v. Thomas

on a case-by-case basis in terms of the consequences that result from specific acts.<sup>118</sup>

*Ad hoc* tribunal interpretations of “great harm and suffering” offer additional guidance. Although undefined in the ICTY Statute, the Trial Chamber repeatedly has held that “bodily harm” refers to harm that “seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.”<sup>119</sup> Even though “harm” need not be permanent or irremediable, it must result in “grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.”<sup>120</sup> With respect to psychological harms specifically, the harm-inflicting act must affect mental facilities in more than a minor or temporary manner.<sup>121</sup>

The characterization of “serious” bodily and mental harm in *Prosecutor v. Vidoje Blagojević* is particularly illustrative.<sup>122</sup> Concluding that the trauma and wounds suffered by those who managed to survive mass executions constituted “serious bodily and

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Lubanga Dyilo, Case No. ICC-01-04/01-06, Observations on Issues Concerning Reparations, ¶¶ 36–37 (Aug. 7, 2012) (finding that child conscription resulted in psychological harm from forcing children to quit school, separating children from their families, and requiring children to participate in hostilities that included the “very real” risk of serious injury or death); *see also* *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Observations by the Legal Representatives for Victims a/1646/10 and a/1647/10, ¶¶ 4–9 (Aug. 8, 2011) (noting that victims sought redress for the “harm and suffering” endured as a result of an attack on the AMIS base).

118. *See Katanga*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 449 (affirming the fact-based standard for assessing harm and suffering) (internal citation omitted); *see also* *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶ 165 (Feb. 25, 2004) (“[C]onsideration must be given to all of the factual circumstances . . . [including] the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.”).

119. *See, e.g.,* *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-T, Judgment, ¶ 645 (Jan. 17, 2005); *Prosecutor v. Kayishema & Ruzidana*, Case No. ICTR-95-1-T, Judgment, ¶ 109 (May 21, 1999).

120. *Kayishema & Ruzidana*, ICTR-95-1-T, Judgment, ¶ 108 (citing *Akayesu* (citation omitted)); *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment, ¶ 513 (Aug. 2, 2001).

121. *See, e.g.,* *Kayishema & Ruzidana*, ICTR-95-1-T, Judgment, ¶¶ 110–13 (holding that “‘causing serious mental harm’ should be interpreted on a case-by-case basis in light of the relevant jurisprudence”).

122. *Blagojević & Jokić*, IT-02-60-T, Judgment.

mental harm,” the Trial Chamber found that “[t]he fear of being captured, and, at the moment of the separation, the sense of utter helplessness and extreme fear for their family and friends’ safety as well as for their own safety, is a traumatic experience from which one will not quickly—if ever—recover.”<sup>123</sup> Additionally, the Trial Chamber held that the trauma associated with the forced displacement of women, children, and elderly reached the requisite level of “serious mental harm” in the circumstances of the case.<sup>124</sup>

Based on the relevant jurisprudence, “great suffering” thus encompasses a wide range of injuries which need not be the immediate consequence of specific actions. Although “great suffering” can result from actions including assault, death threats, and other forms of immediate psychological trauma, systemic state actions that result in collective harms to a population may also cause “great suffering.”<sup>125</sup>

Although the determination as to whether the impact of specific acts falls under Article 7 requires a fact-specific inquiry, tangible consequences of grand corruption at a general level must also be considered.<sup>126</sup> Available empirical data overwhelmingly indicates that corruption negatively impacts poverty levels and inequality.<sup>127</sup>

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123. *See id.* ¶ 647 (explaining that men were stripped of their identification documents and taken to mass grave execution sites, ultimately resulting in the “mental anguish of lying still, in fear, under the bodies—sometimes of relative or friends—for long hours, listening to the sounds of the executions, of the moans of those suffering in pain, and then of the machines as mass graves were dug”).

124. *Id.* ¶¶ 650–54 (finding that the displacement of Bosnian Muslims resulted in traumatic suffering as a result of being forced to abandon their property and being prevented from ever returning to their homes).

125. *See* Rome Statute, *supra* note 15, art. 7 (1) (criminalizing systemic conduct that causes collective harm); Starr, *supra* note 10, at 1300–01 (advancing that crimes against humanity can be “committed over time through imposition of living conditions that make life unsustainable”).

126. *See, e.g.,* Bantekas, *supra* note 16, at 446, 475 n.49 (noting that empirical data on corruption is particularly illustrative; for example, widespread corruption has been acknowledged as one of the most significant causes of the 2002 drought that swept Malawi); Starr, *supra* note 10, at 1283–84 (illustrating how restricting the amount of money used for the public good entrenches poverty and ultimately leads to the loss of life); *cf.* KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 127 (2001) (noting that crimes which occur over long periods of time such as “pillage, plunder, arbitrary destruction or expropriation of public and private property” can still cause “great suffering, or serious injury”).

127. Gupta et al., *supra* note 28 (concluding that increases by one standard

The oft-cited study by Sanjeev Gupta, Hamid Davoodi, and Rosa Alonso-Terme finds that corruption has significant distributional consequences by affecting budgetary revenues and expenditures.<sup>128</sup> More generally, other studies articulate a direct connection between grand corruption and indicators of humanitarian crisis, including: falling life expectancy rates; rising child poverty; increases in violence; and the deterioration of essential education and healthcare infrastructure.<sup>129</sup>

Since empirical evidence demonstrates the severe consequences of grand corruption, these humanitarian consequences must be examined to determine whether they are sufficiently similar to the injuries associated with the enumerated crimes in Article 7(1). Relevant case law indicates that the nature of the facts, and the physical, mental, and moral effects on the victims must be assessed for a similarity determination.<sup>130</sup> Under this rubric, the impact of grand corruption appears comparable to the enumerated crimes in Article 7. For example, much like murder and the extermination of

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deviation increases the Gini coefficient of income inequality by 11% and income growth of the poor by 5% annually).

128. *Id.*

129. See, e.g., Jacqueline Coolidge & Susan Rose-Ackerman, *Kleptocracy and Reform in African Regimes: Theory and Examples*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 71–74 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000) (examining how widespread corruption led to humanitarian crisis in Somalia); Omar Azfar & Tugrul Gurgur, *Does Corruption Affect Health Outcomes in the Philippines?*, 9 ECON. GOV. 197 (2008) (finding that corruption disproportionately negatively affects health indicators of the poor); Utstein Anti-Corruption Research Centre, *Corruption in the Health Sector*, U4 ISSUE 2006, available at <http://www.cmi.no/publications/file/2560-corruption-in-the-health-sector.pdf> (establishing that corruption reduces the resources available for health, lowers the quality and effectiveness of healthcare services, and increases the cost of provided services); Eboe-Osuji, *supra* note 16, at 123 (concluding that grand corruption “affords both motive and opportunity to violate human rights violently”); *Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*, HUM. RTS. WATCH *passim* (Jan. 2004) (describing consequences of the over \$4 billion loss to corruption on poverty and life expectancy in Angola).

130. See *Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60-T, Judgment, ¶ 627 (Jan. 17, 2005) (“The element of ‘similar seriousness’ is to be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s).”).

populations, grand corruption perpetuates lower life expectancy rates among its collateral victims.<sup>131</sup> Grand corruption can also inflict severe deprivation, impacting the fundamental necessities of life in a manner comparable to deportation, forcible transfer, and economic persecution.<sup>132</sup> Further, as in the case of apartheid, rule by kleptocracy will inevitably involve systematic oppression of a segment of the population to benefit the ruling class.<sup>133</sup> Accordingly, Article 7 has both the substantive and temporal breadth to encompass the perpetration of grand corruption, which occurs on an ongoing systemic basis and inflicts long-term consequences.<sup>134</sup>

Although individual violations of Article 7 would have to be determined on a case-by-case basis, as a general principle, grand corruption meets the Article 7(1)(k) requirements for great harm and suffering. As such, if the particular consequences resulting from the perpetration of grand corruption are sufficiently severe, they will fulfill the *actus reus* of Article 7(1)(k).

### 3. *The Consequences of Grand Corruption Are Intentional*

Under Article 7(1)(k), the requisite *mens rea* for “other inhumane acts” is intent.<sup>135</sup> Following Article 30 of the Rome Statute, “intent” exists only when an actor “means to engage in the conduct” or “means to cause a consequence or is aware that it will occur in the ordinary course of events.”<sup>136</sup> The ICC Elements of Crimes addressing Article 7(1)(k) provides further elaboration, requiring that the perpetrator is “aware of the factual circumstances that establish the character of the act.”<sup>137</sup>

Despite some disagreement, many scholars recognize that the cumulative effect of these provisions extends *mens rea* beyond the specific intent to bring about a particular consequence to include all consequences that would occur in the ordinary course of events.<sup>138</sup>

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131. Rome Statute, *supra* note 15, art. 7; *see also* Starr, *supra* note 10, at 1282–86, 1301 (commenting on the devastating impact of grand corruption).

132. Starr, *supra* note 10, at 1301.

133. *Id.*

134. *Id.*

135. Rome Statute, *supra* note 15, art. 30.

136. *Id.* art. 30(2).

137. *Id.* Elements of Crimes, art. 7(1)(k).

138. Compare Starr, *supra* note 10, at 1302–03, and ANTONIO CASSESE,

As such, if the consequences of grand corruption are predictable, the Rome Statute would allow tribunals to draw inferences based on the circumstances regarding the perpetrator's mental state, i.e., the intention behind the underlying corrupt act.<sup>139</sup>

Article 25 addresses the issue of remoteness between *actus reus* and *mens rea* by providing that public officials will be liable when they intend to oversee the chain of command but do not personally carry out prohibited acts.<sup>140</sup> Under Article 25, intending to play an "essential role in the implementation of a common plan" and having awareness of the centrality of that role suffices to create criminal culpability.<sup>141</sup> Liability in these situations extends to arrangements where none of the participants have total control over the entire offense, but rely on one another for different parts of its commission.<sup>142</sup> This form of liability is particularly relevant for high-

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INTERNATIONAL CRIMINAL LAW 165–66, 176 (“[R]ecklessness (*dolus eventualis*) may be held to be contemplated in the definition laid down in paragraph 2.”), and Darryl Robinson, *The Elements of Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 108 (Roy S. Lee ed., 2001) (advancing that Article 7(1)(k) language that requires awareness of the “factual circumstances that established the character of the act” incorporates Article 30 standards into the provision), with SCHABAS, *supra* note 51, at 475–76 (arguing that the “ordinary course of events” standard is higher than recklessness and must be assessed in terms of whether the consequence to the act in question was certain or near-certain).

139. See, e.g., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 352–69 (June 15, 2009) (defining and applying “intent” under Article 30); see also Georges Anderson Nderubumwe Rutaganda v. Prosecutor, Case No. ICTR-96-3-A, Judgment, ¶ 63 (May 26, 2003) (noting that intent can be inferred from evidence that demonstrates a consistent pattern of conduct); Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶ 820 (Jan. 14, 2000) (finding that acting pursuant to a common plan can indicate intent).

140. Rome Statute, *supra* note 15, art. 25(3)(a); see also Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgment, ¶ 183 (Jan. 27, 2000) (concluding that complicity in aiding, abetting, or instigating a crime suffices to meet the *mens rea* requirement, even if specific intent to commit the crime is absent).

141. See Rome Statute, *supra* note 15, art. 25(3). See generally SCHABAS, *supra* note 51, at 429 (2010) (citing instances of Article 25(3) application).

142. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, ¶¶ 342, 346–48 (Mar. 14, 2012) (finding that liability extended where control over the commission of the prohibited act is shared); *Gombo*, ICC-01/05-01-08, Decision on the Confirmation of Charges, ¶ 350 (advancing that under the



ranking government officials who carry out prohibited acts by way of their subordinates.<sup>143</sup> Accordingly, Article 25 prevents government officials who perpetrate systematic crimes from using their political offices to obfuscate the *mens rea* requirements of the Rome Statute.

In sum, under the Rome Statute, the cumulative effect of these standards creates liability for those who *govern with the predictable effect* of inflicting significant harm and suffering against their civilian populations.<sup>144</sup> With regard to the perpetration of grand corruption, one can infer intention from the relationship between gravity of the corrupt act and the vulnerability of the population.<sup>145</sup> If a population is sufficiently impoverished or vulnerable to contracting disease, for instance, and the diversion of funds is sufficiently large in relation to the resources available to serve the needs of that population, under ordinary circumstances that diversion would prove significantly harmful.<sup>146</sup> These consequences would seem clearly apparent to high-ranking officials who govern by way of corruption over an extended period of time. Although those officials may not know of the specific individuals impacted by their corruption, the systemic consequences would be apparent.<sup>147</sup>

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concept of co-perpetration, two objective factors must exist: “(i) the suspect must be part of a common plan or agreement with one or more persons; and (ii) the suspect and the other co-perpetrator must carry out essential contribution in a coordinated manner which result in the fulfillment of the material element of the crime”).

143. Cf. Rome Statute, *supra* note 15, art. 25(3)(a); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, ¶¶ 342, 346-48 (Mar. 14, 2012); *Gombo*, ICC-01/05-01-08, Decision on the Confirmation of Charges, ¶ 390 (establishing the scope of liability for co-perpetration, which directly implicates high-level government officials).

144. See Starr, *supra* note 10, at 1303 (advancing that the consequences of grand corruption would inevitably be apparent to its perpetrators); see also Bantekas, *supra* note 16, at 474-75 (arguing that Article 30 can be used to hold members of governments responsible for placing their people in a condition of life, “which in the ordinary course of events would deprive them of access to sufficient food and medical care”).

145. Starr, *supra* note 10, at 1303.

146. Cf. Bamidele et al., *supra* note 54, at 15-16 (finding empirical support for the proposition that corruption impedes Nigeria’s poverty reduction efforts). See generally Gupta et al., *supra* note 28, *passim* (articulating the connection between poverty and corruption).

147. See Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-A, Judgment, ¶ 41 (July 7, 2006) (noting the breadth of intent); Starr, *supra* note 10, at 1303 (providing an example of an accused who tells others to rape Tutsi

B. PETER ODILI'S TENURE AS GOVERNOR OF RIVERS STATE  
PRESENTS A *PRIMA FACIE* CASE OF GRAND CORRUPTION THAT  
VIOLATES ARTICLE 7(1)(K) OF THE ROME STATUTE

In the abstract, the application of Article 7 in the relevant case law indicates that the perpetration of grand corruption constitutes a crime against humanity under the Rome Statute. Accordingly, this subsection considers the specific application of Article 7(1)(k) to Peter Odili's tenure as governor of Nigeria's Rivers State. In this regard, it assesses the prospective liability of Governor Odili and suggests a potential path for ICC action.

*1. Odili Perpetrated Grand Corruption During His Tenure as  
Governor of Rivers State*

As noted above, grand corruption involves high-level public officials who commit widespread abuse of power for private gains at the expense of the public.<sup>148</sup> Under this definition, Odili's direct role in perpetrating economic and electoral corruption establishes the commission of grand corruption during his tenure as governor.<sup>149</sup> In effect, the evidence demonstrates that Odili effectively governed by way of kleptocracy.

With regard to economic corruption, the evidence implicates Odili for his direct involvement in orchestrating widespread budgetary diversions and the siphoning of government funds from the Rivers State treasury.<sup>150</sup> Specifically, his relationship to the Rockson Engineering Company resulted in the establishment of dummy corporations, awarding of fictitious contracts, and channeling of billions of Naira into various unidentified bank accounts.<sup>151</sup>

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women—the accused will not know the individual victims, but will still be liable for instigating rape; “the relevant factual circumstances are those giving this conduct its devastating impact—the extremely poor population, pervasive threats of preventable disease, the cash-strapped government, and so forth. The mental state element is satisfied . . . if the perpetrator is aware of those facts—as a head of state surely would be”).

148. See discussion *supra* Part II.A (defining grand corruption).

149. See discussion *supra* Part II.C (outlining the breadth of Odili's corruption).

150. See EFCC REPORT, *supra* note 62 (implicating Odili for siphoning money out of the Rivers State treasury); *Draft Charges*, *supra* note 63 (confirming these allegations); *Chop Fine*, *supra* note 56, 75–78 (outlining budgetary malfeasance in Rivers State).

151. EFCC REPORT, *supra* note 62.

Similarly, Odili's documented use of State power to perpetrate widespread electoral corruption is also indicative of grand corruption. His willingness to inflict widespread violence against his political opponents and his use of government personnel and gang leaders for his political benefit helped him to solidify power in the 2003 election; it also amounted to a significant abuse of power.<sup>152</sup>

Accordingly, under the Odili regime, the gravity and scope of corruption perpetrated against the people of Rivers State provides a compelling case for violations of Article 7(1)(k) of the Rome Statute. Focusing on the contextual *chapeau* elements of Article 7(1) and the *actus reus* and *mens rea* elements of Article 7(1)(k), the following subsections assess the grand corruption under the Odili regime in the context of the Rome Statute.

## 2. Odili's Perpetration of Grand Corruption Meets the Contextual Requirements for Article 7 Crimes Against Humanity

Odili's perpetration of grand corruption meets the *chapeau* requirements of Article 7(1).<sup>153</sup> His abuse of public office, including his looting of the public treasury and his coordination of widespread electoral fraud, became the *de facto* policy of the Rivers State government.<sup>154</sup> Moreover, even if these actions were informal and/or unauthorized under Nigerian law, Article 7(2) jurisprudence indicates that they would still constitute State policies, and thus satisfy the "attack" requirement of Article 7(1).<sup>155</sup>

Likewise, corruption under Odili was both widespread and systematic.<sup>156</sup> Looting the public coffers of ₦100 billion impacted a wide segment of the population.<sup>157</sup> Additionally, Odili perpetrated

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152. See, e.g., *Nigeria's 2003 Election*, *supra* note 81, at 14–19 (outlining violence in the 2003 election).

153. Rome Statute, *supra* note 15, art 7(1).

154. See discussion *supra* Part II.C.

155. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 653 (May 7, 1997) (observing that the notion of an "attack" is broad); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, ¶¶ 204–05 (Mar. 2, 2000) (arriving at a similar conclusion).

156. Rome Statute, *supra* note 15, art. 7(1); see *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 93–97 (June 12, 2002) (defining "widespread" and "systematic").

157. Cf. *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges

electoral corruption in a systematic, organized, and deliberate manner to solidify his power throughout the State.<sup>158</sup> As these “attacks” and their consequences were neither isolated nor random, they were widespread and systematic.<sup>159</sup>

Governor Odili also would have known of the broader context of his “attacks” against the people of Rivers State.<sup>160</sup> Given that Odili occupied the highest office in the state and would have overseen all government appropriations, he would have been aware of the scale and scope of abuses associated with the Rivers State budget.<sup>161</sup> The same can be said of Odili’s role in the perpetration of electoral corruption, which he engineered to his political benefit.<sup>162</sup> Finally, one may infer Odili’s level of awareness because his actions resulted in predictable consequences, which he either intended or ought to have known would follow.<sup>163</sup> This point is expanded upon below.

### 3. *Odili’s Perpetration of Grand Corruption Caused Great Suffering and Serious Injury*

As noted above, the *actus reus* element of Article 7(1)(k) is contingent on the extent of the harm and suffering that results from attacks against civilian populations.<sup>164</sup> Application of the Rome Statute also clarifies that “suffering” and “injury” are to be

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of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 116–24 (June 15, 2009) (finding repeated similar attacks that occurred in a large geographic area “widespread”).

158. Rome Statute, *supra* note 15, art 7(1); *see* Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 271 (July 15, 1999) (elaborating on the “widespread or systematic” requirement).

159. *Cf. Kumarac*, IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 93–97 (adopting the definitions of “widespread” and “systematic” set out in *Tadic*).

160. Rome Statute, *supra* note 15, art. 7(1); *see also* Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-T, Judgment, ¶¶ 133–34 (May 21, 1999) (noting that the accused must have actual or constructive knowledge about the broader context of his act).

161. Rome Statute, *supra* note 15, art. 7(1); *Chop Fine*, *supra* note 56, at 79–80 (noting that Odili would have had final say on all budgetary appropriations).

162. *See* COMMONWEALTH SECRETARIAT, *supra* note 81, at 14–19 (documenting Odili’s ties to gang leaders).

163. *See* Gupta et al., *supra* note 28, *passim* (finding causation between corruption and poverty); Bamidele et al., *supra* note 54, at 15–16 (linking corruption and underdevelopment in Nigeria).

164. *See* discussion *supra* Part III.A.2 (defining the *actus reus* of Article 7(1)(k)).

interpreted broadly, can occur over extended periods of time, and can be directed against a general population.<sup>165</sup> As a result, specific corrupt acts do not need to be connected to the harms of specific individuals; instead, if corruption creates a harm or injury to the general population sufficiently comparable to the harm or injury from the enumerated crimes in Article 7, the *actus reus* will be satisfied.<sup>166</sup>

Under the Odili regime, grand corruption exacerbated poverty, deterred investment, and threatened the physical and psychological security of the citizens of Rivers State.<sup>167</sup> Economic corruption associated with the Rivers State budget significantly diminished the available money for essential social services.<sup>168</sup> While Odili and his allies accrued considerable benefits from widespread corruption, the Rivers State government failed to make more than nominal investments in healthcare and education, despite the availability of funds due to the significant influx of oil revenue.<sup>169</sup> Certainly, these deprivations would have negatively impacted the citizens of the State.

Socio-economic data from Rivers State illustrates the overall vulnerability of much of the population and confirms the significant consequences of corruption. For example, in 2005, 43.12% of the population lived on one dollar or less per day.<sup>170</sup> The Gini coefficient was 0.4792, well below the national average of 0.488.<sup>171</sup> Moreover,

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165. See discussion *supra* Part III.A.2.

166. See *id.*

167. *Chop Fine*, *supra* note 56, at 75–88; see *Nigeria: Corruption and Misuse Rob Nigerians of Rights*, HUM. RTS. WATCH (Jan. 31, 2007), <http://www.hrw.org/news/2007/01/31/nigeria-corruption-and-misuse-rob-nigerians-rights> (arriving at the same conclusion).

168. See *Chop Fine*, *supra* note 56, at 77–78 (noting that in 2006, budgetary expenditures for transport, dining, and other extravagances constituted seventeen percent of total state government spending, amounting to more than ₦30.1 billion (\$230 million)—more than the annual allocation given to many Nigerian states).

169. See *id.* at 89–90 (explaining that because funds were diverted instead of applied to improving health and education, many Rivers State citizens were denied some of their most basic human rights); Hassan Tai Ejibunu, *Nigeria's Niger Delta Crisis: Root Causes of Peacelessness*, 7 EPU RESEARCH PAPERS 22 (2007), available at <https://www.yumpu.com/en/document/view/6730590/nigerias-niger-delta-crisis-root-causes-of-peacelessness-european-> (reiterating the extravagant expenses in the 2006 budget).

170. *Nigeria 2008-2009*, *supra* note 60, at 150.

171. See Bamidele et al., *supra* note 54, at 15–16 (concluding the same with

United Nations Development Program (“UNDP”) data from 2009 discloses that Rivers State had an unemployment rate of 27.9%, dwarfing the national average of 19.7%.<sup>172</sup> The same data also conclusively indicates that although Rivers State has a relatively high GDP (\$5,210.69), it has a pronounced disparity in wealth and entrenched poverty.<sup>173</sup> Moreover, in 2008, the life expectancy rate in Rivers State (forty-four years for males and forty-six years for females) further supports the conclusion that lagging socio-economic development resulted in significant harm and suffering to the population.<sup>174</sup>

On its face, the situation in Rivers State is consistent with the research that concludes that corruption increases poverty and inequality, and decreases social spending and economic growth.<sup>175</sup> In light of the causal relationship between corruption and underdevelopment, it logically follows that Odili’s abuse of the budgetary process and outright theft of Rivers State funds would have significantly contributed to negative socio-economic conditions.<sup>176</sup> As such, Odili’s actions should be regarded as creating significant harm and suffering to the citizenry.<sup>177</sup>

Odili’s documented perpetration of widespread electoral fraud also

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respect to Nigeria, specifically). *Compare id.* at 148 (noting statistics that depict the high poverty level in Rivers State), *with* Gupta et al., *supra* note 28, at 38–40 (concluding that corruption increases of one standard deviation increase the Gini coefficient of income inequality by about eleven points and income growth of the poor by about five percentage points per annum).

172. *Social Statistics in Nigeria*, NAT’L BUREAU OF STATISTICS 238 (2009), available at <http://www.scribd.com/doc/53345549/Social-Statistics-in-Nigeria-2009>.

173. *Nigeria 2008–2009*, *supra* note 60, at 64–65.

174. *Id.* at 152.

175. *See* Gupta, *supra* note 28, at 38–40; Kwabena Gyimah-Brempong, *Corruption, Economic Growth, and Income Inequality in Africa*, 3 *ECON. GOV.* 183, 185–86 (2002) (concluding that (1) a one point increase in corruption decreases the growth rates of GDP by between 0.75 and 0.9 percent per year and of per capita income growth rate by between 0.39 and 0.41 percent per year, respectively; and (2) a one point increase in the corruption index is tied to a seven point increase in the Gini coefficient).

176. *See* Gupta, *supra* note 28, at 38–40.

177. *See* Ejibunu, *supra* note 169, at 22 (noting that as of 2007, 80% of companies had stopped their operations in Rivers State, which in turn increased youth unemployment and exacerbated societal discontent and violence).

significantly harmed the citizens of Rivers State.<sup>178</sup> Directly, Odili used State power to direct violence against his political opponents during the 2003 election.<sup>179</sup> In addition to hiring gangs to carry out acts of violence against political opponents,<sup>180</sup> he also relied on local-level chairmen<sup>181</sup> and police forces to further his political interests throughout the state.<sup>182</sup> Commenting on the 2003 electoral period, one civil society group referred to it as a “low-intensity armed struggle.”<sup>183</sup>

In addition to the immediate violence, widespread electoral corruption harmed the Rivers State population over the longer term. It rendered political officeholders unaccountable to their constituents and undermined the responsiveness of government institutions to the population’s needs.<sup>184</sup> As a result, by allowing public officials to govern without the risk of being voted out of office, electoral fraud exacerbated corruption in Rivers State, which, as noted above, ultimately harmed the citizenry.<sup>185</sup>

The perpetration of grand corruption in Rivers State satisfies the requirement for “great harm and suffering” under Article 7(1)(k). Substantively, the above-noted consequences of grand corruption correspond with the requisite level of severity established in the jurisprudence—the consequences were severe, and inflicted

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178. See COMMONWEALTH SECRETARIAT, *supra* note 81, at 14–19 (outlining the corruption and violence that underpinned the 2003 Rivers State elections).

179. *Id.*

180. See *Criminal Politics*, *supra* note 82, at 36 (reporting explicit evidence of Odili contracting with gang leaders to disrupt the election in his favor).

181. See *Chop Fine*, *supra* note 56, at 33–34 (finding that state-level politicians expected the local chairmen to “make returns” on their stolen government funds by mobilizing violence and manipulating election results in their constituencies).

182. See COMMONWEALTH SECRETARIAT, *supra* note 81, 14–15 (citing HRW interview, Port Harcourt, July 14, 2003, which revealed that that police played an active role in supporting the PDP).

183. *Criminal Politics*, *supra* note 82, at 80–81 (citing an election monitoring report from Apr. 26, 2003).

184. See Suberu, *supra* note 81, at 459, 469–71 (2010) (finding that, over the long-term, electoral corruption impedes development and creates unresponsive institutions, an over-centralization of power, a near-monolithic party system, and ethno-regional conflict).

185. See *Chop Fine*, *supra* note 56, at 100–01 (“Nigeria’s federal government has allowed the perpetuation of a political system that often rewards politicians who use their ill-gotten gains to mobilize violence in support of their political ambitions. In doing so, it undermined its own efforts to fight corruption.”).

widespread physical and psychological damage to the citizenry.<sup>186</sup> Further, since “harm and suffering” includes the direct and indirect consequences of specific acts, both the short-term consequences (deprivation of essential social services and the infliction of violence) and the long-term consequences (poverty and accountability deficit) of corruption in Rivers State satisfy this element.<sup>187</sup>

#### *4. Odili’s Perpetration of Grand Corruption Was Intentional*

Under Article 7(1)(k), the consequences of “other inhumane acts” acts must be intentional.<sup>188</sup> Article 30 of the Rome Statute, however, elaborates that intention can be constructive, based on the consequences that would ordinarily occur from specific actions.<sup>189</sup> Accordingly, to determine whether Odili perpetrated grand corruption intentionally, the appropriate question is whether he governed with the predictable effect of inflicting harm and suffering against the population of Rivers State.

Based on the gravity of his acts and centralization of power in the Governor’s Office, Odili would have needed either actual or constructive intent to bring about the consequences of his actions.<sup>190</sup> The consequences of Odili’s looting of the public treasury were predictable.<sup>191</sup> The monopoly on power that Odili claimed in the governor’s office gave him discretionary authority over all public

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186. See, e.g., Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶¶ 449 (Sept. 30, 2008) (charging the perpetrators of non-fatal violent attacks); Prosecutor v. Vidoje Blagojević & Dragan Jokić, Case No. IT-02-60-T, Judgment, ¶¶ 623–32 (Jan. 17, 2005) (finding forcible transfer constituted an “other inhumane act”); Prosecutor v. Mitar Vasiljevic, Case No. 1T-98-32-A, Judgment, ¶ 166 (Feb. 25, 2004) (holding that witnessing and surviving mass execution resulted in serious mental harm); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01-04/01-06, Observations on Issues Concerning Reparations, ¶¶ 36–37 (Aug. 7, 2012) (noting the psychological harm resulting from child conscription).

187. See Gupta, *supra* note 28, at 38–40; Gyimah-Brempong, *supra* note 175, at 183, 185–86 (analyzing the empirical consequences of corruption).

188. See discussion *supra* Part III.A.3 (defining the *mens rea* of Article 7(1)(k)).

189. Rome Statute, *supra* note 15, art. 30.

190. See *id.* art. 25 (creating liability for jointly-committed offenses).

191. See discussion *supra* Part II.C.1 (outlining Odili’s budgetary corruption). See generally Gupta et al., *supra* note 28; Gyimah-Brempong, *supra* note 175.



expenditures, including decisions to neglect government agencies in need.<sup>192</sup> Accordingly, the Governor would have consciously decided to siphon public funds into dummy corporations and financially starve social service infrastructure.<sup>193</sup> As a result, if the harm that followed from these actions was not specifically intended, at a minimum it would have been predictable to Odili.<sup>194</sup> This is especially clear with regard to the socio-economic vulnerability of the Rivers State population, which also would have been apparent to the Governor.<sup>195</sup> The fact that Odili materially benefited from using the Rivers State Budget as a slush fund for his private gains further highlights the obvious consequences of budgetary corruption as Odili directly benefitted at the expense of the public.<sup>196</sup>

Similarly, Odili's orchestration of electoral fraud is viewed as intentional. The above-noted evidence documents his abuse of government power to manipulate the 2003 election results—particularly, the hiring of gangs to carry out violent attacks against political opponents.<sup>197</sup> When considering the testimony from Ateke Tom, Odili's stark intentionality behind the 2003 attacks directly implicates him for sponsoring violent activity to eliminate his political enemies.<sup>198</sup>

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192. See *Chop Fine*, *supra* note 56, at 79 (“Political and economic power in Rivers State rests overwhelmingly in the hands of its governor. This basic fact is starkly reflected in the enormous proportion of state revenues available to the governor to spend at his discretion, and in the financial neglect accorded to other government agencies.”).

193. *Id.*

194. See Starr, *supra* note 10, at 1303 (advancing the predictability standard); see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 130 (June 15, 2009) (noting intent can be inferred from relevant facts and circumstances).

195. See *UN Quality of Life Index: Nigeria Placed 156*, VANGUARD, Nov. 2, 2011, <http://www.vanguardngr.com/2011/11/un-quality-of-life-index-nigeria-placed-156/> (ranking Nigeria 156 out of 187 countries with comparable data on the International Human Development Indicators with an average life expectancy of 51.9 years and average income of roughly \$2000 per year); cf. Gupta et al., *supra* note 28, at 38–40; Gyimah-Brempong, *supra* note 175, at 183, 185–86 (explaining that corruption causes these consequences).

196. See discussion *supra* Part II.C.1 (outlining scale of financial corruption in Rivers State).

197. See discussion *supra* Part II.C.2 (noting Odili's role in perpetrating electoral corruption).

198. *Criminal Politics*, *supra* note 82, at 81.

The longer-term consequences of electoral corruption were also predictable. Inherently, the massive electoral fraud in 2003 resulted in the undemocratic election of government officials who were largely unaccountable to their constituents.<sup>199</sup> Additionally, failing to fulfill his post-election promises to pay and employ youth gangs had the inevitable consequence of creating significant violent backlash and further deterioration of social cohesion.<sup>200</sup> Commenting on the broader consequences of the 2003 elections, Patrick Naagbantou, Port Harcourt journalist and activist, remarked:

They buy guns for our youths; destroy our schools and our amenities, and our communities. They ask our youths to kill one another and do others of their biddings . . . . Most of these youths that the state had turned into cultists, hostage-takers, armed robbers, assassins, prostitutes and thugs would have been great and meaningful to this society, but today their future is rocked with violence and evil.<sup>201</sup>

While these consequences may not have been intended, surely they were predictable to those orchestrating the violence, including Governor Odili.

As grand corruption under the Odili regime satisfies the contextual (*chapeau*), *actus reus*, and *mens rea* elements of Article 7(1)(k), a strong case exists for ICC prosecution of Governor Odili for having committed crimes against humanity. Moreover, given the Nigerian judiciary's unwillingness to hold Odili accountable for stealing public money and abusing the powers of his office, the ICC provides a viable alternative to domestic prosecution.<sup>202</sup> Accordingly, with the need and legal availability for ICC investigation and prosecution of grand corruption in mind, the following section highlights two central recommendations for incorporating anti-corruption initiatives into the ICC's mandate.

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199. See Suberu, *supra* note 81, at 459, 469–71 (advancing that the systemic problems of River State are tied to financial and electoral corruption).

200. See generally *Criminal Politics*, *supra* note 82, 81–90 (exploring the legacy of the 2003 Election in Rivers State).

201. *Id.* at 80.

202. See discussion *supra* Part II.C.3 (outlining the accountability deficit in Rivers State); see also EFCC REPORT, *supra* note 62; *Draft Charges*, *supra* note 63 (implicating Odili for heinous corruption); cf. Rome Statute, *supra* note 15, art. 17 (limiting the ICC jurisdiction to situations where host states are unwilling or unable to investigate and/or prosecute international crimes).

#### IV. RECOMMENDATIONS

Addressing the prevalence of corruption in the developing world ultimately requires a multifaceted solution, involving both domestic and international legal tools. Given the significant barriers to the amendment of the Rome Statute, and the unwillingness of certain countries to consent to the ICC's jurisdiction, this comment argues that the existing ICC framework already provides a working foundation to prosecute egregious cases of grand corruption.<sup>203</sup> Unlike most international anti-corruption treaties, the Rome Statute empowers the ICC with the functional tools necessary for the prosecution of grand corruption.<sup>204</sup> The ICC has broad investigatory powers to collect information about international crimes.<sup>205</sup> Further, upon conviction, the ICC also has the authority to compel states to forfeit assets derived directly or indirectly from those crimes.<sup>206</sup> Therefore, not only would the ICC create international criminal accountability for those who perpetrate grand corruption, it would provide an opportunity for the return of the proceeds of corruption.

Working within the current legal framework, the following recommendations would bolster ICC prosecution of grand corruption. First, the ICC should amend the Regulations of the Office of the Prosecutor ("OTP") to include prosecutorial discretion guidelines that focus on egregious international crimes that occur on systemic basis, beyond those crimes typically prosecuted as a result of armed conflict and mass atrocity. Second, in conjunction with the UN, the ICC should support the formation of an Anti-Corruption Advisory Board, which would conduct hearings concerning egregious corruption and make formal recommendations to the OTP.

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203. See Starr, *supra* note 10, at 1297, 1305–06 (noting both the barriers to amending the Rome Statute and the ICC's limits with respect to non-party states).

204. See Webb, *supra* note 2, at 193–204, 218–22 (outlining the absence of functional enforcement mechanisms in the current international anti-corruption regime).

205. Rome Statute, *supra* note 15, arts. 5(1), 54–56.

206. *Id.* arts. 77, 79.

A. THE OFFICE OF THE PROSECUTOR SHOULD AMEND ITS  
GOVERNING REGULATIONS TO PROVIDE FOR PROSECUTORIAL  
DISCRETION GUIDELINES THAT TARGET SYSTEMIC CRIMES

As prosecutorial discretion is a central feature of the OTP, questions arise pertaining to the transparency of the situation and case selection process, and whether it sufficiently considers all of the most egregious international crimes.<sup>207</sup> For example, the 2009–2012 Prosecutorial Strategy sets out a vague mandate that limits OTP investigation and prosecution to top-level government officials who perpetrate crimes that are sufficiently grave with respect to the crimes' scale, nature, manner of commission, and impact.<sup>208</sup> The decision-making process based on these criteria, however, has resulted in the OTP focusing narrowly on crimes that are perpetrated during “crises”—i.e., armed conflict or mass atrocities.<sup>209</sup> Accordingly, systemic crimes that occur outside of immediate “crises” have been largely ignored, despite their express enumeration in the Rome Statute.<sup>210</sup> The ICC has neglected these crimes, even though they arguably have created more long-term harm and suffering than some of the crimes that the ICC has investigated and prosecuted.<sup>211</sup>

To address this functional limitation, the OTP should amend its Prosecutorial Strategy to expressly account for non-“crisis” crimes, including those unenumerated crimes such as grand corruption.<sup>212</sup> In doing so, the OTP would effectively widen its mandate and create

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207. International Criminal Court, *Regulations of the Office of the Prosecutor*, reg. 13, ICC Doc. BD/05-01-09 (Apr. 29, 2009) (“[T]he Prosecutor shall ensure that the Office and its members maintain their full independence and do not seek or act on instructions from any external source.”).

208. *Prosecutorial Strategy 2009–2012*, ICC OFFICE OF THE PROSECUTOR ¶¶ 18–21 (Feb. 1 2010), <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>.

209. See Starr, *supra* note 10, at 1312–13 (recognizing that although crisis-linked prosecution of crimes against humanity have been the norm, the Rome Statute creates legal and political space for which systemic crimes could be prosecuted outside of the crisis context).

210. Rome Statute, *supra* note 15, art. 7(1).

211. See discussion *supra* Part III.A.2 (arguing that grand corruption creates significant harm and suffering).

212. See Starr, *supra* note 10, at 1276–77 (noting this deficiency and arguing that selection should be based on the degree of suffering and the Court's institutional capacity to reduce such suffering).

further international awareness of the prosecutorial reach of the ICC. This type of amendment could also work to increase ICC transparency through an adoption of more precise guidelines for OTP selection of situations and cases for formal investigation and prosecution.<sup>213</sup>

B. THE ICC SHOULD SUPPORT THE FORMATION OF AN  
INTERNATIONAL ANTI-CORRUPTION ADVISORY BOARD TO  
CONDUCT HEARINGS ON GOVERNMENT CORRUPTION AND MAKE  
FORMAL RECOMMENDATIONS TO THE OTP

In conjunction with the UNODC, the ICC should support the formation of an Anti-Corruption Advisory Board to solicit evidence and conduct hearings with respect to the perpetration of corruption by high-level government officials.<sup>214</sup> In doing so, the Advisory Board would seek evidence from a broad array of domestic and international civil society groups, citizenry, and former government officials. The Advisory Board would make preliminary assessments as to the veracity of corruption-related complaints and also function as an information repository for ongoing situations in conjunction with existing international anti-corruption organizations.

In the event that the Advisory Board is presented with compelling evidence of egregious government corruption, it would make public recommendations for the punishment of corrupt officials under domestic law. Working with the Conference of the States Parties to the United Nations Convention against Corruption, the Advisory Board would attempt to induce domestic prosecution of the implicated government officials.<sup>215</sup> If the implicated state failed to comply, however, the Advisory Board would then make formal recommendations to the OTP to conduct an official investigation of the alleged corruption. These recommendations would mirror U.N.

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213. Kai Ambos & Ignaz Stegmiller, *Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?*, 58 CRIME LAW SOC. CHANGE 391, 392, 409–10 (advocating that the OTP should clarify its prosecutorial guidelines for further coherence and transparency in the situation case and selection process).

214. See Harms, *supra* note 16, 199–200 (making a similar recommendation prior to the passage of UNCAC).

215. See UNCAC, *supra* note 13, art. 63 (establishing the Conference of the State Parties to improve cooperation and capacity for UNCAC implementation).

Security Council or State party referrals proscribed in Article 13 of the Rome Statute.<sup>216</sup> In so doing, the Advisory Board would support the gradual incorporation of grand corruption into the ICC's prosecutorial strategy, which would be particularly crucial given the lack of an international legal standard for prosecuting corruption.<sup>217</sup>

## V. CONCLUSION

In accordance with the Rome Statute, the ICC should exercise its prosecutorial discretion to adopt an aggressive strategy to fight egregious cases of grand corruption, particularly where government leaders decimate domestic budgets or otherwise engage in gross abuses of power that detrimentally affect the public. The legal foundation for this proposition is strong: grand corruption constitutes an "other inhumane act" under Article 7(1)(k); it also satisfies the contextual requirements for crimes against humanity due to its scope, widespread consequences, and underlying intentionality. As grand corruption already falls under the purview of the Rome Statute, the ICC has the authority, legitimacy, and functionality to fill the glaring enforcement gap that currently plagues the international anti-corruption regime. Ultimately, failing to address this problem will allow high-level government officials like Peter Odili to maintain impunity for the perpetration of grand corruption—a crime against humanity—against their people.

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216. See Rome Statute, *supra* note 15, art. 13(a), (b). *But see id.* art. 53 (providing the Prosecutor final discretion to refuse to initiate a formal investigation).

217. See Starr, *supra* note 10, at 1312 (noting that corruption has never been prosecuted in the international criminal context).