

# CRIMINALIZING THE PROBLEM OF UNEXPLAINED WEALTH: ILLICIT ENRICHMENT OFFENSES AND HUMAN RIGHTS VIOLATIONS

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#### INTRODUCTION

Nations often face vast procedural challenges in successfully detecting and prosecuting their officials when the officials engage in corrupt activities, for those activities typically leave no evidence trail. Government officials and their private-sector counterparties enter into secret, illegal agreements, usually without third-party witnesses or documentation. The apparent increase in wealth enjoyed by the participating government officials may be the only signal that corrupt acts have transpired. The officials may amass luxury cars, buy extravagant homes, and enjoy exotic vacations to the amazement and anger of their constituents and colleagues.

Frustrated with the ever-growing problem of corrupt public officials, governments around the world have been devising creative and aggressive legal measures to combat corruption. At the forefront of these efforts is the crime of illicit enrichment, a relatively new criminal offense. The illicit enrichment offense criminalizes the “unexplained increase in the wealth of a public official while in office.”<sup>1</sup> It targets a “significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful in-

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1. Peter W. Schroth & Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations: Romania in Comparative Perspective*, 52 AM. J. COMP. L. 625, 688 (2004).

come,”<sup>2</sup> essentially deeming a public official’s unexplained accumulation of significant capital to be a form of corruption.<sup>3</sup> The offense has five principal elements: (1) a public official who (2) during the relevant time period (3) experiences a significant increase in assets (4) knowingly and (5) without justification.<sup>4</sup>

Since 1964, when Argentina and India enacted the first anti-illicit enrichment statutes into law, many other nations have followed suit: more than 40 nations have now criminalized illicit enrichment, to the applause of various international organizations and anti-corruption groups.<sup>5</sup> Indeed, the United Nations Convention against Corruption, the Inter-American Convention against Corruption, and the African Union Convention on Preventing and Combating Corruption encourage their member nations to criminalize illicit enrichment as an efficient means of combating corruption.<sup>6</sup>

Many scholars applaud the adoption of illicit enrichment offenses, noting that they “are necessary to any anti-corruption movement”<sup>7</sup> and are “accepted instrument[s] in the global fight against corruption”<sup>8</sup> that “enhance the [government’s] powers to monitor wealth and improve transparency within the public sector.”<sup>9</sup> Courts in many nations justify the laws as a proportionate and measured response to the pernicious problem of corruption.<sup>10</sup> By “combating [an official’s] unexplained material gains,”<sup>11</sup> illicit enrichment offenses “mak[e] it clear to public officials that if they engage in corrupt con-

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2. United Nations Convention against Corruption art. 2, Oct. 31, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) [hereinafter United Nations Convention against Corruption].

3. See Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT’L & COMP. L. 793, 814 (2001).

4. LINDY MUZILA ET AL., ON THE TAKE: CRIMINALIZING ILLICIT ENRICHMENT TO FIGHT CORRUPTION 13 (2012) (analyzing the five principal elements common to most illicit enrichment statutes).

5. See *infra* note 93 and accompanying text.

6. See *infra* notes 46–48 and accompanying text.

7. Shiloh Hoggard, *Preventing Corruption in Colombia: The Need for an Enhanced State-Level Approach*, 21 ARIZ. J. INT’L & COMP. L. 577, 610 (2004).

8. Ndiva Kofele-Kale, *Change or the Illusion of Change: The War Against Official Corruption in Africa*, 38 GEO. WASH. INT’L L. REV. 697, 720 (2006).

9. Joanna E. MacMillan, *Reformasi and Public Corruption: Why Indonesia’s Anti-Corruption Agency Strategy Must be Reformed to Effectively Combat Public Corruption*, 25 EMORY INT’L L. REV. 587, 627 (2011).

10. See *infra* note 214 and accompanying text.

11. Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT’L L.J. 691, 729 (2007).

duct they will lose their offices, forfeit illegally acquired wealth, and go to prison.”<sup>12</sup>

While generally effective at attacking political corruption, criminalizing illicit enrichment may not be a panacea. Many contend that the offense violates human rights because it puts the burden on the accused to put forth evidence demonstrating the legitimate origin of the assets at issue.<sup>13</sup> Others disagree, noting that the burden of proof imposed upon the defendant in illicit enrichment does not amount to a violation of the defendant’s rights.<sup>14</sup> Given this divergence of opinion, the offense has been labeled “[p]erhaps the most controversial criminal offense” by some scholars.<sup>15</sup>

This Article argues that despite the benefits of illicit enrichment for thwarting corruption, this offense violates fundamental human rights of the accused and therefore must be replaced by alternate enforcement mechanisms. Part I demonstrates how illicit enrichment surfaced as a mechanism to thwart global corruption and explores the pervasiveness of such corruption, the human rights infringements it causes, and the difficulties governments face in prosecuting corruption offenses. Part II provides a critical examination of the offense of illicit enrichment by investigating its background and history, dissecting its procedural and substantive elements, and detailing its widespread adoption. Using a human rights-oriented approach, Part III criticizes the offense for violating several fundamental rights of the accused. It illustrates how the offense impinges upon the presumption of innocence, the right to silence, and the privilege against self-incrimination. Part IV discusses alternative measures that combat the underlying issue of unexplainable wealth of public officials while also respecting the rights of the accused.

## I.

### GLOBAL CORRUPTION AND HUMAN RIGHTS INFRINGEMENTS

#### A. *The Nature of Global Corruption*

Corruption continues to plague nations around the world, tainting governments, impairing economies, and damaging communities. Typi-

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12. Benjamin B. Wagner & Leslie Gielow Jacobs, *Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Countries*, 30 U. PA. J. INT’L L. 183, 184–85 (2008) (quoting Larry Diamond, *Institutions of Accountability*, HOOPER INSTITUTION (July 30, 1999), <http://www.hoover.org/research/institutions-accountability>).

13. See *infra* Part II.C.5.

14. See *infra* Part III.

15. Snider & Kidane, *supra* note 11, at 728.

cally understood as the abuse of power for personal gain,<sup>16</sup> corruption negatively impacts virtually all countries and amounts to a “dirty tax” on the public.<sup>17</sup> The latest findings from Transparency International’s Corruptions Perceptions Index (CPI) and the World Bank Control of Corruption Index—two well-recognized indices used to measure corruption<sup>18</sup>—suggest that corruption is ever-present in both developing and developed countries.<sup>19</sup> Indeed, Transparency International deemed two-thirds of the countries analyzed in its 2013 CPI were “perceived to have a serious corruption problem.”<sup>20</sup> The World Bank declares corruption to be “the single greatest obstacle to economic and social development,”<sup>21</sup> and research suggests corruption maintains a stronghold in most countries examined.<sup>22</sup>

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16. See Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 329–30 (2012) (explaining that “the most common definition of corruption [is the] abuse or misuse of a position of trust or responsibility for private gain rather than the purpose for which that trust or responsibility was conferred”); see also BLACK’S LAW DICTIONARY 397 (9th ed. 2009) (defining corruption as “[t]he act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others”).

17. *Corruption Perceptions Index 2012*, TRANSPARENCY INT’L, <http://www.transparency.org/cpi2012/results> (last visited Nov. 4, 2014).

18. See Joshua V. Barr, Edgar Michael Pinilla & Jorge Finke, *A Legal Perspective on the Use of Models in the Fight against Corruption*, 8 S.C. J. INT’L L. & BUS. 267, 273–74 (2012). Both indices are perception-based, in that they measure perceptions of corruption, rather than rates of actual corruption. See *id.* at 273; see also Eric C. Chaffee, *The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Corruption Laws in Preventing or Lessening Future Financial Crises*, 73 OHIO ST. L.J. 1283, 1309–10 (2012) (explaining how perception-based indices of corruption are the only viable methods to gauge corruption rates, given the difficulties in measuring actual corruption).

19. See TRANSPARENCY INTERNATIONAL, *CORRUPTION PERCEPTIONS INDEX 3* (2012), available at [http://files.transparency.org/content/download/537/2229/file/2012\\_CPI\\_brochure\\_EN.pdf](http://files.transparency.org/content/download/537/2229/file/2012_CPI_brochure_EN.pdf); *Worldwide Governance Indicators*, WORLD BANK GROUP, <http://www.govindicators.org> (last visited Nov. 4, 2014).

20. *Corruption Perceptions Index 2013*, TRANSPARENCY INT’L 7, <http://www.transparency.org/cpi2013/results> (last visited Nov. 4, 2014).

21. See *Empowering the Poor to Fight Corruption*, WORLD BANK GROUP, <http://go.worldbank.org/APAR27YJ50> (last visited Nov. 4, 2014); see also Wagner & Jacobs, *supra* note 12, at 184 (2008) (“corruption is the development issue of the twenty-first century.”).

22. Transparency International conducts its annual Global Corruption Barometer survey which collects public views on corruption. The latest survey, with interview responses gathered from citizens in 100 countries, found that most citizens interviewed in the majority of countries surveyed believe that the level of corruption within their countries is increasing. See *2010/11 Global Corruption Barometer*, TRANSPARENCY INT’L, [http://www.transparency.org/gcb201011/in\\_detail](http://www.transparency.org/gcb201011/in_detail) (last visited Nov. 4, 2014) (including link to data set detailing responses by country to the question, “In the past 3 years, how has the level of corruption in this country changed?”).

A growing body of empirical research shows how corruption stifles economic growth and productivity.<sup>23</sup> For instance, the World Bank estimates that corruption may decrease a nation's growth rate by 0.5 to 1.0 percentage points annually, while research from the International Monetary Fund demonstrates that investment into countries with widespread corruption is significantly less than in countries with little apparent corruption.<sup>24</sup> Standard & Poor's reportedly assigns a fifty to one-hundred percent chance that investments in countries with significant corruption will be lost within five years.<sup>25</sup> Additional studies illustrate how corruption redistributes wealth in detrimental ways, with harmful social and economic effects.<sup>26</sup>

Corruption manifests itself in various forms, including bribery, embezzlement, and abuse of position.<sup>27</sup> Government agents engage in corrupt activities for a variety of reasons. They may deliberately intend to gain an advantage over their competitors or garner unwarranted compensation, they may justify their actions with the understanding that others in the industry engage in the same practices, or they might believe that their actions are merely a normal part of doing business.<sup>28</sup> As a result of such activity, "citizens are compelled to pay for services that should be free; state budgets are pillaged by corrupt politicians; public spending is distorted as decision-makers fo-

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23. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 9–26 (1999); Giorleny D. Altamirano, *The Impact of the Inter-American Convention Against Corruption*, 38 U. MIAMI INTER-AM. L. REV. 487, 492–97 (2007) (discussing research findings regarding the negative impact of corruption on the economy).

24. See Press Release, *Tenth United Nations Crime Congress in Vienna, 10–17 April*, United Nations (Apr. 6, 2000), available at <http://www.un.org/press/en/2000/20000406.soccp214.doc.html-0>.

25. *Id.*

26. See, e.g., Nichols, *supra* note 16, at 338–40 (discussing negative economic impact of corruption in the business sector); Miguel Schloss, *Fighting International Corruption & Bribery in the 21st Century, Luncheon Address*, 33 CORNELL INT'L L.J. 469, 469–70 (2000) ("Statistical evidence illustrates that higher corruption is associated with: (i) higher [and more costly] public investment; (ii) lower government revenues; (iii) lower expenditures on operations and maintenance; and (iv) lower quality of public infrastructure.") (brackets in original); Snider & Kidane, *supra* note 11, at 695.

27. See INT'L COUNCIL ON HUMAN RIGHTS POL'Y, *CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION* 18–20 (2009), available at [http://www.ichrp.org/files/reports/40/131\\_web.pdf](http://www.ichrp.org/files/reports/40/131_web.pdf) [hereinafter *CORRUPTION AND HUMAN RIGHTS*] (identifying bribery, embezzlement, abuse of functions or position, trading in influence, and illicit enrichment as primary forms of corruption).

28. See *Corruption Information: Why corruption occurs*, GLOBAL INFRASTRUCTURE ANTI-CORRUPTION CENTRE (Jan. 30, 2013), [http://www.giacentre.org/why\\_corruption\\_occurs.php](http://www.giacentre.org/why_corruption_occurs.php).

cus spending on activities likely to yield large bribes like major public works; foreign investment is stymied . . . ; and economies suffer.”<sup>29</sup>

### B. *Corruption Implicates Human Rights*

A significant body of scholarship has examined the causes and consequences of corruption, particularly focusing upon its attendant harms to public and private interests.<sup>30</sup> A number of recent studies have examined the dynamics between corruption and human rights. Such research highlights how corruption often undermines human rights and citizen well-being.<sup>31</sup> A strong relationship exists between acts of corruption and violations of human rights,<sup>32</sup> as corrupt activities may infringe upon particular human rights.<sup>33</sup> For instance, if an individual must tender a bribe in order to access food, water, adequate housing, health, education, or the political or judicial process, corruption violates that individual’s respective rights.<sup>34</sup>

Corruption also disproportionately impacts the rights of vulnerable and disadvantaged groups.<sup>35</sup> Research conducted by the International Council on Human Rights Policy demonstrates how corruption can reinforce the exclusion of minorities, migrant workers, indigenous

29. *The basics of anti-corruption*, U4 ANTI-CORRUPTION RES. CTR., <http://www.u4.no/articles/the-basics-of-anti-corruption/> (last visited Nov. 4, 2014).

30. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* 1–26 (1978); JOHANN GRAF LAMBSDORFF, *THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM* 1–15 (2007).

31. See Julio Bacio Terracino, *Corruption as a Violation of Human Rights 2* (2008) (working paper), available at [http://www.ichrp.org/files/papers/150/131\\_terracino\\_en\\_2008.pdf](http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf); see also Criminal Law Convention on Corruption pmb., Jan. 27, 1999, C.E.T.S. No. 173, 2216 U.N.T.S. 225.

32. A human rights violation may be defined as “occur[ing] when a state’s acts, or failure to act, do not conform with that state’s obligation to respect, protect or fulfil recognised human rights of persons under its jurisdiction.” *CORRUPTION AND HUMAN RIGHTS*, *supra* note 27, at 26.

33. See, e.g., *id.* at 4; Kolawole Olaniyan, *Introductory Note to African Union (AU): Convention on Preventing and Combating Corruption*, 43 INT’L L. MATERIALS 1, 3 (2004) (explaining that corruption is “antithetical to the enjoyment of economic, social and cultural rights and the enemy of the principle of good governance [and] an infringement on human rights by virtue of the fact that it increases the debt of states”) (internal quotation marks omitted).

34. See Terracino, *supra* note 31, at 8–9.

35. See *CORRUPTION AND HUMAN RIGHTS*, *supra* note 27, at 7; James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT’L L. 125, 148 (2009) (arguing that economically and politically disenfranchised groups disproportionately suffer from the effects of corruption because they are especially dependent on public goods); Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT’L L. 495, 507 (1999) (arguing that anti-corruption efforts should focus upon the concrete deprivations and problems of the victims of corruption in specific locales).

peoples, refugees, those with HIV/AIDS, disabled people, prisoners, and people living in poverty, among others, and exacerbate the discrimination that these groups experience.<sup>36</sup> Moreover, endemic corruption in a society may prohibit a government from meeting its obligations to defend, respect, and fulfill its citizens' human rights, particularly if corrupt acts deplete state resources which could otherwise be utilized to deliver essential public goods and services.<sup>37</sup>

Research addressing the relationship between corruption and human rights has bridged the human rights and anti-corruption movements,<sup>38</sup> with many now calling for the adoption of a human-rights approach in developing strategies for designing and implementing anti-corruption programs.<sup>39</sup> Several scholars press for acknowledgment of a human right to live in a corruption-free society, given that corruption can hamper the fundamental rights to life, equality, and personal dignity, among others.<sup>40</sup> Professor Ndiva Kofele-Kale has argued, for instance, that the right to a corruption-free society constitutes a fundamental human right and that, as a corollary, policymakers should treat a breach of this right as a crime of universal interest under international law.<sup>41</sup>

### C. *Combating Corruption Through National Legislation and International Instruments*

Most countries principally battle corruption through domestically enacted legislation.<sup>42</sup> Many follow a standard approach of maintaining criminal sanctions and civil penalties that outlaw specific acts of corruption,<sup>43</sup> and others supplement this legal regime by retaining admin-

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36. See CORRUPTION AND HUMAN RIGHTS, *supra* note 27, at 7; see also Gathii, *supra* note 35, at 125, 126 n.1 (collecting sources).

37. See Gathii, *supra* note 35, at 147. Professor Gathii argues that corruption may severely compromise a government's ability to provide health, educational, and welfare services when corruption seeps into public resource management. *Id.* at 148.

38. See, e.g., *id.* at 125 (discussing scholarship addressing corruption and human rights).

39. See, e.g., *id.* at 177–78 (arguing for rights-based strategies for addressing corruption).

40. See CORRUPTION AND HUMAN RIGHTS, *supra* note 27, at 3; C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 52–53 (2003); 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 LAW. 149, 152 (2000).

41. Kofele-Kale, *supra* note 40, at 152.

42. See Schloss, *supra* note 26, at 469.

43. See Henning, *supra* note 3, at 806 (discussing countries' enactment of legislation that prohibits particular forms of corruption); Parthapratim Chanda, *The Effec-*



istrative regulations and ethical guidelines for public administration that limit a public official's opportunity to abuse public authority.<sup>44</sup> The scope of a country's anti-corruption laws typically extend to transactions that transpire within its borders, though a growing number of countries are enacting criminal legislation with extraterritorial reach, prohibiting their citizens from bribing foreign officials in international business transactions.<sup>45</sup>

To supplement and enhance these national initiatives, an international anti-corruption legal regime has emerged over the last twenty years that is designed to bring international uniformity to criminal legislation and coordinate enforcement systems.<sup>46</sup> A set of international organizations largely facilitated the creation of this regime by fostering multilateral agreements that require signatory countries to sustain punitive criminal laws that penalize various forms of corruption, and to adopt other anti-corruption mechanisms.<sup>47</sup> As a result of these conventions and the global anti-corruption movement generally, most countries have a range of substantive provisions that outlaw various corrupt activities.<sup>48</sup>

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*tiveness of the World Bank's Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties*, 32 DENV. J. INT'L L. & POL'Y 315, 319 (2004) (describing how criminal sanctions are a standard component of legal regimes to fight corruption in many nations); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1505 (2009) ("European authorities have also focused on the need for criminal sanctions to respond to corruption, and have urged all European nations to adopt criminal anti-corruption laws.").

44. See Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 701 (2000) (describing how the United States bears three mechanisms for combating public corruption, namely "criminal statutes, professional and ethical regulations enforced by civil sanctions and disciplinary action (but not criminal sanctions), and impeachment."); Henning, *supra* note 3, at 793.

45. See, e.g., Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq.* (2013); Antonio Argandoña, *The 1996 ICC Report on Extortion and Bribery in International Business Transactions*, 6 BUS. ETHICS: EURO. REV. 134, 136-37 (1997) (discussing international efforts to prohibit bribery of foreign officials).

46. Such global measures surfaced in response to increased global awareness of corruption's corrosive impact upon transactional economies and public institutions. See Snider & Kidane, *supra* note 11, at 698-711 (analyzing international anti-corruption initiatives); Henning, *supra* note 3, at 805-06 (same).

47. See Henning, *supra* note 3, at 795.

48. See Wagner & Jacobs, *supra* note 12, at 194 (analyzing anti-corruption conventions and noting that "[m]ost developing countries now have a range of substantive provisions prohibiting bribery and other acts of public corruption").

#### D. *Obstacles in Combating Corruption*

While virtually all countries foster a set of anti-corruption legal initiatives, their collective effectiveness in thwarting corruption has been limited, as the rate of corruption appears to be increasing globally.<sup>49</sup> Empirical studies in several countries have found that the adoption of anti-corruption mechanisms has had a limited impact on reducing actual corruption.<sup>50</sup>

Professors Thomas Dunfee and David Hess coined this disconnect the “paradox of corruption,”<sup>51</sup> in which “[c]orruption is universally disapproved yet universally prevalent.”<sup>52</sup> Several variables may account for the paradox, ranging from public unawareness of enacted laws prohibiting corruption,<sup>53</sup> to impaired law enforcement systems in countries where the rule of law is weak,<sup>54</sup> to antiquated codes of criminal procedure that hinder any effective corruption investigation.<sup>55</sup> Miguel Schloss, former executive director of Transparency International, points to broader causes to account for corruption’s complexity, noting that corruption often surfaces as “the consequence of more deep-seated problems of policy distortion, institutional incentives, and governance.”<sup>56</sup>

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49. See David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 313 (2008) (discussing evidence suggesting that “the prevalence of bribery is actually increasing in the post-SOX era of increasing attention to matters of corporate integrity and accountability”); Schloss, *supra* note 26, at 469 (noting that anti-corruption efforts have had a limited impact).

50. See Bryane Michael, *Issues in Anti-Corruption Law: Drafting Implementing Regulations for Anti-Corruption Conventions in Central Europe and the Former Soviet Union*, 36 J. LEGIS. 272, 272 (2010) (discussing empirical studies that “point to little, if any, correlation between the extent to which several Central and Eastern European countries have adopted conventions against corruption and reductions in perceived corruption levels in that country”).

51. David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C<sup>2</sup> Principles (Combating Corruption)*, 33 CORNELL INT’L L.J. 593, 595 (2000).

52. *Id.* (quoting Hess & Ford, *supra* note 49, at 312–13); accord Nichols, *supra* note 16, at 325 (discussing the paradox of corruption).

53. See Hess & Ford, *supra* note 49, at 315 (discussing survey findings in which “42% of executives of U.S. companies with international operations were ‘totally ignorant’ of the laws covering bribery”).

54. Miguel Schloss has explained that for many developing countries, the courts, prosecutors, law enforcement agencies, and other government bodies are frequently unreliable because the often-fragile rule of law in these countries may be overcome by corrupt interests. Schloss, *supra* note 26, at 469. In developed countries, other factors may exist that provide the resources for corrupt activity, including questionable standards of conduct, tax incentives, and general attitudes. *Id.*

55. See Wagner & Jacobs, *supra* note 12, at 186.

56. Schloss, *supra* note 26, at 469.

While countries may enact a host of criminal laws that prohibit various corrupt acts, the effectiveness of these laws in fulfilling their purpose is of course dependent upon the ability and willingness of governments to investigate and prosecute.<sup>57</sup> Perhaps the most significant obstacle governments face in combatting corruption is detecting the corruption itself. Corrupt activity is “notoriously difficult” to uncover because of its inherently illicit nature, where typically two or more perpetrators enter into a covert agreement.<sup>58</sup> Law-enforcement officials often find corruption detection and investigation nearly impossible because none of the direct participants to the corrupt activity wishes for the crime to be detected.<sup>59</sup> The involved parties have strong motivations to cloak their actions in secrecy,<sup>60</sup> and their crimes mostly transpire without the presence of a direct victim who might report the activity to authorities.<sup>61</sup> Offenders with solid reputations and social standing may compound the investigatory problem by avoiding suspicion among community members and deterring any investigation.<sup>62</sup> With its “hallmarks of . . . stealth and obfuscation between ostensibly cooperating parties,” corruption has earned the reputation of being “certainly among the most difficult crimes to investigate and prosecute successfully.”<sup>63</sup>

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57. Cf. Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 616 n.4 (1982) (discussing how the effectiveness of a federal criminal statute “depends upon the willingness of the Department of Justice to prosecute cases”); Wagner & Jacobs, *supra* note 12, at 186 (advising that “[w]ithout an infrastructure of procedural provisions supporting law enforcement’s case-making activities, the many new corruption crimes added to the statute books in developing countries may well remain mere window-dressing”).

58. Hongbin Cai et al., *Eat, Drink, Firms, Government: An Investigation of Corruption from the Entertainment and Travel Costs of Chinese Firms*, 54 J. LAW & ECON. 55, 56 (2011); accord 115 CONG. REC. 5874 (1969) (statement of Sen. John L. McClellan) (“Today’s corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition and earlier eras.”).

59. See *United States v. Gendron*, 18 F.3d 955, 961 (1st Cir. 1994); Wagner & Jacobs, *supra* note 12, at 184 (“[Corruption] is a secret crime, carried out by powerful and often sophisticated perpetrators intent on silencing potential witnesses and retaining access to the spoils.”).

60. See Dan Wilsher, *Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft That Respects Human Rights in Corruption Cases*, 45 CRIME L. & SOC. CHANGE 27, 27 (2006).

61. Henning, *supra* note 3, at 803–04.

62. *Id.* at 804. Law enforcement may use informants for this reason. See Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1510 n.114 (2012) (“Crimes involving drugs, vice, and corruption, in which there is no victim to complain to the police, are notoriously difficult for the State to detect without the assistance of informants.”).

63. Henning, *supra* note 3, at 804; accord Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 422–23 (2012) (“Measuring bribery and other forms of corruption is notoriously difficult, in large part because corruption typically leaves no

Such precarious social issues likely create consternation among the public. For instance, officials may attract public attention and amazement when they buy and sell luxury homes, drive exotic sports cars, sail expensive yachts, embark upon lavish vacations with their families, or display other trappings of wealth. Constituents may question the source of such wealth and conclude that the officials could not have accumulated it from legitimate sources, given the officials' limited public salaries and no apparent prior ties to wealth. The inevitably frustrated constituents may draw the attention of law enforcement, but, perhaps more often than not, enforcement agents may not be able to find sufficient evidence linking the suspect officials to the specific corrupt acts necessary to secure any prospective conviction.<sup>64</sup> With no substantive evidence trail uncovered and no tangible proof of any specific corrupt act detected, governments are thus left without legal recourse, while their aggravated citizens witness public officials ostensibly reaping the benefits of wrongdoing.

## II.

### CRIMINALIZING ILLICIT ENRICHMENT AS A MECHANISM TO THWART CORRUPTION

Public officials engage in corrupt activities essentially to reap the expected monetary rewards. Individuals can enter public service from humble beginnings and emerge tremendously wealthy as a result of lucrative corrupt engagements.

Frustrated with the procedural complications inherent in detecting corruption and embarrassed by modestly paid public officials who amass significant wealth after taking office, dozens of nations have enacted criminal statutes that sanction public officials for the possession of unexplained wealth.<sup>65</sup> Advocates praise the concept of criminalizing illicit enrichment as serving the public interest, for it circumvents the evidentiary problem in proving the officials' participation in the underlying corrupt activities which gave rise to such wealth.<sup>66</sup> It also allows governments to recover the proceeds of cor-

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paper trail."); Wagner & Jacobs, *supra* note 12, at 185 ("In all countries, public corruption is more difficult than most other illegal acts to investigate and prosecute.").

64. The public officials under investigation may "use their exalted position to impede investigations and destroy or conceal evidence." Ndiva Kofele-Kale, *Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes*, 40 INT'L LAW. 909, 912 (2006).

65. *See, e.g., id.* at 910–12. Though typically called "illicit enrichment," this crime is also known as "unexplained wealth," "inexplicable wealth," or "disproportionate wealth."

66. *See infra* Part IV.A.

ruption as ill-gotten gains. The crime is now part of many countries' anti-corruption regimes, but it is fraught with controversy due to concerns that the laws infringe upon the rights of the accused.<sup>67</sup> This Part provides an overview of the illicit enrichment offense, describes the offense's history and development, and analyzes its elements and the range of sanctions assigned to it.

#### A. *An Overview of the Illicit Enrichment Offense*

The illicit enrichment offense criminalizes the "unexplained increase in the wealth of a public official while in office."<sup>68</sup> Article 20 of the United Nations Convention against Corruption contains arguably the most widely-cited definition of illicit enrichment: the "significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."<sup>69</sup> The crime targets elected officials and other public servants<sup>70</sup> who receive compensation for their engagement in illegal activities, but does not cover those who provide such compensation.<sup>71</sup> It effectively deems a public official's unexplained accumulation of significant assets to be a form of corruption.<sup>72</sup> Many now treat illicit enrichment as a primary

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67. See *infra* Part III.

68. Schroth & Bostan, *supra* note 1 at 688; accord Anita Ramasastry, *Odious Debt or Odious Payments?: Using Anti-corruption Measures to Prevent Odious Debt*, 32 N.C. J. INT'L L. & COM. REG. 819, 836 (2007) (noting standard definition of illicit enrichment).

69. United Nations Convention against Corruption, *supra* note 2, at 19. Article 9 of the Inter-American Convention against Corruption presents a similar definition of the crime: "[A] significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions." Organization of American States, Inter-American Convention against Corruption art. 9, Mar. 29, 1996, 35 I.L.M. 724 [hereinafter Inter-American Convention against Corruption]. Likewise, the African Union Convention on Preventing and Combating Corruption defines illicit enrichment as "the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income." African Union Convention on Preventing and Combating Corruption art. 1, July 11, 2003, 43 I.L.M. 5 [hereinafter African Union Convention].

70. See *infra* Part II.C.1 (addressing the scope of public servants covered by illicit enrichment laws).

71. See Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL'Y INT'L BUS. 53, 56 (1999); see also Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 247 (1998) ("The recipient is the focus of the illicit enrichment provision.")

72. Henning, *supra* note 3, at 814.

form of corruption, joining bribery, embezzlement, trading in influence, and abuse of function.<sup>73</sup>

Illicit enrichment qualifies as an “acquisitive crime” in that, like money laundering, fraud, and larceny, it involves perpetrators generating and maintaining illegitimate profits.<sup>74</sup> As “[t]he heart of almost any public corruption case is the pecuniary benefit flowing to the corrupt official,”<sup>75</sup> illicit enrichment deprives public officials of any such pecuniary benefit accumulated through corrupt activities.<sup>76</sup> By divesting officials of their ill-gotten gains, the crime operates to eliminate any monetary benefits corruption may offer.<sup>77</sup> Implicit in this operation lies the assumption that unexplained wealth is a substantial marker of impropriety.<sup>78</sup> The illicit funds that transfer from a payor to a corrupt official are often the only substantive evidence that a corrupt act has transpired. Under the assumption of impropriety, the corrupt official’s enrichment is the visible manifestation of the corruption.<sup>79</sup>

Illicit enrichment statutes serve a procedural purpose by functioning as “catch-all” legislation that benefit law-enforcement agencies when they lack sufficient evidence to prove that the public officials engaged in bribery, embezzlement, or another underlying predicate offense that generated the illicit proceeds in question.<sup>80</sup> The statutes may

73. See United Nations Convention against Corruption, *supra* note 2, art. 20 (listing illicit enrichment as a primary form of corruption); CORRUPTION AND HUMAN RIGHTS, *supra* note 27, at 18, 20 (featuring illicit enrichment in its “list of core corrupt acts”); Mark, *supra* note 63, at 422 n.24 (identifying illicit enrichment as one of the “five primary forms” of corruption).

74. See GUILLERMO JORGE, AM. BAR ASS’N, THE ROMANIAN LEGAL FRAMEWORK ON ILLICIT ENRICHMENT 14–15 (2007), available at [https://apps.americanbar.org/rol/publications/romania-illegal\\_enrichment\\_framework-2007-eng.pdf](https://apps.americanbar.org/rol/publications/romania-illegal_enrichment_framework-2007-eng.pdf) (defining acquisitive crimes as “crimes that generate profits” and discussing illicit enrichment in the context of other acquisitive crimes); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195–97 (1985) (creating a typology where crimes may be classified as acquisitive crimes or crimes of passion).

75. Wagner & Jacobs, *supra* note 12, at 225.

76. See JORGE, *supra* note 74, at 14 (“[A]ttacking criminal profits after they have been earned became a central objective of many criminal law systems aiming at reducing any type of acquisitive crime.”).

77. See BOOZ ALLEN HAMILTON, COMPARATIVE EVALUATION OF UNEXPLAINED WEALTH ORDERS 62 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf> (explaining that the purpose of a particular illicit enrichment provision “is to take out the profit from the crime by depriving the criminal of ill-gotten gains.”).

78. See Chanda, *supra* note 43, at 336.

79. See MUZILA ET AL., *supra* note 4, at 5.

80. Henning, *supra* note 3, at 826 (describing illicit enrichment as “a form of a catch-all provision”); accord Nancy Zucker Boswell, *An Emerging Consensus on Controlling Corruption*, 18 U. PA. J. INT’L ECON. L. 1165, 1171 (1997) (“Illicit enrichment only requires an unexplained increase in assets rather than proof of a receipt of a bribe.”).

also serve as a deterrent for public officials against participation in corrupt acts. The crime's penalties, typically imprisonment and asset forfeiture,<sup>81</sup> as well as exposure to potential press coverage and public disgrace, may diminish a public official's motivation to engage in corrupt activity.<sup>82</sup>

### B. *History and Development of Illicit Enrichment*

Illicit enrichment is a relatively new criminal offense. Common law never recognized the concept of illicit enrichment as a crime *per se*; it viewed illicit enrichment as simply the end result of previous criminal activity.<sup>83</sup> The origins of illicit enrichment as a criminal offense date to 1936, when Argentinean congressman Rodolfo Corominas Segura encountered a fellow public official ostentatiously displaying newfound wealth while traveling to Buenos Aires by train.<sup>84</sup> Corominas Segura believed the official could not have acquired such wealth from a legitimate source.<sup>85</sup> Shortly thereafter, Corominas Segura introduced a bill that would sanction "public officials who acquire wealth without being able to prove its legitimate source."<sup>86</sup> The Argentinean legislature did not enact the bill into law that year, but the bill's introduction brought awareness to the issue and kick-started the movement to criminalize illicit enrichment.<sup>87</sup>

In 1964, Argentina and India enacted the first criminal statutes that outlawed illicit enrichment.<sup>88</sup> During the 1970s and 1980s, lawmakers from various countries introduced illicit enrichment laws, and by 1990, at least ten countries had enacted such laws.<sup>89</sup> The rate of enactment soon skyrocketed. By 2000, the number of countries surpassed 20 and, by 2010, over 40 countries had passed illicit enrich-

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81. See *infra* Part II.B (discussing the range of penalties for violating illicit enrichment statutes).

82. See JORGE, *supra* note 74, at 14 (explaining how legal instruments that confiscate ill-gotten gains will decrease the motivation for engaging in corruption); Natasha Srdoc & Joel Anand Samy, *Why does Croatia need lobbying to join the EU?*, EUOBSERVER (Feb. 3, 2011, 12:57 PM), <http://euobserver.com/opinion/31743> ("Confiscation of illicit enrichment amassed by public officials and their cronies . . . could serve as the first step in resolving past political corruption cases and effectively deterring future crimes.").

83. Humberto Marquez, *Americas: Pioneers in the Fight Against Corruption*, INTER PRESS SERVICE, Mar. 26, 1996, available at <http://www.ipsnews.net/1996/03/americas-pioneers-in-the-fight-against-corruption>.

84. MUZILA ET AL., *supra* note 4, at 7.

85. *Id.*

86. *Id.* at 7–8.

87. *Id.* at 8.

88. *Id.*

89. *Id.*

ment legislation.<sup>90</sup> India's illicit enrichment statute is representative of such domestic legislation:

A public servant is said to commit the offence of criminal misconduct . . . if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.<sup>91</sup>

Latin American countries first embraced the offense, followed by a number of African nations, and then spiraling onward to additional regions.<sup>92</sup> At least forty-four countries currently outlaw illicit enrichment, covering a set of civil- and common-law jurisdictions in most regions of the world.<sup>93</sup> Efforts are reportedly underway to adopt illicit enrichment legislation in a number of other countries including Russia,<sup>94</sup> Tunisia,<sup>95</sup> and Romania.<sup>96</sup>

Three major international anti-corruption conventions—the 1996 Inter-American Convention against Corruption (IACAC),<sup>97</sup> the 2003

90. *Id.*

91. The Prevention of Corruption Act, No. 49 of 1988, INDIA CODE (1988), § 13, available at [http://www.persmin.gov.in/DOPT/EmployeesCorner/Acts\\_Rules/PCAct/pcact.pdf](http://www.persmin.gov.in/DOPT/EmployeesCorner/Acts_Rules/PCAct/pcact.pdf) [hereinafter Prevention of Corruption Act].

92. See Peter Kyle et al., *Session Two: Legal Reform Processes*, 12 LAW & BUS. REV. AM. 459, 464 (2006) (remarks of Ndiva Kofele-Kale) (noting that “the Latin Americans were the first to design this broader concept of corruption by introducing the offense of illicit enrichment . . . [t]he Latin Americans introduced it, the Africans picked it up, and the UN a couple of years ago also incorporated it in its Anticorruption Convention”).

93. See MUZILA ET AL., *supra* note 4, at 89–90. The following civil and common law jurisdictions have enacted illicit enrichment provisions: Algeria, Angola, Antigua and Barbuda, Argentina, Bangladesh, Bhutan, Bolivia, Botswana, Brunei, Chile, China, Colombia, Costa Rica, Cuba, Ecuador, Egypt (Arab Republic), El Salvador, Ethiopia, Gabon, Guyana, Honduras, Hong Kong SAR, India, Jamaica, Lebanon, Lesotho, Macao SAR, Macedonia, Madagascar, Malawi, Malaysia, Mexico, Nepal, Nicaragua, Niger, Pakistan, Panama, Paraguay, Peru, Philippines, Rwanda, Senegal, Sierra Leone, Uganda, Venezuela, and the West Bank and Gaza. *Id.*

94. See *Communist corruption clean-up: Russian party backs UN convention*, RT (Mar. 21, 2013 13:23), <http://rt.com/politics/russian-communists-get-public-backing-of-un-anti-corruption-convention-593/> (reporting on the Russian Communist Party's efforts to outlaw illicit enrichment).

95. See *Seminar on Tunisia's draft law on illicit enrichment*, REGIONAL PROJECT ON ANTI-CORRUPTION AND INTEGRITY IN THE ARAB COUNTRIES (Dec. 12, 2012), <http://www.undp-aci.org/resources/ac/details.aspx?aid=368>.

96. See JORGE, *supra* note 74, at 53–54 (discussing efforts to criminalize illicit enrichment in Romania).

97. Inter-American Convention against Corruption, *supra* note 69, art. 9. Over thirty nations have ratified the IACAC. See *Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/juridico/english/Sigs/b-58.html> (last visited Nov. 5, 2014).



African Union Convention on Preventing and Combating Corruption (AUCPCC),<sup>98</sup> and the 2003 United Nations Convention against Corruption (UNCAC)<sup>99</sup>—facilitated illicit enrichment’s accelerated rate of enactment and widespread international recognition.<sup>100</sup> The UNCAC, IACAC, and AUCPCC prescribe illicit enrichment as a criminal offense.<sup>101</sup> These conventions seek to eradicate public-sector corruption in part through harmonizing the criminal statutes of their signatories,<sup>102</sup> and in this regard they synchronize the definition and elements of illicit enrichment in order to build consistency across countries.<sup>103</sup> The conventions also expand the definition of corruption by deeming illicit enrichment to be considered an “act of corruption.”<sup>104</sup>

The IACAC adopts an aggressive approach in treating illicit enrichment as a mandatory offense, thereby requiring that its signatory states criminalize the offense.<sup>105</sup> Conversely, the UNCAC and AUCPCC treat illicit enrichment as a non-mandatory offense, merely directing each signatory state to consider criminalizing the offense, subject to their own constitutional provisions.<sup>106</sup> The three conventions direct any signatory state that has not criminalized the offense to

98. See African Union Convention, *supra* note 69, art. 8. Over forty countries have ratified the AUCPCC. See *List of Countries Which Have Signed, Ratified/Acceded to the African Convention on Preventing and Combating Corruption*, AFRICAN UNION, <http://www.au.int/en/sites/default/files/Corruption.pdf> (last updated Jan. 3, 2013).

99. United Nations Convention against Corruption, *supra* note 2, art. 20. Roughly 170 countries are parties to the UNCAC. See *United Nations Convention against Corruption Signature and Ratification Status as of 5 September 2014*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last updated Sept. 5, 2014).

100. MUZILA ET AL., *supra* note 4, at 9.

101. See United Nations Convention against Corruption, *supra* note 2, art. 20; African Union Convention, *supra* note 69, art. 8; Inter-American Convention against Corruption, *supra* note 69, art. 9.

102. See Konstantinos D. Magliveras, *A Critical Analysis of the Inter-American Convention against Corruption*, 13 INT’L ENFORCEMENT L. REP. 327, 327 (1997) (noting that the Inter-American Convention “aims at eliminating corruption from the public sector of American states by harmonizing their domestic legal orders in this respect”).

103. See MUZILA ET AL., *supra* note 4, at 11.

104. See Inter-American Convention against Corruption, *supra* note 69, art. 9 (“Among those States Parties that have established illicit enrichment as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.”). For a discussion of the controversy surrounding the IACAC’s treatment of illicit enrichment as a mandatory offense, see Low et al., *supra* note 71, at 247.

105. See Inter-American Convention against Corruption, *supra* note 69, art. 9; MUZILA ET AL., *supra* note 4, at 9.

106. The UNCAC directs signatories to consider enacting criminal illicit enrichment legislation “[s]ubject to its constitution and the fundamental principles of its legal system.” United Nations Convention against Corruption, *supra* note 2, art. 20. The AUCPCC directs its signatories to consider enacting criminal illicit enrichment legis-

“provide assistance and cooperation with respect to [the] offense,” insofar as its laws permit.<sup>107</sup>

Penalties for illicit enrichment violations typically include prison sentences and fines. For instance, those convicted of illicit enrichment in Hong Kong face ten-year maximum prison sentences and fines of up to HK\$1,000,000.<sup>108</sup> Some countries provide for additional punishment options, including the forfeiture of any government pension scheme<sup>109</sup> and disqualification from holding any public office.<sup>110</sup> Many countries give full discretion to the courts to determine punishment, laying out only basic remediation guidelines.<sup>111</sup> For instance, the World Bank identifies four broad objectives in determining the appropriate level of punishment for those convicted of illicit enrichment:

- (a) to restore to the state losses that have occurred through corruption; (b) to punish officials who engage in illicit enrichment; (c) to prevent them from benefiting from ill-gotten gains, signaling through prosecution that crime does not pay, thereby providing an effective deterrence; and (d) to incapacitate them through dismissal or prison sentences.<sup>112</sup>

### C. *The Elements of an Illicit Enrichment Offense*

As Professor Guillermo Jorge has noted, illicit enrichment consists of the knowing receipt of unexplained proceeds (*mens rea*) and the actual possession of the proceeds (*actus reus*).<sup>113</sup> Five core elements comprise the offense: (1) a public official who (2) during the

lation “[s]ubject to the provisions of their domestic law.” African Union Convention, *supra* note 69, art. 8.

107. Inter-American Convention against Corruption, *supra* note 69, art. 9; accord United Nations Convention against Corruption, *supra* note 2, art. 38; African Union Convention, *supra* note 69, art. 8.

108. Prevention of Bribery Ordinance, (1997) Cap. 201, 7, § 12(1) (H.K.), available at [http://www.legislation.gov.hk/blis\\_pdf.nsf/4f0db701c6c25d4a4825755c00352e35/660A25EA15B8C9D6482575EE004C5BF1/\\$FILE/CAP\\_201\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/4f0db701c6c25d4a4825755c00352e35/660A25EA15B8C9D6482575EE004C5BF1/$FILE/CAP_201_e_b5.pdf).

109. Antigua and Barbuda authorizes this penalty, among others. See Prevention of Corruption Act, arts. 7 & 8(1)(iii) (2004) (Ant. & Barb.), available at <http://laws.gov.ag/acts/2004/a2004-21.pdf>.

110. See Organization of American States [OAS], Comm. of Experts of the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption, Rep. on its 15th Meeting, Sept. 14–18, 2009, at 16, OAS Doc. 238/09 rev. 3 (Sept. 18, 2009), available at [http://www.oas.org/juridico/english/mesicic\\_III\\_rep\\_arg.pdf](http://www.oas.org/juridico/english/mesicic_III_rep_arg.pdf) (providing English translation of CODIGO PENAL [COD. PEN.] art. 268(2) (Arg.)).

111. See MUZILA ET AL., *supra* note 4, at 54.

112. *Id.* at 53.

113. JORGE, *supra* note 74, at 60.

relevant time period (3) experiences a significant increase in assets (4) knowingly and (5) without justification.<sup>114</sup>

### 1. Targeting “Public Officials”

Illicit enrichment legislation targets public officials.<sup>115</sup> For many governments, the definition of “public official” extends well beyond elected and appointed government officials. The dominant international trend features states adopting a broad view of “public official” that includes anyone who provides a public service or performs a public function.<sup>116</sup> Article 2 of the UNCAC reflects this expansive approach:

‘Public official’ shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a ‘public official’ in the domestic law of a State Party.<sup>117</sup>

A number of countries also scrutinize the financial dealings of the family members and close associates of the public official under investigation.<sup>118</sup> These third parties may be subject to an ancillary aiding-and-abetting prosecution and their assets may also be subject to forfeiture.<sup>119</sup>

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114. MUZILA ET AL., *supra* note 4, at 13 (analyzing the five principal elements common to most illicit enrichment statutes); Low et al., *supra* note 71, at 282 (describing illicit enrichment’s “material elements [as] the possession, by a government official, of an amount of money in excess of the amount the official could earn by his salary or through other legitimate sources of income [and that] the money was obtained by corrupt means”). The illicit enrichment definitions contained in the UNCAC, AUCPCC, and IACAC feature these elements. *See, e.g., id.* (discussing the illicit enrichment elements of the IACAC).

115. MUZILA ET AL., *supra* note 4, at 13.

116. *See id.* at 13–14 (analyzing the meaning of “public official” across nations). Bhutan, for instance, liberally defines “public official” as “[a]ny person who, being or having been a public servant or a person having served or serving under a non-governmental organization or such other organization using public resources.” The Anti-Corruption Act of Bhutan 2006, art. 107, *available at* [www.acc.org.bt/pdf/accacte.pdf](http://www.acc.org.bt/pdf/accacte.pdf); *accord* MUZILA ET AL., *supra* note 4, at 14 (discussing Bhutan’s definition of “public official”).

117. United Nations Convention against Corruption, *supra* note 2, art. 2(a).

118. *See* MUZILA ET AL., *supra* note 4, at 41.

119. *See, e.g.,* OAS, Comm. of Experts of the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption, Rep. on its 16th Meeting, Mar. 22–26, 2010, at 18, OAS Doc. 248/09 rev. 4 (Mar. 25, 2010), *available*

## 2. *Setting the Time Frame for Enrichment*

The enrichment time frame captures the “period of interest” during which a public official experiences a significant increase in wealth, thereby exposing the official to liability for engaging in the illicit conduct.<sup>120</sup> This element temporally connects one’s public service to the significant increase in wealth.<sup>121</sup> Establishing this relevant liability period gives government agents a concrete time frame on which to concentrate their investigation and prosecution resources.<sup>122</sup>

Lindy Muzila and her colleagues identify three approaches legislatures adopt to craft the period of interest. For all three approaches, the statutory period of interest covers the public official’s time in office or other form of public-sector engagement,<sup>123</sup> but the approaches vary in whether they include liability coverage for any amount of time after which the public official ceases such public sector engagement. The first approach sets the period of interest to coincide with the public official’s term of office or performance of public functions.<sup>124</sup> Venezuela’s illicit enrichment legislation reflects this approach, as it applies to a public official “who in the performance of his duties” obtains unjustified increases in wealth.<sup>125</sup> Public officials may circumvent illicit enrichments laws that adopt this approach if the officials delay the receipt of any corrupt gains until after the end of their terms of office or public-sector functions.<sup>126</sup> The second approach attempts to remedy this shortcoming through expanding the enrichment time frame to a set number of years after the official ceases his or her public sector functions.<sup>127</sup> For instance, Panama outlaws illicit enrichment “obtained during the occupation of [the public official’s] post and for up to five years after having left the post.”<sup>128</sup>

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at [http://www.oas.org/juridico/english/mesicic\\_III\\_rep\\_ven.pdf](http://www.oas.org/juridico/english/mesicic_III_rep_ven.pdf) [hereinafter Venezuela Final Report] (discussing art. 73 of Venezuela’s Anticorruption Law); MUZILA ET AL., *supra* note 4, at 15–16.

120. MUZILA ET AL., *supra* note 4, at 16.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Venezuela Final Report, *supra* note 119, at 18.

126. MUZILA ET AL., *supra* note 4, at 16.

127. *Id.*

128. OAS, Comm. of Experts of the Follow-Up Mechanism for the Implementation of the Inter-American Convention against Corruption, Rep. on its 17th Meeting, Sept. 13–16, 2010, at 16, OAS Doc. 257/10 rev. 4 (Sept. 16, 2010), available at [http://www.oas.org/juridico/english/mesicic\\_III\\_rep\\_pan.pdf](http://www.oas.org/juridico/english/mesicic_III_rep_pan.pdf) (providing English translation of Panama Criminal Code, art. 345).

The third approach takes the most aggressive stance by creating an open-ended enrichment time frame “so that anyone who has ever been a public official may be held liable for an illicit enrichment offense for the rest of his or her life.”<sup>129</sup> Guyana’s legislation exemplifies the third approach, as its law covers the possession of unexplained wealth by any “person who is or was . . . in public life.”<sup>130</sup> This approach treats illicit enrichment as a continuous offense,<sup>131</sup> a type of crime that effectively extends the relevant statute of limitations time period, so that governments can prosecute public officials for possessing the illicitly obtained funds at any point in time, even if the officials obtained those funds decades prior.<sup>132</sup>

### 3. Identifying the Significant Increase in Assets

Illicit enrichment statutes criminalize the “significant increase” in a public official’s “assets.”<sup>133</sup> Legislatures do not define “significant” or similar modifiers employed in illicit enrichment statutes (e.g., “excessive,”<sup>134</sup> “disproportionate,”<sup>135</sup> and “out of proportion”<sup>136</sup>), leaving the courts to interpret their meaning.<sup>137</sup> Assessing whether an increase

129. MUZILA ET AL., *supra* note 4, at 16–17.

130. Guyana Integrity Commission Act, sec. 41 (1988), available at [http://www.oas.org/juridico/spanish/mesicic2\\_guy\\_integrity\\_comm\\_act.pdf](http://www.oas.org/juridico/spanish/mesicic2_guy_integrity_comm_act.pdf) [hereinafter Guyana Integrity Commission Act].

131. See, e.g., Jeffrey R. Boles, *Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine*, 7 NW. J. L. & SOC. POL’Y 219, 228 (2012) (explaining that a continuing offense is one that involves an ongoing course of conduct that causes harms for as long as the course of conduct persists).

132. The illicit enrichment provisions of Algeria’s and Madagascar’s laws classify illicit enrichment as a continuing offense. See MUZILA ET AL., *supra* note 4, at 67 (*translating* Law no. 06-01 on the Prevention and the Fight against Corruption, art. 37 (2006) (Alg.); Madagascar Law no. 2004-030, art. 14 (2004), available at <http://issuu.com/ethics360/docs/madagascar>).

133. See, e.g., United Nations Convention against Corruption, *supra* note 2, art. 20 (providing that illicit enrichment involves the “significant increase in the assets of a public official”); MUZILA ET AL., *supra* note 4, at 18–21 (analyzing the meaning of “significant increase in assets”).

134. Anti-Corruption Act 1997, art. 32 (Malay.), available at [http://www.sprm.gov.my/images/webuser/files/static\\_content/act/Act575/HTML/Act575.html](http://www.sprm.gov.my/images/webuser/files/static_content/act/Act575/HTML/Act575.html).

135. The Corruption Prevention Act, sec. 14.1(5)(a) (Jam.), available at <http://www.moj.gov.jm/sites/default/files/cpc/The%20Corruption%20Prevention%20Act.pdf> (stipulating that it may be an act of corruption “where a public servant owns assets disproportionate to his lawful earnings”).

136. Anti-Graft and Corrupt Practices Act, Rep. Act No. 3019, § 8 (Phil.), available at [http://www.lawphil.net/statutes/repacts/ra1960/ra\\_3019\\_1960.html](http://www.lawphil.net/statutes/repacts/ra1960/ra_3019_1960.html) (providing grounds for dismissal when “a public official . . . found to have acquired . . . an amount of property . . . manifestly out of proportion to his salary and to his other lawful income”).

137. See MUZILA ET AL., *supra* note 4, at 18. Indian courts have established that a significant increase must be one that exceeds 10% of the public official’s lawful in-

in assets is significant enough to violate an illicit enrichment statute will likely entail a weighing of the illicit funds relative to the public official's lawful income sources, and prosecutors may necessarily exercise a degree of discretion in making such assessments.<sup>138</sup>

The meaning of "assets" and similar terms in illicit enrichment statutes dictates what types of evidence prosecutors may introduce to prove illicit enrichment. Countries interpret these terms to take into account the public official's liquid assets, real property, income-generating instruments, and the like.<sup>139</sup> To detect and verify the origins of an official's property, governments may employ forensic accounting techniques and gather bank statements, tax records, property-tracking documents, casino and horse racing records, and other probative documents.<sup>140</sup>

#### 4. *Demonstrating the Requisite Intent*

The prosecution must establish intent as an element in a typical illicit enrichment prosecution.<sup>141</sup> The UNCAC, for instance, provides that illicit enrichment must be "committed intentionally,"<sup>142</sup> and many nations require a demonstration of intent as a general matter of criminal procedure for any conviction under their criminal codes.<sup>143</sup> Without an intent element, an illicit enrichment statute would function as a strict liability offense.<sup>144</sup>

Intent in the context of illicit enrichment reflects the public official's awareness of the "significant increase in assets" at issue.<sup>145</sup> Intent "may be inferred from objective factual circumstances,"<sup>146</sup> such as proof of a public official's sizeable fund transfers, significant cash payments, or enjoyment of luxury properties.<sup>147</sup> While illicit enrichment is a corruption offense, the prosecution need not show the public

come. See *Krishnanand v. Madhya Pradesh*, (1977) 1 S.C.C. 816 (India) ("[S]ince the excess is comparatively small—it is less than ten per cent of the total income[—]we do not . . . hold that the [illicit] assets . . . were disproportionate to his known sources of income."); *MUZILA ET AL.*, *supra* note 4, at 18 n.25 (discussing Indian case law).

138. See *MUZILA ET AL.*, *supra* note 4, at 18.

139. See *id.* at 19.

140. *BOOZ ALLEN HAMILTON*, *supra* note 77, at 76 & n.146.

141. See *id.* at 21.

142. United Nations Convention against Corruption, *supra* note 2, art. 20.

143. See *MUZILA ET AL.*, *supra* note 4, at 21.

144. *Id.* (noting that illicit enrichment as a strict liability offense would "allow[ ] for the prosecution of an official even if he is genuinely ignorant of the unexplained income and increase in net worth").

145. *Id.*

146. United Nations Convention against Corruption, *supra* note 2, art. 28.

147. See *MUZILA ET AL.*, *supra* note 4, at 21.

official's awareness of any predicate corrupt acts that may have generated the illicit assets in question.<sup>148</sup>

### 5. *Showing a Lack of Justification for the Enrichment*

The final element requires a demonstration that the enrichment lacks any legitimate explanation or justification.<sup>149</sup> Countries generally build this element into their statutory definition of the offense. India, for instance, punishes the possession of disproportionate assets “for which the public servant cannot satisfactorily account.”<sup>150</sup> Ethiopia criminalizes possession of disproportionate assets “unless [the public official] gives a satisfactory explanation to the court [as] to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control.”<sup>151</sup> The international conventions mirror national legislatures' approach in embedding the justification element into their illicit enrichment definition. For instance, UNCAC criminalizes a “significant increase in the assets of a public official *that he or she cannot reasonably explain.*”<sup>152</sup>

Scholars label this element a “reverse-onus” provision<sup>153</sup> because it places an onus on the defendant to put forth sufficient evidence of the relevant assets' legitimacy.<sup>154</sup> The element correspondingly relaxes the prosecution's burden to prove that a defendant public official increased his or her assets illicitly.<sup>155</sup> Through this reverse-onus provision, illicit enrichment statutes relieve the prosecution of the burden of putting forth direct evidence of corruption and from tying the illicit

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148. *See id.* at 22 (noting that the relevant intent in the illicit enrichment offense relates to an increase in assets, not to misconduct).

149. *Id.*

150. Prevention of Corruption Act, *supra* note 91, art. 13(1)(e).

151. Criminal Code of the Federal Democratic Republic of Ethiopia, art. 419(1)(b) (2004), available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=248268](http://www.wipo.int/wipolex/en/text.jsp?file_id=248268).

152. United Nations Convention against Corruption, *supra* note 2, art. 20 (emphasis added); accord African Union Convention, *supra* note 69, art. 1; Inter-American Convention against Corruption, *supra* note 69, art. 9; MUZILA ET AL., *supra* note 4, at 22.

153. Margaret K. Lewis, *Presuming Innocence, or Corruption, in China*, 50 COLUM. J. TRANSNAT'L L. 287, 291 (2012) (defining reverse-onus provisions as “offenses that at least partially place on the defendant's shoulders the burden of proof with respect to an element of the crime”).

154. *See* Kofele-Kale, *supra* note 64, at 912; Lewis, *supra* note 153, at 293 (noting that reverse-onus provisions are used “as a mechanism for punishing corrupt officials who succeed in covering up the illegal dealings but not the fruits gained from those dealings”).

155. Kofele-Kale, *supra* note 64, at 912; *see also* Boswell, *supra* note 80, at 1171–72 (explaining how illicit enrichment lowers the prosecution's burden of proof).

assets to a predicate offense.<sup>156</sup> The element arguably creates a presumption of corruption upon proof of disproportionate assets.<sup>157</sup>

Courts commonly treat the justification element as a rebuttable presumption that arises procedurally once the prosecution demonstrates the existence of the defendant's enrichment. In a standard illicit enrichment prosecution, the prosecutor must first show that the defendant qualifies as a public official during the relevant time frame and has experienced a significant increase of unexplained assets with the requisite intent.<sup>158</sup> Once the prosecutor so demonstrates, a rebuttable presumption surfaces in which the court presumes that the defendant engaged in illicit enrichment.<sup>159</sup> In order to avoid conviction, the defendant must rebut the presumption by putting forth a satisfactory explanation to account for the assets, accompanied with evidentiary support.<sup>160</sup> The defendant generally rebuts the presumption on the civil standard of a preponderance of the evidence.<sup>161</sup> A satisfactory explanation to account for the assets' origins may include evidence that the assets originated as a gift from a loved one, as an inheritance, as gambling winnings, or as prize money.<sup>162</sup>

*a. Placing the Burden of Proof upon the Accused*

The prosecution generally bears the legal burden of proof in criminal cases, where it must convince the fact-finder of the defendant's guilt in order to obtain a conviction.<sup>163</sup> In circumstances where a defendant bears this burden, the defendant's failure to persuade the

156. JORGE, *supra* note 74, at 16; *see also* Henning, *supra* note 3, at 814 (explaining how illicit enrichment "make[s] proof of corruption much easier by removing any requirement to demonstrate a nexus between a benefit gained by an official and a particular governmental action"); Wilsher, *supra* note 60, at 29, 30 (discussing how, in cases of inexplicable wealth crimes, the prosecution is relieved of the burden of proof).

157. Wilsher, *supra* note 60, at 29–30.

158. MUZILA ET AL., *supra* note 4, at 22–23.

159. *Id.*

160. BOOZ ALLEN HAMILTON, *supra* note 77, at 44 ("The [defendant] has the burden to prove the lawful source and to produce evidence that rebut the allegation that his or her property is recoverable."); MUZILA ET AL., *supra* note 4, at 22–23.

161. *See* Kofele-Kale, *supra* note 64, at 913; Wilsher, *supra* note 60, at 30 ("In common law jurisdictions, the standard of proof is the balance of probabilities for issues in respect of which the defendant bears a burden.").

162. MUZILA ET AL., *supra* note 4, at 25. Konstantinos Magliveras provides an example of a public official having an exclusive employment contract with the government, and also a second job in the private sector that does not interfere with the official's state functions. Magliveras, *supra* note 102, at 332. If the official were to disclose the private sector employment under these circumstances, he or she may be exposed to self-incrimination. *Id.*

163. *In re* Winship, 397 U.S. 358, 364 (1970).



fact-finder—by putting forth evidence supporting his or her innocence—will result in the defendant’s conviction.<sup>164</sup>

The party bearing an evidentiary burden does not need to prove the issue in question, but rather put forth sufficient evidence to create reasonable doubt.<sup>165</sup> Once the defendant puts forward such evidence, the prosecution must refute that evidence beyond a reasonable doubt.<sup>166</sup> When the defendant bears an evidentiary burden in a criminal case, the prosecution must still prove all elements beyond a reasonable doubt, but the court may draw adverse inferences against the defendant if he or she does not provide evidence in accordance with the evidentiary burden.<sup>167</sup>

A virtually universal principle of criminal procedure dictates that the burden of proof in criminal cases remains with the prosecution.<sup>168</sup> “Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt.”<sup>169</sup> Exceptions to this principle have been made by statute on various public-policy grounds in a number of jurisdictions.<sup>170</sup> For example, both statutory and common law sometimes impose certain burdens upon defendants in relation to certain defenses such as self-defense,<sup>171</sup> insanity,<sup>172</sup> or duress.<sup>173</sup> The reverse-onus provisions in illicit enrichment statutes also function as an exception to this principle.<sup>174</sup>

Courts typically construe illicit enrichment provisions to impose either a legal or evidentiary burden upon the defendant to disprove corruption.<sup>175</sup> In an illicit enrichment case where the defendant bears

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164. See Wilsher, *supra* note 60, at 30 (discussing three methods of imposing the burden of proof on defendant).

165. *Id.*

166. *Id.*

167. See MUZILA ET AL., *supra* note 4, at 24.

168. See, e.g., Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414 (2007) (“Locating the burden on the government is consonant with general criminal law precepts that place the burden of proof of each essential element of a crime squarely on the government.”).

169. *Woolmington v. DPP*, [1935] A.C. 462 (H.L.) 481 (appeal taken from Eng.); accord Wilsher, *supra* note 60, at 29.

170. See JORGE, *supra* note 74, at 40–41 (discussing instances where the burden of proof does not fully reside with the prosecution).

171. See Wilsher, *supra* note 60, at 30.

172. See, e.g., 18 U.S.C. § 17 (2013) (providing for an insanity defense for prosecution under any federal statute while placing the burden of proof upon the defendant).

173. See *United States v. Bailey*, 444 U.S. 394, 408–09 (1980) (holding defendant bears the burden of proof to establish the defense of duress).

174. See Lewis, *supra* note 153, at 307–08.

175. See Wilsher, *supra* note 60, at 30. Legislatures could draft illicit enrichment provisions as strict liability offenses by creating a mandatory presumption that an

the legal burden of proof, the defendant must persuade the fact-finder that the assets in question derived from legal sources, in addition to producing supporting evidence, in order to meet this legal burden.<sup>176</sup> When bearing the evidentiary burden only, the defendant charged with illicit enrichment must produce evidence to rebut the presumption that the assets originated from illicit sources.<sup>177</sup> If the defendant proffers evidence showing the assets' legal source, the burden shifts to the prosecution to demonstrate that the assets were illicitly obtained.<sup>178</sup> If the defendant fails to introduce sufficient evidence, the fact-finder must find that the defendant illicitly obtained the assets.<sup>179</sup>

Some countries stress that their illicit enrichment statutes merely place an evidentiary burden of proof upon the defendant to account for the increase in unexplained assets and that the legal burden of proof remains with the prosecution.<sup>180</sup> Whether defendants face a legal or evidentiary burden, the practical ramifications essentially remain the same, in that the defendants must proffer substantive evidence as to the legitimacy of the disproportionate assets.<sup>181</sup> Meeting the legal burden of proof may coincide with the defendants' proffered evidence, as a convincing account may flow from the substantive evidence. Regardless of whether the defendant carries a legal or evidentiary bur-

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official's assets are illicit if the prosecution first proves that those assets exceed the official's legitimate income. Lewis, *supra* note 153, at 305. Alternatively, legislatures could also draft illicit enrichment provisions where the burden of production and persuasion remain with the prosecution, where the prosecution must prove that the public official's assets exceeded his or her legitimate income and that those assets originated from illicit sources. *Id.*

176. See BOOZ ALLEN HAMILTON, *supra* note 77, at 51 (explaining that the burden of proof reversal "requires the suspect to present sufficient evidence and to justify that his or her assets are not the proceeds of crime"); Lewis, *supra* note 153, at 307 (discussing how the burden on the defendant is greater when he is required to persuade the fact-finder that the assets in question were from legal sources).

177. See Lewis, *supra* note 153, at 306.

178. See *id.*

179. See *id.* at 306–07.

180. MUZILA ET AL., *supra* note 4, at 24–25. Various legislatures and courts have signaled that a defendant bears an evidentiary burden in illicit enrichment offenses. See, e.g., Guyana Integrity Commission Act, *supra* note 130, art. 41 (providing that "[w]here a [public official] is found to be in possession of [disproportionate property or pecuniary resources], and that person fails to produce satisfactory evidence to prove that the possession of the property or pecuniary resource was acquired by lawful means, he shall be guilty of an offence") (emphasis added); C.S.D. Swamy v. The State, (1959) 1 S.C.R. 461, available at <http://www.liiofindia.org/in/cases/cen/INSC/1959/98.html> ("In this case, no acceptable evidence, beyond the bare statements of the accused, has been adduced to show that the contrary of what has been proved by the prosecution, has been established.").

181. See MUZILA ET AL., *supra* note 4, at 25.

den, the placement of any burden upon a defendant in a criminal case raises serious concerns of potential human rights violations.<sup>182</sup>

### III.

#### ILLICIT ENRICHMENT STATUTES VIOLATE HUMAN RIGHTS

As explored in Part I, the fight against corruption complements the protection of human rights. As the Human Rights Council observed, “effective anti-corruption measures and the protection of human rights are mutually reinforcing and . . . the promotion and protection of human rights is essential to the fulfillment of all aspects of an anti-corruption strategy.”<sup>183</sup> This goal is in tension with the enactment of illicit enrichment statutes. Widespread corruption often infringes upon the human rights of its victims, but paradoxically, the criminalization of illicit enrichment as an anti-corruption instrument violates the human rights of the accused.<sup>184</sup> Illicit enrichment statutes incite heavy controversy for their placement of the burden of proof upon the accused;<sup>185</sup> critics of these laws purport that the reverse-onus provisions in illicit enrichment statutes encroach upon fundamental human rights that protect the defendant.<sup>186</sup> This Part argues that illicit

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182. *Cf., e.g.,* *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.”).

183. Human Rights Council Res. 7/11, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 1, 2008 U.N. Doc. A/HRC/7/78, at 31 (July 14, 2008).

184. *See* Magliveras, *supra* note 102, at 331 (opining that illicit enrichment “raises serious questions of civil liberties protection”).

185. *See* MUZILA ET AL., *supra* note 4, at 22; Snider & Kidane, *supra* note 11, at 705.

186. *See* Henning, *supra* note 3, at 815 (noting that illicit enrichment “appears to place the burden of proof on the government official to explain the fact of significant wealth, which clearly violates the fundamental principal of due process in the United States that the government bears the burden of proving all elements of a crime beyond a reasonable doubt”); Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT’L L. 345, 385 (2000) (“[An] illicit enrichment offense . . . raises serious American constitutional problems.”); Snider & Kidane, *supra* note 11, at 705–06 (explaining how “constitutional and jurisprudential concerns” surround illicit enrichment). However, others disagree with the conclusion that illicit enrichment violates human rights. *See* Kofele-Kale, *supra* note 64, at 915 (arguing that illicit enrichment offenses and their reverse onus clauses are compatible with the presumption of innocence “(i) to the extent reasonable limits can be placed on this principle that can be justified in a free and democratic society, and (ii) [if the offense] expressly place[s] an evidentiary burden on, and impliedly shift[s] the legal burden to, the accused to prove the lawful and legitimate origins of his wealth on the balance of probabilities standard”); Davor Derencinovic, *Criminalization of Illegal Enrichment*, FREEDOM FROM FEAR MAGAZINE, <http://f3magazine.unicri.it/?p=469> (last visited Nov. 5, 2014) (arguing that illicit enrichment “is not per se contrary to the presumption of innocence”).

enrichments conflicts with human rights, particularly the presumption of innocence and the related rights to silence and protection against self-incrimination.

A. *Illicit Enrichment Statutes Impinge upon the Presumption of Innocence*

One of the most widespread criticisms of illicit enrichment legislation maintains that the offense is incompatible with the presumption of innocence.<sup>187</sup> The presumption of innocence is widely recognized as a general principle of constitutional law that applies equally to anyone whose guilt has not yet been established<sup>188</sup> and arises in connection with a criminal charge.<sup>189</sup> Under this presumption, public authorities assume that a suspect is innocent until an adjudication of guilt occurs.<sup>190</sup> The presumption of innocence creates a duty to refrain from prejudging a trial's outcome, giving the benefit of doubt to the accused.<sup>191</sup> Requiring that the accused be "treated with the dignity and respect due to presumably innocent individuals,"<sup>192</sup> the presumption also mandates that the prosecution carry the burden of proof for all elements in a criminal offense.<sup>193</sup> The prosecution overcomes the presumption of innocence when it proves each element of the offense

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187. See, e.g., MUZILA ET AL., *supra* note 4, at 22; Wilsher, *supra* note 60, at 28 ("The most obvious potential for conflict between crimes of inexplicable wealth and human rights relates to both the presumption of innocence and the right of silence.").

188. Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 260, 262 (2002); Schroth & Bostan, *supra* note 1, at 688 (describing the presumption as "one of the main safeguards of any criminal proceeding").

189. Schroth & Bostan, *supra* note 1, at 700.

190. Lewis, *supra* note 153, at 300. According to the United States Supreme Court, "The presumption of innocence is . . . the right of the accused to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., . . . the [accused] is presumed not to be guilty is to say in another form that the [prosecution] must evidence it." *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978) (internal quotation marks and citation omitted).

191. See Lewis, *supra* note 153, at 300–01; Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458 (1989) ("In the criminal trial setting, the presumption of innocence is given vitality primarily through the requirement that the government prove the defendant's guilt beyond a reasonable doubt.").

192. François Quintard-Moréas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 148 (2010).

193. Lewis, *supra* note 153, at 303–04; see also Schroth & Bostan, *supra* note 1, at 688 (explaining that the presumption of innocence mandates that the prosecution bear the burden of proving allegations against the accused as part of a fair trial).

beyond a reasonable doubt.<sup>194</sup> This presumption is a central component of the right to a fair trial.<sup>195</sup>

*1. The Presumption of Innocence Aims to Prevent the Conviction of Innocent Parties*

The presumption of innocence enjoys widespread international support as a fundamental human right.<sup>196</sup> It is “among the most internationally celebrated and fundamental rights of the accused.”<sup>197</sup> Many key international instruments recognize the presumption as a bedrock human right. The Universal Declaration of Human Rights provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”<sup>198</sup> The International Covenant on Civil and Political Rights similarly declares that “[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”<sup>199</sup> Most countries accept the presumption of innocence, subject to their own interpretations.<sup>200</sup> The presumption joins the right to silence and the

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194. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional statute of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). The reasonable doubt standard requires that the “trier of fact [reach] a subjective state of certitude” about the defendant’s guilt. *Id.* (internal quotation marks omitted); see also Lewis, *supra* note 153, at 304.

195. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (describing the presumption of innocence as a “basic component of a fair trial under our system of criminal justice”); Kofele-Kale, *supra* note 64, at 916 n.17 (explaining that the right to a fair criminal trial consists in part of the “right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, the right to defend oneself in person or through counsel, the right to call witnesses, and the right to protection from retroactive criminal laws”); Schroth & Bostan, *supra* note 1, at 688.

196. Lewis, *supra* note 153, at 297; Schroth & Bostan, *supra* note 1, at 688 (“The national constitutions of many countries explicitly recognize some version of the presumption and it is part of the international constitutional law binding on most countries of the world.”).

197. Lewis, *supra* note 153, at 300.

198. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 11, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

199. International Covenant on Civil and Political Rights, art. 14, Mar. 23, 1976, 999 U.N.T.S. 171, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; accord European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”).

200. Kitai, *supra* note 188, at 260; Lewis, *supra* note 153, at 299; Peter W. Schroth, *National and International Constitutional Law Aspects of African Treaties and Laws*

protection against self-incrimination as a core component of the right to a fair trial.<sup>201</sup>

Maintaining a presumption of innocence protects those accused of a crime from erroneous conviction and punishment.<sup>202</sup> This motivation is famously captured in William Blackstone's assertion that it is "better that ten guilty persons escape, than that one innocent suffer."<sup>203</sup> Anyone charged with a crime faces serious social, economic, and personal ramifications, including potential loss of life or physical liberty; social stigma; ostracism from family, friends, and the larger community; loss of employment; and other harms.<sup>204</sup> Given the seriousness of these consequences, the presumption of innocence is a crucial tool to safeguard the liberty and dignity of anyone accused of criminal conduct.<sup>205</sup>

While it shares virtually universal recognition, the presumption of innocence does not enjoy treatment as an absolute and unqualified right.<sup>206</sup> The risk of acquitting the guilty and the public's consequent loss of confidence in the criminal justice system counterbalance the principles underlying the presumption of innocence.<sup>207</sup> Many countries accordingly place limits upon the presumption of innocence and justify those limits by the need to preserve public order and confidence through the enforcement of criminal laws.<sup>208</sup> Section 36 of the South African Constitutional Bill of Rights illustrates a standard approach countries take in circumscribing the presumption, as the approach allows for limitations upon the presumption "only . . . to the extent that the limitation is reasonable and justifiable in an open and

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*Against Corruption*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 83, 105 (2003) (describing the "constitutional presumptions of innocence in many African constitutions").

201. See *infra* Part III.B.

202. Sundby, *supra* note 191, at 467.

203. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*352; accord *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

204. See *R. v. Oakes*, (1986) 1 S.C.R. 103, 119–20 (Can.), available at <http://canlii.ca/t/1ftv6>.

205. *Id.* at 120.

206. JORGE, *supra* note 74, at 55; Scott E. Sundby, *The Virtues of a Procedural View of Innocence—A Response to Professor Schwartz*, 41 *HASTINGS L.J.* 161, 165 (1989) ("[T]he presumption of innocence is not an absolute right barring conviction of any conceivably innocent individual.").

207. Sundby, *supra* note 206, at 165; see also Kofele-Kale, *supra* note 64, at 942–44 (describing justifications for limiting the presumption of innocence).

208. See Sundby, *supra* note 206, at 165.

democratic society based on human dignity, equality and freedom, taking into account all relevant factors.”<sup>209</sup>

In evaluating such a limitation in the context of reverse-burden provisions, courts typically balance the government’s interest in shifting the burden of proof against the defendant’s interest in preventing that shift.<sup>210</sup> This “limitation and proportionality test”<sup>211</sup> involves an analysis of whether the reverse-onus burden is a rational and proportional limitation on the presumption of innocence.<sup>212</sup> A reverse-burden provision may satisfy this test if “the fact to be presumed rationally and realistically follows from [the facts] proved and also if the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection.”<sup>213</sup> Many courts will permit the use of reverse-onus provisions and the corresponding restraint on the presumption of innocence if they find that

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209. S. AFR. CONST., 1996, available at <http://www.gov.za/documents/constitution/1996/96cons2.htm>. Section 36 includes five factors to consider, “(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.” *Id.*

210. See MUZILA ET AL., *supra* note 4, at 31; JORGE, *supra* note 74, at 42. Jurisdictions will also examine whether there are less restrictive means to achieve the purpose of the limitation. *Id.*

211. R. v. So Sai-Fong, [1992] 2 H.K.L.R. 695, 700 (C.A.).

212. *Id.* Courts derived this test largely from two leading cases, *Salabiaku v. France* and *Attorney-General v. Lee Kwong-Kut*. In *Salabiaku*, one of the first cases to analyze the compatibility of reverse-burden provisions with the presumption of innocence, the European Court of Human Rights engaged in a balancing analysis of the government’s and defendant’s interests to uphold the legitimacy of a reverse-burden provision and allow for the presumption of innocence to be confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” *Salabiaku v. France*, 13 Eur. Ct. H.R. 379 (1988); accord *Kofele-Kale*, *supra* note 64, at 931 (discussing the significance of *Salabiaku*). In *Kwong-Kut*, the Judicial Committee of the Privy Council extended the findings of *Salabiaku* by proffering guidelines for determining whether the government may legitimately adopt a reverse-burden procedure and departure from the presumption of innocence. *Attorney-General v. Lee Kwong-Kut*, (1993) 3 H.K.L.R. 72, 93–94 (P.C.); accord *Kofele-Kale*, *supra* note 64, at 932 (analyzing the Privy Council’s findings in *Kwong-Kut*). Advising that the issue be approached “with realism and good sense, and kept in proportion,” the court proposed a balancing test where restrictions upon the presumption of innocence are permissible if “rationally connected . . . [and] proportional to the objective.” *Kwong-Kut* 3 H.K.L.R. at 78 & 97 (internal quotation marks omitted).

213. R. v. Sin Yau-Ming, [1990] 1 H.K.P.L.R. 88, 90 (C.A.); accord R. v. Chaulk, [1990] 3 S.C.R. 1303 193, 216–17 (providing that the infringement upon the presumption of innocence must support “a sufficiently important objective . . . , must be rationally connected to the objective, [and] be such that [its] effects on the limitation of rights and freedoms are proportional to the objective”) (internal quotation marks omitted).

the provisions proportionately promote a public policy goal.<sup>214</sup> The limitation and proportionality test is the principal tool courts utilize to evaluate the legitimacy of illicit enrichment reverse-burden provisions.<sup>215</sup>

## 2. *Illicit Enrichment Statutes Offend the Presumption of Innocence*

Defendants in a number of countries have raised challenges to the validity of illicit enrichment statutes on the grounds that the statutes violate the presumption of innocence.<sup>216</sup> After employing variants of the limitation and proportionality test, courts in multiple jurisdictions routinely find that the illicit enrichment statutes at issue do not impermissibly burden the defendant's right to be presumed innocent.<sup>217</sup> When applying the test, many courts highlight the severity and pervasiveness of public-sector corruption<sup>218</sup> and find that the various illicit enrichment reverse-burden provisions promote a compelling public interest by aiding in the conviction of corrupt public officials.<sup>219</sup> For example, the Hong Kong Court of Appeals in *Attorney General v. Hui Kin Hong* described corruption as a "cancerous" activity<sup>220</sup> that qualifies as one of the "exceptional situations"<sup>221</sup> that warrant placing re-

214. Kofele-Kale, *supra* note 64, at 932–33; Wilsher, *supra* note 60, at 38.

215. See MUZILA ET AL., *supra* note 4, at 31; Kofele-Kale, *supra* note 64, at 933 ("Restrictions on the presumption of innocence in the war on corruption will be justified provided they pursue a legitimate goal and are proportionate to that goal.")

216. See MUZILA ET AL., *supra* note 4, at 30–32 (reviewing cases).

217. See Kofele-Kale, *supra* note 64, at 933–34 (examining cases that upheld the validity of illicit enrichment statutes); Wilsher, *supra* note 60, at 37–39 (same). In contrast to the dominant trend among jurisdictions, the Constitutional Court of Italy in 1994 declared the country's illicit enrichment statute to be unconstitutional on the grounds that it violated the presumption of innocence. Corte Cost., 17 febbraio 1994, n. 48, Racc. uff. corte cost., 1994 (It.), available at <http://www.giurcost.org/decisioni/1994/0048s-94.html>; see also BOOZ ALLEN HAMILTON, *supra* note 77, at 53 (same); MUZILA ET AL., *supra* note 4, at 29 (discussing the Constitutional Court's holding).

218. See *supra* Part I (discussing the ways in which corruption harms the public).

219. See MUZILA ET AL., *supra* note 4, at 31 (citing case law weighing the public interest against the rights of the accused).

220. [1995] 1 H.K.L.R. 227, 229 (C.A.) (internal quotation marks omitted).

221. *Id.* at 231 ("[T]here are exceptional situations in which it is possible compatibly with human rights to justify a degree of deviation from the normal principle that the prosecution must prove the accused's guilt beyond reasonable doubt."); see also MUZILA ET AL., *supra* note 4, at 31. The Royal Commission of Conduct in Public Life opined that a reverse-burden provision "can be justified only for compelling reasons, but we think that in the sphere of corruption the reasons are indeed compelling . . . the burden of proof on the defence is in the public interest and causes no injustice." Bertrand de Speville, *Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms?* (1997) (unpublished manuscript), available at <http://8iacc.org/papers/despeville.html>.



strictions upon the presumption of innocence.<sup>222</sup> Addressing the proportionality prong, the court determined that the illicit enrichment provision “is dictated by necessity and goes no further than necessary,” and therefore “[t]he balance is right.”<sup>223</sup> In its ruling, the court highlighted the “notorious evidential difficulty” in obtaining evidence of corrupt activities,<sup>224</sup> and reasoned that “[t]here is nothing unreasonable in what is required of an accused” via the applicable reverse-burden provision.<sup>225</sup> Many courts have upheld the validity of illicit enrichment statutes, dismissing concerns that the statutes unjustly impinge upon the presumption of innocence.<sup>226</sup>

These court decisions concentrate too narrowly on the pervasiveness of public-sector corruption and give short shrift to the principles embodied in the presumption of innocence. The decisions arguably use the limitation and proportionality test in illicit enrichment cases as a mechanism to rationalize a violation of human rights. Illicit enrichment statutes, through their burden-shifting provisions, plainly intrude upon the presumption of innocence, and by adopting such statutes, governments violate the human rights of criminal defendants.<sup>227</sup>

The reverse-burden procedure is contrary to a defendant’s right to be presumed innocent,<sup>228</sup> regardless of whether legislatures or judiciaries cast the reverse-burden provisions as shifting an evidentiary burden or a persuasive burden of proof upon the defendant.<sup>229</sup> Prosecutors overcome the presumption of innocence when they prove each element of the offense beyond a reasonable doubt,<sup>230</sup> yet illicit enrich-

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222. *Attorney General*, [1995] 1 H.K.L.R. at 236 (C.A.).

223. *Id.* at 236.

224. *See supra* Part I (discussing the inherently secretive nature of corruption and the difficulty in gathering evidence of corrupt activities).

225. *Attorney General*, [1995] 1 H.K.L.R. at 235 (C.A.).

226. *See MUZILA ET AL.*, *supra* note 4, at 30–31.

227. According to the International Council on Human Rights Policy, a state violates human rights when its actions do not confirm with requirements under international or domestic human rights norms. *See CORRUPTION AND HUMAN RIGHTS*, *supra* note 27, at 24. Domestic and international human rights instruments generally include the presumption of innocence as a core human right. *See supra* notes 196–200 and accompanying text.

228. *See Meeting of the Council for Countering Corruption*, PRESIDENT OF RUSS. (Mar. 13, 2012, 15:30), <http://eng.state.kremlin.ru/face/3537> (“The presumption of innocence, which is the foundation of our legal system, stipulates that criminal punishment cannot be imposed on officials unless it is proved that they had obtained the [disproportionate assets] through criminal activity.”).

229. *But see* Kofele-Kale, *supra* note 64, at 943 (arguing that illicit enrichment statutes are compatible with the presumption of innocence provided that they expressly place an evidentiary burden upon the defendant).

230. *See supra* notes 187–195 and accompanying text (discussing the relation between the presumption of innocence and the prosecutor bearing the burden of proof).

ment statutes evade and weaken this principle when they impose upon the defendant the need to rebut a central element to the illicit enrichment offense: the illicit origins of the disproportionate assets.<sup>231</sup>

Some argue on policy grounds for the legitimacy of the reverse-burden provisions by maintaining that defendants should bear the burden to address the origins of the disproportionate assets, given that this information lies within the defendants' knowledge and that the prosecution may face difficulty in obtaining evidence to demonstrate this element.<sup>232</sup> These arguments elevate the aims of law enforcement above the protections inherent in the presumption of innocence. Shifting the burden to defendants in illicit enrichment cases on such grounds harms the criminal justice system. It undermines the fairness of the fact-finding process<sup>233</sup> and dilutes the fundamental principle that guilt is to be determined beyond a reasonable doubt through the government's production of probative evidence.<sup>234</sup>

Moreover, comparing the burden-shifting features of illicit enrichment offenses against those of affirmative defenses highlights the unfair nature of illicit enrichment offenses. Affirmative defenses warrant a permissible burden shift to the defendant that does not violate the presumption of innocence since affirmative defenses do not mandate the defendant to negate any element of the offense.<sup>235</sup> In raising an affirmative defense, the defendant asserts facts that extend beyond those facts asserted by the prosecution to establish the elements of the offense. The prosecution bears the entire burden of proof to establish each element of the offense; any affirmative defenses raised are ancillary to this burden. Illicit enrichment conversely requires that the defendant shoulder the burden for the central justification element of the offense by affirmatively putting forth facts showing the defendant has

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231. See Lewis, *supra* note 153, at 312 (“To require that the prosecutor only prove a defendant is wealthy beyond the assets that fit squarely into categories which are considered lawful income—and then require the defendant to explain the nature of that wealth—places a critical element of the offense on the defendant’s shoulders.”); *supra* Part II.C.5 (discussing the ‘lack of justification’ element in illicit enrichment offenses). The requirement that prosecutors prove every element of an offense is a matter of fundamental fairness and a core principle of criminal justice. See *supra* note 193 and accompanying text.

232. See JORGE, *supra* note 74, at 61; *supra* Part II.C.5 (discussing the evidentiary difficulties in demonstrating the underlying illicit activities that generate the unexplained wealth).

233. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

234. See *id.*

235. See *Patterson v. New York*, 432 U.S. 197, 206–07 (1977); see also 1 Weinstein’s Federal Evidence § 303.06 (2014).

not illicitly enriched himself.<sup>236</sup> If the defendant is unable to do so when charged with illicit enrichment, the judge or jury would draw adverse inferences against the defendant, leading to a conviction. For this reason, the illicit enrichment offense, unlike affirmative defenses, violates the presumption of innocence.<sup>237</sup>

The United States and Canada have recognized the dangers illicit enrichment offenses pose to the presumption of innocence, as noted in their response to the inclusion of illicit enrichment as Article IX to the IACAC.<sup>238</sup> A U.S. Senate resolution rejected the IACAC's illicit enrichment provision, declaring that "[t]he offense of illicit enrichment as set forth in Article IX of the Convention . . . places the burden of proof on the defendant, which is inconsistent with the United States Constitution and fundamental principles of the United States legal system."<sup>239</sup> Canada likewise noted that "[a]s the offence contemplated by Article IX would be contrary to the presumption of innocence [guaranteed] by Canada's Constitution, Canada will not implement Article IX."<sup>240</sup> Other countries that respect the presumption of innocence should likewise reject illicit enrichment as a violation of this presumption.

*B. Illicit Enrichment Statutes Encroach upon the Right to Silence and the Privilege Against Self-Incrimination*

Illicit enrichment statutes also violate the right to silence and the closely related privilege against self-incrimination, two established international human rights associated with the presumption of innocence that defendants enjoy.<sup>241</sup> International courts recognize these rights as due-process protections established to attain fair trials in adversarial

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236. See *supra* Part II.C.5 (discussing the justification element of the illicit enrichment offense).

237. See *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

238. See Schroth & Bostan, *supra* note 1, at 688–89 (noting that the United States and Canada found the IACAC's illicit enrichment provision unacceptable "because it plainly violates the constitutional presumption of innocence").

239. See 146 CONG. REC. S7809 (2000).

240. *Signatories and Ratifications: Inter-American Convention against Corruption*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/juridico/english/sigs/b-58.html> (last visited Nov. 6, 2014) (listing Canada's Statement of Understanding of Article IX, Illicit Enrichment).

241. See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544, available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf> [hereinafter Rome Stat-

systems of justice.<sup>242</sup> As explained by the European Court of Human Rights, “[t]here can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure.”<sup>243</sup> These rights apply from custodial interrogation until the court renders its final verdict.<sup>244</sup>

Many nations recognize the right to silence to provide that an individual cannot be compelled to answer questions raised during pre-trial investigations or criminal proceedings.<sup>245</sup> This right protects the accused from any adverse inference that might be drawn if he or she fails to testify or to answer questions,<sup>246</sup> and the accused exercises this right by remaining silent under questioning or by declining to answer any inquiry.<sup>247</sup> Such silence cannot traditionally be considered evidence against the defendant.<sup>248</sup>

The defendant’s right not to testify as part of the criminal proceedings closely relates to the right to remain silent.<sup>249</sup> Many nations acknowledge that this right prohibits the state from compelling any person to be a witness against himself or herself in any criminal case.<sup>250</sup> The right aims to shield the accused from any government

ute] (recognizing the presumption of innocence (art. 66), the right to remain silent (art. 67), and the privilege against self-incrimination (arts. 55, 67)).

242. See *id.*; Gideon v. Wainwright, 372 U.S. 335, 344 (1963); OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, UNITED NATIONS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 240–41 (2003), available at <http://www.ohchr.org/Documents/Publications/training9chapter6en.pdf>.

243. Murray v. United Kingdom, 22 Eur. Ct. H.R. 29, ¶ 45 (1996).

244. See JORGE, *supra* note 74, at 49; Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 926 (2002).

245. See Rome Statute, *supra* note 241, art. 55(2)(b); K.A. Cavanaugh, *Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom*, 35 CORNELL INT’L L.J. 491, 492 (2002).

246. See Andrew Ashworth, *Fifth Amendment, Confessions, & Guilty Pleas: Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?*, 30 CARDOZO L. REV. 751, 754 (2008); Van Kessel, *supra* note 244, at 929 (analyzing purposes of the right to silence).

247. Cavanaugh, *supra* note 245, at 492.

248. *Id.*

249. See JORGE, *supra* note 74, at 49 (“Any compulsion to produce incriminating evidence becomes an infringement of the right of silence.”).

250. See, e.g., U.S. CONST. amend V; Matthias Goldmann, *Does Peace Follow Justice or Vice Versa? Plans for Postconflict Justice in Burundi*, 30 FLETCHER F. WORLD AFF. 137, 145 (2006) (describing the right against self-incrimination as “a right that forms part of major human rights instruments and is considered customary international law”).

coercion to yield particular information.<sup>251</sup> The rationale behind allowing an individual to refuse to testify in his or her defense recognizes that it is “essentially and inherently cruel to make a man an instrument of his own condemnation.”<sup>252</sup>

Like the presumption of innocence, the right to remain silent and the privilege against self-incrimination are not absolute rights.<sup>253</sup> Countries allow inroads into these rights by restricting their scope<sup>254</sup> and suspending their activation under certain situations, such as public-safety emergencies.<sup>255</sup> The European Court of Human Rights explains:

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.<sup>256</sup>

Domestic and international courts generally have not yet addressed whether illicit enrichment statutes violate the right to silence and the right against self-incrimination. Yet it is plain under inspection that reverse-burden provisions within illicit enrichment statutes violate these rights.<sup>257</sup> As the reverse-burden provisions call for the accused to provide a satisfactory explanation that accounts for the origin of the

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251. See Ashworth, *supra* note 246, at 754.

252. David W. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89, 95 (1965).

253. JORGE, *supra* note 74, at 55.

254. See, e.g., *Schmerber v. California*, 384 U.S. 757, 764 (1966) (noting that the scope of the right to silence in the United States is restricted to testimonial or communicative evidence, such as a written confession or verbal communication).

255. See, e.g., *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, ¶ 47 (1996) (permitting an exception to the right to remain silent based on importance to combating terrorism); *New York v. Quarles*, 467 U.S. 649, 653 (1984) (establishing a public-safety exception to the *Miranda* warning requirement).

256. *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, ¶ 47 (1996).

257. See BOOZ ALLEN HAMILTON, *supra* note 77, at 37 (“[I]f the defendant fails to disclose facts related to his or her property and is asked to do so by the court, the court will interpret this as an admission that the concerned assets were derived from an offense.”); Chanda, *supra* note 43, at 336 (noting that illicit enrichment “conflicts with a defendant’s constitutional right to refrain from testifying against himself in a criminal matter.”); Low et al., *supra* note 71, at 282; Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 267 n.55 (1999) (noting that the illicit enrichment provision of the Inter-American Convention Against Corruption appears to violate the presumption of innocence).

disproportionate assets, silence is not a practical option, for if the accused remains silent, he or she faces an automatic determination of guilt.<sup>258</sup> The provisions effectively strip away the right to silence in illicit enrichment cases, making the defendant the unwilling “instrument of his or her own condemnation.”<sup>259</sup>

The accused also risks potential self-incrimination by putting forth such testimony, given that the provisions essentially require the accused to proffer testimonial evidence or face conviction.<sup>260</sup> For example, if the accused provides evidence of income from gambling, business operations, inheritances, gifts, or other sources in order to account for the origins of the assets in question, that evidence could satisfy the judge or jury that the accused did not violate an illicit enrichment statute. The evidence nevertheless could expose the defendant to criminal, civil, or administrative liability for violating other statutes.<sup>261</sup> If, for instance, the defendant obtained the assets in question from gambling winnings but did not disclose those winnings to the proper tax authorities, the defendant could face prosecution for committing tax crimes. That defendant may hesitate to proffer such gambling winnings as evidence to defend against illicit enrichment charges given the risk of self-incrimination.<sup>262</sup> In these ways, illicit enrichment statutes infringe upon the right to silence and the privilege against self-incrimination. The offense generally presents no special threats to the public order, such as imminent harm to public safety, to justify any recognized exception to these human rights. Moreover, it carries significant potential for abuse by unscrupulous government officials, as particular government regimes may use illicit enrichment charges as a weapon to attack political opponents.<sup>263</sup>

#### IV.

#### ADDRESSING UNEXPLAINED WEALTH THROUGH ALTERNATIVE MEASURES

The international momentum to enact illicit enrichment offenses appears to be growing. To wit, a recent EUobserver article argues for the introduction of illicit enrichment legislation in Europe, noting that

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258. See Low et al., *supra* note 71, at 282.

259. *Mitchell v. United States*, 526 U.S. 314, 325 (1999).

260. See MUZILA ET AL., *supra* note 4, at 32.

261. *Id.*

262. *Id.*

263. See, e.g., Ryan Dube, *Former Peru President Toledo Denies Wrongdoing in Real-Estate Purchases*, WALL ST. J., May 21, 2013, <http://online.wsj.com/article/BT-CO-20130521-711820.html> (discussing illicit enrichment allegations that, according to the accused, stem from political opponents on a campaign to discredit him).

“[c]onfiscation of illicit enrichment amassed by public officials and their cronies based on the reverse burden of proof could serve as the first step in resolving past political corruption cases and effectively deterring future crimes.”<sup>264</sup> Yet this discussion tends to downplay the fact that lawmakers who enact illicit enrichment statutes in their pursuit to quash corruption are adopting an anti-corruption tool that violates human rights. Moreover, courts that have upheld the validity of illicit enrichment statutes wave away the issue by elevating the need to fight corruption at the expense of protecting human rights.<sup>265</sup> Courts tacitly approve the dangerous presumption that a government official’s failure to show how her possessions were legitimately obtained is a sufficient basis to prosecute her for corruption and have those possessions confiscated.

A. *Countries Should Reject the Illicit Enrichment Offense as Incompatible with Human Rights*

Proponents of illicit enrichment often offer utilitarian arguments to justify such statutes. These proponents point to the public interest in combating widespread corruption through illicit enrichment prosecutions and to the thorny evidentiary issues prosecutors face in demonstrating proof of corruption without such statutes.<sup>266</sup> Professor Ndiva Kofele-Kale asks, “In the interest of promoting the greater good for the greater number of people, which is what the global war against official corruption seeks to achieve, why not simply allow the accused public official to disclose the source of his suspicious wealth?”<sup>267</sup> Some contend that the illicit enrichment offense “offer[s] a faster and more effective method of finding and expelling corrupt actors,”<sup>268</sup> is “a valuable tool for prosecuting corrupt leaders,”<sup>269</sup> and is “necessary to any anti-corruption movement.”<sup>270</sup>

These proponents accurately note that prosecutors routinely face practical difficulties in discerning the origins of any illicit assets held

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264. Srdoc & Samy, *supra* note 82.

265. See Lewis, *supra* note 153, at 307 (noting the perspective that the prosecution and defense may “elevate form over substance by engaging in a game of strategic labeling to avoid overtly running afoul of the presumption of innocence”); *supra* note 217 and accompanying text (discussing court cases upholding constitutionality of various illicit enrichment offenses).

266. See *supra* notes 7–9 and accompanying text.

267. Kofele-Kale, *supra* note 64, at 936.

268. Chanda, *supra* note 43, at 336 (advocating that the World Bank adopts illicit enrichment as a “sufficient ground” to remove officials from their position).

269. Ramasastry, *supra* note 68, at 822.

270. Hoggard, *supra* note 7, at 610.

by defendants.<sup>271</sup> In response, legislators design reverse-burden provisions to shift the evidentiary burden unto the defendant, thereby making the prosecutor's job significantly easier. The reverse-burden provisions ultimately function as a tool of convenience for the government.<sup>272</sup> While prosecutors legitimately encounter serious evidentiary challenges in marshaling evidence that demonstrates the origins of illicit assets, a just solution to this problem cannot involve a shift of the burden of persuasion and/or production to the defendant in illicit enrichment.<sup>273</sup> When such burden shifts occur, courts unjustly permit the entry of compulsorily acquired evidence.<sup>274</sup> The burden shifting mechanism smacks of unfair governmental coercion, a danger recognized by the U.S. Supreme Court:

In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. . . . Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact . . . the occasion of casting on the defendant the obligation of exculpation.<sup>275</sup>

Human rights instruct that illicit enrichment does not respect the rights of the accused.<sup>276</sup> Countries that honor a defendant's right to a fair trial should reject the illicit enrichment offense as an unsuitable option to combat corruption.<sup>277</sup> The prosecution's "presumption of

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271. See, e.g., *supra* text accompanying notes 224–225 (noting the prosecutorial difficulties in obtaining evidence of corrupt behavior).

272. See Ramasastry, *supra* note 68, at 822 (describing the illicit enrichment offense as a valuable prosecutorial tool).

273. *Contra* Kofele-Kale, *supra* note 64, at 936 (“[T]he rule ought to be that in corruption proceedings where the evidence required to establish a crime is within the control of the accused, courts should require that this party bear the initial burden of production.”).

274. *Cf.* JORGE, *supra* note 74, at 49.

275. *Tot v. United States*, 319 U.S. 463, 469 (1943).

276. See Schroth & Bostan, *supra* note 1, at 711 (“Corruption, a major threat to democracy, should be fought by means that are themselves respectful of democracy.”).

277. See Hoggard, *supra* note 7, at 587.



guilt”<sup>278</sup> sets a dangerous precedent by violating the human rights of the accused in the name of law enforcement.

While the failure to enact illicit enrichment statutes may help the guilty avoid conviction for corruption, such an outcome is an inevitable consequence of respecting human rights.<sup>279</sup> If introduced in the United States, reverse-burden provisions would likely not pass constitutional muster because the offense is inconsistent with U.S. constitutional principles.<sup>280</sup> Nations and international organizations should not encourage implementation of this statute, for it “prescrib[es] a remedy that is worse than the ailment.”<sup>281</sup>

### *B. Alternative Measures May Combat Unexplained Wealth While Respecting Human Rights*

Other measures exist for governments to attack the phenomenon of illicit enrichment without violating the human rights of the accused.<sup>282</sup> These alternative solutions involve a combination of financial-disclosure obligations for government officials coupled with penalties through tax-evasion laws.<sup>283</sup> Such a combination allows the government to detect illicit gains among government officials through a routine disclosure system and to prosecute officials through tax evasion statutes for those gains.

#### *1. Financial Disclosure Uncovers Illicitly Obtained Assets*

Laws compelling financial disclosure generally require government officials to disclose information about their income, assets, liabilities, and positions held outside public office.<sup>284</sup> These laws create

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278. Posadas, *supra* note 186, at 385 n.168; *accord* Snider & Kidane, *supra* note 11, at 728.

279. See Van Kessel, *supra* note 244, at 929.

280. See Low et al., *supra* note 71, at 281–82; Ann Powers, *Justice Denied? The Adjudication of Extradition Applications*, 37 TEX. INT’L L.J. 277, 309 n.246 (2002). The Fifth Amendment of the U.S. Constitution encompasses the right to remain silent. See U.S. CONST. amend. V; *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). While not articulated in the Constitution, the presumption of innocence is encompassed by the Fifth, Sixth, and Fourteenth Amendments. *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”); *In re Winship*, 397 U.S. 358, 365 (1970); *Coffin v. United States*, 156 U.S. 432, 453 (1895).

281. Snider & Kidane, *supra* note 11, at 729.

282. See *id.* at 729.

283. See Low et al., *supra* note 71, at 284–85.

284. See generally John E. Theuman, Annotation, *Validity and Construction of Orders and Enactments Requiring Public Officers and Employees, or Candidates for Office, to Disclose Financial Condition, Interests, or Relationships*, 22 A.L.R.4th 237

disclosure systems which provide a basis to detect whether public officials are violating the public trust via conflicts of interest between the public officials' public duties and their private interests.<sup>285</sup> Many countries incentivize their officials to comply with disclosure requirements by maintaining criminal or administrative sanctions for the provision of false or incomplete information and for the failure to disclose material assets.<sup>286</sup> By requiring public officials to file statements of their financial interests, the disclosure laws create a detection system that may uncover and deter corrupt practices.<sup>287</sup>

Countries may use financial-disclosure laws to detect evidence of illicit enrichment.<sup>288</sup> Public officials provide their net worth and sources and value of income as of the time of filing, and, upon verification, any inconsistencies between the officials' disclosed wealth and the officials' legitimate sources of wealth (e.g., assets derived from salaries, inheritances, and other valid income streams) may serve as a trigger for investigation and as evidence in a subsequent prosecution.<sup>289</sup> Government agencies can detect illicit enrichment by evaluating and flagging through the disclosure framework material changes in a public official's wealth that do not result through legitimate income sources.<sup>290</sup> The disclosure statute could also provide penalties for filing false information when officials' declarations do not match their legitimate income.<sup>291</sup>

Financial-disclosure statutes that are drafted to encompass all sources of income from a wide base of public officials may boost transparency and public trust in government officials; while such statutes also implicate the official's individual rights, these statutes justifiably elevate the "competing superior right of the public to know facts relevant to the performance or potential performance of its public offi-

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(1981) (providing an overview of financial disclosure laws for public officers and employees).

285. See, e.g., FLA. CONST. art. II, § 8. (declaring that "[a] public office is a public trust" and "[t]he people have the right to secure and sustain that trust against abuse" through "full and public disclosure of their financial interests.").

286. MUZILA ET AL., *supra* note 4, at 41–42.

287. See Chanda, *supra* note 43, at 337 (describing financial disclosure legislation as "an essential component to ensuring the integrity of public organizations").

288. See *id.* ("In the U.S., for example, detailed annual financial disclosures are required of members of all three branches of government.").

289. MUZILA ET AL., *supra* note 4, at 41.

290. See THE WORLD BANK, PUBLIC OFFICE, PRIVATE INTERESTS: ACCOUNTABILITY THROUGH INCOME AND ASSET DISCLOSURE 15 (2012), available at <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-9452-6> [hereinafter PUBLIC OFFICE, PRIVATE INTERESTS].

291. *Id.*

cials.”<sup>292</sup> Financial disclosure statements have the intended purpose of increasing public confidence in government openness.<sup>293</sup> For instance, the disclosure statements help public officials to identify potential conflicts of interest and bring awareness to citizens of the financial interests of the officials and employees who serve them.<sup>294</sup> Individuals accordingly enter the public sector with the knowledge that they will be subject to such reporting requirements and thus implicitly agree to provide such information as a condition of holding public office. Moreover, financial-disclosure operations are less susceptible to politically motivated prosecution, unlike illicit enrichment charges that could be brought to embarrass or harass a political opponent.<sup>295</sup>

The financial disclosure statements submitted by public officials may give prosecutors initial evidence of an official’s engagement in corrupt activities.<sup>296</sup> Countries should adopt financial-disclosure legislation as part of a broader approach to combatting the underlying issue of illicit enrichment.<sup>297</sup> In structuring such a system, officials should file disclosures at the start of their public official tenure with updates thereafter until their official duties cease, with one final disclosure filing when the officials leave office or cease their public official duties.<sup>298</sup> Disclosures should include all property interests greater than a statutorily defined threshold amount; all income from every source; and sales, purchases, and exchanges in excess of a defined threshold amount.<sup>299</sup> Noncompliance with the disclosure requirements should carry administrative and/or criminal sanctions.<sup>300</sup> The burden-shifting issues that violate the presumption of innocence in illicit enrichment prosecutions are not present in disclosure noncompliance actions, as

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292. *Kenny v. Byrne*, 365 A.2d 211, 216 (N.J. Super. Ct. App. Div. 1976) (quoting *Lehrhaupt v. Flynn*, 356 A.2d 35, 41 (N.J. Super. Ct. App. Div. 1976)).

293. See, e.g., OHIO ETHICS COMM’N, FORM NO. OEC-2013 OHIO ETHICS COMMISSION FINANCIAL DISCLOSURE STATEMENT 1 (2013), available at <http://ethics.ohio.gov/forms/2013/OEC-2013.pdf>.

294. *Id.*

295. See *supra* note 263 and accompanying text.

296. See Chanda, *supra* note 43, at 337 (stating that subjecting more public officials to disclosure requirements would “increase transparency and provide preliminary evidence under any illicit enrichment provision once enacted”).

297. See *id.* at 337.

298. See Kofele-Kale, *supra* note 64, at 941 (advising that public officials should declare their assets at the beginning and end of their terms in office).

299. See Low et al., *supra* note 71, at 284–85.

300. See, e.g., 5 U.S.C. app. § 104 (2013) (specifying penalties for failing to file financial disclosure reports); *Penalties for Violations of State Ethics and Public Corruption Laws*, NAT’L CONF. STATE LEGISLATURES, (Nov. 7, 2013), <http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx> (providing survey of criminal penalties associated with noncompliance with state financial disclosure laws).

the government solely bears the burden of proof to establish the defendant's noncompliance with the disclosure mandates.

Various international anti-corruption instruments contain provisions that encourage nations to implement income- and asset-disclosure systems to help thwart corruption.<sup>301</sup> The IACAC recommends “[s]ystems for registering the income, assets, and liabilities of persons who perform public functions in certain posts as specified by law and, where appropriate, for making such registrations public.”<sup>302</sup> The UNCAC and AUCPC feature similar provisions.<sup>303</sup> A number of countries have already implemented disclosure frameworks, including Argentina, China, Indonesia, Rwanda, and the United States.<sup>304</sup> In their attempt to combat illicit enrichment, other countries should follow suit and adopt such a framework as the first part of a dual approach to combat illicit enrichment.

## 2. *Governments Can Prosecute Officials for Tax Evasion upon Evidence of Illicitly Obtained Wealth*

As a viable alternative to criminalizing illicit enrichment, countries can supplement financial-disclosure laws with robust tax-evasion statutes to target unexplainable wealth.<sup>305</sup> Coupling the demands of mandatory financial disclosure with the power of criminal tax prosecution has the power to penalize those government officials who garner unexplainable wealth in a manner that respects human rights.

Courts and legal scholars have recognized the “net worth” method of proof to prosecute tax evasion.<sup>306</sup> This method, employed widely in the United States by the Internal Revenue Service, is an established indirect method of proof that establishes the taxable income of the accused in criminal tax cases.<sup>307</sup> The method is a particularly valuable tool for prosecutors in that it reconstructs taxable

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301. See PUBLIC OFFICE, PRIVATE INTERESTS, *supra* note 290, at 10–16 (discussing financial disclosure systems as addressed by the international anti-corruption agreements).

302. Inter-American Convention against Corruption, *supra* note 69, art. 3(4).

303. See United Nations Convention against Corruption, *supra* note 2, art. 8(5); African Union Convention, *supra* note 69, art. 7.

304. See PUBLIC OFFICE, PRIVATE INTERESTS, *supra* note 290, at 2.

305. See Low et al., *supra* note 71, at 284; Snider & Kidane, *supra* note 11, at 729.

306. See, e.g., *Holland v. United States*, 348 U.S. 121, 125 (1954); David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 479 (1998) (“[I]n the United States, a form of unjust enrichment is addressed in the ‘net worth’ method of proof used in prosecuting certain U.S. tax evasion actions.”).

307. U.S. DEPT. OF JUSTICE, 2012 CRIMINAL TAX MANUAL § 31 (2012), available at <http://www.justice.gov/tax/readingroom/2008ctm/CTM%20Chapter%2031.pdf>.

income when the prosecutor cannot establish income via direct evidence.<sup>308</sup> It proceeds on the assumption that that “if a taxpayer has more wealth at the end of a given year than at the beginning of that year, and the increase does not result from nontaxable sources such as gifts, loans, and inheritances, then the increase is a measure of taxable income for that year.”<sup>309</sup> Such a computation displays the presence of income and how the individual spent the income, presenting a financial snapshot of the taxpayer.<sup>310</sup>

The government makes out a prima facie case under the net worth method of proof when it demonstrates that the defendant’s net worth increased for the period in question and significantly surpassed his or her reported taxable income.<sup>311</sup> The Fifth Circuit Court of Appeals has explained how the net worth method of proof procedurally demonstrates income as follows:

The government established its case through the “net worth” approach, a method of circumstantial proof which basically consists of five steps: (1) calculation of net worth at the end of a taxable year, (2) subtraction of net worth at the beginning of the same taxable year, (3) addition of non-deductible expenditures for personal, including living, expenditures, (4) subtraction of receipts from income sources that are non-taxable, and (5) comparison of the resultant figure with the amount of taxable income reported by the taxpayer to determine the amount, if any, of underreporting.<sup>312</sup>

The method thus achieves the same goal as an illicit enrichment provision as it allows the government to detect and prosecute government officials for the acquisition and maintenance of unexplained wealth.<sup>313</sup> Synthesizing the criminal penalties for submitting false dis-

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308. *Id.* at § 31.03[1].

309. *Id.* at § 31.01.

310. *Id.*; see also *United States v. Mastropieri*, 685 F.2d 776, 778 n.2. (2d Cir. 1982) (comparing the “net worth” and “cash expenditure” methods of proof); *Holland*, 348 U.S. at 132.

311. *United States v. Sorrentino*, 726 F.2d 876, 879–80 (1st Cir. 1984). In order to determine a defendant’s net worth, the government assesses the defendant’s assets (such as cash on hand and in accounts, checking, savings, and brokerage accounts, securities, vehicles, real estate investments) and liabilities and accumulated depreciation (from, for instance, loans, notes, credit card balances, mortgages); see also *Internal Revenue Manual—9.5.9 Methods of Proof* (Mar. 19, 2012), INTERNAL REVENUE SERVICE, [http://www.irs.gov/irm/part9/irm\\_09-005-009.html#d0e678](http://www.irs.gov/irm/part9/irm_09-005-009.html#d0e678) (explaining “the various methods of proof available to the special agent in determining a subject’s correct taxable income, and how to properly document each method of proof”).

312. *United States v. Schafer*, 580 F.2d 774, 775 (5th Cir. 1978).

313. See Lucinda A. Low, *American Bar Association Section of International Law and Practice Report to the House of Delegates, Inter-American Convention against Corruption*, 31 INT’L L. 1121, 1126 (1997).

closure reports<sup>314</sup> with the examination of atypical disclosure items and the prosecution for tax evasion under the net worth method may deter illicit enrichment as effectively as would illicit enrichment criminal legislation.<sup>315</sup> Only the former approach carries the benefits of vigorously combating corruption while respecting human rights.

#### CONCLUSION

Illicit enrichment statutes aggressively combat governmental corruption, but the placement of the burden of proof upon the criminal defendant constitutes an impermissible presumption that violates the human rights of the accused. Such legislation, by its operation, abuses the rights of defendants. For this reason, jurisdictions worldwide should resist using illicit enrichment offenses to combat corruption. Alternative measures exist via financial disclosure and tax evasion legislation that may properly address unexplainable wealth without violating human rights. Governments should explore these alternative means in their continued fight against corruption.

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314. *See, e.g.*, 18 U.S.C. § 1001 (2013) (enumerating the criminal punishments for making false statements); 26 U.S.C. § 7201 (2013) (attempt to evade or defeat tax); 26 U.S.C. § 7206(1) (2013) (filing fraudulent or false tax return or tax statement).

315. Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. 593, 618–19 (2002).