

# LEGAL REMEDIES FOR GRAND CORRUPTION

THE ROLE OF CIVIL SOCIETY



OPEN SOCIETY  
JUSTICE INITIATIVE

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This volume was compiled by Ken Hurwitz, senior legal officer for the Anticorruption Program of the Open Society Justice Initiative, and Richard E. Messick, a lawyer and consultant on anticorruption issues. It brings together in final form a series of papers that were first presented at a day of discussions on the worldwide legal fight against high-level corruption organized by the Open Society Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict in June 2014. Several of the individual papers have been previously published on the Global Anticorruption Blog (<https://globalanticorruptionblog.com/>), which is edited by Richard E. Messick and Matthew Stephenson, professor of law at Harvard Law School.

Our sincerest thanks to the authors for their inimitable contributions.

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FOREWORD | **KEN HURWITZ**

# SEEKING LEGAL REMEDIES FOR GRAND CORRUPTION

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This collection of articles exploring past experiences and future opportunities for civil society to advance accountability for grand corruption<sup>1</sup> has something of a long prehistory. In 2005, the Open Society Justice Initiative published *Legal Remedies for the Resource Curse*, which aimed to digest experience in using law to combat corruption in the natural resource extraction industries. That book grew out of the Open Society Foundations' work in the area of resource extraction transparency. At the time, OSF's work included important engagement in the Extractive Industries Transparency Initiative and support for and collaboration with many other complementary efforts, such as Publish What You Pay, which presses for governments and corporations to adopt open and accountable structures and practices in the resource extraction sector; Global Witness, which exposes the often horrendous human rights and environmental consequences of resource corruption; and the establishment of Revenue Watch Institute, now the Natural Resource Governance Institute, which advises policy makers, national governments, and civil society on the implementation of global norms that can effectively deliver transparent and accountable resource governance.

What was largely missing from this package, we thought, were strategies aimed at accountability, and the *Legal Remedies* book was the Justice Initiative's effort to jump-start such work by taking the initial step of assaying the field as it was, to develop an informed basis on which to advance.

While the book found many valuable precedents and incipient encouraging trends, its overall assessment was somewhat bleak:

**Where legal remedies for natural resource corruption exist, they are often difficult to activate. Although many countries recognize corporate criminal liability, some have been slow to extend its application to bribery or other spoliation-related crimes, or the full range of predicate offenses that give rise to a charge of money laundering. There is little sustained will to pursue offenders systematically.**

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In response, particularly, to this problem of sustained will, the book argued:

**Beyond government commitment, the pursuit of bribing companies and laundering banks requires strategic and innovative thinking by dedicated lawyers and civil society actors. In some cases, efforts should focus on the filing of complaints and launching of court cases to secure enforceable legal remedies. In others, zealous advocacy is needed to generate political will, gather evidence or promote the adoption of transparency mechanisms. Often, comprehensive reform will be possible only once offending regimes have fallen, or when the illicit activities of companies or banks are exposed through media attention.**

Though in recent years we have come to see grand corruption through a broader lens than the strictly resource-focused perspective we started with, the Justice Initiative's anticorruption efforts have been largely guided by insights in the *Legal Remedies* publication, beginning with two cases we developed with non-governmental organization (NGO) partners Asociación Pro Derechos Humanos de España (APDHE) and EG Justice, which were filed, respectively, in 2007 and 2008. Both cases sought legal remedies for high-level corruption related to oil extraction in Equatorial Guinea. Both built on massive evidence of corruption uncovered in 2003-2004 by the U.S. Senate's Permanent Subcommittee on Investigations: The subcommittee's examination of anti-money laundering compliance at the former Riggs Bank, in Washington DC, found that, for years, Riggs had disregarded its anti-money laundering obligations with regard to Equatorial Guinea and had turned a blind eye to evidence that the bank was handling the proceeds of foreign corruption, allowing and sometimes actively facilitating suspicious financial activity. At the time, counting the Equatoguinean governmental accounts together with the personal accounts of its ruling clan, "Equatorial Guinea" made up the largest client at Riggs.

The Justice Initiative's first case, *APDHE v. Equatorial Guinea*, was filed in the African Commission on Human and Peoples' Rights, and argued that the Government of Equatorial Guinea should be held accountable for violation of Article 21 of the African Charter on Human and Peoples' Rights,<sup>2</sup> for its systematic collusion in the spoliation of the country's natural resource wealth by the ruling Obiang family.

The second case, *APDHE v. Obiang Family*, was filed in Spain. In that case, APDHE acted as *acusador popular*, a kind of "people's prosecutor" or civil party under Spanish law. (For more, please see this volume's "Laundering the Proceeds of Corruption in Equatorial Guinea: The

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Our experience with these cases has shown both the challenges and the possibilities of seeking legal remedies for high-level corruption.

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Case before the Spanish Courts,” by Nuria García Sanz.) The case in Spain targeted a series of transactions exposed by the Senate Subcommittee in which, as signatory (jointly with his son or his nephew) on the Equatorial Guinea Treasury’s oil revenues receipts account at Riggs, the Equatoguinean president paid more than \$26.5 million into a Spanish account at Banco Santander, in the name of a Panamanian shell company that the subcommittee believed “may be partly or wholly owned by the President of Equatorial Guinea.”

Our experience with these cases has shown both the challenges and the possibilities of seeking legal remedies for high-level corruption.

After four years, the African Commission dismissed the “Article 21” case for failure to exhaust domestic remedies. The commission concluded that the victims did not sufficiently prove a “clearly defined jeopardized situation if they tried to exhaust domestic remedies,” rejecting arguments that efforts to seek recourse against Obiang family corruption in Equatorial Guinea’s courts would be futile and likely extremely dangerous, in light of the country’s documented record for systematic governmental corruption, sham justice, and repressive brutality. The commission also rejected (but did not address) arguments that Equatorial Guinea lacks domestic norms to outlaw conflicts of interest and the corruption that they breed. Yet the commission has shown appetite for addressing economic rights, and Article 21 remains a unique if relatively untested tool among regional protection mechanisms. The experience of the Nigerian Socio-Economic Rights and Accountability Project (SERAP) suggests that the ECOWAS Court, for example, may be a promising forum for developing Article 21 jurisprudence, including with respect to corruption.<sup>3</sup>

We fared much better in Spain. Deliberate but energetic investigation by the Spanish prosecutor and police, complemented by important information and analysis from APDHE and the Justice Initiative, have to date been remarkably fruitful. Tens of thousands of pages of evidence have been unearthed, revealing what appears to be a vast network of money laundering and other criminality carried out by and for the benefit of Equatoguinean officials and their long roster of helpers. Three of the apparent organizers of the complex enterprise were arrested in Panama and extradited to Spain, where we anticipate a trial will take place.

When the Justice Initiative began its efforts to develop cases of high-level transnational corruption, many colleagues, and we ourselves, worried that civil society groups might be overmatched by the challenges of generating accountability for transnational corruption. Cases of corruption at the highest levels—perpetrated by acme political figures and family members or cronies, by international business actors, and by the professionals and institutions that grease the rails for movements of corrupt funds around the global financial system—are among the hardest cases to prosecute. The hurdles for such cases include factual complexity, bank secrecy and legal privilege, the ability to move funds rapidly and repeatedly through endless networks of opaque offshore vehicles, the enormous political power and deep pockets of potential defendants, and legal rules (such as for bribery, money laundering, conflicts of interest, and electoral corruption) often designed for the criminal schemes of a simpler era.

Yet our experience in our own cases and our observation of others in the field have shown that civil society can be well placed and able to develop the capacity needed to prompt and assist prosecutors in investigating and prosecuting strong cases, and to mobilize public opinion and

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other political support for aggressive anticorruption cases by explaining, in ways prosecutors may not be able to, the narratives of abuse and harm revealed in those cases, and their significance, including for legal or policy reform agendas. One insight strongly driven home to us concerns the balance of strengths and weaknesses within law enforcement. Prosecutors and courts are, of course, the ultimate dispositive actors in the dispensation of accountability, and law enforcement properly enjoys numerous legal powers that civil society does (and should) not. At the same time, however, civil society often has the advantage when it comes to nimbleness, ability to profit from opportunity, political independence, area and subject expertise, global perspective, international links with governments and civil society, geographic mobility, consistency of mandate, and license to speak.

Through our casework and our study of the experience of others, we have come to understand how to approach the pursuit of legal remedies against the same or related perpetrators in different jurisdictions, “arbitraging,” when possible, particular strengths that different jurisdictions provide to allow the cases to help each other advance. Our case in Spain targeting Obiang family corruption has been strengthened by, and has reinforced, in turn, both Association Sherpa’s *Biens Mal Acquis* money-laundering case against President Obiang’s son, Teodorin Nguema, in France (see “France’s *Biens Mal Acquis* Affair” in this volume) and a now-settled civil asset forfeiture case in California brought by the U.S. Department of Justice’s Kleptocracy Asset Recovery Initiative, targeting, among other extravagances allegedly purchased with corruption proceeds, a Malibu mansion, a Gulf Stream jet, high-end automobiles, and a very famous “White Crystal-Covered ‘Bad Tour’ Glove” formerly owned by Michael Jackson, making its federal court debut.

One jurisdiction provides opportunities for robust discovery; another has accommodating standing rules for civil society actors to participate; yet another may have useful freedom of information regimes, legislative or other non-judicial investigative mechanisms, or ample access to relevant information or evidence, including through the presence of a large diaspora population. Grand corruption is a global enterprise; anticorruption must be as well. And corruption’s globalization may mask telling patterns. Although the web of transactions spun by world-class kleptocrats can seem—and often is—dauntingly bewildering, overlapping actors and connections, repeating transaction structures and corruption “styles,” and “frequent flyer” venues are surprisingly common, which can simplify investigation and help position civil society actors to become invaluable sources along well-worn paths they have studied over time.

Civil society organizations can find invaluable opportunities to link up law enforcement (especially in foreign jurisdictions) with populations directly victimized by and/or otherwise intimately knowledgeable of patterns of high-level corruption in their countries, connections that can lead to understanding, evidence, and testimony otherwise out of reach for prosecutors; contributing to such efforts to bring the corrupt to account and to return stolen wealth to its rightful owners, can also begin to empower victims.

In our own anticorruption work, we seek to motivate and sustain a limited number of high-profile cases in pursuit of interrelated objectives. We want to motivate law enforcement by example and partnership and bolster civil society groups’ ability to help strengthen particular aspects of anticorruption enforcement. We try to use our cases to reveal the baleful nature and complex structure of grand corruption while also demonstrating that accountability for such crimes is

practicable; that national-level prosecutors have both the capacity and the obligation to pursue such crimes; and that highly motivated, knowledgeable, focused, flexible, and energetic civil society actors can provide invaluable support for sometimes very beleaguered prosecutors.

As discussed in several of the articles in this volume, civil society organizations may be strongly positioned to identify, investigate, document, and report cases of grand corruption to domestic or foreign law enforcement agencies believed to be open to good faith investigation and prosecution of viable cases; indeed, depending on local rules on legal standing, civil society groups may be able to initiate and litigate cases on their own initiative. Our experience, however, and the narratives in this collection, show that even if not all civil society organizations or activists have the resources or skill to develop case dossiers or engage directly in litigation, there is still much that can be done to combat impunity for kleptocrats, bribers, and launderers.

Civil society can play a critical role in supporting anticorruption investigations and prosecutions by educating the public about the importance and the significance of particular cases that are taking place, but also by supporting and defending more broadly the institutions and/or institutional actors—national level prosecutors and other law enforcement, and national and international civil society organizations—that are central to constructing a truly effective global web of anticorruption accountability.

At the same time, where prosecutors are unwilling—or believe themselves unable—to pursue clearly viable cases, well-informed civil society can press them to do their duty, or use the setback to expose systematic problems and drive further debate. In the Justice Initiative’s collaboration with the Swiss NGO TRIAL International, for example, where the groups sought prosecution of the gold refinery Argor-Heraeus for colluding with the pillage of conflict gold from eastern DRC, the Swiss prosecutor dismissed the *dénonciation pénale* filed against the refinery. However, news of the prosecutor’s finding that Argor had violated its own legally-mandated anti-money laundering rules by failing to confirm the legality of the gold it refined—and in so doing had helped perpetuate the conflict—still inflicted a major reputational hit on not just Argor but the entire Swiss gold refining industry (refiners of 70 percent of the world’s gold). Today, the overwhelming majority (89 percent) of the Swiss public supports laws to hold Swiss corporations accountable for human rights and environmental violations committed abroad.<sup>4</sup>

Despite the steep challenges, civil society and governments are increasingly recognizing that kleptocracy and international bribery cannot be ignored or separated from the fundamental challenges of the 21st century: climate change, food security, sustainable development, economic and social inequality, and the viability of open societies. Civil society and popular movements have taken the lead in putting corruption at or close to the top of the agenda in countries ranging from Ukraine to Guatemala, Tunisia to South Africa, and including Spain, Russia, Brazil, and Nigeria, among many others. And on the law enforcement side, we now have a stunning landscape of major corruption cases recently concluded or still pending: forfeiture proceedings pursued by the U.S. (and parallel proceedings by eight other countries) against \$850 million in bribery proceeds paid to Uzbekistan’s former presidential daughter, Gulnara Karimova; the 1MDB asset diversion scandal centered around Malaysian Prime Minister Najib Razak, involving as much as \$7 billion in stolen state funds; Brazil’s “Operation Car Wash,”



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## There is still much that can be done to combat impunity for kleptocrats, bribers, and launderers.

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involving bribery and money laundering of almost \$5 billion or more by Petrobras, Odebrecht, and other major Brazilian and foreign companies; a recent \$400-plus million U.S. settlement with hedge fund Och-Ziff for bribery in Libya, Zimbabwe, Chad, Niger, Guinea, and DRC; the breathtaking impact of the International Commission against Impunity in Guatemala, which gave hope to a population oppressed for generations by dictatorship and kleptocracy and brought unprecedented accountability for grand corruption; and, not least, the milestone achievement marked by the corruption trial in Paris of Equatorial Guinea's first presidential son Teodorin Nguema—and the October 27, 2017 verdict convicting him of embezzlement, abuse of trust, and money laundering.<sup>5</sup> To increasing degrees, these cases are characterized by sturdy international collaboration, with U.S., Swiss, U.K., Dutch, Brazilian, and/or other countries playing their parts.

Particularly in a political environment where, in many countries, core democratic values and the notion of truth itself are under attack, these synergies between popular movements fed up with kleptocracy and dedicated law enforcement courageously taking on corrupt elites can outline the path for effective measures to reverse crony governance. In this context, among the most important tasks for those who defend the rule of law must be steady insistence that genuinely *legal* remedies are needed to address the corruption we target; that legal standards must apply to all equally and effectively; and that essential principles of law do not, and cannot be allowed to, change from one election, or one country, to another.

We hope and believe that readers will find in at least some of the following articles stimulus for thought, tools for action, and grounds for confidence in the work ahead.

INTRODUCTION | RICHARD E. MESSICK

# PAST STEPS AND FUTURE DIRECTIONS

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No one volume could hope to cover the many and varied ways civil society groups in different nations have sought to craft legal remedies for the corruption curse, and this one does not try. Rather, its purpose is twofold. The first is to bring greater attention to civil society's efforts to secure judicial relief for corruption in countries as diverse as Nigeria, Cambodia, India, and the United States. These accounts seek to attract more recruits for these efforts: lawmakers to approve statutes making it easier to secure a legal remedy for corruption; donor organizations to provide financial support; citizens to bring complaints to lawyers and public interest law groups; and journalists, investigators, and advocates to expand reporting on corrupt actors and their transactions. The second reason is to assist those already in the legal trenches by sharing lessons from both successful and unsuccessful attempts to bring those responsible for corruption before the bar of justice and to suggest new lines of attack by the creative adaptation of existing legal doctrines and procedures for doing so.

To accomplish these objectives, the articles in this volume review lessons learned from resource-corruption cases—starting with the cases urged in the Justice Initiative's earlier *Legal Remedies for the Resource Curse*, published in 2005. Where did the recommendations of that earlier volume prove out, where did they not, and why? Other authors examine some prominent efforts of civil society groups working in sectors besides natural resources to again see what lessons they offer. Did the recommendations suggested in 2005 succeed? Were some approaches tried while others were not, and if so, why? What other methods have been employed? What can civil society in one country take from experiences in others? Are there precedents that can be borrowed? Procedural techniques that can be copied? The volume also looks at ways in which civil society groups can stimulate more anticorruption litigation across the board.

The 2005 review found that, too often in the countries where resources are extracted, the main hurdle to bringing enforcement actions, be they criminal prosecutions or civil claims, is political. Those profiting from the corruption hold enormous economic and political power, which they wield in any number of ways to retard enforcement actions if not block them altogether. Investigation and prosecution services and courts are starved for funds, and the low salaries and poor working conditions that result make it hard to attract and keep qualified

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personnel. When cases are begun, political pressure and intimidation tactics frequently lead to their abandonment or dismissal.

The countries where resource extraction companies are located or the proceeds of corruption are stashed are for the most part wealthy, industrialized states or financial centers. Their courts and prosecution services are technically competent, less subject to political pressure, and better funded than those in the countries where resources are extracted. Nonetheless, until very recently few cases of grand corruption had been pursued in these countries either. The reasons were often political but of a different sort than in the extraction countries. In France, the close ties between French leaders and former French colonies were until recently an absolute bar to any enforcement action implicating the leadership of a former colony.

A second reason for the scarcity of resource corruption cases is that the investigation, prosecution, and trial of a case where some of the acts were committed in another jurisdiction is time-consuming and expensive, and authorities have found it hard to pursue such cases in the face of more pressing demands for action on local crime. Since the 1999 ratification of the Antibribery Convention of the Organisation for Economic Cooperation and Development (OECD), and in particular the peer reviews examining the resources each party devotes to enforcement, the situation has begun to change. But change has been slow. Reviews in 2015 and 2016 gave low scores to Belgium, France, Italy, and Spain—all countries with significant ties to poor, resource extraction countries—for their failure to adequately fund the investigation and prosecution of foreign corruption cases. Even in those countries that earned a passing grade, funding has hardly been generous. Reviewers, for example, found the four public prosecutors devoted to foreign corruption work in Norway insufficient.

With the almost complete absence of state-initiated resource corruption cases in OECD nations at the time the first *Legal Remedies* volume appeared in 2005, one might have expected the public interest law community to fill the void. But while in some OECD jurisdictions civil suits were a possibility, they too are complex and time-consuming and thus require a significant commitment by the public interest legal community. At the time, however, the public interest law community's focus was not corruption but the human rights violations and environmental crimes associated with extractive industries.

Given the power imbalances and the state of the judiciary and the prosecution services in the countries where the resources were extracted, the authors concluded it was unlikely that, even with a powerful push by civil society, enforcement actions would follow in those countries.

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They thus recommended that civil society devote its efforts to stimulating enforcement actions and civil suits either in the countries where the resource extracting companies were found or in those where banking relationships furnished a basis for a criminal prosecution or civil lawsuit.

*Legal Remedies for the Resource Curse* singled out France and Spain as jurisdictions where civil society efforts to spur criminal cases for resource corruption held promise. In common law countries, by law or through practice, criminal prosecution is the exclusive preserve of public prosecutors. Not so in either France or Spain. In both countries a private citizen or group of citizens can play an active role in initiating a criminal prosecution. In Spain, the *acción popular* procedure grants citizens the right to pursue a criminal action to vindicate a broad public interest; in France a *partie civile*, an individual or group which “personally suffered damage directly” from the violation of a criminal statute, has the right to ask the public prosecutor to open an investigation.

Spain seemed a particularly promising place for a civil society-inspired criminal case, given its close connections with its former colony, Equatorial Guinea, a country notorious for massive corruption in its oil sector. Equatorial Guineans born before 1968 are eligible for Spanish citizenship, and many have had their land seized or their businesses confiscated in pursuit of corrupt dealings in oil exploration and development. Depositing proceeds from this corruption in a Spanish bank would violate Spain’s anti-money laundering laws, exposing the individuals involved to criminal charges and the funds to confiscation. There were thus several grounds on which Spanish prosecutors could open a case and several legal theories those injured by the corruption could pursue for a private remedy.

Thus in 2008, with support from the Justice Initiative, the Spanish human rights group Asociación Pro Derechos Humanos de España (APDHE) filed a criminal complaint against the Obiang family for money laundering. The Spanish prosecutor’s office concluded that there was indeed a case to answer and initiated what has become a long-running and still unresolved criminal investigation.

French civil society also succeeded in persuading French prosecutors to open a case arising from grand corruption in resource extraction in low income countries—but not without a lengthy court battle in the course of which a precedent-setting decision was handed down. Shortly after the 2005 *Legal Remedies* volume appeared, the French non-governmental organization (NGO) Association Sherpa invoked the rights of a *partie civile* to request French prosecutors to open a criminal case against the leaders of Equatorial Guinea, Gabon, and the Republic of Congo. Leaders of all three countries had mansions, luxury cars, and/or other assets in France that Sherpa argued were the proceeds of resource corruption in their countries. Under French law these assets could thus be seized.

Prosecutors rejected Sherpa’s request. Their argument was that as a civil society organization, Sherpa had not suffered the type of damage that would give it civil party status, and while the lower courts upheld the prosecutors’ decision, France’s highest court reversed it. In a 2010 precedent-setting opinion, it ruled that a civil society group dedicated to fighting corruption would indeed be injured if the allegations in Sherpa’s complaint were true. The first of the so-called *Biens Mal Acquis* (illicit enrichment) cases, targeting Teodorin Nguema Obiang, the oldest son of Equatorial Guinea’s president, went to trial in Paris in June 2017; a few months later, on October 27, Teodorin Nguema was convicted of abuse of trust, embezzlement, and

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## TRIAL's legal strategy provides a guide for others seeking to litigate cases of pillage and related crimes.

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money laundering, the first senior official to be convicted in a foreign jurisdiction, while in office, of high-level corruption.

As Bénédict de Moerloose, an attorney with the Swiss non-governmental organization TRIAL International, explains in the “Challenging Pillage” article in this volume, civil society has not always succeeded in its efforts to bring resource corruption cases before the courts of developed nations. Under Swiss law, citizens can file a formal request with the public prosecutor, a *dénonciation pénale*, requesting the opening of a criminal investigation against a named party for offenses specified in the filing. TRIAL did succeed in persuading Swiss prosecutors to open a criminal investigation against Swiss gold refiner Argor-Heraeus.

The case arose from Argor's refining of gold mined in violation of United Nations Security Council sanctions imposed to help quell war in Eastern Congo. Argor stood at the end of a long line of corrupt dealings that allowed the gold to be mined in violation of UN sanctions and then transferred through various intermediaries until it arrived at Argor's refinery in Mendrisio, Switzerland. Reports over the years had accused the company of turning a blind eye to the corruption, and in 2013 the Justice Initiative asked TRIAL if there were any way Argor could be held accountable under Swiss law for doing so.

In fall 2013, TRIAL filed a *dénonciation pénale* with Swiss prosecutors, asking them to investigate Argor for collusion in the pillaging of the DRC's resources and for violations of Swiss anti-money laundering laws. Prosecutors agreed to do so and shortly thereafter raided Argor's headquarters, looking for evidence. Argor then sought an order from the Swiss Federal Criminal Court to both close the case and return all material seized. The court, however, rejected Argor's request, ruling the “credible” and “plausible” evidence in TRIAL's *dénonciation* was sufficient to justify an investigation. That was the good news. The bad was that prosecutors subsequently concluded that Argor should not face criminal charges as “it is not clear ... that the defendants had any doubts as to, or concealed any evidence of, the criminal origin of the gold.”

Though the outcome was a disappointment, the case was by no means a complete loss. The attention it garnered has helped change behavior in the Swiss mining industry by putting it on notice that it could be prosecuted in Switzerland for criminal acts committed abroad, and indeed Argor itself now advertises the great care it takes to ensure it does not become ensnared in corrupt dealings. TRIAL's legal strategy provides a guide for others seeking to litigate cases of pillage and related crimes. The case also showed how money laundering violations can hold companies with no direct activity outside Switzerland (or acting through a corporate veil often hard to pierce) accountable under Swiss law for involvement in crimes committed elsewhere, something particularly important for practitioners analyzing the activities of companies dealing with products originating from conflict zones.

Lastly, the case has fed into the ongoing discussion in Switzerland about corporate responsibility for human rights abuses. Since it was filed, Swiss human rights groups have highlighted the need for a comprehensive legal framework that could effectively hold Swiss multinationals accountable for human rights violations committed abroad. At this writing, the necessary reforms are under serious consideration.

While the 2005 *Legal Remedies* focused on what civil society could do to stimulate resource-related corruption litigation in developed nations' courts, it suggested that the African Commission on Human and Peoples' Rights and the African regional human rights tribunals might also be places to push cases. These bodies all enforce the African Charter on Human and Peoples' Rights, which contains provisions that would seem to apply directly to resource corruption cases. The charter protects the right of member-states' citizens "to freely dispose of their wealth and natural resources" and obliges member-state governments to avoid "foreign economic exploitation."

In 2007 the Justice Initiative, again along with Asociación Pro Derechos Humanos de España and the U.S.-based rights organization Equatorial Guinea Justice (EG Justice), tested the African Commission's willingness to entertain a resource corruption case based on these provisions. The three won an important victory early in the proceedings when the commission ruled that civil society organizations had standing to submit such a complaint, but they lost on the larger issue. In 2011, the commission dismissed their complaint for failure to exhaust remedies within Equatorial Guinea, apparently unmoved by the argument that such remedies were non-existent and/or dangerous even to attempt. Given the charter's natural resource provisions, the commission's decision was particularly disappointing.

The range and number of civil society projects to prompt legal remedies for corruption in areas besides resource extraction have grown steadily since the 2005 publication of *Legal Remedies*, and a number reflect the approach it advocated. In 2012, a South African NGO called Section 27 brought a civil suit against the government seeking an order that it provide the textbooks that schoolchildren had not received due to corruption in the procurement process; in 2013, the Angolan NGO Associação Mãos Livres and Corruption Watch UK filed a complaint requesting Angolan prosecutors to investigate corruption arising from an Angolan-Russian debt forgiveness deal; and the Indonesian NGO Telapak has been feeding information on corruption in the forestry sector in Sulawesi to local prosecutors and the anticorruption agency.

On the other hand, some of civil society's most consequential efforts to rein in corruption have been in cases much different from those suggested by *Legal Remedies*. In a 2005 suit, the British NGO Corner House succeeded in forcing the U.K. export credit agency to incorporate more stringent anticorruption provisions in the credit guarantees it issued. In South Africa, civil society groups won a judgment ordering the government to give the anticorruption agency more independence, and at the behest of civil society, Indian courts on several occasions have appointed outside monitors to ensure corruption investigations are conducted in a timely and thorough manner.

At the same time as some civil society groups have used the courts to force wholesale changes in the enforcement of the anticorruption laws, others have pursued what might be called "retail

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efforts” to spur more corruption litigation. Perhaps the leading example is the Advocacy and Legal Advice Centers operated by chapters of Transparency International. From the Solomon Islands and Papua New Guinea to Zimbabwe to Lebanon, more than 40 national affiliates help individual victims of corruption seek legal redress by offering legal advice on where and how to seek compensation and relief. A USAID-sponsored program in Afghanistan created a Citizens Legal Advocate Office in Kabul to provide free legal aid to those injured by corruption.

Given the limits of time, space, and money, a thorough analysis of the dizzying number and variety of civil society efforts to gain justice for violations of anticorruption laws is too much to accomplish in a single volume. What the Justice Initiative has opted for in this volume is a closer look at a select number of efforts, through which we hope to enhance our own understanding of progress the field achieved and where emphases might be placed over the next 10 years, while also providing anticorruption activists with a range of experiences, theories, and proposals that can encourage and assist them to deepen their own work.

Perhaps no country’s courts have been so willing to consider anticorruption litigation by concerned citizens and civil society organizations (CSOs) as those in India, and in “Anticorruption Litigation in the Supreme Court of India,” Arghya Sengupta, the founder and research director of Delhi’s Vidhi Center for Legal Policy, first describes the remedies Indian judges have crafted for the wrongs these actions have exposed and then assesses the impact those remedies have had. Two remedies have been breathtakingly broad. In some instances, courts have ordered the restructuring of institutions responsible for fighting corruption, and in others have mandated continuous judicial oversight of individual corruption investigations. Thus, in response to suits alleging that India’s Central Bureau of Investigation (CBI) refused to investigate corruption allegations leveled against high-ranking politicians and bureaucrats, the Indian Supreme Court ordered revisions to the way CBI directors are appointed to insulate them from political pressure.

When civil society has shown that, although a case against a powerful public official has been opened, the authorities are not pursuing it with vigor, the courts have assigned a civil society representative to monitor its progress and periodically advise the court on the case’s progress. Nor have the courts ignored traditional remedies against corruption, canceling in one action the award of telecommunications licenses worth tens of millions of dollars after CSOs alleged that favoritism tainted the process.

As Sengupta shows, the courts’ efforts to curb grand corruption in response to private lawsuits have met with mixed success. In the wake of its restructuring, the CBI is opening more cases against high-ranking politicians and senior civil servants, and in several instances just opening

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**Courts’ efforts to curb grand corruption in response to private lawsuits have met with mixed success.**



a case has forced the individual from office. On the other hand, the monitoring of individual investigations appears to have had little effect in speeding up the process, and there is, as Sengupta warns, the possibility that any resulting conviction will be overturned on the grounds that the monitoring compromised the defendant's due process rights. Even the invalidation of suspiciously awarded licenses and permits has not been free of controversy, for in several cases cancellation has harmed the rights of innocent third parties.

The Indian experience teaches that liberal standing rules coupled with an activist judiciary provide traditional public interest law groups a fertile field for devising legal remedies to combat corruption in all its guises, while posing new challenges to balance and protect the various rights and interests involved. "Legal Remedies for Victims of Corruption under U.S. Law" teaches several different, but equally important, lessons. The first is that when looking for ways to encourage more civil society enforcement actions, advocates and policymakers should look beyond public-spirited organizations to include other types of actors. While narrow standing rules have given traditional civil society organizations little space to pursue legal remedies for corruption in the United States, the existence of class, or representative, actions coupled with provisions that permit lawyers to be handsomely paid from any damage award has produced numerous suits by individuals, shareholder groups, and for-profit businesses for corruption-related offenses. The article also highlights useful precedents those seeking damages for these offenses can cite or at least borrow arguments from—whether they are private parties seeking compensation for damages they suffered or public interest plaintiffs pursuing broader, public-interest claims. The most important ones involve how damages are to be calculated and the amount of proof an injured party must present to recover, a principle applicable no matter the identity of the plaintiff or the purpose of the case.

One legal remedy for corruption the United States has pioneered is the *qui tam* action. Under the federal False Claims Act, any citizen can file suit against a firm or individual he or she believes has cheated the federal government in the performance of a public contract, and if the suit succeeds, the plaintiff is entitled to between 15 and 30 percent of the damages the court awards. The offer of a reward creates an army of volunteer investigators and lawyers willing to invest their own time and energy in ferreting out fraud and corruption. If they win the case, the government recoups most of its losses. If they lose, the government isn't out a cent.

While the False Claims Act has caught the attention of advocates and lawmakers in a number of countries looking for a way to enhance corruption enforcement actions, in "Lessons from *Qui tam* Litigation in the United States," University of Houston Law Center Professor David Kwok explains that the success of the False Claims Act in the U.S. depends upon several factors that may not be present in other countries. As one observer notes, although U.S.-Kenya exchanges prompted a task force to propose a Kenyan version of the legislation, Kenya's prohibition on contingency fees may, irrespective of the idea's overall merits, pose an insurmountable obstacle to mustering an army of corruption fighters seeking to capture a reward. In the absence of these or similar conditions, Kwok suggests that policymakers thinking of enacting a similar law think long and hard before doing so.

Although the 2005 *Legal Remedies* may have misjudged the African Commission's receptiveness to corruption-related cases, the suggestion that African regional tribunals might entertain them proved correct in *SERAP v. Nigeria*, a 2010 decision of the Court of Justice



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Although this is not widely known, in many countries corruption victims are not limited to bringing civil suits for damages.

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of the Economic Community of West African States. The court is empowered to hear cases alleging violations of the African Charter by its 15 member states, and in 2007 the Nigerian NGO Socio-Economic Rights and Accountability Project (SERAP) brought a case against the Nigerian government for failing to curb corruption in the education sector. As Adetokunbo Mumuni, its executive director, explains in “Litigating Corruption before International Human Rights Tribunals,” the group argued that Nigeria’s failure resulted in a violation of the right to education, a right guaranteed Nigerian citizens by the African Charter.

The decision is an important precedent for civil society groups in countries where governments are unwilling to address deeply-ingrained, high-level corruption that denies citizens constitutionally guaranteed rights. It also demonstrates how an energetic civil society group committed to fighting corruption can find a creative legal argument to unlock the courthouse door.

Given its repressive government and its poorly-funded, submissive courts, Cambodia would seem to be an unlikely place for civil society to prevail in an anticorruption action. As Bunthea Keo explains in “Litigation Lessons from Contesting a Corrupt Land Grab in Cambodia” (describing his efforts to secure a legal remedy for corruption that threatens to displace villagers from land they have tilled for generations), he has not won a final victory. In his article, he explains not only the legal theories behind the case but the practical hurdles, organizational and financial, involved in bringing a public interest suit on behalf of a citizens’ group. The article serves as an important reminder that the potential of public interest litigation is often closely linked to the exercise of other democratic rights that can shine public light on not only the courts but also related political and policy decisions.

For an individual or a civil society organization to file a civil action challenging corruption, they must have the legal right, termed “standing” in many countries, to initiate a case. In “Standing Doctrine and Anticorruption Litigation,” Harvard Law Professor Matthew Stephenson surveys national standing laws, explaining that in some countries the rules are quite liberal, whereas other countries impose stringent rules on who can bring suit. Going beyond a description of how the rules vary from country to country, he also explains the rationales offered to limit standing. In many countries, the critical step in increasing the enforcement of anticorruption laws will be persuading the legislature or the judiciary to open the courthouse doors to more actions by civil society through liberalizing standing rules. Stephenson’s article gives advocates the ammunition needed to make the case for more generous standing rules.

Although this is not widely known, in many countries corruption victims are not limited to bringing civil suits for damages. Thailand, Taiwan, certain American states, and virtually all 53 members of the British Commonwealth allow citizens and in some cases civil society groups

to step into the shoes of the public prosecutor and pursue a criminal case against those who have violated their jurisdiction's anticorruption laws. In "Private Prosecutions: A Potential Anticorruption Tool in English Law," British lawyers Tamlyn Edmonds and David Jugnarain provide an in-depth look at private prosecutions in the United Kingdom, explaining how a citizen or civil society organization can initiate a case, the tools at their disposal to investigate, the costs involved, and the risks they run if they fail to secure a conviction. Edmonds and Jugnarain suggest no reason why, where state authorities are unable or unwilling to prosecute those who violate their nation's anticorruption laws, their citizens should not enjoy the protections this safeguard offers and many reasons why they should.

Public trust theory derives from the sovereign's duty to act as the guardian of certain interests for the benefit of the nation as a whole. In the United States, it serves as the basis for citizen suits to vindicate environmental rights, and it has been incorporated into the African Charter on Human and Peoples' Rights. The question Elmarie van der Schyff, a professor of law at South Africa's North-West University, asks in "South Africa: Public Trust Theory as the Basis for Resource Corruption Litigation," is whether civil society could use this doctrine to combat grand corruption in the allocation of land and natural resources. Her thoughtful analysis concludes that it could, and goes on to offer arguments citizens and civil society organizations could use to persuade courts to award damages where corruption has led to a violation of the public trust.

Beginning from the simple and indisputable premise that those harmed by corruption should be able to do something about it, Professor Abiola Makinwa of The Hague University of Applied Sciences develops in "Empowering the Victims of Corruption" a novel approach to attacking the ubiquitous problem of corruption in public procurement, which builds on a doctrine of contract law. There are circumstances in which the principal beneficiary of a contract is not one of those who signed it but a third party, and where this is the case, the law of many countries gives that third party a right to sue for breach of the contract. When the government enters into a contract with a construction company to build a road to allow farmers to transport their crops to market quickly and cheaply, the farmers are the principal beneficiaries. Why shouldn't they have the right to sue if, as a result of corruption in the procurement, the road is poorly built or never built? Policymakers and civil society groups looking for ways to bolster the enforcement of the anticorruption laws would do well to give Professor Makinwa's proposal a careful look.

Not every tactic that succeeds in one jurisdiction will succeed in another, and precedents that persuade in one country will not always persuade in another. Litigation landscapes vary too much from one nation to another. But they are similar enough, and the curse of corruption destructive enough, that the Justice Initiative believes that wherever an active, unfettered civil society is considering challenging corruption in the courts, it will find something of value in this volume.

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# FRANCE'S *BIENS MAL ACQUIS* AFFAIR: LESSONS FROM A 10-YEAR LEGAL STRUGGLE

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## MAUD PERDRIEL-VAISSIÈRE

*Formerly the executive director of Sherpa, Maud Perdriel-Vaissière is a French lawyer with extensive experience in the areas of asset recovery and anticorruption.*

On June 19, 2017, trial proceedings opened in Paris in a money laundering case that has become perhaps the preeminent example of how determined civil society groups can take the lead in prosecuting international grand corruption. The defendant, Teodoro Nguema Obiang Mangue, is vice president of the small African state of Equatorial Guinea (he is widely known as Teodorin, or little Teodoro, to distinguish him from his father, the country's dictatorial ruler, Teodoro Obiang Nguema Mbasogo).

Teodorin was brought before the court on charges of diverting corruptly acquired funds into investments on French territory that included a €110 million mansion on Avenue Foch in the heart of Paris, a fleet of luxury sports cars, and a 76 meter luxury yacht valued at around €100 million. The charges carry a prison sentence of up to 10 years, and fines of millions of euros. Yet the initial criminal complaint was brought not by French criminal prosecutors, but by non-governmental organizations (NGOs) devoted to fighting corruption, including the French lawyers group Association Sherpa, which works on a range of global economic justice issues, and Transparency International France, which focuses on combating corruption.

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The opening of the trial before the Paris Criminal Court (*Tribunal Correctionnel*)— initially scheduled for January 2, 2017, but postponed until June at the request of the defense—was in itself a remarkable development. France (like many other countries) has traditionally avoided scrutinizing the wealth of politically influential foreign investors, particularly when French foreign policy interests in Africa may be at stake. Equatorial Guinea, while small, is a significant oil producer.

It is unlikely that the trial would ever have happened without a remarkable legal effort that had begun some 10 years previously, in what has become known in France as the *Affaire des Biens Mal Acquis* (sometimes, BMA), or Ill-Gotten Gains Affair. Initially, few would have bet that a case brought by Sherpa would succeed in overcoming the numerous political and legal obstacles associated with the prosecution of a high-ranking foreign public official, and in arraigning him before the French courts. How this eventually came about was the result of a mix of dogged persistence and political change that included a battle for legal standing that went all the way to France's top appellate court and set an important legal precedent for future action.

## HISTORY OF THE CASE

The *Biens Mals Acquis* affair had its origins in a report published in 2007 by a French NGO, the Comité Catholique contre la Faim et pour le Développement (CCFD), which set out to assess the value of the accumulated assets in Western countries of 23 dictators and former dictators and their families.<sup>6</sup> Based solely on public sources of information, the research was necessarily non-exhaustive, but its findings were still startling: by CCFD's estimates, the value of foreign assets accumulated by the 23 leading families covered in the report totaled some \$200 billion.<sup>7</sup>

Concerned by the findings of this survey and especially by the volume of assets accumulated on French territory, and refusing to let this report disappear into oblivion (like so many others once they have fallen out of the media spotlight), Sherpa and its allies decided to take action.

In March 2007, Sherpa, together with two other associations (Survie and Fédération des Congolais de la Diaspora) filed a criminal complaint (*notitia criminis*) against the presidents of Congo-Brazzaville (Denis Sassou Nguesso), Gabon (Omar Bongo Ondimba, now deceased), and Equatorial Guinea (Teodoro Obiang Nguema Mbasogo, the father of Teodorin), as well as the members of their respective entourages (family members and close associates). The complainants claimed, based on CCFD's research, that these individuals held considerable real estate assets on French soil that could not have reasonably been acquired through their salaries and emoluments alone. The complainants also alleged that, given the existence of serious suspicions of misappropriation of public funds surrounding these same individuals, these property investments likely involved money laundering.

A preliminary police investigation was undertaken in June 2007. This investigation corroborated most of Sherpa's allegations and further revealed the existence of a number of other assets, both real and movable. It thus appeared that the "Bongo circle" owned at least 39 properties in France—17 of them in the name of Omar Bongo Ondimba (now deceased)—and most of them located in the very well-to-do 16th *arrondissement* of Paris; the "Sassou Nguesso circle" (11 individuals) held no fewer than 112 bank accounts; and Teodoro Nguema Obiang Mangué, the

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The examining magistrates issued an indictment against Teodorin, which was opposed by his attorneys, who claimed that he enjoyed immunity from criminal prosecution.

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son of the head of state of Equatorial Guinea, enjoyed an automobile fleet consisting of at least eight vehicles, valued at a total of more than €4 million.

In spite of these findings, on **November 12, 2007** the charges were dropped by the French Public Prosecutor on the ground that the “offences [were] insufficiently proven.”

On **July 9, 2008**, Transparency International France (TI France), convinced by Sherpa to join this unprecedented legal initiative,<sup>8</sup> filed another complaint with the Paris Public Prosecutor. This complaint set out exactly the same facts as those that had been filed 16 months earlier by Sherpa and had no purpose other than to satisfy the procedural conditions for admissibility of its application to join the proceedings as a civil party (*constitution de partie civile*), pursuant to the then new Article 85 of the French Code of Criminal Procedure.<sup>9</sup> Thus, it was no great surprise when the Public Prosecutor decided not to pursue the case.

On **December 2, 2008**, TI France, represented by attorney William Bourdon, the chairman of Sherpa, filed a criminal complaint with the Presiding Magistrate of the Examining Judges of the Paris Court (*Tribunal de Grande Instance de Paris*) petitioning to join the case as a civil party, in hopes of obtaining the commencement of a judicial investigation—which the Paris prosecuting authorities (*Parquet*) publicly, and in completely unprecedented fashion, opposed in a press release dated April 20, 2009.

Before ruling on whether or not to commence a judicial investigation, the Presiding Magistrate of the Examining Judges had to determine first whether TI France had the required legal standing: did TI France have a sufficient legal interest to justify its participation in the case, thereby allowing it to file a complaint?

In an order dated **May 5, 2009**, the Presiding Magistrate of the Examining Judges of the Paris Court accepted TI France’s application to join the case as a civil party—a decision that should have allowed the commencement of a judicial investigation, had the prosecuting authorities not hastened to file an appeal. The relentless opposition of the prosecuting authorities towards this case was such that it led to questions in Parliament by Deputy André Vallini. In fact, on May 12, 2009, during the questions to the government, Deputy Vallini asked the then-Minister of Justice Rachida Dati: “Did you intervene with the Paris prosecuting authorities in this case? If yes, in what capacity? If not, did other government authorities intervene in this case?”<sup>10</sup> In a decision handed down **October 29, 2009**, the Examining Chamber of the Paris Court of Appeals reversed the decision of the Presiding Magistrate of the Examining Judges and ruled, affirming the position of the Attorney General (*Procureur Général*), that TI France would not be allowed to join the case as a civil party.

TI France filed an appeal before the supreme court and, in a decision rendered on **November 9, 2010**, the Criminal Chamber of the Court of Cassation reversed the decision handed down by the appeals judges, and accepted the complaint filed by TI France on December 2, 2008. It was a historic decision: not only was an association combating corruption recognized for the first time, and outside of any statutory authorization,<sup>11</sup> as having legal standing to institute corruption proceedings;<sup>12</sup> but also, and above all, the decision of the Court of Cassation allowed (three years after the filing of the initial complaint) for the appointment of an examining judge and the commencement of a judicial investigation.

The examining magistrates quickly focused on Teodorin's lifestyle. This choice, which was eminently strategic, may be easily explained:

- Teodorin was at the time already the target of a separate investigation by the U.S. Department of Justice (DOJ); in fact, the DOJ had sent a request for mutual legal assistance to France in early September 2007 (while the French preliminary inquiry was underway).
- Since the start of the judicial investigation, the French magistrates had gained access to a significant volume of information about Teodorin. Beyond the results of the magistrates' own preliminary inquiry, and the evidentiary materials sent by DOJ as part of its request for mutual legal assistance, TI France had also submitted a report prepared by Sherpa that identified Teodorin as the possible beneficial owner of a vast real estate complex located at 42 Avenue Foch in the very chic 16th *arrondissement*—an asset that would come to be the focus of breathtaking developments in the case (see below).
- Unlike the other public officials targeted in the complaint, Teodorin did not at that time hold any official position likely to confer upon him any personal immunity from criminal prosecution by the French courts (he was then Minister of Agriculture and Forestry in the Equatoguinean government).

Thus, the investigation advanced quickly in respect of Teodorin who, in response, launched with the help of his lawyers a series of appeals and other blocking maneuvers. Unable to justify Teodorin's conduct legally, the defense strategy consisted largely of trying to abuse international law on immunity to protect both his person and his assets. Following this strategy, his lawyers argued that Teodorin benefited from immunity from criminal prosecution in French courts; as to the assets, they were presented as linked to the Equatoguinean diplomatic mission in Paris. This strategy ultimately failed.

## HIGHLIGHTS OF THE LEGAL BATTLE

**September 28 and October 3, 2011:** 18 vehicles belonging to Teodorin were seized following two searches carried out at 42 Avenue Foch and nearby parking facilities. The vehicles seized by the French police included two Bugatti Veyrons, one Maserati MC12, one Porsche Carrera GT, one Ferrari Enzo, and one Ferrari 599 GTO. The photos and videos of this spectacular seizure were widely publicized on the Internet and in other media.<sup>13</sup> These seizures were unsuccessfully challenged by Teodorin's attorneys.

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**October 13, 2011:** The Equatoguinean government announced that it had appointed Teodorin as Equatorial Guinea's Adjunct Permanent Delegate to UNESCO<sup>14</sup>—a highly strategic decision given that such a position confers immunity from criminal prosecution; the Equatoguinean government did not even bother to downplay its motives, as can be seen in the related press release, which stated that this appointment “[was decided] in view of the circumstances affecting Teodoro Obiang Mangue.” In response, Sherpa and its partners sent a series of letters protesting this development to UNESCO<sup>15</sup> as well as to the French government<sup>16</sup> (France being the host state of the UN organization), deploring this delaying tactic and requesting that they oppose this nomination by all available means. Ultimately, Teodorin did not take up a position at UNESCO, but was instead appointed Second Vice President of Equatorial Guinea (see below).

**February 14-23, 2012:** An extensive search was carried out by agents of the Central Office for the Suppression of Major Financial Crimes (*Office Central pour la Répression de la Grande Délinquance Financière*, or OCRGDF) at 42 Avenue Foch, which then confirmed that Teodorin was actually the beneficial owner of the property. With total floor space of approximately 5,000 square meters distributed across five floors, Teodorin's Parisian “*pied-à-terre*”—valued at €110 million—boasted no fewer than 101 rooms, including a sports room, a discothèque with cinema screens, an Oriental salon, a Turkish bath, and a hairdressing salon.

The search, which lasted for an extraordinary 10-day period, mobilized some 20 investigators and resulted in the seizure of the equivalent of three containers of high-value objects. The Equatoguinean government denounced these actions as a violation of diplomatic privileges, claiming that the residence was the property of the Equatoguinean government and was used for diplomatic purposes. In response, the French Ministry of Foreign Affairs maintained that the building was not at that time formally registered as a diplomatic residence. Appeals to oppose these seizures were also unsuccessful.

**May 21, 2012:** The President of Equatorial Guinea appointed Teodorin as Second Vice President of the Republic, responsible for defense and security.<sup>17</sup>

**July 13, 2012:** An arrest warrant was issued against Teodorin following the latter's refusal to respond to a summons issued by the examining magistrates for purposes of examining him—a measure that was, once again, unsuccessfully challenged by his attorneys.

**July 19, 2012:** The examining magistrates ordered the seizure of the residence at 42 Avenue Foch. In response, the Equatoguinean government decided to hang the flag of Equatorial Guinea on the façade of the residence, affix a diplomatic plaque on the gate, and transfer



a portion of its staff to the premises. Once again, in vain, the Equatoguinean government challenged the legality of the examining magistrates' actions before the French courts.

**March 18, 2014:** The examining magistrates issued an indictment against Teodorin, which was opposed by his attorneys, who claimed that he enjoyed immunity from criminal prosecution.

**April 16, 2015:** The Examination Chamber of the Paris Court of Appeals rejected the application for nullification filed by Teodorin's attorneys, ruling on this occasion that his nomination to the position of vice president was "a nomination of circumstance." Teodorin's attorneys filed an appeal to the Court of Cassation.

**December 15, 2015:** The Court of Cassation rejected the immunity claim, stating that Teodorin could not claim the benefits of any personal immunity because his duties "were not those of Chief of State, Head of Government or Minister of Foreign Affairs"; nor could he benefit from functional immunity (to which all public officials are entitled) because "all the offences of which he was accused . . . were committed for personal purposes," and bore no relation to his official functions.

**May 23, 2016:** The Financial Crimes Public Prosecutor (*Procureur de la République Financier*) prepared its final determination, ruling in favor of Teodorin's referral to the Criminal Court of Paris.

**June 13, 2016:** Equatorial Guinea filed legal action against France with the International Court of Justice (ICJ) in hopes of gaining legal recognition of Teodorin's alleged immunity from criminal prosecution, along with the diplomatic status of the building located at 42 Avenue Foch.<sup>18</sup>

**June 22, 2016:** Teodorin was appointed "Vice-President of the Republic, Charged with National Defence and State Security."<sup>19</sup>

**September 5, 2016:** The examining magistrates ordered Teodorin to be referred to the Criminal Court of Paris to respond to accusations of money laundering with respect to misappropriation of corporate assets, misappropriation of public funds, misappropriation of entrusted assets, and acts of corruption committed on French soil between 1997 and 2011. More precisely, according to the French magistrates, Teodorin illegally enriched himself by demanding improper payments from private companies seeking to do business in Equatorial Guinea; by diverting public funds, including some €110 million allegedly diverted from the Equatorial Guinea Public Treasury to Teodorin's personal accounts between 2004 and 2011; and by spending for personal purposes funds from several Equatoguinean companies; he then allegedly diverted the proceeds of these various offenses to France (through transactions involving real estate and movable assets).

**September 29, 2016:** In light of the imminent commencement of Teodorin's trial, Equatorial Guinea called upon the ICJ to issue a provisional order (i.e., pending final decision from the ICJ on the merits), instructing France to suspend all criminal proceedings underway against the Vice-President of the Republic of Equatorial Guinea and to ensure the inviolability of the "diplomatic premises" located at 42 Avenue Foch (presumably, against a potential French decision to confiscate the property).<sup>20</sup>



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**December 7, 2016:** The ICJ ruled on the provisional claims filed by Equatorial Guinea.<sup>21</sup> Concerning the dispute relating to the premises at 42 Avenue Foch, in anticipation of a final decision on the case brought before the ICJ, the court ordered France to ensure that the premises being presented as hosting the diplomatic mission of Equatorial Guinea should enjoy treatment equivalent to that required by the Vienna Convention. It further ordered that France suspend the execution of any confiscation measure prior to final resolution of the case by the ICJ—a measure that would not, however, in any way deprive the French judges of the possibility of issuing an order of confiscation.

With regard to the request from Equatorial Guinea concerning Teodorin's immunity, the court declared itself incompetent to hear it. Therefore, there were no more obstacles to prevent Teodorin from being brought before the Paris Criminal Court.

**December 15, 2016:** In the run-up to the scheduled January 2017 opening of the Teodorin trial, the government of Equatorial Guinea announced that it had detained and questioned five employees of the Société Générale Bank of Equatorial Guinea, including three French citizens, for allegedly handing over secret banking details to the French investigation.<sup>22</sup>

## IMPACT OF THE CASE

At the time of writing, the eventual outcome of the Paris trial remains unknown. Yet it is possible to identify several ways in which the *Biens Mal Acquis* affair has already had an impact that goes beyond the specific case of the Obiang family and Equatorial Guinea.

In France, the expression *Biens Mal Acquis* has now largely passed into common usage, and the affair has played a significant role in raising public awareness of the extent to which France and other European countries have provided a safe haven for the proceeds of corruption. This awareness has been highlighted by external developments, such as the widely reported events of the Arab Spring<sup>23</sup> and the fall of Victor Yanukovich's corrupt regime in Ukraine. Internationally, the case has contributed to growing momentum in the battle against corruption, and the related efforts around the recovery of illicit assets.

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The *Biens Mal Acquis* affair has already had an impact that goes beyond the specific case of the Obiang family and Equatorial Guinea.

The case also brought about changes in French law on three important issues:

- **It enabled anticorruption groups to be granted the status of injured parties before the courts, thus enabling them to institute criminal proceedings relating to crimes of corruption.** The major decision handed down by the Court of Cassation on November 9, 2010 was finally codified in the Law of December 6, 2013; since then, anticorruption associations are allowed to act in court and a large number of corruption cases have also been filed at the initiative of Sherpa, TI France, and Anticor (the largest anticorruption groups in France).
- **It ordered the referral of an incumbent foreign public official to a criminal court in order to respond to accusations of corruption.** While other jurisdictions had already ruled that corruption could not be considered as official acts enjoying functional immunity from prosecution (see, for example, the proceedings filed in the United States and in Switzerland against former Ukrainian Prime Minister Paul Lazarenko), this is however, to our knowledge, the first time such a determination has been made in respect of an incumbent public official (up to then, only former officials had been targeted).
- **It strengthened the independence of justice in France.** Public disapproval of the numerous efforts by the prosecuting authorities to block progress in the BMAS affair appears to have played an important role in passage of the Law of July 25, 2013, which provides that the Minister of Justice can no longer specifically instruct public prosecutors with respect to their handling of individual cases.

These various victories—judicial, legal, and political—are the result of a combination of three principal factors: the legal framework, Teodorin’s personality, and civil society’s support for the proceedings.

## The Legal Framework

French law—both substantive and procedural—was particularly propitious to the favorable development of the *Biens Mal Acquis* affair. Two aspects specifically deserve to be highlighted. First, NGOs were afforded the opportunity to join a case as a civil party and thus to overcome the inertia of the prosecuting authorities. Without TI France’s petition to join the case as a civil party (and, of course, the Court of Cassation’s decision to accept it), the *Biens Mal Acquis* affair would, in fact, have ended on November 12, 2007, with the prosecuting authorities’ decision to drop the case.

TI France’s role was all the more valuable in this case, in which the prosecuting authorities not only tried to block the commencement of the judicial investigation, but also, at least up until 2012,<sup>24</sup> obstructed progress in the investigation by specifically refusing to grant the examining magistrates the necessary authorization to investigate the new facts that were uncovered in the course of the investigation. Even though it should have been a mere formality, the prosecuting authorities did, in fact, refuse on at least two occasions to follow up on such requests from the investigating magistrates, thus forcing TI France to overcome the prosecution office by filing additional complaints.

It is further worth noting that the status of civil party confers a certain number of rights (right of access to the case files, right of appeal, right to submit observations, and right to request additional investigative measures) which TI France made sure to exercise and which also advanced the investigation by the examining magistrates (see below).

More generally, in light of the *Biens Mal Acquis* affair (as well as the case filed in the Spanish courts by the NGO Asociación Pro Derechos Humanos de España, or APDHE<sup>25</sup>), it is clear that the ability of civil society actors to file criminal complaints as civil parties is a valuable weapon in effectively combating corruption in “sensitive” political-financial cases.

The second aspect of the legal framework germane to this case is the manner in which money laundering is understood under French law. Money laundering can be pursued in France as long as the illegal conduct that generated the illicit wealth (the predicate offenses) would constitute a criminal offense under the French criminal code if it were committed in France. It does not matter where this illegal conduct took place, nor whether it has ever been pursued, nor whether the offender has been convicted; it does not matter if the conduct constitutes a criminal offense in the foreign country where it took place (no dual criminality requirement applies<sup>26</sup>).

This autonomy of the offense of money laundering specifically countered the argument raised on numerous occasions by Teodorin’s attorneys, who fallaciously sought to establish that the predicate offenses (and specifically the numerous misappropriations of corporate assets) did not constitute offenses under Equatoguinean law (and, accordingly, could not be prosecuted in France)—an argument that, to be sure, did not prevail in the courts.

## Teodorin’s Personality

Teodorin’s appetite for flamboyant and extravagant luxury consumption significantly assisted efforts to mobilize both public and official interest in the case. In fact, his personal profligacy stands in marked contrast to the impoverished social and economic conditions prevailing in his homeland, where most of the country’s 1.2 million people have seen only limited benefits from the country’s oil wealth. It also underlined the obvious gap between his supposed official salary (less than \$100,000) and his personal consumption habits, which would make even the most uninformed observer wonder about the source of the funds.

In addition, his apparent indifference to the proceedings filed against him, and his readiness to maintain his lifestyle unchecked, fueled the impression that he believed he was above the law. An article from the daily newspaper *Le Monde*,<sup>27</sup> for instance, reported in June 2011 that in 2009—two years after the BMA proceedings had commenced—Teodorin had chartered an airplane that made a stopover in France with 26 luxury cars on board (including seven Ferraris and five Bentleys). According to this same article, Teodorin spent no less than €18 million at the auction sale of the collection of Yves Saint-Laurent and Pierre Bergé that was held in Paris in *February* 2009.

This impression of arrogance, combined with the various delaying tactics employed to thwart the judicial process, most certainly encouraged the French magistrates (both the examining magistrates and the judges who heard the various appeals filed by Teodorin’s and Equatorial Guinea’s attorneys) to demonstrate tenacity and, it must be said, a certain audacity in handling this case.

## Civil Society Support for the Proceedings

Sherpa and TI France did not limit themselves to filing the case; they actively supported it, primarily through supporting the judicial investigation and by raising media awareness.

Although not formally a party to the proceeding, Sherpa nevertheless actively contributed to the successful progress of the judicial investigation. Sherpa's legal experts performed important research work on various points of law likely to impede the successful outcome of the proceeding (including judicial precedents and other relevant decisions). This specialized work supported the magistrates, who would not have been able to assign sufficient resources to this effort given their overall caseload.

Sherpa also supported the judicial investigation by collecting information and potential evidence,<sup>28</sup> both from sources who contacted the group and from allies involved in legal actions underway in both Spain and the United States.<sup>29</sup> This material was then forwarded to the magistrates responsible for the investigation through the intermediation of TI France in its capacity as civil party.<sup>30</sup> All this research largely supported the work of the magistrates;<sup>31</sup> most notably, the discovery of the property located at 42 Avenue Foch resulted from a detailed investigation carried out by Sherpa.<sup>32</sup>

Sherpa and TI France sought to raise media awareness throughout the process, to denounce the prosecuting authorities' initial lack of action, as well as their various blocking attempts, and Teodorin's own delaying tactics (particularly his attempt to join UNESCO), or simply to highlight specific developments in the matter. The numerous media reports about the case (both in France and abroad) certainly kept the magistrates aware of the importance of the stakes in question, which undoubtedly encouraged them in their tenacity and audacity.

While civil society's contribution was extremely important for the case, it was not without cost or risk. Any civil society organization preparing to engage in this kind of high-level effort against powerful and influential political figures must keep in mind that the confrontation does not take place only in court, but can expose those involved to very serious risks outside the courtroom. As essential as it might be, the involvement of individuals or organizations from local civil society should be contemplated only if their safety can be assured.

These risks were painfully underlined by two incidents in 2008 and 2009. On December 30 and 31, 2008, several Gabonese militants who had publicly expressed their support for the *Biens Mal Acquis* affair<sup>33</sup> were arrested in the capital Libreville. Accused of "attempts to destabilize the regime," they were detained in violation of all regular procedures and under particularly worrying conditions for 12 days—a duration that could have been even longer without the mobilization of Sherpa and its partners, which immediately denounced these arrests through press releases and organized legal assistance on site.

We also note the tragic loss of Bruno Ossebi and his family. On December 3, 2008, the day after TI France's petition to institute a judicial investigation, Bruno Ossebi, a Franco-Congolese activist who ran a blog denouncing the misappropriations of the Congolese regime, contacted Sherpa with the idea of joining in the proceedings. On January 21, 2009, the house that Bruno Ossebi occupied with his companion and the latter's two small children was the scene of a

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terrible fire. Ossebi's companion and her two children died in the blaze; as for Bruno, he was transported to the Brazzaville military hospital. Even though his medical condition appeared to be stable and the French Foreign Affairs Ministry was preparing his repatriation to France, Bruno died suddenly on the night of February 1-2. According to the investigation carried out by Reporters sans Frontières,<sup>34</sup> Bruno's home was razed fewer than 14 hours after the fire, even though no investigation was made of the scene. No autopsy was performed on Bruno Ossebi's body. All the evidence that might have contributed to understanding what happened during the nights of January 20 and February 1 was thus destroyed.

On a much lower scale, Sherpa, TI France and their respective chairmen faced numerous disinformation campaigns aimed at discrediting them. Sherpa, for example, was at one point accused of being financed by the CIA. Most recently, after Teodorin's referral to the Criminal Court for trial, several African websites carried an online statement supposedly issued by a previously unknown coalition of 1,800 unnamed African NGOs, accusing Sherpa's Director William Bourdon of seeking to destabilize Africa.<sup>35</sup>

Although these attacks did not affect the course of the judicial proceeding (at least not directly), fending them off consumed a great deal of energy, since it was essential to ensure that false allegations did not take root in local public opinion.

In addition, the lengthy judicial proceedings and numerous related legal actions for slander could have been a financial black hole for Sherpa and TI France. This risk was offset partly by the low cost of access to the courts and investigative magistrates in France, and partly by the provision of pro bono legal services by the lawyers involved, in particular the leading attorneys, Sherpa's Bourdon and Emmanuel Piwnica of TI France.

On October 27, 2017, the Paris Criminal Court convicted Teodorin Nguema Obiang of embezzling over €150 million of Equatoguinean public money, and related crimes of corruption and money laundering. Teodorin was given a three-year prison sentence and a €30 million fine, both of which were suspended (*sursis*) so long as Teodorin commits no further crimes in France for a period of five years. The court also ordered a seizure of more than €100 million of ill-gotten assets Teodorin had held in France, including his 101-room Avenue Foch townhouse. Teodorin has filed an appeal.<sup>36</sup>

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# LAUNDERING THE PROCEEDS OF CORRUPTION IN EQUATORIAL GUINEA: THE CASE BEFORE THE SPANISH COURTS

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## NURIA GARCÍA SANZ

*A law graduate from Complutense University of Madrid, Nuria García Sanz's professional career has always been linked to international human rights law and criminal law. Since 2010, she has worked as a lawyer with the Asociación Pro Derechos Humanos de España (APDHE), the first organization in Spain dedicated to the defense and promotion of human rights.*

The small African coastal state of Equatorial Guinea (EG) has a population of some 1.2 million people. Despite living in a country that produces around 250,000 barrels of oil a day from its offshore fields, the vast majority of the population lives in poverty. Notwithstanding its petroleum-driven per capita gross national income of over \$21,000—more than Brazil, Argentina, or Croatia—Equatorial Guinea ranks 135 (out of 188) on the United Nations Development Programme's (UNDP) Human Development Index. More telling, perhaps, is UNDP's measure of "GNI per capita rank minus HDI rank." This metric broadly shows the extent to which potentially available national resources are actually used to benefit human development and well-being in the country, with a negative score indicating under-use of such resources. In 2016, Equatorial Guinea scored -79, by far the worst performance of all countries measured. (The next worse performers were Kuwait at -48 and Gabon at -46).<sup>37</sup>

But while much of the population remains extremely poor, the family of President Teodoro Obiang, who seized power in 1979, has prospered since the discovery of oil and gas in the Gulf of Guinea in the mid-1990s. The offshore reserves attracted international energy companies, led by the American companies ExxonMobil, Hess, and Marathon Oil. As the oil flowed, the president's son, Teodorin Nguema Obiang, became the owner of a luxury villa in Malibu, California, a personal jet, and a collection of highly prized sports cars, as well as even more massively extravagant luxuries in Paris, including a €180 million 101-room townhouse on Paris's posh Avenue Foch.

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Initially, the rest of the world paid little attention to what was happening in Equatorial Guinea. But in the summer of 2004, a United States Senate investigation into money laundering, launched in the aftermath of the September 11, 2001 terror attacks on New York and Washington, DC, delivered a damning report on the operations of a small but extremely well-connected private bank based in Washington. Riggs Bank had styled itself as the “most important bank in the most important city in the world” and boasted of a history that went back to the 1840s. It was also handling the banking affairs of the Obiang family.

Among many other revelations, the report from the Senate’s Permanent Subcommittee on Investigations showed that Riggs had allowed millions of dollars from Equatorial Guinea’s government accounts—which received hundreds of millions of dollars in oil revenues from the U.S. oil companies—to be transferred under suspicious circumstances into personal accounts linked to the Obiang family. The revelations rocked the Washington establishment; eventually Riggs was sold to PNC Financial and obliged to pay \$41 million in civil and criminal fines to the U.S. authorities over major deficiencies in its anti-money laundering controls (involving its dealings both with Equatorial Guinea and with the former Chilean dictator Augusto Pinochet).<sup>38</sup> In 2006, the banker handling the EG accounts, Simon Kareri, and his wife both pleaded guilty in federal court to charges related to fraud and money laundering. Simon Kareri was sentenced to 18 months’ imprisonment.<sup>39</sup>

The breadth and detail of the revelations in the Senate report on Riggs, and the extensive documentation provided, created an unparalleled insight into the operations of a case of resource-based corruption that was both exceptional and paradigmatic. It exposed a system that had allowed international oil interests to turn a blind eye to private corruption by EG’s ruling family—a criminal conspiracy that essentially cut out the country’s population from the broad benefits to be expected from the development of the country’s oil reserves.

The report also created an opportunity for regulators outside the U.S. to take action, and for civil society groups to add their weight to efforts to unravel a network of corrupt dealings that clearly went far beyond Washington, DC.

Amongst other questionable dealings exposed at Riggs, it was discovered that over a period of three years, transfers amounting to just under \$35 million had been made from the Equatorial Guinea Oil Receipts Account at Riggs Bank to accounts in Spain and Luxembourg owned by two shell companies, “at least one of which the Subcommittee [had] reason to believe [might] be owned in whole or in part by the E.G. President.”<sup>40</sup> Transfers from the Oil Account required the signature of the president, plus that of either his son or his nephew.

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Investigations showed that Riggs had allowed millions of dollars from Equatorial Guinea’s government accounts... to be transferred under suspicious circumstances into personal accounts linked to the Obiang family.



The bulk of these sums—more than \$26 million—went to an account at Banco Santander, one of Spain’s largest banks, under the name of a Panamanian company called Kalunga SA.

The revelations that there might be laundering of public funds through Spanish banks led to an additional investigation being opened in Spain in 2004 by the Office of the Special Prosecutor for Economic Crimes Linked to Corruption (*Fiscalía Especial para la Represión de Delitos Económicos Relacionados con la Corrupción*). No charges, however, were brought as a result.

Then, in 2009, the Asociación Pro Derechos Humanos de España (APDHE), a Spanish human rights law group, with support from the Open Society Justice Initiative, decided to push for a criminal investigation into a suspected money laundering scheme involving Kalunga. Investigation by APDHE and the Justice Initiative had uncovered a number of real estate purchases in Spain by various senior Equatoguinean figures that appeared to correlate with specific transfers to Kalunga, suggesting that some of the Kalunga payments might have been laundered through the purchase of Spanish properties. (APDHE had been taking a close interest in the Riggs bank case, in part because it had been involved in the legal action in Spanish courts seeking accountability for human rights violations perpetrated by another of the bank’s tainted clients, Augusto Pinochet.)

The action was made possible because of the Spanish legal system’s broad approach to legal standing, which allows an *acusador popular* (a “people’s prosecutor”) to bring a criminal legal complaint (*denuncia penal*) before the courts.

APDHE set out facts suggesting that millions of dollars had been diverted to purchases of Spanish real estate and urged the authorities to open a criminal investigation into allegations that specific individuals from EG had been engaged in laundering the proceeds of corruption in Spain. This complaint is still under investigation by the Spanish authorities—and this article sets out the course of these criminal proceedings.

Between 1995 and 2004, the government of Equatorial Guinea opened more than 50 accounts with Riggs in Washington, DC, including both institutional accounts and accounts held in the names of various senior government officials and their families. The account established at Riggs by EG’s Treasury, with average deposits of around \$700 million, also became the principle destination for all payments by U.S. oil companies operating in EG, including not only their production concession payments and other operational expenditures, but also payments for non-oil related activities, such as financing scholarships for EG students in the U.S., and paying operating expenses for EG’s diplomatic missions in Washington and New York. The oil companies were also making payments to individual EG officials, their family members, or entities controlled by officials or family members. Taking the personal and government accounts together, by 2003 Equatorial Guinea had become Riggs’ biggest client.

The 2004 U.S. Senate report noted that the extensive violations identified at Riggs had included failing to notify the authorities about suspicious transactions, including facilitating nearly \$13 million in cash deposits into accounts controlled by President Obiang and his wife. As much as \$3 million at a time would be delivered to the bank in suitcases, containing “unopened, plastic-wrapped bundles” of cash.<sup>41</sup>



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The report found particularly suspicious the \$35 million in payments from the EG Treasury account to accounts in Spain and Luxembourg between 2000 and 2003, at least one of which, the subcommittee believed, might be partly or wholly owned by the President Obiang.

Meanwhile, in Spain an effort was begun to investigate the \$26.5 million transferred to Spain between 2000 and 2003 from the EG Treasury account to the Banco Santander account opened in the name of an apparent shipping company registered in Panama.

An initial investigation was launched in 2003 by Spain’s anti-money laundering agency, the *Servicio de Prevención de Blanqueo de Capitales del Banco de España* (SEPBLAC). SEPBLAC discovered that only a small amount of the transferred funds appeared to have been used to fund its shipping business activities; the rest was used to fund other activities, including public works, diplomatic missions, and defense-related work. In addition, the company was not engaged in any significant commercial business in Spain beyond receiving funds, mostly from the Riggs Bank account. Once the money arrived in Spain, it was in turn moved to numerous other companies based in different countries. Money was also transferred to senior officials in the EG government.

SEPBLAC also established that from the beginning of 2005 a number of new companies were established in Panama, for the purpose of opening new bank accounts in Spain. These followed a similar model, receiving money from the EG Treasury, but via accounts based in France. Subsequently, these funds were used to acquire real estate in Spain.

The suspicion that these transactions were linked to the crime of money laundering in Spain led to the opening in 2004 of an investigation (*diligencias informativas de investigación*) by the office of the Spanish anticorruption special prosecutor.

Against this background, APDHE launched an extensive independent investigation into Equatorial Guinea’s bank dealings in Spain, with the support of the Justice Initiative. The investigation revealed close correlations in timing between at least five of the wire transfers to Kalunga and nine real estate purchases by President Obiang and family members and other high officials in Madrid, Grand Canary, and elsewhere. APDHE subsequently filed a criminal complaint (*denuncia penal*) in 2008 before a Spanish court, accusing a number of individuals linked to the government of Equatorial Guinea of money laundering.<sup>42</sup>

The support of the Justice Initiative, which had previously researched the question of the misuse of Equatorial Guinea's oil and gas revenues, was essential in this process. No Spanish court would have begun an official investigation without a thoroughly documented complaint that provided evidence of behavior presumptively amounting to the crime of money laundering.

This complaint sought a rigorous and exhaustive investigation of the apparent diversion of public funds from Equatorial Guinea to shell companies based abroad, for the purpose of acquiring property in Spain. The accused included high officials of the government of Equatorial Guinea, but excluded the president, who enjoys immunity from prosecution under international law.

APDHE demonstrated that it had the necessary legal standing to make this complaint on the basis of Article 125 of the Spanish Constitution and the national laws of Spain, which allow a private action to be brought by any citizen or judicial person, which includes associations, non-governmental organizations (NGOs), and public or private entities.

In addition, the statutory objectives of APDHE include "the defense of human rights in all aspects and geographies, and monitoring the implementation of existing rights, as well as the advancement and realization of rights not as yet recognized."<sup>43</sup>

The ability of APDHE to file this complaint before the Spanish courts can be contrasted with the struggle of civil society groups in France to win standing in the ongoing *Biens Mal Acquis* case involving corruption allegations in Equatorial Guinea, Gabon, and Congo Brazzaville. The ability of French NGOs to commence and participate in that case was eventually affirmed in December 2015 by France's highest court, the *Cour de Cassation*, but only after an expensive multi-year struggle. At the same time, Spain's *acusador popular* process gives the civil party an active role in the initial investigative stages of a case beyond the filing of the initial complaint, including access to the case docket and the right to call witnesses and to introduce investigative leads. (This engagement is suspended toward the final stages of the case, when the investigating judge can declare the investigation secret for a range of evidential and procedural reasons, though with the removal of the secrecy, the civil party regains access to the docket and full standing rights in in the case.)

The *denuncia penal* was also framed entirely in terms of Spanish law, with the allegations focused on violations of Spain's money laundering laws, including laundering of criminal proceeds from predicate offenses committed abroad. So while the case involved international corruption on a grand scale, there was no need to invoke universal jurisdiction principles that might have provided an alternate legal approach to the case.

The complaint was initially filed before the high court in Madrid (*Audiencia Nacional Española*). On the basis that the competent court should have jurisdiction over the place where the recipient of the funds had opened the relevant bank accounts, the case was subsequently assigned to Examining Magistrates Court 5 (*Juzgado de Instrucción*) in Las Palmas in the Canary Islands. The case was added to the court's docket in 2009 as Preliminary Investigation 737/2009 (*Diligencias Previas*). The court subsequently incorporated into the case the findings of the earlier investigation launched in 2004 by the anticorruption Special Prosecutor.

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The following legal actors are involved in the case:

- APDHE, which may assist the Investigative Magistrate in ways that contribute to the fullest investigation of the facts.
- The Finance Ministry's anticorruption Special Prosecutor. The Regional Prosecutor's Office investigates the facts of the case, and may move for the court to take appropriate measures.
- Both the Special Prosecutor and the Investigating Magistrate may request assistance from the national police's anti-fraud unit (la Unidad de Delincuencia Económica y Fiscal).
- The Investigating Magistrate conducts the case.

## THE JUDICIAL INVESTIGATION

After the transfer of the case to the court in the Canary Isles, the Investigating Magistrate launched extensive further investigations involving a range of public and private actors involved in the alleged transactions. As a result, the first conclusion was that the EG funds that were transferred to Spain originated from the country's oil revenues, but had not been used for the benefit of the country's population. Instead the funds were dispersed among numerous companies located in different countries, with much of the money ultimately used to acquire properties in Spain.

At the same time, as part of its role in the case, APDHE has been involved in a detailed analysis of the case under Spanish law to establish the existence of the predicate (or underlying, precedent) crime for money laundering (since proving money laundering under Spanish law requires proving the existence of the crime that generated the allegedly diverted funds, even if this cannot be prosecuted as a crime under Spanish law).

As part of this effort, APDHE sought information on all aspects of criminal activity involving EG, including trafficking in arms and drugs. A second stage of our investigation focused on corruption involving the oil and gas sector, construction, and other related areas, drawing on the work of the U.S. Senate Riggs Bank report of 2004. We also analyzed the U.S. investigation at the time into properties allegedly purchased with corrupt proceeds in the U.S. by Teodorin Nguema Obiang, the first son of President Obiang,<sup>44</sup> extracting information that would be of use to the investigation in Spain, and elements of the *Biens Mal Acquis* investigation in France

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**EG funds that were transferred to Spain originated from the country's oil revenues, but had not been used for the benefit of the country's population.**

into money laundering allegations against the same son of President Obiang (see “France’s *Bien Mal Acquis* Affair: Lessons from a 10-Year Legal Struggle”). In addition, we provided testimony from business people who could attest to corrupt practices prevalent in Equatorial Guinea that might be directly linked to the President Obiang and his circle.

In 2009, the Spanish media reported that two senior officials and family relations of President Obiang had received more than \$2 million from the Kalunga account.<sup>45</sup> The president’s son-in-law, and former EG ambassador to Russia, Fausto Abeso Fuma, received \$1,944,900 from Kalunga between December 1999 and July 2003; and President Obiang’s nephew, Melchor Esono Edjo, former secretary of the Treasury and co-signatory on the Riggs Equatorial Guinea Treasury account, received \$201,132 between April and July 2003. Other senior officials who received money from Kalunga or other related accounts have also been identified.

In April 2013, the court in Las Palmas declared the proceedings closed to all except the Special Prosecutor for Anticorruption. This process, under Article 302 of the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*), allows the magistrate to close proceedings to the public (*Secreto de sumario*)—including the civil party who initiated the case—for as long as he or she deems necessary. Such a closure can last several years, as it did in this case: the period of the *Secreto* continued until February 2017. (Judges have until recently been granted a high level of discretion to determine the length of the secrecy period, although a revision of the Criminal Procedure Act passed in 2015 stipulates that closing a case is permissible only to protect life, liberty, or personal safety, or to protect the process from a serious threat of disruption.)

While the secrecy period was in effect, the next major development came in September 2015, when three Russian nationals were detained in Panama under an order issued by the Las Palmas Investigating Magistrate, Judge Ana Isabel de Vega Serrano.<sup>46</sup> The three Russians, Vladimir Kokorev, an ex-diplomat; his wife, Yulia; and their younger adult son, Igor, face charges over their roles as alleged managers of the Panamanian shell company Kalunga Company, S.A., and (as the investigation had uncovered) numerous other related companies as well.

Shortly after the issuance of warrants, the Panamanian police acted, and the three Kokorevs were detained. At the end of 2015, these three suspects were extradited to Grand Canary, Spain, where they were placed in provisional detention, having been judged flight risks. At the same time, investigators executed entry and search warrants at a number of private homes in connection with the investigation of other individuals possibly linked to the transactions, including lawyers and accountants.

In September and October 2017, Yulia and Igor Kokorev were released from detention without bail. At this writing, Vladimir Kokorev remains in detention. Pretrial release for Vladimir would, the court has ruled, require him to put up bail of €600,000.

The investigation is continuing.

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## STRATEGIC CONSIDERATIONS

This case, *APDHE v. Obiang*, remains as yet unfinished after nine years. Yet it has already become something of a paradigm for the challenges and opportunities for civil society groups engaged in addressing resource-based grand corruption across national barriers. Since 2009, both APDHE and the Open Society Justice Initiative have learned more about what it takes to engage in this kind of a complex case, and have developed a greater understanding of the role that civil society groups can play in developing and pursuing such a case. Some of these lessons have already helped the Justice Initiative to support other legal action in other countries, notably the effort to prosecute Argor Heraeus S.A., the Swiss gold refiner, for processing pillaged gold from the Democratic Republic of Congo. In conclusion, it is important to note several aspects of the case that stand out:

### Seizing an Unparalleled Opportunity

It would have been extremely difficult if not impossible for either APDHE or the Justice Initiative to develop this case without the treasure trove of information, documentation, and valuable leads presented by the Senate's Riggs Bank investigation.

That investigation was itself the result of an unforeseen development that changed the political calculations in Washington, DC: the terror attacks of September 11 led Congress to strengthen statutory requirements for money laundering controls, and to crack down on lax banking operations that had in the past been tolerated—in significant part for reasons of perceived U.S. national security interest.

The Riggs revelations provided fertile ground for further investigative work by reporters, notably Ken Silverstein, a U.S.-based journalist who began to focus much of his work on Equatorial Guinea. At the same time, the Open Society Justice Initiative was taking initial steps towards working on resource-based corruption, providing a potential backer for the kind of long-term effort required. Fortuitously, APDHE was already interested in the Riggs scandal, because of its prior interest in Pinochet.

With equal serendipity, the Spanish system, with its *acusador popular* process, provided an ideal legal avenue for action.

### Awareness of the Political Dimension

Transnational corruption on the grandest scale inherently touches on questions of national interest, involving as it does the possibility of legal action against a state's political leaders and their allies over illicit money flows. Despite the revelations of the Riggs Bank report, U.S. oil companies remain the largest investors in the economy of Equatorial Guinea. The country's elite also retain close ties with Spain, despite episodic tensions, and in 2006 President Obiang paid a state visit to Madrid, during which he met King Juan Carlos.

## Despite the revelations of the Riggs Bank report, U.S. oil companies remain the largest investors in the economy of Equatorial Guinea.

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Political ties of this kind need to be taken into consideration in a case of this nature, given the possibility of political pressure being brought to bear on prosecutors, or on the media to discourage coverage of the issues at stake. Our strategy has therefore included a two-pronged effort to win broad political support for this action both inside and outside Spain.

Within Spain, the leading media outlets have paid relatively little attention to what has been happening in this former Spanish colony, reflecting generally cordial and flexible relations between the two countries and certain shared economic interests. This has created for APDHE and similarly minded organizations the need to support the case with a wider effort, to inform the general public about not only corruption in EG but also other abuses such as the systematic practice of arbitrary detention, persecution, and mistreatment, including torture and summary executions, of those seen as critical of the regime there.

To this end, APDHE has engaged in a range of activities aimed at drawing attention to human rights abuses in EG, including developing links with key Spanish media outlets, supporting protest campaigns, and doing what we can to raise international support for human rights defenders in EG. We coordinate our efforts with diaspora groups such as EG Justice, the Asociación para el Progreso de los Pueblos de Africa, and the Asociación para la Solidaridad Democrática con Guinea Ecuatorial, and we have also supported other efforts by EG civil society.

At the same time, we have sought to demonstrate that this is more than an effort to hold individual leaders to account, but also an effort to deliver remedies to the victims of the resulting violations of economic, social, and political rights. In this case, the victims comprise the bulk of the population of EG, who have seen their most basic rights violated as a result of the prevailing regime of corruption. Ensuring that the victims are acknowledged and compensated requires making the public aware of these violations—in terms of political suppression and deprivation of basic economic livelihood despite EG's oil wealth.

This has involved us in not only looking at the underlying crime upon which money laundering is predicated, but also examining the forward-looking question of how—presuming a successful outcome—to return the proceeds of corruption to benefit the victimized population of a country whose government is itself notoriously corrupt and abusive. Similarly, we have considered how best to wind up and close down business activities funded by the crime.<sup>47</sup>

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## Turning International Civil Society into an Anticorruption Investigator

More broadly, the EG case has promoted the growth of significant and productive cross-border links between a range of civil society groups—in a way that has, in turn, established civil society as a valuable ally for national prosecutors, whose investigative authority is by and large limited to their own country.

This has included exchanging information with groups elsewhere in Europe and the United States, such as Association Sherpa and Transparency International in France, which spearheaded the *Biens Mal Acquis* investigation into the Obiang family, and the International Centre for Asset Recovery at the Basel Institute on Governance, as well as supporting the development of anticorruption jurisprudence in Spanish and European law. In addition, the Open Society Justice Initiative has engaged a broad network of allies in Africa, and brought to the table its expertise in international efforts to link efforts to combat corruption and to compensate victims elsewhere.

This shared expertise, and the depth of knowledge developed by individual civil society groups in their efforts to develop a case, can in turn provide invaluable support for national prosecutors, who are rarely given adequate resources, or the international reach needed, to join the dots of international corruption.

## The Need for a Long-term Approach

Any attempt to investigate and prosecute major international corruption is by its nature complicated. The perpetrators rely on teams of well-paid lawyers who are expert in covering the money trail with screens of shell companies and indirect beneficiaries. National prosecutors have other cases to deal with, which may be less complex and less politically fraught. In our case, at least, without the pressure—and support—from civil society, the case would not exist. The costs of maintaining the pressure—and support—should not be underestimated.



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# STANDING DOCTRINE AND ANTICORRUPTION LITIGATION: A SURVEY

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## MATTHEW C. STEPHENSON

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While private parties have always played a role in anticorruption enforcement, for example by acting as whistleblowers or watchdogs, the pursuit of legal action in the courts against corrupt actors has usually been left to public bodies: prosecutors, anticorruption agencies, ombudsmen, and the like.<sup>48</sup> But in recent years, a range of private citizens and civil society organizations (CSOs) has become more active in going to court directly, bringing (or at least contemplating) a variety of anticorruption legal actions. Such actions can take a variety of forms. Alleged victims of corruption might sue for compensation, restitution, or other relief from corrupt government officials and private parties. In some instances, where the legal system permits it, private parties have sought, or may seek, judicial imposition of criminal penalties on corrupt actors. Private parties may also file suits challenging the legality of government decisions that were allegedly the product of corruption—sometimes seeking to invalidate allegedly unlawful government action or inaction. And sometimes private complainants might seek to compel government agencies to initiate enforcement proceedings against corrupt actors, when such enforcement has been withheld for allegedly unlawful reasons. This movement in the direction of more private anticorruption litigation is in keeping with the United Nations Convention against Corruption (UNCAC), which requires every member state to “take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage.”<sup>49</sup>

An important potential barrier to private anticorruption actions, however, is the doctrine of standing (known in some systems by the Latin term *locus standi*—“a place to stand”). In brief, courts will entertain only suits complaining of unlawful conduct by complainants who are legally entitled to do so. This inquiry usually (though, as we shall see, not always) involves determining whether the complaining party has a sufficiently direct and concrete interest in the subject of the lawsuit. If the complaining party lacks standing, the court will not hear the complaint, no matter how plausible the allegations of unlawful conduct. Standing doctrine is



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## Standing doctrine is of particular relevance to lawsuits challenging corruption, or failure to act against corruption...

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of particular relevance to lawsuits challenging corruption, or failure to act against corruption, because in many such cases it is difficult to demonstrate a direct connection between the defendant's unlawful conduct and an injury to the private would-be complainant.<sup>50</sup> It is therefore important for anticorruption activists hoping to use the courts to fight corrupt behavior to have a basic familiarity with standing doctrine, as well as a sense of the diversity of approaches to this area of law. Indeed, legal systems—even systems within the same legal “family” —vary quite a bit with respect to the doctrine of standing.

The purpose of this paper is to provide a brief overview of standing doctrine and its implications for private anticorruption litigation. The paper is intended to complement the other contributions in this volume, many of which touch on issues of standing in the context of particular cases or initiatives. The paper will proceed in four parts. Part I introduces the basic concept of standing and discusses some of the reasons why legal systems might (or might not) want to impose limits on the parties entitled to challenge unlawful behavior in court. Part II provides a brief, non-comprehensive survey of the approaches to standing in civil cases that different legal systems have adopted, in order to illustrate the significant doctrinal differences across systems and to suggest some implications of these doctrinal differences for private anticorruption litigation in the civil context. Part III considers the standing of private parties to initiate or to compel *criminal* actions, and also discusses some additional topics that, while perhaps not involving standing per se, are sufficiently related to mention. Part IV discusses how standing requirements may differ when the party bringing the challenge is a CSO, rather than an individual, business organization, or other entity. This topic is of particular importance to private anticorruption litigation, given the central role that CSOs have played, and will continue to play, in spearheading such action.

## WHAT IS STANDING DOCTRINE AND WHY DOES IT EXIST?

Although different legal systems organize their concepts somewhat differently, standing doctrine is generally distinguished from other potential restrictions on access to the courts in that standing doctrine focuses on the complaining party, rather than on the nature of the claim, the identity of the defendant, or the merits of the suit (though in practice it is not always possible to draw clean, sharp lines between these different considerations). The basic idea is that there may be limits on which individuals or entities are entitled to invoke the power of the courts to remedy an unlawful activity. Those with a sufficient interest in that allegedly unlawful activity have standing to bring a suit; those without a sufficient interest do not have the requisite standing, and the courts will not entertain their claims or provide judicial redress, no matter how egregious the alleged violations of the law.

## The damage that corruption does to a society is often quite difficult to connect to specific individual victims.

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How do courts decide whether a would-be plaintiff has a sufficient interest in the alleged misconduct to have standing to maintain a lawsuit? As subsequent sections of this paper will describe, there is a great deal of diversity across (and sometimes within) different legal systems in the answer to this question. Some systems have very liberal standing rules, which allow just about anyone who can claim a good-faith interest in the subject matter to initiate a lawsuit. Such systems are hospitable territory for anticorruption activists interested in using private litigation as a major component of their overall strategy.

Other systems, however, have much more restrictive standing rules, often requiring a would-be plaintiff to demonstrate that he or she was directly and personally injured by the defendant's allegedly unlawful conduct, and that this injury is particular and concrete, rather than broad, diffuse, abstract, or ideological. Such restrictive standing rules may pose challenges to the use of private litigation as part of an anticorruption strategy, because the damage that corruption does to a society is often quite difficult to connect to specific individual victims. This is not always the case—if a building collapses because an inspector took bribes to overlook substandard construction, or a business loses a contract because a rival paid off the procurement officer, or a corrupt minister embezzles funds from the state treasury and flees the country, then there may be identifiable plaintiffs (tenants in the building, the business that lost the contract, the state itself) who can show a direct, personal, concrete injury.

But corruption (whether grand or petty) often causes severe harms that are nevertheless diffuse, indirect, and widely shared: corruption may distort markets, worsen government performance, sap vital public programs of needed resources, marginalize and oppress those without connections to the ruling elites, and so forth. In this sense, anticorruption activists who want to initiate private litigation are often in a more difficult position than, say, CSO activists seeking redress for more traditional human rights violations, which usually have identifiable victims with identifiable injuries.

The case for liberal standing rules is intuitively appealing, perhaps especially to anticorruption advocates who are likely the principal audience for this volume. After all, if a defendant has broken the law, it seems straightforward (at least to many people) that someone who objects to that illegality should be able to go to court and get some sort of redress—at the very least, an order to stop the unlawful conduct, and perhaps some sort of penalty or other remedy. And while most people would probably find it sensible to limit standing in cases of purely private injury—if X breaches a contract with Y, then it should be up to Y to decide whether she wants to sue for damages—in cases of unlawful conduct that causes a public injury, many would maintain that any member of the public, or at least any member of the public who can demonstrate a good-faith concern about this particular sort of illegality, should be able to sue.

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Because a position in support of liberal standing rules is more intuitive (and, I should acknowledge, the position to which I am generally more sympathetic), it is perhaps worth spending a bit of time considering the possible justifications for imposing standing requirements that make it difficult for plaintiffs to bring lawsuits in cases involving illegal conduct with diffuse, general harms. Advocates for a more restrictive standing doctrine put forward a number of such justifications; most revolve, in one way or another, around concerns about the appropriate role of courts and litigation in addressing social problems.

For example, some maintain that although courts are relatively good at resolving cases that involve the infringement of legal rights held by individuals, and assigning liability for concrete injuries, courts are not terribly good at managing complex social problems, reforming complex institutions, or crafting remedies that balance conflicting political values. For this reason, the argument continues, courts should be reluctant to weigh in on cases where there is not an identifiable injured party with a concrete, individual interest—such as the infringement of an individual right—that the court can vindicate with a relatively simple judicial remedy.

A related but perhaps distinct justification for restrictive standing doctrines has been advanced in systems that endorse a separation of legislative, executive, and judicial powers. According to this (controversial) argument, the general enforcement of the law is an executive function that is the province of the executive branch; the judicial branch is concerned with redressing injuries to identifiable legal interests. So, the argument continues, if the legislature and the courts empower private parties to oversee the general enforcement of the law, out of the context of individual legal injury, they would effectively usurp executive branch authority, and this would be bad because (according to those who subscribe to this view) the executive branch's ability to decline to enforce certain laws aggressively is an important, valuable institutional feature of the political system.<sup>51</sup>

Another concern that may justify a more restrictive standing doctrine is simply the conservation of judicial resources. The number of individuals with a general interest in fidelity to the law is very large (potentially everybody), and many of the complaints they bring may ultimately be meritless. Allowing the actions to proceed to the merits stage is costly, consuming scarce judicial resources and imposing considerable burdens on the defendants (often government agencies, which may be challenged from all sides). Standing may be one tool that enables courts to more efficiently screen out many cases at the front end of the process, limiting the ability of parties to file frivolous (or, for that matter, non-frivolous but ultimately meritless) legal complaints. This concern may be especially acute in contexts where there are legitimate concerns about political adversaries using the courts to harass or damage one another; courts in such settings may prefer to remain above the fray as much as possible, limiting access to those who can show a specific harm to themselves, rather than those who accuse their opponents of any number of unlawful acts.<sup>52</sup> Indeed, as some commentators have put it, the most fundamental trade-off when crafting standing doctrine is between the desire to enforce the law and the desire to avoid excessive judicial interference in politics.<sup>53</sup>

In addition, courts and commentators have sometimes expressed concern that litigants who lack a direct, personal interest in the subject of the lawsuit simply might not do a very good job, and if they bungle the suit, there might be collateral consequences for other parties

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whose interests are ultimately more directly affected. Even collusive suits are a possibility, though there may be other effective ways to address that concern. The idea here is that, even if standing requirements may seem somewhat arbitrary, limiting access to the courts to those with a concrete interest in the outcome of the case may ensure more effective advocacy.

To be clear, I do not offer the above discussion as an endorsement (or, for that matter, as a rejection) of any of the proffered arguments for restrictive standing rules. Rather, I seek to give a sense of the tensions and trade-offs involved in determining which individuals have the right to invoke the power of the courts to redress unlawful conduct, including corruption and related activities. There is likely no single right answer to the question of which would-be plaintiffs ought to have standing, and as the remainder of this paper will show, different systems have resolved that question quite differently.

The above discussion may be relevant for anticorruption activists for an additional reason: as the subsequent sections will illustrate, in some countries standing doctrine has been the subject of proposed or actual reforms, and indeed the general trend around the world, particularly over the past 20 years, has been toward liberalizing standing doctrine (though there are a number of important exceptions to this trend).<sup>54</sup> Insofar as anticorruption activists want to participate in the push for further liberalization of standing doctrine, they will need to engage and address the reasons why some countries remain reluctant to do so.

## **STANDING TO SUE IN CIVIL CASES: A SPECTRUM OF APPROACHES**

Although some private anticorruption litigation seeks to impose criminal penalties on corrupt actors, to date most private anticorruption litigation, and most public interest litigation more generally, has involved civil suits. Sometimes these suits are brought against corrupt public officials, bribe-paying firms, or intermediaries (such as banks), seeking damages, injunctions, or other remedies. Civil suits may also be brought against the government; such suits may seek judicial review of government action (or inaction) that is allegedly tainted by corruption, or of the allegedly unlawful failure of the government to address corruption appropriately.

In order to maintain such suits, the would-be plaintiffs must establish standing, and as noted above, some countries have quite restrictive standing doctrines. The United States is a leading

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example. According to prevailing doctrine, the U.S. Constitution requires a would-be plaintiff in a U.S. federal court to establish that the plaintiff suffered a concrete and particular “injury-in-fact,” one that is fairly traceable to the defendant’s alleged conduct, and that a favorable judicial ruling could redress. Neither a general interest in enforcing the law nor an ideological or professional interest in the subject matter is sufficient to confer standing on private plaintiffs in the U.S. federal system.<sup>55</sup> And because the U.S. Supreme Court has grounded these requirements in the Constitution, they are not amenable to legislative revision.

On top of those constitutional standing requirements, U.S. federal courts have adopted additional standing requirements, or read such additional requirements into statutes. For example, even if a U.S. government agency’s alleged violation of a statute has caused a private party to suffer a sufficiently concrete injury-in-fact to satisfy constitutional standing requirements, that party still does not have standing to bring a legal challenge to the action unless she can show that the sort of injury she suffered is within the “zone of interests” that the statute at issue is intended to protect.<sup>56</sup> (That is, the plaintiff alleging violation of a federal statute must show not only that she suffered harm but also that this harm was of the sort the statute is intended to prevent.)

While the United States may have one of the most restrictive approaches to standing in the world—particularly because the U.S. Supreme Court has constitutionalized the core aspects of the doctrine, making it impossible to reform through ordinary legislation—a number of other countries have adopted similarly restrictive approaches. Germany, for example, has a narrow approach to standing, requiring a complainant to show a direct injury to a personal legal interest, and not allowing private groups to sue on behalf of collective public interests.<sup>57</sup> Nigeria—apparently influenced by the U.S. approach—has also adopted a uniform standing rule that requires the plaintiff to show some particular injury (actual or threatened) that differs in some special way from the injury to other members of the public.<sup>58</sup> Likewise, the People’s Republic of China (perhaps unsurprisingly) strictly limits access to the courts for public interest litigants: Chinese civil law requires a plaintiff to have a direct interest in the suit, and this “direct interest” requirement is construed narrowly.<sup>59</sup> Singapore also makes it difficult for non-governmental actors to pursue public interest goals through litigation, as Singaporean courts will confer standing only on plaintiffs who can show an injury to a private right, or else some kind of “special damage” particular to that plaintiff.<sup>60</sup> In these and other countries that adopt similarly restrictive approaches, public interest litigants (including anticorruption litigants) face daunting challenges. It is of course sometimes possible to identify a party who has suffered a sufficiently direct, personal injury due to corruption, but this is rare.

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**The United States may have one of the most restrictive approaches to standing in the world...**

At the other end of the spectrum, some countries have extremely liberal standing rules, at least when the plaintiff seeks to vindicate some public right. Spain and South Africa are leading examples. Spanish law grants legal standing to all Spanish citizens on issues involving the public interest, and—in stark contrast to the United States—petitioners need not show a direct injury to initiate a public interest suit, including a suit seeking judicial review of government action, or in certain cases (discussed more below) seeking to initiate criminal proceedings.<sup>61</sup> South Africa’s approach to standing is, if anything, even more relaxed, allowing standing for virtually all citizens on matters of public importance, whether or not the would-be plaintiffs can demonstrate particular injury or special interest in the subject matter.<sup>62</sup> A number of other countries appear to have adopted similarly broad approaches to standing, at least in public interest cases. For example, Colombia has a liberal standing doctrine that allows any citizen to bring a suit, even if that individual has no personal stake in the case,<sup>63</sup> and the Venezuelan Constitution allows a plaintiff to sue not only to vindicate a personal right or interest but also to vindicate a collective or public right or interest.<sup>64</sup> The Kenyan Constitution—though very new—also appears, at least on its face, to grant similarly broad standing rights.<sup>65</sup>

Another leading example of a country with very liberal standing rules—and which is therefore quite hospitable to public interest litigants, including anticorruption litigants—is India. The Indian situation is a bit more complex, however, perhaps due to the fact that India’s long and rich tradition of public interest litigation has given Indian courts more opportunities to refine (and complicate) the doctrine. On the one hand, the Indian Constitution contains provisions that allow for the initiation of public interest litigation, and Indian courts have construed these provisions very broadly, imposing relatively few standing barriers to public interest organizations and litigants.<sup>66</sup> And indeed, as another contribution to this volume shows, anticorruption activists have taken advantage of India’s liberal standing doctrine.<sup>67</sup>

At the same time, there are some important qualifications to this broad standing right. First, although the Indian Constitution allows a person or entity to bring a public interest suit even if that plaintiff has not been “injured” in the traditional sense, if there is some individual who *has* suffered a more traditional injury due to the allegedly unlawful conduct, and that individual does not want to seek relief, other entities have no standing to bring a lawsuit. Indian courts, however, have interpreted this limitation quite narrowly, so in practice public interest litigants rarely find it an obstacle.<sup>68</sup> Second, although Indian standing law is extremely liberal with respect to who may bring a lawsuit, the doctrine is somewhat more restrictive with respect to standing to seek *particular remedies*. For example, although a public interest litigant has standing to sue to compel a government agency to undo a decision tainted by corruption, that public interest litigant does not have standing to seek a judicial order that the defendant pay punitive damages for its misconduct. The explanation for this rule is that only those parties against whom the defendant acted with malice have standing to seek punitive damages.<sup>69</sup> (Some Indian scholars criticize this decision, arguing that the standing issue goes only to the court’s jurisdiction to hear the case, and once standing is established, the court should be able to award whatever legal remedies are available to redress the illegality.<sup>70</sup>) Third, even though all citizens in principle have an equal right to bring a suit alleging unlawful conduct against the public interest, in high-profile cases an Indian court may appoint an experienced lawyer as *amicus curiae* to represent the public, and once an *amicus* is appointed, no other public



interest organizations may intervene or formally take part in the proceedings (although they retain the ability to provide information and evidence to the *amicus*).<sup>71</sup>

In a somewhat similar vein, there are a few other countries that do not impose strict “injury-in-fact” or “direct interest” requirements but do impose other hurdles—some mild, others more significant—on plaintiffs seeking standing to vindicate some public or diffuse interest in court. In Guatemala, for instance, any person has standing to bring a suit on matters of general interest, but only if that person has the assistance of at least three attorneys.<sup>72</sup> And the Peruvian Constitution grants standing to bring constitutional challenges to (among others) any group of 5,000 citizens and to professional associations on matters concerning their fields.<sup>73</sup>

While India is an example of a country that generally has quite liberal standing rules, but with some important exceptions and qualifications, the Philippines is an example of a country that generally has more restrictive standing rules, but with some important exceptions and qualifications. To establish standing in Philippine courts, the plaintiff is usually required to show a “direct injury”—a requirement similar on its face to that found in Germany or the United States. However, Philippine courts have construed this requirement broadly and carved out important exceptions, particularly for cases involving the public interest. Most relevant to the anticorruption context, Philippine courts have adopted an expansive conception of “taxpayer standing” that a Philippine plaintiff can invoke to sue to restrain unlawful expenditure of public funds. The courts have also occasionally relaxed or eliminated the usual standing requirements in cases of so-called “transcendental importance.”<sup>74</sup> (The “transcendental importance” doctrine has been invoked for cases involving curfews and martial law; it is unclear whether it might be available for claims involving serious, high-level corruption as well. In one case, the court invoked the doctrine to consider a challenge to the creation of the Philippine Truth Commission, which was charged with investigating corruption in a prior regime.<sup>75</sup>) The doctrine on these qualifications or exceptions to the usual standing rules is not entirely clear, and as a result some commentators criticize the application of standing rules by Philippine courts as inconsistent and somewhat unpredictable.

Just as standing requirements may differ depending on the remedy sought, as in India, standing requirements may differ in cases seeking remedies against an individual party (such as a private person, private firm, or public official sued in his or her individual capacity), and in cases seeking judicial review of an official government action. The English approach is illustrative. In civil litigation seeking damages or similar remedies, the general rule under English law is that the plaintiff must have sufficient interest in the subject matter of the claim, which typically requires an invasion of a personal, legally protected right the plaintiff holds.<sup>76</sup> Of particular relevance to anticorruption suits, although English law recognizes a tort of “misfeasance in public office,” a plaintiff does not have standing to bring such a tort suit unless the plaintiff can show material damages because of the corrupt behavior in question.<sup>77</sup> Partly because of this (and given similar provisions of Scottish law), Transparency International’s U.K. chapter has declared that, in the corruption context, “there is no basis for civil society to bring private civil proceedings in the U.K.”<sup>78</sup> U.S. rules are similarly restrictive for these sorts of civil suits, but the systems diverge with respect to suits seeking judicial review of agency action; England’s rules are much more relaxed and flexible than those applied in U.S. federal courts. While U.S. courts apply the same injury-in-fact, causation, and redressability



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requirements to plaintiffs challenging allegedly unlawful agency action, an English citizen with a general or public interest in an agency action may seek judicial review of that action without such a showing, at least in cases of serious public importance.<sup>79</sup> This distinction in English law demonstrates that we need to be careful about generalizing too broadly about standing doctrine even within individual jurisdictions.

Finally, in addition to variation according to the identity of the defendant and the nature of the remedy sought, in some countries standing rules vary according to the subject matter of the lawsuit. It is not uncommon for a country to have a default standing requirement that is relatively restrictive, but to have statutes that broaden standing to seek judicial redress for violations of particular laws. This is more generally the case where standing doctrine is grounded in statutes passed by the legislature, rather than the constitution or judge-made common law. In Italy, for instance, the default statutory rule, established by the Code of Civil Procedure, requires the complainant to present a concrete rather than a hypothetical question, and to allege that the defendant violated a recognized right or interest; in making this latter determination, Italian courts focus on the legislative intent behind the statute the defendant has allegedly violated.<sup>80</sup> However, the Italian Parliament has modified these statutory default rules in particular contexts, liberalizing standing rules with respect to suits allegedly violating specific statutes, particularly (though not exclusively) in areas like labor rights and environmental protection.<sup>81</sup>

## STANDING TO BRING PRIVATE CRIMINAL COMPLAINTS

In many (perhaps most) countries, the standing of private parties to initiate, compel, or participate in criminal actions is more limited than it is in the civil context. Even countries with liberal standing rules for civil cases often adopt the view that the enforcement of criminal law is the exclusive responsibility of the government, and while private parties may provide information about alleged crimes, file complaints, or encourage public prosecutors to act, such private parties have no standing themselves to file a criminal complaint or to otherwise invoke the power of the courts to influence prosecutorial decisions. This is not universally true, however: in many countries, private parties do have standing to bring criminal complaints—to act as so-called “private prosecutors.”

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Spain's broad standing rights extend to criminal as well as civil criminal proceedings. Under Spanish law, any Spanish citizen can initiate criminal proceedings, and any non-citizen who is a victim of a crime can as well. Distinct provisions of Spanish law cover victims and non-victims: a crime victim is an *accusador particular*, while a non-victim who initiates criminal proceedings to vindicate the public interest is an *acusador popular*.<sup>82</sup> Prosecutions brought by an *acusador popular* do not require the permission or prior approval of the public prosecutor. Anticorruption CSOs have already taken advantage of the *acusador popular* procedure. In one particularly notable case, the Asociación Pro Derechos Humanos de España (in cooperation with the Open Society Justice Initiative) filed a criminal complaint acting as an *acusador popular* targeting a series of transactions involving Equatorial Guinea and the Spanish Banco Santander. As of the time of this writing, the investigation is still ongoing, but indictments are expected.<sup>83</sup>

England and a number of jurisdictions that inherited the English legal system, including Australia, Hong Kong, and Singapore, also allow private prosecutions: any person (including any business or non-governmental organization) has the right to initiate and conduct a criminal prosecution, regardless of whether the crime directly affected him or her.<sup>84</sup> The English courts have described the availability of private prosecutions as “a valuable constitutional safeguard against inertia or partiality on the part of authority.”<sup>85</sup> Nonetheless, the scope for private prosecution in England is much more limited than in Spain. First, the Crown Prosecution Service (CPS) may take over any private prosecution and may discontinue proceedings if it does not believe there is a realistic prospect of conviction (though not just because the CPS would not have brought the case itself).<sup>86</sup> Second, even though the default rule is that any person can initiate a private prosecution, some statutes—most importantly in the present context, including the U.K. Bribery Act—require the prior consent of the Director of Public Prosecutions.<sup>87</sup> Also, and of particular importance for asset recovery actions, the only compensation private prosecution can pursue is compensation for direct personal injury or loss, and only when there is no real question as to those who have suffered the loss, and how much; private prosecution cannot pursue recovery of proceeds of crime.<sup>88</sup> Other countries that have private prosecution provisions on the books impose even more significant limitations on these actions, which sharply limit their usefulness for anticorruption activists. In Egypt, for instance, private parties may lodge a criminal case without going through the public prosecutors only if the party filing the case is the actual victim of the crime, the crime in question is a misdemeanor rather than a felony, and the crime was committed domestically rather than abroad. Even more significant for anticorruption litigants, private prosecutions alleging criminal charges relating to public officials' performance of their work cannot proceed without permission of the public prosecution authority.

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**In many countries, private parties do have standing to bring criminal complaints—to act as so-called “private prosecutors.”**

Although relatively few countries follow Spain and England in granting private parties broad rights to act as private prosecutors, a larger number of countries have a formal procedure through which a private party can seek to compel the public prosecutor to pursue a case, or at least to publicly justify a decision not to do so. While these mechanisms do not relate directly to the doctrine of standing, they do provide an avenue to pursue redress for an individual who might under other circumstances pursue a private prosecution. Therefore, I will discuss them briefly.

Switzerland and Spain have provisions for the filing of a “denunciation”—essentially the filing of a criminal complaint, but with greater formality and with a greater consequent obligation on the public prosecutors than a system without this mechanism would require. In Spain, the public prosecutor is under an independent legal obligation both to proceed with an investigation if there is credible evidence of crime, and to prosecute a case once there is enough evidence to convict, regardless of the prosecutor’s wishes (and, in the case of a public criminal offense, regardless of the victim’s wishes). For this reason, citizens can compel action by the public prosecutor simply by filing a sufficiently credible complaint—a *denuncia*.<sup>89</sup> And in Switzerland, although the Prosecutor’s Office has a monopoly on criminal enforcement actions, any person or entity (including any CSO) can file a criminal complaint—a *dénonciation pénale*. Unlike in Spain, the filing of a credible *dénonciation* in Switzerland does not obligate the prosecutor to pursue the case, and complaining parties have no right to appeal a prosecutorial decision.<sup>90</sup> However, the filing of a *dénonciation* does require the public prosecutor to formally reply, and to explain a decision not to pursue the case if that is what the prosecutor chooses to do. Scottish law achieves a similar result in a slightly different way: Scottish law nominally allows for private prosecutions, but only if the public prosecutors do not bring charges, and only if the private prosecutor secures the prior approval of the public prosecutor; requests for such approval are almost always refused, but the request does obligate the public prosecutor to give reasons for not bringing charges, in a manner somewhat similar to how the filing of a *dénonciation* in Switzerland obligates the public prosecutor to give a formal explanation if it chooses not to pursue the case.<sup>91</sup>

Some countries permit private parties to sue to compel the public authorities to initiate or pursue a corruption investigation (or any other matter) if the responsible government agencies have decided not to do so. In most, but not all, countries it is usually very difficult for private parties to compel prosecutors or other government enforcement agencies to take such action. Obstacles to a lawsuit seeking to compel prosecutors to pursue criminal investigations or similar enforcement actions generally fall into three categories. The first is standing doctrine, the main focus of this paper. In many countries, as I have shown, parties may not bring a

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suit unless they can show some direct personal injury. In the case of a challenge to non-prosecution of alleged corruption, a restrictive standing rule would require the complainant to show that the prosecutor's failure to pursue the case caused the plaintiff a direct personal injury, typically a high barrier. Second, many countries impose doctrines of non-reviewability that are distinct from doctrines of standing. For example, in the United States, a regulatory agency's decision not to bring an enforcement action is presumptively non-reviewable, even if the party filing the complaint can establish standing by showing a direct personal injury derived from the non-enforcement decision.<sup>92</sup> (Proponents of such non-reviewability doctrines typically argue that these doctrines avoid entangling courts in thorny and politically charged questions of agency enforcement priorities and resource allocation decisions.) Finally, even when a private party has standing to challenge a government non-enforcement decision, and even when that non-enforcement decision is judicially reviewable, it simply may be hard to win on the merits because the courts in many countries are reluctant to second-guess a prosecutor's judgment or good faith.

A nice illustration of this last point (as well as the distinction between these different obstacles) is the British case involving a suit brought by The Corner House, an anticorruption CSO, challenging the Serious Fraud Office's decision to drop its investigation into allegations that the British multinational BAE Systems had bribed senior government officials in Saudi Arabia. As this paper has shown, although English courts apply relatively restrictive standing requirements to ordinary civil suits, standing requirements are quite liberal for challenges to allegedly unlawful agency action, and The Corner House's standing to bring the case was never questioned. Furthermore, in contrast to the prevailing U.S. doctrine, the U.K. courts treated the SFO's decision to drop the investigation as presumptively reviewable. But The Corner House lost nonetheless, in part because of judicial reluctance to second-guess the prosecutors.<sup>93</sup>

## SPECIAL STANDING RULES FOR CSO PLAINTIFFS?

Many public interest lawsuits are brought not by (or not only by) individuals but by non-governmental civil society organizations with an organizational interest in the subject matter of the lawsuit. This is especially true in the anticorruption context, where a range of CSOs, in both wealthy and developing countries, have taken a leading role in pursuing judicial remedies for corrupt activities. In many jurisdictions, the standing rules that would apply to an individual public interest plaintiff differ in cases where the plaintiff is a CSO. One way to think about why this might be so is to consider the proffered justifications for restrictive standing rules discussed in Part I of this paper. It's at least plausible to assert that some of these justifications do not apply, or do not apply in the same way, when the plaintiff is a CSO rather than an individual or a firm.

Again, looking across countries, we see a range of approaches to standing for CSOs. The United States, which takes a very restrictive approach to standing generally, also takes an extremely restrictive approach to standing for CSOs and other representative organizations. Although such organizations may bring lawsuits in U.S. federal courts, they may do so only on behalf of their members, only if their members (or at least one member) would have independent standing to sue, and only if the organization is sufficiently representative of

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In many jurisdictions, the standing rules that would apply to an individual public interest plaintiff differ in cases where the plaintiff is a CSO.

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those members. In other words, in the United States, a CSO bringing a lawsuit, and seeking standing as a representative organization, is subject to *additional* standing requirements, rather than relaxed standing requirements.<sup>94</sup> The United States is not alone in this approach: other countries, such as Nigeria and Egypt, require CSOs to meet (at minimum) the same standing requirements that would apply to individual litigants.

By contrast, some other countries—even some that adopt restrictive standing requirements for individual litigants—relax standing requirements for CSOs with a particular interest in the subject of the lawsuit. Italy, as noted above, has liberalized its standing rules in certain substantive areas (most notably labor rights and environmental protection), and has done so principally by granting standing not to citizens in general but to specific organizations (labor unions and certified environmental protection CSOs, respectively).<sup>95</sup> Argentina is another example, and may be particularly notable because in most other ways Argentina's standing law is very similar to that of the United States (requiring the plaintiff to demonstrate concrete injury-in-fact, causation, and redressability).<sup>96</sup> Despite this similarity, Argentinian law allows an organization to sue to vindicate the interests it was designed to pursue, without requiring that the organization be acting as a representative of individual members who would have standing to sue in their own right, based on some concrete personal injury.<sup>97</sup> In other words, the usually strict requirement of a particular, non-ideological, non-abstract injury is not applied to CSOs in Argentina, even though it is applied to individual plaintiffs. Similarly, Sri Lanka generally requires that a plaintiff show a "sufficient interest" in the subject of the suit, but Sri Lankan courts have held that a CSO with a dedicated mission germane to the issues raised in the suit can satisfy that requirement.<sup>98</sup> And in the Netherlands, the General Administrative Law Act allows an organization to bring a legal challenge to an administrative act so long as the organization's goals and interests (which may be distinct from the individual interests of its members) relate to the challenged actions.<sup>99</sup>

Other countries have staked out a variety of intermediate positions, somewhat relaxing standing requirements for CSOs but regulating more assiduously which CSOs are entitled to avail themselves of these more liberal rules. Here, the French approach is particularly interesting, and especially salient for anticorruption CSOs. In France, the Public Prosecutor's Office has a default monopoly over criminal prosecutions and investigations, but in certain special types of cases, CSOs are qualified to file criminal complaints on behalf of the general public. In 2010, in a case brought by the CSOs Transparency International France (TI-F) and Sherpa, the *Cour de Cassation* ruled that TI-F was qualified to file a complaint on behalf of citizens injured by corruption, even though at the time there was no explicit statutory right under French law for CSOs to bring private prosecutions in relation to corruption matters.

The basis of the *Cour de Cassation*'s standing ruling was an interpretation of the "personal and direct damage" provision of the French Criminal Code, which French courts have interpreted to allow a CSO to bring a complaint if the offense alleged directly impairs the interests the association is organized to defend. The *Cour de Cassation*'s 2010 ruling was limited to the standing of TI-F in that particular case, but in 2013 the French Parliament affirmed and expanded the recognition of CSO standing in anticorruption cases by enacting a special provision that allows approved anticorruption CSOs to file complaints on behalf of the general public in cases of corruption (including foreign bribery), influence peddling, money laundering, and concealment.<sup>100</sup> But this authorization is subject to an important limitation: an anticorruption CSO must be certified to avail itself of this special authority to file a complaint on behalf of the public. Such certification requires that the CSO has existed for at least five years, and that during those years the CSO has publicly committed the majority of its resources to fighting corruption. Additionally, the CSO must establish that it has a relatively large membership, that it is independent (including from funding sources), and that its members manage it on an ongoing basis.<sup>101</sup> The certification must be renewed every three years, and the Minister of Justice can revoke it.

Bangladesh, which also has a generally liberal approach to CSO standing, imposes a different kind of restriction on which CSOs have standing to bring public interest lawsuits: a Bangladeshi CSO may sue on behalf of its members alleging a general injury, but only CSOs unique to Bangladesh may do so; international NGOs, and the Bangladeshi branches of international CSOs, are not eligible for this relaxed standing requirement.<sup>102</sup>

Whereas France makes it easier for CSOs to file complaints in anticorruption than most other jurisdictions, Brazil is perhaps an example of the opposite, with higher barriers to anticorruption action than to other kinds of complaints. Brazil has been described as a "friendly haven for litigating collective public interests,"<sup>103</sup> in part because Article 1 of the 1988 Brazilian Constitution supports broad access to the courts,<sup>104</sup> and in general Brazil recognizes CSOs as legitimate parties to lawsuits, without any causation or injury-in-fact requirements, so long as the NGO is at least one year old and is dedicated to pursuing specific public interests germane to the subject of the suit.<sup>105</sup>

However, Brazil restricts standing—including standing for CSOs—in the context of anticorruption law far more than in relation to other complaints. For instance, under the Brazilian Administrative Misconduct Act—the principal statute regulating misconduct, including corruption, by public officials—standing is limited to the entity that suffered damage due to the misconduct, and to the public prosecutors (who act as representatives of the public interest). The public prosecutors also have the exclusive standing to seek an injunction to freeze the defendants' assets; the injured entity may not seek this remedy. Many Brazilian scholars have criticized the public prosecutors' monopoly over anticorruption lawsuits, but the Brazilian government has resisted proposals to expand standing to permit CSOs to bring suits under the Administrative Misconduct Act.<sup>106</sup> Likewise, under Brazil's new Anticorruption Act, which focuses on bribe-paying companies, standing to bring an action lies with the public authorities, not with private parties or CSOs. And another Brazilian law allows any citizen to bring a lawsuit to nullify certain government acts that are harmful to the government, including government contracts tainted by corruption—but that law extends standing to bring such a suit under this law only to individual citizens, not to CSOs.

## CONCLUSION

It is important for anticorruption CSOs and other activists—including non-lawyers—to have a basic familiarity with the doctrine of standing for at least two reasons. First, as private litigation becomes a more central feature of the anticorruption agenda, advocates will need to carefully assess both the promises and the limits of this approach, and to make strategic choices about how to invest their resources. Existing rules on access to the courts—of which standing doctrine is one important component—will inevitably have implications for those decisions. Second, standing doctrine is neither uniform across jurisdictions nor static across time; it is the subject of ongoing debate, revision, and reform. Anticorruption activists are already participants in certain important efforts to liberalize standing doctrine, and as private litigation becomes a more central feature of their strategy, this engagement will become all the more significant. An appreciation of the range of approaches to standing doctrine, as well as an appreciation (though not necessarily an endorsement) of the legitimate concerns that sometimes favor more restricted access to the courts, is important for effective participation in these conversations.

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# INTERNATIONAL IMMUNITIES AND THE FIGHT AGAINST GRAND CORRUPTION

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## MAUD PERDRIEL-VAISSIÈRE

*Formerly the executive director of Sherpa, Maud Perdriel-Vaissière is a French lawyer with extensive experience in the areas of asset recovery and anticorruption.*

In recent years, there have been a number of high-profile instances of grand corruption featuring then-incumbent heads of state amassing massive wealth and secreting it abroad. These include Ben Ali of Tunisia, Hosni Mubarak of Egypt, the now-deceased Muammar Gaddafi of Libya, and, more recently, Viktor Yanukovych of Ukraine.

Most often, enforcement actions on the part of foreign authorities followed the same *modus operandi*: hardly had these rulers been deposed than the foreign states which had been receiving their ill-gotten gains started to freeze the assets and to investigate related corruption allegations. No doubt such initiatives are welcome; one may nevertheless wonder why they were not launched earlier.

The inertia of foreign enforcement authorities is all the more regrettable given that since 2003 and the adoption of the United Nations Convention against Corruption (UNCAC), there is an international consensus that corruption—and, in particular, political corruption—is a matter of global concern.

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Since...the adoption of the United Nations Convention against Corruption (UNCAC), there is an international consensus that corruption—and, in particular, political corruption—is a matter of global concern.

The UNCAC covers a broad set of corrupt behavior on the part of public officials, including embezzlement, passive bribery of foreign public officials, trading in influence, abuse of functions, and illicit enrichment. Further, it contains key provisions aimed at facilitating and enhancing the pursuit of foreign corruption and the recovery of related illegal proceeds: For example, Article 23.2.(c) requires states parties to criminalize money laundering, irrespective of the place where the predicate corruption offense was committed. Likewise, Article 54.1 encourages states parties to allow the confiscation of assets of foreign origin on the grounds of money laundering or any other appropriate offenses.

The general idea behind those provisions was to ensure that there will be no more impunity for corrupt officials, or safe haven for their ill-gotten gains. In other words, even if perpetrators of corruption might be safe at home, the money laundering frequently associated with their conduct will be pursued abroad.

However, even though the UNCAC lays out a comprehensive framework to support international anticorruption and asset recovery enforcement actions, it is almost silent on how to deal with the immunity privilege enjoyed by senior state officials before foreign courts—the single most important legal obstacle to foreign enforcement.<sup>107</sup> And yet, grand corruption usually takes place at the top levels of the public sphere.

Does that mean that nothing can be done to combat grand corruption? Not exactly. As emphasized by the World Bank-United Nations Office on Drugs and Crime Stolen Asset Recovery Initiative (StAR), “where there is political will there is a legal way.”<sup>108</sup> But, clearly, international corruption hunters should be aware of how the rules on international immunities operate to be able to play by them.

## THE RULES OF THE GAME

Under international law, heads of state and certain other high-ranking officials are, by virtue of their office, entitled to personal immunity from criminal jurisdiction in foreign domestic courts. The rule, which results from customary international law, has been recently asserted in explicit terms by the International Court of Justice (ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (sometimes referred to as the Yerodia case), in which the Democratic Republic of the Congo sought successfully to block the prosecution by Belgium of Foreign Minister Abdoulaye Yerodia Ndombasi on charges of inciting genocide in 1998 (before the creation of the International Criminal Court). At the time, the ICJ ruled that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.”<sup>109</sup>

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## The Substantive Scope of Personal Immunity

Also known as immunity *ratione personae*, personal immunity is broad since it prohibits foreign states from the exercise of criminal jurisdiction against certain high-ranking officials while they are in office. In other words, whenever a senior public official is entitled to personal immunity, no criminal proceedings may be brought abroad against him or her no matter if the illegal conduct was perpetrated prior to taking the office, nor if it was perpetrated in a private capacity and bears no relation with his or her official functions, no matter how serious the illegal conduct is, nor if said conduct is prohibited under international (criminal) law.<sup>110</sup>

Various domestic courts have dismissed cases involving the commission of international crimes (i.e., war crimes, crimes against humanity, and crimes of genocide) by incumbent heads of state on the ground that immunity *ratione personae* bars foreign criminal proceedings.

For example, in 2001, the French Supreme Court reversed a decision rendered by a Court of Appeal that had authorized the prosecution of Colonel Muammar Gaddafi of Libya for the terrorist bombing of UTA Flight 772 in 1989 on the ground that, while in office, heads of state enjoy immunity from criminal prosecution.<sup>111</sup> In January 2004, an English district judge reached a similar conclusion and rejected an application for the arrest and extradition of President Robert Mugabe of Zimbabwe to stand trial for torture.<sup>112</sup> Likewise, on February 6, 2008, the Spanish Investigative Judge Andreu Merelles issued an indictment charging 40 Rwandan military officials with serious international crimes including genocide, crimes against humanity, war crimes, and terrorism perpetrated from 1990 to 2002 against the civilian population, and primarily against the members of the Hutu ethnic group. The indictment, however, ruled out the prosecution of Paul Kagame, arguing that he could not be prosecuted as long as he holds the position of president of Rwanda.

Regarding grand corruption, personal immunity has been also explicitly recognized by the Swiss Federal Tribunal in a judgment rendered on November 2, 1989 in relation to a request for mutual legal assistance from the United States involving then-President Ferdinand Marcos of the Philippines. The United States sought bank documents in Switzerland for the purpose of a criminal case against Marcos who, according to the American enforcement authorities, had used his official position to steal public monies and had laundered those illicit funds through the purchase of artworks and real estate investments in New York. In a famous *obiter dictum*, the Swiss Federal Tribunal stated that “Heads of state enjoy total criminal immunity in foreign states in respect of any conduct which should ordinarily fall within the jurisdiction of those states.”<sup>113</sup> (That decision did not ultimately assist Ferdinand Marcos because the government of the Philippines eventually lifted his personal immunity.)

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To date, no criminal proceedings have been brought successfully against foreign officials entitled to personal immunity. Hence the importance of determining who they are.

In fact, to date, no criminal proceedings have been brought successfully against foreign officials entitled to personal immunity.<sup>114</sup> Hence the importance of determining who they are.

## The Subjective Scope of Personal Immunity

Although it was well established in customary international law that heads of state and heads of government enjoyed personal immunity while in office,<sup>115</sup> there was no such established state practice regarding ministers for foreign affairs, which is why the ruling of the ICJ has attracted some criticism. The ICJ ruling was all the more problematic because the wording used in paragraph 51 of the judgment—“such as”—left open the possibility that, beyond heads of state, heads of government, and ministers for foreign affairs, other high-ranking officials might also qualify for such immunity.

And, in fact, this broad interpretation of the subjective scope of personal immunity was confirmed in at least two rulings of British courts. In 2004, British judges declined to issue an arrest warrant for General Shaul Mofaz (then defense minister of Israel) and recognized his personal immunity, giving a functional rationale similar to that which the ICJ gave for the immunity of a minister of foreign affairs.<sup>116</sup> Likewise, in 2005, British judges declined to issue an arrest warrant for Bo Xilai (then minister for commerce and international trade of China) stating that “under the customary international law rules Mr. Bo has immunity from prosecution as he would not be able to perform his functions unless he is able to travel freely.”<sup>117, 118</sup>

In contrast, the French Supreme Court refused to grant personal immunity to Teodorin Nguema Obiang, then second vice president of Equatorial Guinea (who had been charged by French investigating magistrates with money laundering in connection with corruption, embezzlement, breach of trust, and misuse of corporate assets) on the ground that “his functions are distinct from those of a head of state, a head of government or a minister for foreign affairs.”<sup>119</sup> The issue of immunity was not yet solved, as shortly afterwards, and with the blatant intention of hampering the proper course of the proceedings in France, Teodorin Nguema Obiang was appointed *first* vice president of Equatorial Guinea.<sup>120</sup> Despite this nomination, French examining magistrates ordered Teodorin Nguema Obiang to be referred to the Criminal Court of Paris to face trial and, as expected, Teodorin Nguema Obiang claimed that he enjoyed personal immunity due to his position as vice president.

In an outstanding ruling rendered on October 27, 2017, the Paris trial court rejected his claim and convicted him of money laundering in connection with embezzlement and other corruption offenses and sentenced him to three years in prison; a fine of €30 million; and forfeiture of his Paris townhouse, its luxury furnishings, and the automobiles, artworks, designer suits, and other extravagant trappings of his now-concluded Paris lifestyle.<sup>121</sup> In fact, the court ruled that he was not head of state and that the defense had not, at any point, provided supporting evidence to substantiate the defendant’s claim that his functions as vice president were genuine and effective (*effectivité des fonctions*).

From that reasoning, it may be inferred that claims for personal immunity originating from foreign high-ranking officials (other than heads of state, heads of government, and ministers for foreign affairs) must be considered by taking into account the actual functions (rather than

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Given that grand corruption is typically committed during the tenure of the office (and is facilitated by it), it is critical to determine in which category such corrupt acts may fall: should they qualify as official acts (covered by functional immunity) or should they be considered private acts?

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the formal title as it appears on paper). Such a requirement is indeed critical in cases, such as the Teodorin Nguema Obiang case the court was addressing, where it is highly suspected that the international rules on immunities are being abused and are not invoked to ensure the effective performance of high-ranking officials' functions on behalf of their home country. The decision—which is the first conviction of an *incumbent* senior foreign official (but not entitled to personal immunity) for corruption-related charges—is not final yet, as Teodorin Nguema Obiang has filed an appeal (see further discussion below).

Even though it is hard to draw firm conclusions from state judicial practices, let us note that the United Nations' International Law Commission,<sup>122</sup> which is currently studying the issue of immunity of state officials from foreign criminal jurisdiction, proposes to limit the subjective scope of immunity *ratione personae* to the head of state, head of government, and minister for foreign affairs.<sup>123</sup>

## The Temporal Scope of Personal Immunity

Personal immunity (or immunity *ratione personae*) applies only during the tenure of the office. Once they are no longer office holders, former heads of state, heads of government and, *a fortiori*, ministers for foreign affairs no longer enjoy immunity *ratione personae*. After the tenure of their office, they (only) enjoy—as any other state officials—functional immunity, also known as immunity *ratione materiae*. This only prohibits the exercise of criminal jurisdiction in relation to acts performed by foreign state officials (both serving and former<sup>124</sup>) in an official capacity.

This rule, which also derives from customary international law,<sup>125</sup> was further reaffirmed in the *Yerodia* case: “[A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity”<sup>126</sup>

In other words, functional immunity only applies to official acts. Therefore, criminal proceedings may be brought against former heads of state, heads of government, and ministers for foreign affairs (as well as against any other foreign state officials, both serving and former) for acts committed during the tenure of their office whenever the alleged criminal conduct was perpetrated in a private capacity.

Given that grand corruption is typically committed during the tenure of the office (and is facilitated by it), it is critical to determine in which category such corrupt acts may fall: should they qualify as official acts (covered by functional immunity) or should they be considered private acts?

Two important decisions rendered in the U.S. seem to indicate that illicit enrichment and related corruption offenses do not qualify as acts performed in the exercise of official functions and, therefore, cannot be covered by functional immunity.<sup>127, 128</sup>

First of all, in 1962, a United States Court of Appeals asserted in explicit terms that political corruption-related crimes cannot be regarded as official acts. In fact, American judges determined in a case concerning the extradition of former Venezuelan President Marcos Peres Jiménez, who had taken up residence in Miami after his exile, that “acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained (...) were not acts of (...) sovereignty. (...) each of these acts was ‘for the private financial benefit’ of [Jimenez]. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it” (*Jiménez v. Aristeguieta*, 311 F.2d 547; 5th Cir. 1962, December 12, 1962).<sup>129</sup>

The U.S. also convicted a former high-ranking official for corrupt acts perpetrated during the tenure of his office.<sup>130</sup> In November 2009, former Ukrainian Prime Minister Pavel Lazarenko was sentenced by a U.S. court to eight years in prison after his conviction for his role in laundering \$30 million in extortion proceeds.<sup>131</sup> According to the press statement released by the U.S. Attorney’s Office of the Northern District of California, “Pavel Lazarenko misused his office to extort tens of millions of dollars from a Ukrainian citizen, lied to the people of Ukraine about his assets, and abused our banking system in an attempt to establish a safe haven in the United States.”<sup>132</sup> To our best knowledge, this was the first and only conviction of a *former* foreign high-ranking official for money laundering in connection with political corruption.

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Generally, the longer it takes for enforcement authorities to institute proceedings, the smaller the chance they will manage to secure a criminal conviction against the defendant and/or recover the assets.

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The fact that both cases were either initiated or supported by the countries of origin—which may be interpreted as an implicit decision to waive immunity—is of no relevance here. In fact, there was no need for any sort of immunity waiver given that courts ruled that the acts in question were not acts of state covered by immunity. (Such an immunity waiver would have been needed had the acts been considered “acts of state.”)

This restrictive approach to functional immunity is welcome, making it theoretically possible to investigate and prosecute foreign corrupt high-ranking officials after they leave office. The challenges increase, however, when the individual refuses to leave office—and many of the most egregious offenders manage to remain in power for decades.

More generally, the longer it takes for enforcement authorities to institute proceedings, the smaller the chance they will manage to secure a criminal conviction against the defendant and/or recover the assets. Indeed, as a result of the passage of time, the expiration of the statutes of limitation may well reduce the possible avenues for prosecution (i.e., some of the assets may have been acquired through criminal activities for which former heads of state cannot be prosecuted anymore because of the expiry of the relevant limitation period); supporting evidence may not be available any more (lost or destroyed); and potential witnesses may have passed away (or their memories may have faded). As for the corrupt assets, they will certainly have been concealed through layers of anonymous corporations and trusts, likely in multiple jurisdictions, and commingled with legitimate funds, making them even more difficult (if not impossible) to recover. In fact, to date, most corrupt senior political figures have managed to escape justice; enjoying their ill-gotten gains in total impunity.

So, these are the rules of the game. But what can international corruption hunters do about them?

## PLAYING BY THE RULES OF THE GAME: SOME PROMISING APPROACHES

Although personal immunity is broad, there are still ways for addressing ongoing corruption at the highest levels of the government.

### Don't Go after the Big Fish

One possible avenue for addressing grand corruption is not to target all the corrupt agents but just those who are not entitled to personal immunity. Indeed, given that the subjective scope of personal immunity is limited to “certain high-ranking officials,” all other foreign state officials enjoy only functional immunity—a privilege which does not seem to prevent criminal proceedings in matters of political corruption as recently confirmed with the *Biens Mal Acquis* case already discussed above (see “France’s *Bien Mal Acquis* Affair: Lessons from a 10-Year Legal Struggle”).



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The Swiss Federal Tribunal has ruled on various occasions that immunity cannot be invoked to oppose the seizure of assets that are held in the names of frontmen or offshore companies.

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In that proceeding, the main subject of the initial investigation was the son of Equatorial Guinea's President Obiang, Teodorin Nguema Obiang, who for years served as the minister of forestry, fisheries and the environment in that country—a position that did not give him personal immunity from foreign prosecution. In response to the proceedings in France, Teodorin Nguema Obiang and his lawyers have made every attempt to escape justice (and to protect his ill-gotten wealth) by abusing the international law rules on immunity.

First, and most likely inspired by the “Falcone precedent,”<sup>133</sup> Equatorial Guinea vainly attempted to get Teodorin Nguema Obiang appointed deputy permanent delegate of Equatorial Guinea to UNESCO<sup>134</sup>—a position that comes with personal immunity from the criminal process. Then, in May 2012 (shortly after the seizure of his assets in France), he got himself appointed second vice president of the Republic of Equatorial Guinea, with the blatant intention of being granted personal immunity. Fortunately, as noted above, the French Supreme Court ruled that the functions of a second vice president “are distinct from those of a head of state, a head of government, or a minister for foreign affairs,” thus, preventing Teodorin Nguema Obiang from being granted personal immunity.

However, being a foreign state official, Teodorin could still potentially enjoy functional immunity. The French Supreme Court had, therefore, to determine whether his alleged misconduct could be covered by this privilege, and in the same decision, French judges ruled that he could not claim functional immunity because the alleged acts (money laundering in connection with corruption, extortion, and embezzlement offenses) are of a private nature. While this determination is not new (cf. the U.S. precedents discussed above), this is, as far as the author knows, the first time that such a determination has involved an *incumbent* foreign official. That outstanding decision paved the way for Teodorin's conviction (as detailed above).

**Another group of agents worth targeting are non-state actors.** Indeed, it is well-established that non-state actors—including family members<sup>135</sup>—do not enjoy immunity from criminal jurisdiction (either personal or functional). And yet, for anonymity purposes, it is not uncommon for corrupt agents to hold assets through relatives, frontmen, or companies. In that regard, Switzerland seems to be an interesting venue to pursue proceeds of grand corruption when they have been laundered using frontmen and/or corporate vehicles. Indeed, the Swiss Federal Tribunal has ruled on various occasions that immunity cannot be invoked to oppose the seizure of assets that are held in the names of frontmen or offshore companies.

In one case, a Swiss investigating judge ordered the seizure of bank records pertaining to an account held by an offshore company. Omar Bongo (then president of Gabon), who claimed to be the ultimate beneficial owner of the bank account in question, challenged the seizure arguing that the account was protected by his personal immunity. The Swiss Federal Tribunal ruled that “an individual who chooses to shield his identity through the use of corporate vehicles is bound by the legal representation that he has himself created and is therefore not entitled to make claims in relation to that property”<sup>136</sup>

In another case involving the Republic of Kazakhstan, the Swiss Federal Tribunal ruled that “assets held by state officials through corporate vehicles are presumed to be managed in a private capacity which implies that they are not protected by the immunity privilege.” The facts were as follows: In 1999, a Swiss magistrate froze \$84 million in bank accounts held by offshore companies that were controlled by senior Kazakh officials, including the head of state. The Republic of Kazakhstan, which claimed that the accounts were official government accounts, denounced the freezing order as a violation of its sovereign immunity.<sup>137</sup> The Swiss Federal Tribunal asserted that sovereign immunity applies only in relation to genuinely sovereign acts (*acta jure imperii*)<sup>138</sup> and determined that the bank accounts were held by offshore corporations for opaque purposes so that the funds could not be regarded as sovereign funds deposited for legitimate public purposes.<sup>139</sup>

We do not know how different the decision would have been if the claim had been brought by the head of state rather than the sovereign (i.e., the head of state invoking his personal immunity, for which there is no distinction between the nature of the acts in question). The reasoning of the judgment, however, suggests that a similar logic might further apply to any corruption case confronted with the assertion of personal immunity to protect assets held by individual frontmen or anonymizing nominee corporate entities.

We should further note that while the Institute of International Law recognizes full personal immunity for heads of state, it admits nevertheless that “When serious doubt arises as to the legality of the appropriation of a fund or any other asset held by, or on behalf of, the Head of State, nothing in these provisions prevents the State authorities of the territory on which those funds or other assets are located, from taking provisional measures with respect to those funds or assets, as are necessary for the maintenance of control over them while the legality of the appropriation remains insufficiently established.”<sup>140</sup>

In other words, while nothing prevents the pursuit of assets held by relatives, it is further assumed that personal immunity enjoyed by high-ranking officials should not prevent the pursuit of assets held through frontmen and corporate vehicles and, in any case, should not restrict the taking of temporary measures in relation to said assets.

## Seek Civil Forfeiture of Assets rather than Criminal Conviction

Confiscation of ill-gotten gains usually takes place as part of sentencing following conviction at trial (known as criminal confiscation, also referred to as conviction-based confiscation).

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Non-conviction based confiscation is a powerful tool to address grand corruption since it is available in situations when the offender is beyond the reach of criminal justice...

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A rising number of jurisdictions, however, further allow for confiscation outside criminal proceedings: in fact, non-conviction based confiscation (also referred to as civil forfeiture or *in rem* forfeiture in some jurisdictions) allows the confiscation of the property on the basis that the property is tainted or dirty (i.e., it constitutes the proceeds or instrumentalities of unlawful activities). This process is different from conviction-based confiscation in that the action is against the property, not against the person (that is why the proceeding is called *in rem*), and it does not require prior criminal conviction of the offender.

Non-conviction based (NCB) confiscation is a powerful tool to address grand corruption since it is available in situations when the offender is beyond the reach of criminal justice, such as when a prosecution might be thwarted by the statute of limitations or because the accused has died or has absconded, but also, possibly, where confronted with international immunities. In fact, there is at least one case that may support this assumption: is a civil forfeiture case brought by the U.S. Department of Justice (DOJ) against the assets of Teodorin Nguema Obiang alleged to be the proceeds of corruption laundered in the United States. When the launch of the proceedings was officially announced by the DOJ in October 2011, Teodorin was minister of forestry, fisheries and the environment in Equatorial Guinea; in May 2012 he was designated second vice president of Equatorial Guinea; but as far as we know, the question of immunity was never raised in the course of the proceedings and DOJ ultimately reached a settlement with Teodorin which involved the surrender of more than \$30 million worth of his ill-gotten gains.<sup>141</sup> That case, and, in particular, the absence of immunity claims, tends to indicate that immunity does not apply to civil forfeiture cases (at least in the U.S.).<sup>142</sup>

This assumption is confirmed by StAR, which notes in a publication dedicated to NCB forfeiture that “because an NCB asset forfeiture regime is not dependent on a criminal conviction, it can proceed regardless of death, flight, or any immunity the corrupt official might enjoy.”<sup>143</sup> This makes perfect sense given that such proceedings are *in rem* (they target the assets, not the individual) but also because the forfeiture of tainted assets does not prevent the proper functioning of official functions—which is the very reason immunities were established.

Although a civil forfeiture proceeding does not involve a penal conviction (i.e., recognition of guilt), still, it may ultimately lead to the confiscation of ill-gotten gains and, therefore, prevent corrupt high-level officials from enjoying the proceeds of their crimes.

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# ANTICORRUPTION LITIGATION IN THE SUPREME COURT OF INDIA

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## ARGHYA SENGUPTA

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Corruption by public officials in India—ministers, bureaucrats, and other officers of state—is rampant. In Transparency International’s Corruption Perceptions Index of the most corrupt countries, India ranks 94 out of 177.<sup>144</sup> In the largest corruption case of the past two decades, involving corruption in the allocation 2G telecoms licenses in 2008, the government auditing commission estimated that the exchequer lost as much as Rs. 1,76,000 crores (\$29 billion) in revenue.<sup>145</sup> At the end of 2012, there were 7,023 cases pending trial under the Prevention of Corruption Act, the focal legislation for penalizing corruption by public servants.<sup>146</sup>

It is unsurprising that the public perception of corruption has given rise to enormous discontent. A massive anticorruption protest movement was launched in 2011 with unprecedented public support cutting across regional, caste, and class lines.<sup>147</sup> The Aam Aadmi Party (Common Man’s Party), born out of this protest movement, came to power in the Delhi Legislative Assembly in 2013 in its first electoral contest, an unprecedented political achievement, with the rallying cry of sweeping the corrupt politician from public office.<sup>148</sup>

The Indian Supreme Court became a major site of anticorruption activism in India in the late 1990s, with anticorruption non-governmental organizations (NGOs) bringing litigation to a strongly counter-majoritarian court. The court had begun to entertain public interest litigation (PIL) petitions in the early 1980s, relaxing the strict rules of standing, allowing representative actions as well as actions by concerned citizens for issues of public interest.<sup>149</sup> While it had primarily heard cases related to social causes and human rights issues in its early period,<sup>150</sup> corruption-related complaints began to rise, with fragile coalition governments increasing NGOs’ reliance on the court.<sup>151</sup> Often comprising wafer-thin majorities, governments in the 1990s were widely seen as unresponsive and fleeting, incapable of curbing corruption, comprised of officials interested primarily in partaking in the spoils of office. A responsive court thus presented a viable avenue for effective activism against grand corruption, defined here as corruption by any person in the service or pay of the government that constitutes a violation of the Prevention of Corruption Act, 1988.

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... corruption-related complaints began to rise, with fragile coalition governments increasing NGOs' reliance on the court.

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Remedies the Supreme Court has awarded in public interest litigation cases brought by NGOs regarding grand corruption can be classified into three types: first, orders of the court that seek to undertake systemic overhaul of institutions in order to reduce the incidence of corruption; second, judgments that mandate ongoing judicial oversight of the criminal prosecution pertaining to the alleged acts of corruption; and third, traditional remedies of quashing and declaring that any executive action tainted by corruption is illegal and consequently stripped of any legal basis, without any compensatory action being ordered.<sup>152</sup> Parts I, II, and III of this paper describe and analyze these three types of remedies. On this basis, Part IV gleans lessons for NGOs, both in India and other jurisdictions, regarding effective ways courts can be used to combat grand corruption.

## OVERHAULING ANTICORRUPTION INSTITUTIONS

The Supreme Court's decision in *Vineet Narain v Union of India* in 1998 became the foundation of the judicial forum's ability to function as a bulwark against corruption in high places.<sup>153</sup> The seizure of certain diaries had disclosed a close nexus between high-ranking politicians, bureaucrats, and criminal elements in society. Funds were being clandestinely channeled to public officials for several purposes unauthorized by law. The Central Bureau of Investigation (CBI), a specialized investigative body, possessed considerable evidence to this effect<sup>154</sup> but had not investigated. Various anticorruption NGOs and other interested parties filed several public interest litigations calling on the Supreme Court to oversee the CBI's investigation and ensure a fair and expeditious process; an investigative journalist filed the lead petition.<sup>155</sup> The court grouped these and other cases, accusing the CBI of inaction in all of them in *Vineet Narain*.

The court's 1998 decision ordered sweeping institutional reforms at CBI so as to ensure effective investigation of cases involving holders of public office. Three facets of the court's approach are noteworthy. First, it adopted an innovative procedure, called the *writ of continuing mandamus*.<sup>156</sup> Through this, it asserted its own power to monitor investigation till a police report pertaining to the investigation is filed in court for the judicial officer to take cognizance (charge-sheet),<sup>157</sup> and to pass interim orders at regular intervals to continually hold the investigative agencies accountable. Second, it appointed the counsel for the petitioner as an *amicus curiae* ("friend of the court") and allowed NGOs and all other interested parties to make representations to the court through the brief. Third, it provided an expansive interpretation of Article 32 and Article 142 of the Constitution to effect major structural reform of the state anticorruption machinery. Declaring the non-investigation of allegations against important persons a violation of Article 14's equality clause,<sup>158</sup> the court used its powers to enforce fundamental rights (Article 32[2]<sup>159</sup>) and to do complete justice (Article 142)<sup>160</sup> to pass several

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directions to the executive to restructure the CBI and ensure its accountability. Specifically, it directed the appointment process and working conditions of the director of the CBI so as to afford him maximum insulation from the government and consequently substantial operational independence. At the same time, the accountability of the CBI was to be vested in the Central Vigilance Commission, the nodal vigilance body of the government of India. Apprehending that this commission might also come under governmental pressures, it directed that the state convert it into a statutory body with key legal protections to safeguard its own independence.

The government followed these directions, thereby redesigning the architecture governing anticorruption investigation and prosecution in India. The Central Vigilance Commission became a statutory body with a bipartisan process of appointment of commissioners. Such bipartisan commissioners would in turn constitute the majority of the committee that would select the director of the CBI. These were the key first steps in the court's overall process of de-politicizing anticorruption investigations in India.

Recognizing the threat of interference in anticorruption investigations, the court adapted its procedures to allow for constant monitoring of such investigations as a means to fundamentally transform the nature of the investigative machinery. This marked a radical departure from traditional, one-time remedies in public law.<sup>161</sup> An unstated premise of this innovation was the belief that judicial supervision could substantially remedy any irregularities in corruption-related investigation, hardly a foregone conclusion.

As a means to establish the competence of the judiciary in monitoring investigation and issuing frequent orders to ensure effectiveness and expediency, the court broadened the office of the *amicus curiae*. Ordinarily a respected senior practitioner who would assist the court by acting as an interface between the court and interveners who had knowledge about the progress of investigation and systemic reforms undertaken, the court began to allow any person interested in intervening the right to argue before the *amicus*, making the court's monitoring function truly participatory.<sup>162</sup> The Supreme Court had begun to permit petitioners who had "sufficient interest" and who were not "meddlesome interloper[s] or busybody[ies]" to submit *amicus curiae* in the early 1980s.<sup>163</sup> Applying the relaxed rule to anticorruption issues supported the court's goal of monitoring investigations and ordering systemic reform as a means to elicit independent corroboration of status reports placed before it by the investigating agency and the government.

As the next section demonstrates, several NGOs have made use of this process as court-monitored investigations have become more numerous given the continuing interference in the functioning of investigating agencies by the government.

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## MONITORING INVESTIGATIONS

Experience demonstrates that in the absence of safeguards, agencies such as the CBI can exploit long delays in investigation and trial, to influence police and witnesses and hide or dispose of evidence.<sup>164</sup> For grand corruption cases under the Prevention of Corruption Act, special statutory judges with the power to try these offenses address, in part, the problem of delays.<sup>165</sup> However, the state police or the CBI lead the investigation prior to their referral to a special statutory judge, and delays may be sufficient to be a barrier to justice. The court in *Vineet Narain* intended to remedy this problem.

A 1996 case exemplifies the problem of delay. In *State of Bihar v Ranchi Zila Samta Party*,<sup>166</sup> the Ranchi Zila Samta Party applied to the court to ensure that investigation into an animal husbandry scam was carried out without interference.<sup>167</sup> The then-chief minister of Bihar, a prominent public figure, as well as other high-ranking politicians and bureaucrats in the eastern state of Bihar, had allegedly fabricated accounts in order to embezzle large amounts of public funds. The political party alleged that the local police, hitherto charged with investigation, were lax in filing reports against the accused, and that constant interference from their political masters, the state government, had blocked the investigation. The High Court transferred the investigation to the CBI. The question before the Supreme Court was the validity of the High Court's decision and how the investigation ought to be supervised if it was valid.

In its decision, the court held that conducting investigations in a manner that instills public confidence is a matter of public interest and thus within the domain of judicial intervention through public interest litigation. Further, the state police are answerable to the government under investigation and therefore only an independent agency could ensure such confidence. Thus, it held that ordering the CBI to investigate these matters was valid and that the chief justice of the High Court of Patna would monitor the investigation, requiring the CBI to report from time to time. The chief justice would himself, or through an appropriate bench, issue directions and ensure fair and expeditious investigation into the allegations.

Court-monitored investigations into grand corruption cases have become an institutional feature of anticorruption litigation. The case of *Samaj Parivartan Samudaya v State of Karnataka*, decided in 2012, exemplifies this.<sup>168</sup> In the southern state of Karnataka, several leaders of the political party in power, including Chief Minister B. S. Yeddyurappa, were implicated in corrupt dealings. The question before the Supreme Court was whether to expand the scope of a CBI investigation already underway into illegal mining in Karnataka and Andhra Pradesh to include possible misuse of public office by Yeddyurappa's close relatives. The petitioner was a registered civil society organization that had filed an intervention application in the public interest before the Central Empowered Committee (CEC), the nodal body the Supreme Court had set up to monitor its orders on preventing environmental degradation, in which connection the ban on illegal mining was originally passed.<sup>169</sup> The application made two specific claims: that the actors had made an irregular sale of land to a mining company, and that the company had made a large donation to an education society it had created in recompense. The court found that these claims were *prima facie* valid and that the local police were unlikely to make "a fair, unbiased and proper investigation" because they answered to the chief minister.<sup>170</sup> The court accepted the recommendation of the CEC and ordered the CBI to investigate these claims.



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In *Samaj Parivartan Samudaya*, the court held that the basis for judicial intervention was to “ensure that the rule of law prevails over the abuse of process of law.”<sup>171</sup> In this connection it sought to address two types of abuse: the state authorities’ actual abuse of power in allowing illegal mining contrary to the previous order of the court, and the likely abuse that would ensue from the lack of fair investigation given the complicity of public officials. Only investigation by the CBI under the continuous watch of the court would clearly reveal the extent of abuse and ensure that those guilty of corruption were called to account, irrespective of their stature.

A more recent case firmly entrenched judicial authority over the investigation process in cases where government interference would otherwise hinder it as a matter of law.<sup>172</sup> In 2014, *Manohar Lal Sharma v Principal Secretary and others*<sup>173</sup> required the Supreme Court to monitor investigation in cases pertaining to alleged irregularities in allocation of coal blocks by the government of India through a public interest litigation brought before it by the petitioner, an advocate of the court. In its decision, the court clarified the broad range of circumstances that would “compel” it to intervene in an investigation in the “public interest,” to include an investigation of corruption hindered by any circumstances, including the investigating authority’s deficiency of “enthusiasm” due to “pressures” and the government’s reluctance to comply with an investigation<sup>174</sup> To demonstrate these grounds, public interest petitioners have to provide evidence, presumably circumstantial, of the investigating agency or the government hindering investigation.

*Manohar Lal Sharma* put the question before the court as to whether, in court-monitored investigations, the CBI would require the prior approval of the central government before instituting a preliminary enquiry, as the Prevention of Corruption Act had mandated in all cases registered under it.<sup>175</sup> The purpose of such approval is to protect honest public servants from being subject to frivolous or motivated investigation. The court deemed its monitoring an automatic safeguard against such harassment and deemed prior approval of the government unnecessary. Further, it concluded that allowing the central government to statutorily withhold sanction for an investigation would defeat the entire rationale for a court-monitored investigation.

Unfortunately, ongoing reform by the Supreme Court has not made court-monitored investigations as successful as the judges likely hoped in the 1990s. The judges expressed as much in 2014, almost two decades after the court’s decision in *Vineet Narain* termed the CBI the executive government’s “caged parrot.”<sup>176</sup> Judicial monitoring has functioned as the salve the investigative mechanism needs on an ongoing basis to ensure impartiality and fairness of the process. Yet India’s levels of corruption have changed little, according to Transparency International.

A key challenge for a court in monitoring an investigation is to ensure that its interim orders do not affect the right of the accused to a fair trial. Though in law, monitoring of an investigation extends only up to the filing of the charge-sheet before the magistrate who will conduct the trial,<sup>177</sup> in practice there is a risk that any interim court orders passed in the course of monitoring the investigation may influence the subsequent trial. In 2014, for instance, former Minister of Telecommunications A. Rajah, who had been arrested in connection with the 2G spectrum scandal, alleged that the continuous monitoring of the investigation had prejudiced his right to fair trial.<sup>178</sup> The court must take such objections seriously and mold its interim orders so that they have relevance to the investigation alone. Conversely, if the evidence collected after the best efforts of the investigating agency suggests the lack of a triable case against the accused, the monitoring court should not be hesitant to close the investigation. So far no instance of this having happened has come to the knowledge of the author; the court's lack of diligence in this matter threatens to render the entire system unconstitutional.<sup>179</sup>

## SUPPLEMENTING COURT MONITORING WITH TRADITIONAL REMEDIES

The Supreme Court has supplemented the use of the novel remedy of *continuing mandamus* to monitor investigation and overhaul anticorruption institutions with the traditional public law remedy of quashing a decision alleged to be illegal owing to corruption or misfeasance. A prime example is the case relating to the irregularities in the 2G spectrum scandal. In 2012, the Centre for Public Interest Litigation, an NGO, approached the Supreme Court of India to determine the legality of the Ministry of Telecommunications' use of the first-come-first-served method of allocation.<sup>180</sup>

While respecting the principle that the court would not ordinarily pronounce judgment on fiscal policies of the state by substituting its judgments for expert opinions, the court in its decision in *Centre for Public Interest Litigation v Union of India* underlined that it was always open to testing the legality of such opinions. On this basis, it found that the first-come-first-served policy of allocation favored those who have access to privileged information and therefore falls foul of the equality clause of the Constitution. Further, it found the minister had shown a clear intention to favor certain parties in the implement of the policy. The court therefore issued a severe indictment, declaring the policy unconstitutional, cancelling all licenses the Ministry had issued, and mandating a fresh allocation process, by auction.<sup>181</sup>

Unlike monitoring investigations and reforming anticorruption institutions, an order to cancel licenses is firmly within judicial legitimacy and competence, being a standard remedy in administrative law. However, the order stripped the licenses of third parties who had been allotted spectrum, even in the absence of any accusation that they had adopted corrupt means to obtain them. This caused these businesses significant economic loss and led to considerable criticism of the judgment for breaching the law-policy divide.<sup>182</sup> Critics argued, with some merit, that allowing post-facto judgments to undo the effects of a policy that has already been implemented creates uncertainty that could be harmful to economic growth. However, the state must balance costs to innocent third parties against the benefits of setting a firm precedent against self-serving policies and their corrupt implementation. The order has

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served as a severe precedent for all public officials and private parties open to engaging in corrupt practices to secure favors. Not only would criminal investigations ensue for the acts, but also the benefits of such acts would not accrue as envisaged.

A more complex question about the court's use of traditional remedies to address corruption arose in 1996. *Common Cause v Union of India*<sup>183</sup> centered on 15 gas pump allotments from a minister's discretionary quota alleged to have been given to friends, relations, and important persons following no criteria whatsoever. Quashing the allotments, the court held that discretionary allotment of government largesse must follow a rational, non-discriminatory policy. It also asked the minister to show cause to prevent criminal proceedings for criminal breach of trust and civil proceedings for damages against him. After hearing his reply, the court ordered him to pay Rs. 50 lakh (Rs. 5 million) as exemplary damages for misfeasance involving public largesse.<sup>184</sup> However, in review three years later, the court recalled the damages on the grounds that the public interest petitioner had no standing to be awarded damages. Although it had ordered the minister to pay damages in his personal capacity, not from state funds,<sup>185</sup> it noted that the state could not pay damages to itself.<sup>186</sup>

The reasoning of the court in recalling its damages order is questionable. Apart from the fact that the objection that the state could not pay damages to itself suggests the court was ignorant of its own intent, the doctrine of standing relevant to the case, which is very liberal, relates to the petitioner having sufficient interest to adjudicate the matter. It should automatically follow that the court has the power to grant the remedy necessary to overturn the illegality brought to judicial notice. In fact, exemplary damages were to be paid to the government exchequer, not the petitioner.

Regardless of errors such as the court made in *Common Cause*, quashing and declarations have been overall effective means for the court to deter future acts of corruption. By combining new remedies with these traditional approaches, the court has become the epicenter of anticorruption activism by NGOs in India. Yet as the court navigates the distance between an apolitical dispute resolution forum and a political actor, actively intervening and overseeing systemic solutions, it is constantly negotiating its own role in upholding the rule of law and promoting good governance in the public interest vis-à-vis the other branches of government. As one sign of this negotiation, the court has refused to award damages for misfeasance even though Indian constitutional law provides for such damages,<sup>187</sup> while making frequent use of *mandamus*. Arguably this contradiction suggests the court is checking itself to not overreach

in its endeavor to secure the rule of law. It is performing a careful balancing act, pushing the envelope far enough to secure compliance but not so far as to turn the executive into an adversary. The court provides key lessons for effective anticorruption litigation by NGOs, discussed in the concluding section.

## CONCLUSION

Litigation concerning grand corruption before the Supreme Court of India has benefitted from an extant trend in Indian jurisprudence and an emerging trope in Indian politics. From the 1980s, the Supreme Court had relaxed rules of *locus standi*, as a result of which NGOs, concerned citizens, and even lawyers, as long as they were public-spirited and pointing out public wrongs, could bring such matters to the attention of the court. The migration of public interest causes from social justice and human rights issues in the 1980s to concerns of the middle class in the 1990s and 2000s brought corruption cases before the court more often and with considerable visibility. At the same time, public disaffection with grand corruption was soaring, making it a high-octane political issue. Thus, decisions of the Supreme Court that sought to hold public figures accountable for allegedly corrupt acts had an immediate resonance among the people. The image of the court as a populist institution, creatively shaping remedies in order to curb the menace of corruption which recalcitrant governments had failed to tackle, only bolstered public support for such judicial activism.

It is thus unsurprising that these litigations were largely successful in enforcing political accountability for public figures. The Karnataka Chief Minister B. S. Yeddyurappa, who was implicated in the mining scandal in the state, was forced to resign from office and later from his political party; A. Raja, the minister of telecommunications in the government of India, resigned in the wake of allegations of impropriety in the 2G spectrum scandal and strong words from the Supreme Court. However, as far as legal accountability for such acts is concerned, evidence of the court's success is mixed. The application of principles of administrative law has meant that decisions made pursuant to illegalities have been quashed. At the same time, while continuous monitoring of investigation has ensured strict interim accountability (i.e., regular orders monitoring investigations, leading to arrests and filing of police reports), the conversion of such orders into trials and, further, convictions is rare. Data from the Association of Democratic Reforms, a civil society organization, shows that out of 543 members of Parliament in the 2009 Lok Sabha (Lower House of Parliament), 162 had criminal cases against them. Only three of these cases had resulted in conviction; the rest remained pending. Further, only two MPs had cases registered under the Prevention of Corruption Act, 1988, and in only one of these cases had there been a conviction.<sup>188</sup> Two *prima facie* inferences can be drawn from this: first, despite the wide prevalence of grand corruption, actual registration of cases against holders of public office was low; second, cases against holders of public office, whether under the Prevention of Corruption Act or otherwise, were subject to delays and rarely ended in conviction.

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The mixed record of legal accountability suggests the need for a qualitative study into when it pays for an NGO to litigate grand corruption issues in India. It is undeniable that a responsive Supreme Court that has relaxed rules of standing and ordered wide remedies makes litigation an attractive prospect, and that the very fact of such litigation holds public figures accountable for their actions. But NGOs need to consider closely the conditions needed to convert such litigation into a successful trial and systemic reform. Specifically, a comparative study across three subject areas where *continuing mandamus* is used widely by the Supreme Court of India—environmental protection, human rights protection, and anticorruption monitoring of investigation—needs to be undertaken. Such a study would reveal NGOs' ability to hold the state and public figures accountable on an ongoing basis through litigation and ascertain the usefulness of other NGOs participating in the follow-up process. Such a study would help to make the focus of litigation by NGOs in corruption issues more targeted, thereby building on extant successes in holding public figures accountable.

The challenge to anticorruption activists around the world is to use the case of India to determine the optimal mode of using courts to fight the world's fight against grand corruption.

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# LESSONS FROM *QUI TAM* LITIGATION IN THE UNITED STATES

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## DAVID KWOK

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*Qui tam* litigation is a distinctive form of private litigation, allowing a private party (known as a “relator”) to sue “on behalf of the king,”<sup>189</sup> or the government. In the United States, *qui tam* litigation today exists primarily under the False Claims Act, a statute forbidding fraud against the federal government. If a private party discovers that a company has been defrauding the federal government, the private party can litigate against the company and receive a share of the penalties. *Qui tam* actions have been credited with tremendous growth in prosecutions for fraud.

As this article will lay out, the history of *qui tam* in the United States reveals that the overall success of the legislation rests on a few key ingredients. First, the U.S. system relies heavily upon a well-developed, responsible executive branch of government to handle prosecution. The fate of private litigation, in which whistleblowers bring litigation in cases where the government has not decided to pursue public prosecution, suggests the crucial importance of this role. Second, it relies on a cooperative private bar. Third, the independent and predictable U.S. judiciary maintains the division of responsibility between federal prosecutors and private litigants and provides an independent check on government behavior.

The article will go on to propose improvements over the U.S. system that would be likely to support the success of a *qui tam* system in the absence of the ingredients that have been crucial in the United States. These largely consist of supporting whistleblowers by reducing the uncertainty they face and providing them greater anti-retaliation protection.

History also suggests that countries should have modest expectations for growth in *qui tam* litigation, once instituted; even with a prior well-established civil litigation system, it may take five to 10 years to see a substantial volume of *qui tam* cases.

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## THE HISTORY OF QUI TAM IN THE UNITED STATES

Reflecting the influence of British common law, the United States has a long history of private enforcement of law, and *qui tam* litigation is one of the set of tools.<sup>190</sup> The early British common law system focused almost exclusively on private litigation—there was no public prosecutor or government police force. For example, if a shopkeeper found herself the victim of a robbery, she would have to investigate and pursue the robber herself. This reliance on private litigation resulted in underenforcement; victims were either ineffective or insufficiently motivated to pursue offenders. The presence of unpunished offenders was an ongoing risk to the public. One response to this underenforcement was *qui tam* litigation, rewarding private parties who would aid the king by pursuing offenders. *Qui tam* litigation was available in both courts of “law” and courts of “equity”—what would today be known as criminal and civil litigation.

The United States did not adopt *qui tam* litigation as broadly as the British. Most of the modern U.S. experience stems from the False Claims Act (FCA), a statute addressing fraud against the federal government. The False Claims Act was originally passed in 1863 during the American Civil War, when concerns about private companies selling sawdust labeled as gunpowder to the Union army prompted passage. The provision gives relators incentive to act as private enforcers, because they receive a minimum percentage of the penalty fraudulent military suppliers paid to the federal government. The guidelines for imposing penalties in the statute put them at treble the damages.

The FCA permits both civil and criminal sanctions, but the *qui tam* provisions apply only to civil sanctions; a relator cannot file criminal charges. If the government intervenes in a *qui tam* case, however, it may choose to bring criminal charges in addition to the civil sanctions.

## MODERN FCA PROCEDURE

Today, any person can file a *qui tam* suit against a defendant; the courts stay and seal all *qui tam* actions immediately upon initial filing. Neither the public nor the defendant knows of the filing, and the lawsuit cannot progress until the federal government reviews it. By statute, the government has 60 days to investigate and make a decision regarding intervention. As a practical matter, courts routinely grant the government time extensions. The government typically requires more than a year to investigate.

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Most of the modern U.S. experience stems from the False Claims Act (FCA), a statute addressing fraud against the federal government.



If the federal government chooses to intervene, it takes over the lawsuit and handles the litigation. The government intervenes in roughly a quarter of *qui tam* cases. The relator receives a portion of the final penalties against the defendant but has the sole role of witness in the case.

If the federal government declines to intervene, the statute permits it to unilaterally dismiss the lawsuit and foreclose any relator action, but it rarely exercises that power. In the absence of either action by the federal government, the relator can proceed with her lawsuit against the defendant. If she attempts to settle or dismiss the action, she must obtain government consent.

The original FCA did not give the federal government as much power as it has now. This primacy of Department of Justice (DOJ) choice came about because the U.S. Congress became suspicious of abusive *qui tam* tactics. In the mid-20th century, a relator filed a *qui tam* action based on information that the DOJ already knew and was utilizing in a criminal action. The relator was not disclosing new allegations or information against the particular defendant. Congress revised the FCA to foreclose such parasitic cases, requiring relators to provide information that the government did not already know.

The FCA fell into disuse. The revisions made it too difficult for relators to file *qui tam* actions. The federal government possessed a tremendous amount of information, and it was easy for defendants to secure dismissals of *qui tam* actions based on evidence that someone within the federal government had prior knowledge of the alleged fraud. Congress amended the FCA to help address some of these problems by reducing the restrictions on relators.

The present system still follows the primacy of provision of information. First, the FCA still prohibits *qui tam* actions based solely on information that the government is already using in litigation against a defendant, and it also prohibits *qui tam* actions based upon publicly disclosed information. For example, an individual learning about corporate wrongdoing on a public news program cannot file a *qui tam* action against that corporation. It also prohibits *qui tam* actions based upon government reports or hearings, except if the relator herself discovered the wrongdoing and informed the government report or media.

Relators can receive as much as 30 percent of the civil recovery, which can be substantial given the treble damages provisions in the statute. Civil penalties also include \$5,500 to \$11,000 in fines per false claim. So, if a court determines that a defendant's fraud resulted in \$3 million in damages, which trebled is \$9 million, and levied \$1 million in fines for a total of \$10 million, the relator could receive as much as \$3 million.

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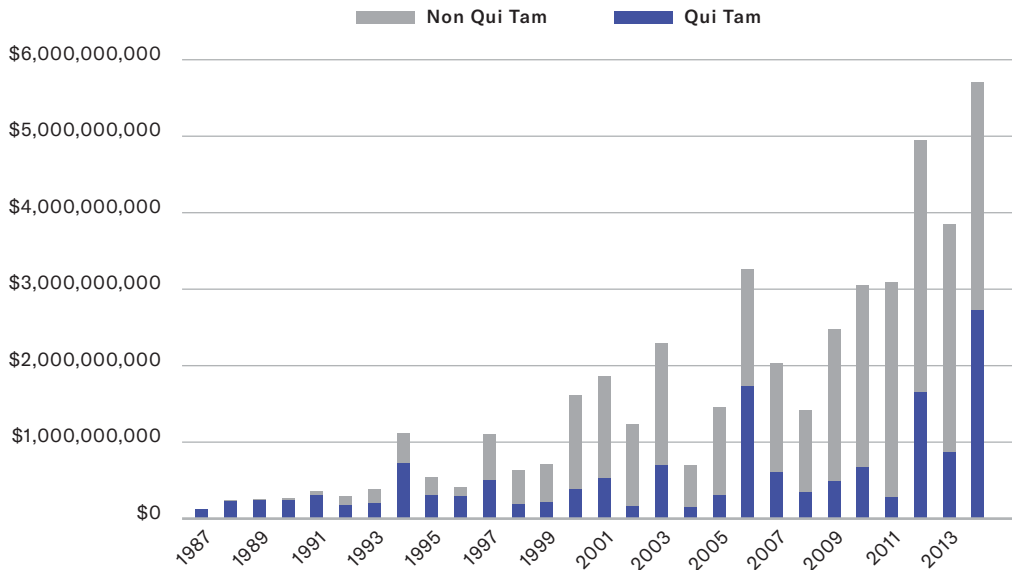
The majority of *qui tam* cases today center on government-provided health insurance—that is, Medicare and Medicaid fraud.

Contrary to *qui tam*'s beginnings in defense contractor fraud cases, the majority of *qui tam* cases today center on government-provided health insurance—that is, Medicare and Medicaid fraud. One possible explanation is that government healthcare spending has grown tremendously, thus increasing the opportunity for fraud. A separate potential explanation is that the healthcare industry is more fragmented and competitive than the defense industry. Consolidation in the defense industry may make defense employees more cautious in becoming whistleblowers or relators, as they may fear an inability to obtain future related employment. In contrast, the fragmented healthcare industry has numerous potential employers, and whistleblowers may be more confident in their ability to find future employment.

## EFFECTIVENESS OF THE U.S. SYSTEM

Measured by dollar recoveries, U.S. *qui tam* litigation under the FCA appears successful. In the past few fiscal years, *qui tam* litigation has led to approximately \$3 billion in FCA recoveries per year, generally dwarfing non-*qui tam* recoveries under the FCA.

**FCA Settlements and Judgments in USD (Non-Inflation Adjusted) by Fiscal Year**



The FCA *qui tam* process also appears to be a success from a cooperation perspective. One concern about private enforcement is the possibility that public enforcement could decline in response—government agents might slack or be reassigned. However, the evidence suggests that government agents are heavily invested in successful cases and are not reducing efforts to identify fraud in response to relator efforts.<sup>191</sup>

The fact that roughly 95 percent of non-intervened cases fail to obtain any recovery suggests the important role of the federal government in making *qui tam* legislation successful. Private, independent litigation against defendants is in fact highly unsuccessful.

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## One concern about private enforcement is the possibility that public enforcement could decline in response...

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The reasons for this disparity in effectiveness have not been resolved. Relators' attorneys often advise clients to dismiss a case if they are unsuccessful in obtaining government intervention, so no jury looks at the facts, leaving us with virtually no evidence as to case quality. One possibility is that the government intervenes in all of the good cases; thus, the remaining cases are of poor quality and we should not be surprised that most of those remaining cases fail to recover anything. A second possibility is the remaining cases are of good quality, but they are more difficult and the government and the relator's attorney recognize this and do not litigate the case. Another possibility is that the negotiating power of the federal government is driving the success—because the federal government has such great leverage against private businesses, businesses feel compelled to settle cases in which it has intervened. Therefore, government intervention itself, rather than case quality or difficulty, determines outcomes. The private cases may have merit, but the defendants do not fear private litigants and therefore refuse to settle. A fourth possibility is that courts draw strong negative inferences from the fact that the government did not intervene, thus making non-intervened cases more difficult procedurally, even if their factual basis is still strong.

Apart from the known problem that private cases find little success, the evidence of success is limited in many ways. As with most white-collar offenses, there is little information available regarding underlying offense levels. For example, if the overall levels of fraud against the federal government have been rising since 1986, the rise in FCA actions since 1986 might follow that trend. We therefore have little insight as to whether the FCA is successfully reducing levels of fraud against the federal government under a deterrence theory.

Moreover, nearly all FCA cases involve settlements or dismissals; only a few go to trial each year, even if the government intervenes. As a result, we have very little independent evidence of the quality of most *qui tam* cases. There have been allegations that some settlements are actually sweetheart deals in which the government levies a light fine against serious fraud because of the importance of the company. There is also evidence that the government does not make intervention decisions based solely on the merits of the case.

Without independent evaluation, perhaps the largest empirical challenge involves the legitimacy of non-intervened cases. These cases constitute the majority of *qui tam* cases. If most of the cases concern real wrongdoing, the *qui tam* system is failing to address those cases. If most of the cases are meritless, relators may be causing the government to spend substantial time and resources on wasteful investigations.

Overall, the *qui tam* provisions of the FCA appear to be successful in encouraging relators to bring information to the government, and the government has been extracting increasingly more settlement dollars from defendants based on such information.

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## CONDITIONS LEADING TO U.S. SUCCESS

### A Strong Executive Branch

Any enforcement regime allowing multiple potential enforcement paths generates the potential for conflict. What determines whether private or government enforcement takes precedence? The U.S. *qui tam* system gives government absolute precedence. The Department of Justice has the right of first refusal over any *qui tam* action. It can halt any action, and must approve any settlement reached between the relator and the defendant, a measure that reduces the potential for collusive settlements that are not in the public interest. This system would not work if the DOJ could not be trusted to pursue the public interest; thus, it rests on a strong and incorrupt executive branch. As the United States has not recently followed any alternative rule, it is difficult to evaluate whether any other system would be superior. For example, if federal prosecutors may fail to prosecute wrongdoing, the present primacy of DOJ decisions is likely to be unhelpful. Alternatives include a system with greater trust in the judicial system, which would allow courts to decide the merits of a relator's case rather than emphasizing executive branch oversight of the case. Another option would be a first-to-file rule: whichever party first brought litigation against a particular defendant would be in charge. Relators could also have greater flexibility. Thus, if a government report reveals wrongdoing, but the executive branch fails to prosecute the wrongdoer, the legislature could rely on relators to prosecute.

### A Cooperative Private Bar

Attorneys specializing in representing relators have been vital in ensuring that meritorious cases reach the federal government. While these attorneys do not independently prosecute cases, the U.S. federal government relies on these private attorneys to investigate and filter them. People who learn of wrongdoing by their employer may feel moral indignation, but attorneys are critical in translating the indignation or suspicion into a legal claim that the government and courts will recognize. Attorneys are also important in helping relators understand the types of evidence needed to convince a court or government prosecutor to take action. Some U.S. courts have permitted relators to file *qui tam* actions without the benefit of attorneys, and those relators' efforts have been particularly unhelpful and unsuccessful.

Cooperative private attorneys are also important because of their ability to help shape the boundaries of proscribed behavior through judicial decisions. For example, under the FCA, fraud is not a fully defined concept. Some forms of fraud are readily known: for example, a healthcare provider defrauds the federal government when it bills the federal government without providing any actual treatment. But when a healthcare provider bills the federal government and provides effective medical treatment, but an unauthorized physician supervises the treatment, the question of fraud is less clear. Private attorneys help identify unclear cases.

Relators have responded to the complications in identifying fraud by filing claims that apply pressure on courts to determine the proper boundary between regulatory violations and fraud under the FCA. Large companies commit a variety of regulatory violations, and due to *qui tam* litigation, courts must decide when a regulatory violation constitutes fraud against the

federal government. For example, relators helped increase the scope of the FCA by bringing a case against a pharmaceutical company for its marketing efforts to physicians, successfully claiming that such improper marketing eventually led to fraudulent government payment for drugs.<sup>192</sup> Relator litigation has also narrowed the scope of the FCA (e.g., the determination that deliberate false identification of an unapproved physician supervisor in a Medicare bill does not constitute fraud under the FCA).<sup>193</sup>

Private attorneys thus have a key role in determining how the lawsuits brought to trial shape such precedents. While the government might make strategic decisions about difficult cases, refusing to intervene in cases that have an untested theory of fraud because of other facts that might cause a court or jury to hesitate, private attorneys can nonetheless press such cases. Losing such a case might establish negative precedent undesirable to the government, but private attorneys and relators nonetheless have the ability to press them.

A cooperative private *qui tam* bar is also important to the success of the U.S. system in that the FCA grants the reward to the first to file in federal court. Subsequent relators who make similar allegations against the defendant are not entitled to any reward. As a practical matter, however, the attorneys who specialize in representing relators recognize the added value of subsequent relators who can strengthen the case against the common defendant. These attorneys have been known to make side agreements to cooperate and share rewards even though they are not the first to file. This produces better results than filing mill behavior in which relators' attorneys pursue a high volume of low-quality cases, betting on the odds that they will be first. The statute could permit such behavior; the cooperation of the public bar has been crucial in preventing it.

## An Independent, Procedural Judiciary

The FCA *qui tam* system, at least early in any individual case, requires little involvement from the judiciary. Courts must be sufficiently independent and reliable in reporting new *qui tam* actions to the DOJ, but courts do not conduct initial evaluation of a claim's merits. Given that the executive branch handles the merits of *qui tam* claims first, and most cases settle out of court if the relator doesn't drop them, the judiciary has a modest role in the U.S. system. Many defendants claim that the executive branch's unilateral power to cut off suspected fraudsters from further government contracts or payments, in itself, is sufficient to pressure defendants into settlements. If a defendant's ongoing business is highly dependent upon government business, loss or delays of potential future government revenue may be catastrophic.

Of course, settlements are made in the shadow of judicial decision-making; parties consider what courts would otherwise do before reaching a settlement agreement. Nonetheless, perhaps the immediate power of the executive branch in negotiation is sufficient to offset at least mild levels of potential judicial bias in favor of defendants.

Evidence suggests the judiciary may be playing a negative role in the failure of non-intervened U.S. *qui tam* cases. For example, U.S. civil litigation is generally known for expansive discovery powers in which plaintiffs can force testimony and evidence from defendants. But courts have upheld higher pleading standards for *qui tam* cases, making it more difficult for non-intervened relators to move past the initial stage and obtain discovery. The DOJ has powers similar to

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discovery that it can exercise prior to the court's application of initial pleading standards, so this judicial requirement applies only to private cases. Thus, the U.S. judiciary may not be as impartial and independent as would be ideal for a successful system, but a country with a significantly less effective judiciary could expect less success than the United States has had.

## ALTERNATIVE QUI TAM MODELS

Any country considering the adoption of *qui tam* should consider a number of potential improvements over the U.S. system, especially if it may lack some of the attributes that have contributed to the success of the U.S. system. This section draws on protections in whistleblower programs, not least because the U.S. system functions in a way that largely resembles such programs. The suggestions are aimed at addressing relator uncertainty: about payment for their efforts, and about retaliation after their decision to litigate.

### Compensating Criminals Who Come Forward

The FCA does not permit anyone convicted of criminal wrongdoing to receive a percentage of the reward. This law certainly speaks to the public's distaste for rewarding a wrongdoer—especially one who has already benefited from criminal acts. But many potential whistleblowers may have some level of culpability for the wrongdoing they would otherwise report. In addition to encouraging wrongdoers to come forward with information, such rewards would deter crime among individuals who recognize their co-conspirators' incentive to report. In cases where no parties aware of the wrongdoing have fully clean hands, society may benefit from a *qui tam* program that does not prohibit rewards to criminals. The benefits of offering leniency in antitrust/cartel conspiracies are well known.<sup>194</sup> Given the difficulty in breaking up secret conspiracies, allowing a reward in addition to non-prosecution may be in society's best interest.

### Setting Reward Amounts

Establishing optimal compensation under a *qui tam* system is a complex question that is beyond the scope of this paper. Policymakers have competing values and purposes that make such a calculation challenging at best: how harmful is the offense, and how much effort should society put into combating the offense? Does a high payout provide incentive for difficult cases, or does it attract frivolous litigation?

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Any country considering the adoption of *qui tam* should consider a number of potential improvements over the U.S. system...

That being said, the U.S. FCA experience helps illustrate some basic parameters. First, establishing a minimum percentage appears to have some importance in a functional *qui tam* regime. Prior to 1986 when the minimum was set at 15 percent, a relator could receive a zero percent reward. While other challenges were eliminated in 1986 as well, this possibility may well have significantly discouraged relators. While, as noted above, those convicted of a crime can still receive nothing, most relators receive 15 to 25 percent. This example suggests that 15 percent may be a useful minimum.

Countries creating new systems may want to look beyond the percentage payment system, which also creates challenges as to proper valuation of the offense. The FCA is crafted to award compensation in two forms. The first is compensation as damages: determining the loss to the government due to the fraud, and having the defendant pay a corresponding amount. This calculation can be difficult when evaluating the proper harm resulting from some types of fraud. For example, a court agreed that a government contractor defrauded the government by claiming to be a qualifying small business when it was not. Nonetheless, the defendant contractor otherwise successfully produced the contracted data-processing facility, and the court was challenged as to proper damages, because the government “got essentially what it paid for.”<sup>195</sup> Separately, the FCA provides for a “per claim” penalty: for every false claim a defendant makes, there is a fixed-dollar penalty. This system raises concerns about whether such fixed amounts properly correspond to the harm.

A more general concern with *qui tam* litigation is the availability of funds for a reward. Under the FCA, while the government “pays” the relator, in reality, the government delivers a share of its recovery from the defendant. Thus, if the defendant does not pay, the relator does not receive anything from the government. This creates a strong incentive for relators to target defendants that actually have the capability to pay (“deep pockets”), and there is little incentive to go after wrongdoers that do not have assets or other capacity to pay fines. This differs from many other information-reward programs in which informants receive a fixed payout from the government regardless of the defendant’s own ability to pay. Other countries may wish to create systems that circumvent this problem.

## Determining the Timing of Payment to Relators

Under the FCA model, payment to the relator is not established until after the primary litigation is resolved. Thus, the relator and the government first work together to prosecute the defendant. Once there is a successful resolution with the defendant, the relator proceeds to negotiate with the government for payment. Some relators have alleged that defendants and the government work together to minimize the relator’s payment.

This model allows the government to fully evaluate the relator’s role in litigation before determining her reward. If a relator has been helpful throughout the litigation process, the government has the full opportunity to observe and then reward the relator for her assistance. It also allows the government to fully evaluate the harm and the wrongfulness of the defendant’s behavior. To the extent that evaluation should come to bear on the relator’s share, this can be useful.



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Significant numbers of *qui tam* actions come from former employees rather than current employees, suggesting that current employees fear retaliation too much to come forward.

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The tradeoff, however, is that the relator essentially relies upon the goodwill of the government throughout the litigation process. After a lengthy litigation process, it may be difficult for the relator to suddenly take on an adversarial role against the government in negotiating or litigating for a larger share of the recovery. Moreover, lack of prior certainty about the percentage reward may make it difficult for attorneys and relators to decide whether a case is worthwhile before filing. Uncertainty may depress reporting as well.

## Prevention of Retaliation

Relators have private information about wrongdoing; in the U.S. context, relators typically have information about their employer's wrongdoing. Revealing this wrongdoing places them at direct risk of retaliation by the employer. The FCA has an anti-retaliation provision, but relators must sue their employers to enforce this provision. The government typically does not intervene to provide aid. Countries creating their own *qui tam* systems could have government prosecutors prioritize litigation against companies that retaliate. We have little systematic data as to the success of the FCA's anti-retaliation provisions, but anecdotal evidence suggests that significant numbers of *qui tam* actions come from former employees rather than current employees, suggesting that current employees fear retaliation too much to come forward.

A *qui tam* system could also protect relators by hiding their identities. Disclosure is likely inevitable if the government decides to pursue litigation, since companies can similarly conduct investigations to determine who had access to incriminating evidence. If, however, the government chooses not to intervene in a case, its present policy is still to unseal and disclose the identity of the relator even if she does not want to proceed with litigation. At least one state, New York, does not follow such a policy and instead protects the relator's identity if so desired. Protecting the relator's identity, at least in a case that does not go forward, would encourage whistleblowers to come forward.

## CONCLUSION

*Qui tam* litigation has been successful as a whistleblower program in the United States, but it has been unsuccessful as an independent private enforcement system. Countries without strong, effective public prosecution and independent courts should be wary of drawing any lessons from the success of the U.S. model.

If countries with good public prosecution and independent courts choose to use the U.S. *qui tam* system as a model, they might consider providing greater reward certainty and protections for whistleblowers in comparison to the U.S. system: private whistleblowers can offer useful information to public prosecutors, and they can use courts to provide accountability over public enforcement efforts. Finally, countries experimenting with *qui tam* should have modest expectations about results. Measuring the volume and proportion of litigation that results in convictions and/or penalties is a reasonable method of evaluating success, but the results of a system will not be available for at least five years, not least because cases take more than a year to resolve. The mature system in the United States achieves penalties in only roughly 25 percent of cases, and countries implementing new systems should expect more modest results for a period.

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# PRIVATE PROSECUTIONS: A POTENTIAL ANTICORRUPTION TOOL IN ENGLISH LAW

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The concept of “private prosecution” is unfamiliar to many. It is, put simply, a criminal prosecution pursued by a private person or body and not by a statutory prosecuting authority. The right to pursue a private prosecution is a remnant of legal history, but it remains an important one in England and Wales, the jurisdiction discussed here.

In the majority of jurisdictions around the world, the criminal justice system is seen to be a function of the state, which investigates and prosecutes alleged offenders on behalf of the public and for the benefit of the public. Historically speaking, this is a relatively recent development in England and Wales and in all jurisdictions based upon the English legal system (such as the United States).

From the 16th century up to the 19th century, crime was seen as a private matter between the victim and/or their family and the accused who, if they wanted to secure justice, would commence a private prosecution. A system existed of unpaid constables whose role it was to keep the peace and to bring anyone accused of a felony before the courts, but they had no duty to investigate crimes or to prosecute them. A system of “thief takers” developed, who obtained public rewards for capturing those who committed certain offenses, such as highwaymen. This private system was rife with false allegations for reward and denied many victims access to justice through a lack of means.

Prior to 1829 there was no organized state police force in England to investigate those responsible for committing crimes. Only in instances where the crime was committed against the state (such as treason) would it be involved in the prosecution. Things began to change in the 19th century with the introduction of an organized paid police force in 1829, which began to bear the burden of prosecuting individuals on behalf of the public, albeit in the capacity as

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## Despite the creation of public prosecutors, the right of an individual to pursue a private prosecution has remained.

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private citizens. In 1879, the office of the Director of Public Prosecutions (DPP) was created, establishing a public prosecutor whose role it was to prosecute the most serious of cases with the remainder of cases being prosecuted by the police or private citizens. This remained the system until the creation of the Crown Prosecution Service (CPS) in 1985, headed by the DPP, whose role it was to bring public prosecutions on behalf of the police. There also now exist a number of other special government departments whose role it is to investigate specific types of offenses and to prosecute them on behalf of the public, for example, the Environment Agency and the Serious Fraud Office.

From 1985 to the present day, the role of the police has been to receive allegations and complaints, which they investigate and thereafter refer to the CPS, which reviews the case and decides whether or not to prosecute. In deciding whether a public prosecution should be brought, the CPS must follow the Code for Crown Prosecutors.<sup>196</sup> The principle test applied, known as the “Full Code Test,” is whether the evidence discloses a reasonable prospect of conviction and, if so, whether the prosecution is in the public interest. Only if both these tests are met should a case be prosecuted. It should be noted that the reasonable prospect of conviction test is not the same as beyond reasonable doubt; it is a much lower evidential threshold. While lawyers are loath to use percentage terms for such tests, it has been referred to as the “51 percent chance test” or the “greater than even chance test.”<sup>197</sup>

While there are many different investigation agencies, some with their own in-house lawyers who will determine whether an individual should be charged with an offense, the Full Code Test will always be applied in public prosecutions. The Full Code Test does not strictly apply to private prosecutions. However, there are good reasons why it is sensible to ensure that this test is capable of being met, as otherwise the case may be taken over and discontinued. This is addressed further below.

Despite the creation of public prosecutors, the right of an individual to pursue a private prosecution has remained. It is a right that is expressly preserved by s.6(1) of the Prosecution of Offences Act 1985 and which has been recognized as being of constitutional importance. In the 1975 case of *Gouriet v Union of Post Office Workers*<sup>198</sup> Lord Wilberforce described the right to bring a private prosecution in the following terms: “the individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system... remains a valuable constitutional safeguard against inertia or partiality on the part of authority.” In the same case, Lord Diplock said that private prosecutions are “a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.”

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Despite dissenting voices in some jurisdictions (including some U.S. states), which consider that the responsibility for criminal law should rest solely with the state as an impartial actor, the right to bring a private prosecution in England and Wales has endured, as it has in Canada and some other common law jurisdictions.

## WHY THE NEED FOR PRIVATE PROSECUTIONS?

While the need for many people to pursue private prosecution in England and Wales has greatly diminished since the creation of public prosecutors, private prosecutions still have an important role to play in ensuring access to justice. While some argue that private prosecutions can lead to malicious complaints and false allegations being pursued by vexatious litigants, there are protections in place that prevent the abuse of the criminal justice system in this way. In particular, the DPP has the power to intervene and to take over any private prosecution,<sup>199</sup> for the purposes of continuing with it themselves or to stop it, “[b]ut the existence of a private prosecutor still acts as an external check against the risk of a rare lapse or oversight on the part of the Director [of Public Prosecutions].”<sup>200</sup>

In the current climate of austerity, budgetary constraints, and crimes of increasing complexity, the use of private prosecutions is undoubtedly on the increase. The police and other traditional law enforcement agencies have suffered massive cutbacks and they no longer have the resources to dedicate to certain types of crime. In 2012 the Lord Chief Justice of England and Wales commented that “there is an increase in private prosecutions at a time of retrenchment of state activity in many areas where the state had previously provided sufficient funds to enable state bodies to conduct such prosecutions.”<sup>201</sup> Those crimes that do not pose an immediate safety risk to the public are undoubtedly seen as a lesser priority, in particular economic crime.

The budgetary constraints on enforcement agencies have also necessarily led to a deficit of expertise to investigate and/or prosecute complex cases. This was recently exemplified in the *Trafigura* case, which involved the illegal dumping of toxic waste off the Ivory Coast in 2006, affecting the health of large numbers of the local community. A dossier of evidence was submitted to the Environment Agency by Amnesty International relating to the alleged involvement of individuals based in the U.K. It was widely reported that the Environment Agency stated that, if true, a serious offense had been committed but that it lacked the resources, capacity, and expertise to investigate such a large company, which was likely to deploy legal arguments.<sup>202</sup> Suffice to say that this provides little in the way of deterrence and adherence to the rule of law.

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Aside from budgetary constraints, there have been a number of cases in which traditional enforcement agencies have been reluctant or unwilling to investigate. This is particularly so where the allegations involve politically sensitive issues, large corporate entities, or allegations against the police. Sometimes such matters can be dismissed as being “civil” law issues.

Private prosecution, or the well-publicized threat of such action, has on occasion been sufficient to place pressure to bear for public prosecutions to be brought. For example, following the *Sea Empress* oil spill off the Pembrokeshire Coast in 1996, Friends of the Earth made clear that if the Environment Agency would not prosecute, it would. This pressure is widely recognized as having brought to bear a decision on the part of the agency to commence a public prosecution.

## WHO CAN BRING A PRIVATE PROSECUTION?

The simple answer to this question is that anyone can. There is no requirement that a private prosecutor be the victim of the crime, or connected to the crime that they wish to prosecute. Any person or entity having “legal personality,” including companies and charities, has the ability to pursue a private prosecution.

There are several bodies and organizations that regularly bring private prosecutions before the courts, including the Royal Society for the Prevention of Cruelty to Animals (RSPCA), the Federation Against Copyright Theft, broadcaster SKY plc, the Premier League, and so on. Invariably these private prosecutions will be for specific types of offenses that the organization, or its members, are particularly concerned with, such as intellectual property rights or, in the case of the RSPCA, cruelty to animals.

## WHO CAN BE PROSECUTED?

If there is evidence that a person has committed a criminal offense then they can be prosecuted, unless they benefit from immunity.

A “person” encompasses any “legal personality” and therefore also includes corporate entities as well as individuals. Where a corporate entity is involved, the actions and the “mind” of the company are ascribed to an individual or individuals who hold senior positions in the company and who can be described as its “directing mind and will.” This will generally be those who are

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near, or at, board level and is unlikely to apply to those who are employees or agents. If there is sufficient evidence to demonstrate that a corporate entity has committed a criminal offense through its “directing mind and will,” both the company and the individual can be prosecuted, as they have separate and distinct legal personalities.

Where corporate crimes are alleged, it will often be challenging to prove the involvement of its “directing mind,” particularly in large multinationals, where they are likely to be relatively removed from the criminal act complained of. In these circumstances, the individual persons responsible can be prosecuted, but the corporate entity itself may escape sanction.

## WHAT CAN THEY BE PROSECUTED FOR?

There are a large number of criminal offenses in England and Wales created by the common law, primary legislation, and secondary legislation. There are estimated to be some 10,000 criminal offenses in England and Wales, not including bylaws.<sup>203</sup> These offenses cover a wide range of prohibited activities, including regulatory offenses. While the number of offenses often leads to criticisms that the criminal law is unwieldy and complex, there is likely to be a specific offense that will capture the criminality that is alleged in most instances. A private prosecutor is generally able to use any offense, although some offenses require consent to be obtained first (see below). Prosecutions can be brought covering areas such as:

- environmental crime,
- war crimes (consent required),
- fraud,
- bribery and corruption (consent required),
- violent and sexual crimes,
- perverting the course of justice,
- slavery,
- money laundering, and
- intellectual property.

## TIME LIMITS

Some offenses are subject to time limits, which will need to be observed. Serious offenses that can be tried in the Crown Court (known as “offences triable on indictment”), such as perverting the course of justice and money laundering, are not subject to a time limit and while there may be legal argument based on any prejudice caused by delay, proceedings may be brought at any time. Offenses which are less serious and which can be tried only in the magistrates’ court (known as “summary only offences”) are generally subject to a time limit of six months from the date on which the offense occurred. When considering a private prosecution, it is essential to move swiftly to ensure that consideration can be given to all possible offenses that might be pursued.



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## CONSENT TO PROSECUTE

A private prosecutor has the ability to bring a private prosecution for any offense. However, proceedings for some offenses require consent be obtained from either the DPP (as the head of the CPS), the attorney general (the government's principal legal advisor), or in some circumstances a relevant minister with responsibility for a particular regulatory agency. Where consent is being sought to prosecute an offense, it will generally involve presenting the evidence to support the allegation in order to satisfy the Full Code Test (reasonable prospect of conviction and public interest).

While consent should generally be sought before proceedings for the offense are instituted (the timing depends on the charge being used), the requirement "shall not prevent the arrest without warrant, or the issue or execution of a warrant for the arrest, of a person for any offence, or the remand in custody or on bail of a person charged with any offence."<sup>204</sup>

Accordingly, even where consent is required, a private prosecutor could apply to the court for a warrant for the arrest of an individual. This provision has, however, recently been limited in respect of war crimes (and similar offenses),<sup>205</sup> and consent is now required from the DPP before a warrant can be applied for in relation to such offenses.<sup>206</sup> The obtaining of arrest warrants in private prosecutions is dealt with in more detail below.

Generally speaking, the consent of the attorney general is required "where issues of public policy, national security or relations with other countries may affect the decision whether to prosecute."<sup>207</sup> This includes offenses under the Official Secrets Act 1911, war crimes, certain terrorism offenses, and so on. The attorney general also retains a power to enter a *nolle prosequi* (unwilling to pursue), bringing any private prosecution already commenced to an end.

Those offenses that require consent from the DPP are, broadly speaking, ones where the discretionary factors to be taken into account in deciding whether or not to prosecute are likely to be particularly sensitive and/or where there is a need to ensure consistency and to prevent abuse. These include offenses such as bribery, conspiracy to commit an offense abroad, offenses under the Terrorism Act 2000, assisted suicide, and so on.

Where consent to prosecute is sought from the DPP, CPS policy states: "If consent is given, that guidance states that 'if the proposed prosecution passess [sic.] the Full Code Test, the CPS will then take over the prosecution. If the proposed prosecution fails the Test, consent to prosecute will not be given.'" The rationale behind this policy would appear to be that any offenses that require consent to be sought should be in the hands of a public prosecutor.

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Where the CPS takes over such a private prosecution and further investigation is required, assistance will be sought from the police. In cases where the police were originally unable or unwilling to provide assistance, seeking consent can accordingly be a worthwhile exercise.

Where consent is granted, it does not mean that the private prosecution will necessarily be taken over, even where the allegations are sensitive or political in nature. For example, in 1976 Mary Whitehouse, an activist campaigner opposed to social liberalism, obtained consent from the attorney general to prosecute Gay News and others for the crime of blasphemous libel (abolished only in 2008) following the publication of a poem by James Kirkup (“The Love that Dares to Speak its Name”), which involved a portrayal of a Roman centurion having sex with Jesus following his crucifixion. This prosecution was permitted to proceed and was ultimately successful.

## JURISDICTION

Jurisdiction is an important factor when considering whether the offending behavior complained of is capable of being prosecuted in the courts of England and Wales, particularly in relation to cross-border offending.

Generally speaking, the courts of England and Wales will have jurisdiction only over crimes committed (or substantially committed) within this jurisdiction, unless there is a specific statutory provision that provides for extra-territorial jurisdiction.

Each case will necessarily be fact-specific; however, there are several types of offense that do have an extra-territorial reach, including:

- specified crimes (such as fraud, dishonesty offenses, blackmail, and computer misuse<sup>208</sup>), which can be prosecuted if a “relevant event” (one of the constituent elements of the offense) occurred in England and Wales;
- crimes of “universal jurisdiction” (including war crimes<sup>209</sup> and torture committed by public officials<sup>210</sup>) that can be prosecuted in the courts of England and Wales, irrespective of the nationality of the accused and irrespective of the jurisdiction where any such criminal acts are alleged to have taken place; and
- murder and manslaughter, which can be prosecuted in England and Wales, irrespective of where they occurred, as long as the accused is a British national.<sup>211</sup>

## WHY BRING A PRIVATE PROSECUTION?

An individual or entity might have a number of different motives for wanting to pursue a private prosecution, including:

- a desire to see justice achieved,
- deterrence,
- compensation/restitution,
- highlighting an issue or publicity, and
- greater control.

It is important to note that there is no requirement that crimes must be reported to state investigation agencies before commencing a private prosecution. Furthermore, even where a complaint has been made to the police, this does not act as a bar to a private prosecution.

The courts have considered whether the motives of a private prosecutor can taint or otherwise affect their ability to pursue a prosecution. It has been acknowledged that “it is inevitable that many private prosecutions will be brought with mixed motives.”<sup>212</sup> However, this does not mean that a prosecution has been improperly brought. In 1993, the English courts dealt with a private prosecution arising from the collision between a dredger and a pleasure boat (the *Marchioness*) on the River Thames in which some 51 people died (the *South Coast Shipping* case<sup>213</sup>). Ivor Glogg, the husband of one of the victims, sought a public inquiry and when this failed he commenced a private prosecution for manslaughter against the owners of the dredger. It was alleged that Glogg’s motives were improper and as such the proceedings were an abuse of the process.

Lord Justice Lloyd commented that, “The fact that a public inquiry has been ruled out does not mean that his motive in instituting the prosecution should now be regarded as improper. If there is evidence that a defendant has been guilty of an offence, then a desire to see him prosecuted and, if found guilty, punished is not an improper motive, especially where the prosecutor is one of the bereaved. Even if Mr. Glogg’s motives were mixed, the courts should be slow to halt a prosecution unless the conduct of the prosecution is truly oppressive....” In short, where there is evidence that demonstrates that an individual or entity is guilty of a criminal offense, the courts are unlikely to interfere with a private prosecution.

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## A Desire to See Justice Achieved

This will be the most common motive, particularly where a victim is the private prosecutor. This is particularly so where the police have been unwilling or unable to investigate a complaint, but there is evidence which can be properly placed before the court to see that those who are guilty of criminal offenses are punished. For example, in 1995 two sex workers reported to the police that they had been raped. Their credibility was challenged by the police, who declined to investigate, and no prosecution was ever brought. With the assistance of the NGOs Women Against Rape and the English Collective of Prostitutes, a private prosecution was brought, which resulted in conviction and a sentence of 14 years' imprisonment.

The desire to see justice achieved has resulted in a number of high-profile private prosecutions that, although unsuccessful, related to areas where victims and/or their families have strived to obtain justice; for example, the private prosecutions relating to the murdered teenager Stephen Lawrence in 1994 and the prosecution of two police officers in 2000 for offenses relating to the Hillsborough disaster. Both these cases were part of broader campaigns for justice that eventually led to independent public enquiries into the actions of the police.

## Deterrence

A private prosecution can be important in deterring others from committing criminal offenses and/or causing persons or entities to desist from ongoing criminal conduct. The threat of criminal sanctions such as imprisonment and the effect of a criminal conviction on individuals cannot be underestimated.

Many private companies often use private prosecutions to protect their intellectual property rights from traders selling counterfeit goods, such as in the case of *Zinga* (2014) (*ante.*) in which Virgin Media brought a prosecution against an individual who sold set-top boxes that allowed users to access a pay TV service for free. Private prosecutions have also recently been brought by the insurers AXA against individuals who have made false insurance claims, in order to deter others from doing so.<sup>214</sup>

Where state enforcement agencies have failed to take action against those who consistently flout the law, a private prosecution can send a clear signal that such activity will not be tolerated by civil society. This has been particularly seen in relation to environmental crime, where there have been a number of successful private prosecutions. For example, in 1991 Greenpeace pursued a successful private prosecution against the chemical company Albright & Wilson under the Water Act 1989 for discharging excessive amounts of heavy metal into the Irish Sea in circumstances where the National River Authority was aware of the offense but was not willing to take any action.

## Compensation/Restitution

Where loss has been suffered, compensation may be a primary motive of a private prosecutor. Given the cost and delays likely to be suffered in pursuing civil proceedings, a private prosecution can be a much more attractive solution. Following conviction, the criminal courts

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have the power to make a compensation order,<sup>215</sup> dependent on the means of the offender. However, the court is unlikely to embark on any detailed analysis of causation for damages.

A private prosecutor is also entitled to pursue confiscation proceedings against a convicted defendant under the Proceeds of Crime Act 2002.<sup>216</sup> This allows the court to undertake a detailed analysis of how a defendant has benefitted from a crime and whether they have a “criminal lifestyle.” In certain circumstances, the court can make assumptions that money/property held by a defendant has been obtained from criminal conduct, unless the contrary is proved. These draconian measures allow the court to confiscate the proceeds of crime, which will not necessarily be limited to the proceeds of the particular offense for which the defendant has been convicted. The courts can order compensation be paid to a victim from the confiscated proceeds of crime. A failure to pay an amount due under a confiscation order will lead to a sentence of imprisonment being imposed in default.

## Highlighting an Issue or Publicity

A private prosecution can be an important way of drawing attention to an issue and while it is unlikely to be the sole motivation, it can be nonetheless an important consideration. The media will often report prosecution results and the public will readily understand what the results mean. This can draw attention to issues and can work hand in hand with deterrence to prevent certain types of persistent criminal behavior.

## Greater Control

When a matter is reported to the police and prosecuted by public authorities, victims can often feel removed from the process. Complaints levied at the CPS by victims often involve failure to communicate and the way in which cases are handled, particularly in times of austerity. A private prosecution necessarily allows greater control over the process.

Often, a private prosecutor will have greater resources to deploy in respect of the investigation and prosecution of an offense. This can mean that a case is better prepared from an early stage, which might result in an early guilty plea. Furthermore, a private prosecution can be quicker and/or more focused than a public one, once the evidence is available.

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## LIMITATIONS ON BRINGING A PRIVATE PROSECUTION

The DPP has a right to take over the conduct of any private prosecution<sup>217</sup> and either continue the proceedings or, if she forms the view that the Code for Crown Prosecutors test is not met, discontinue the proceedings.<sup>218</sup>

Until 2009, the DPP's policy in relation to taking over and discontinuing of private prosecutions was based on a different evidential test from that in the Code for Crown Prosecutors: the DPP would take over and discontinue where there was clearly no case to answer (a reasonable jury presented with the evidence and properly directed could not properly convict) or that the prosecution was clearly likely to damage the interests of justice.

In 2009, the DPP changed the policy in relation to the taking over of private prosecutions. The new policy states:

“The CPS should take over and continue with the prosecution if the papers clearly show that:

- the evidential sufficiency stage of the Full Code Test is met; and
- the public interest stage of the Full Code Test is met; and
- there is a particular need for the CPS to take over the prosecution.

All three elements outlined above must be satisfied before the CPS takes over and continues with the prosecution.”<sup>219</sup>

The decision on if there is a particular need for the CPS to take over the prosecution depends on whether the case warrants prosecution conducted by a public prosecuting authority rather than by a private individual or entity—for example serious offenses, or the disclosure of highly sensitive material.

Currently, if the CPS reaches the view that the evidential sufficiency stage of the code test is not met (there being insufficient grounds to provide a reasonable prospect of conviction), it will take over the conduct of the private prosecution and discontinue the proceedings. It is clear that this policy change leaves less capacity for the continuation of private prosecutions than the “clearly no case to answer” test that existed previously.

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Currently, if the CPS reaches the view that the evidential sufficiency stage of the code test is not met... it will take over the conduct of the private prosecution and discontinue the proceedings.

The lawfulness of this change in policy was challenged in the case of *R (Gujra) v CPS* [2012], after a private prosecution commenced by Regina Gujra against three defendants for common assault and using threatening words was discontinued by the DPP.<sup>220</sup> The Supreme Court held that the CPS's approach to taking over a private prosecution with the intention to discontinue it, unless the evidential stage of the Full Code Test was met, was lawful and did not frustrate or emasculate the objects underpinning the right to maintain a private prosecution in Section 6 of the Prosecution of Offences Act 1985. However, the dissenting judgments of Lady Hale and Lord Mance expressed concern that the reasonable prospect test would emasculate the right to bring a private prosecution. Lady Hale expressed doubts over the reasonable prospect of the success test, on the basis that there could be two reasonable but different views on whether a reasonable court would convict. She went on to say that the possibility of judicially reviewing the DPP's decision to discontinue was not a sufficient safeguard and the test could raise issues under the European Convention of Human Rights.

It is important to note that the DPP may also take over and discontinue proceedings even where the Code Test is met if she forms the view that the prosecution is likely to damage the interests of justice. This would be in cases where, for example, the prosecution interferes with the investigation of another criminal offense, where the prosecution is malicious or vexatious, or where the CPS or the police have promised the defendant they won't be prosecuted.

Where a private prosecution is taken over and discontinued by or on behalf of the DPP, a request can be made for the decision to be reviewed under the CPS Victim's Right to Review Scheme in the first instance.<sup>221</sup> Where any decision under the Victim's Right to Review Scheme can be shown to be irrational (among other potential grounds) it can be the subject of challenge by way of judicial review.

## HOW DO YOU BRING A PRIVATE PROSECUTION?

### Magistrates' Court Process

Under English law, the commencement of all criminal proceedings, including the commencement of a private prosecution, starts with the laying of an information<sup>222</sup> at the magistrates' court. An information is essentially an allegation of an offense that describes the offense and includes the relevant legislation and particulars of the offending in order to make clear what the prosecutor is alleging against the defendant.<sup>223</sup> If the offense is subject to a time limit (see above) the information will need to be laid within it.

Once an information has been laid at the magistrates' court, the court will consider whether to issue a summons or arrest warrant.<sup>224</sup> In order to determine whether a summons or arrest warrant should be issued, the court will at the very least consider whether the essential ingredients of the offense are present: that the offense is not "out of time," that the court has jurisdiction, and whether the informant has the necessary authority to prosecute.<sup>225</sup> The court will also consider whether the allegation is vexatious. An arrest warrant will be issued only where the offense is an indictable offense, or punishable with imprisonment, or where the defendant's address is not known to enable a summons to be served on him or her.<sup>226</sup>



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If a summons is obtained, the court will return this to the prosecutor in order for it to be served on the defendant. The summons will contain information of when and where the defendant is required to attend court and will also specify the offenses. In circumstances where an arrest warrant is obtained, assistance can be sought from the police to see that it is executed.

## Burden and Standard of Proof

The burden of proof is always placed on the prosecutor, who must prove that the defendant has committed each element of the offense in question. These elements must be proved to a jury, or to a judge (depending on the court hearing the matter), so that they are sure beyond a reasonable doubt that the defendant committed the offense in question. There is no burden of proof on a defendant, nor are they required to give evidence. The prosecution must prove its case through the evidence of witnesses and/or documentary exhibits that are placed before the court.

## Conducting an Investigation

Often a private prosecutor will already be in possession of the evidence required in order to start a private prosecution, and it will just be a case of putting that evidence into an admissible form. However, in some cases there may be parts of the evidence that are still required before proceedings can commence. A private prosecutor does not have the powers of the police available to them, therefore they must think creatively (and within the confines of the law) in order to obtain the evidence necessary to institute criminal proceedings. As much evidence as possible should be obtained prior to laying an information, as the risk of not doing so could lead to the DPP taking over the prosecution and discontinuing it at an early stage. There are various ways a private prosecutor can go about gathering evidence, including:

### ***Material obtained from witnesses/statements***

It is important for those acting for the private prosecutor to obtain witness statements from all of the relevant witnesses in the case who will provide evidence that goes towards proving the elements of the particular offense(s) alleged. Those witnesses may also need to produce (as exhibits) documents or even objects that will form part of the evidence. In order for a witness statement to be used in criminal proceedings, it must contain evidence relevant to the issues in the proceedings and it must be signed by the person who makes it, to confirm that the contents of the document are true. All witness statements forming part of the prosecution case will need to be served on the defendant once proceedings have been commenced.<sup>227</sup>

### ***Private investigators—legally obtained material***

It may be necessary to instruct private investigators to obtain evidence prior to commencing proceedings. This may involve meeting with and taking statements from potential witnesses, obtaining publicly available documents (for example land registry or companies house documents), or carrying out surveillance. Private investigators are also often needed where evidence is held outside the jurisdiction, and key witnesses may also be scattered across different international locations. If instructing private investigators, it is important for the private prosecutor to instruct reputable investigators who are well aware of their legal

obligations in relation to the obtaining of evidence. If evidence is obtained illegally, this could have serious consequences for the success of the private prosecution, as such evidence is likely to be ruled inadmissible.

### ***Data Protection Act 1998***

It is possible for a private prosecutor to rely on the exemptions under the Data Protection Act 1998 (DPA) when gathering evidence. Often information is required from third parties—for example banks, the police, and other organizations—who may hold important evidence that is essential for the prosecution. It may be that such organizations are reluctant to share the information because it constitutes “personal data” under the DPA.

However, there are important exemptions under the DPA that the private prosecutor can rely on in this regard. Where personal data is required for the purposes of the prevention of crime, or the prosecution of offenders (as it would be in a private prosecution), it would not be unlawful for the data controller of the organization to provide the required data.<sup>228</sup>

A further exemption is where disclosure is necessary for the purpose of legal proceedings or for the obtaining of legal advice or for establishing, exercising, or defending legal rights.<sup>229</sup>

It should be noted that the exemption in itself does not constitute a justification for handing over personal data. The data controller should also ensure that either the witness or the potential defendant has given their consent to the information being disclosed, or that the disclosure of the personal data is necessary for the purposes of legitimate interests pursued by a third party (for example, a private prosecution).<sup>230</sup>

### ***Norwich Pharmacal Order***

Where evidence is required before the commencement of proceedings, and a third party is unwilling to provide the information under the DPA exemptions, a private prosecutor may wish to consider a Norwich Pharmacal Order,<sup>231</sup> derived from the name of the case that established the principle. A Norwich Pharmacal Order is applied for in the High Court and is an order which requires that a third party who is innocently mixed up in the wrongdoing disclose certain documents or information. Similar orders may also be considered in foreign jurisdictions where evidence is held outside the U.K.

### ***Witness summons***

Where criminal proceedings have commenced, it is possible to obtain a witness summons requiring a potential witness to produce a document or thing, or to give evidence about information held in confidence if it is likely to be material evidence in the prosecution case.<sup>232</sup> This provision can be used, for example, to compel financial institutions to provide information in relation to a defendant’s assets and bank accounts where that evidence is material to the prosecution case, such as in money laundering cases.

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### *Experts*

Consideration should be given to instructing experts where necessary, as often expert evidence is required in prosecution cases. Examples include instructing forensic accountants to provide expert evidence in complex fraud or money laundering cases, expert scientific evidence in environmental cases, or medical evidence in cases involving harm to victims.

## **PITFALLS IN BRINGING A PRIVATE PROSECUTION**

### **Disclosure**

Private prosecutors must comply with the disclosure principles under the Criminal Procedure and Investigations Act 1996. References in the act to the prosecutor “are to any person acting as a prosecutor, whether an individual or body.”<sup>233</sup>

A private prosecutor therefore has a duty to retain and record all relevant material that does not form part of the prosecution evidence in the case. It is deemed to be relevant if it is capable of having a bearing on the case.

Once that material is recorded, two tests must then be applied: (1) Does any of the material undermine the prosecution case; or (2) does the material assist the defence case? If the material satisfies either of these questions, it must be given to the defence. These provisions seek to ensure fairness in the proceedings.

If disclosure is not properly complied with, then the prosecution is likely to fail, with the proceedings deemed an abuse of the court process.

### **Malicious Prosecution**

If a private prosecution is brought where the defendant later alleges that it should not have been—for example if the evidence was fabricated or the prosecution was brought with malice—then the defendant may institute a civil claim against the private prosecutor for malicious prosecution. While claims for malicious prosecution are possible, in reality they are notoriously difficult to prove. The claimant would need to prove that the prosecution was unreasonable, with no reasonable cause to commence the prosecution, and that the private prosecutor had acted with malice (from a motive other than a legitimate desire to bring the person to justice).<sup>234</sup>

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**While claims for malicious prosecution are possible, in reality they are notoriously difficult to prove.**

It is important that the private prosecutor is able to cover the cost of the investigation, preparation of the case, and the subsequent proceedings with a view to recouping these expenses at the end of the case.

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## COSTS

One of the most important aspects to private prosecutions concerns costs. In any proceedings regarding an indictable offense, the court may order the payment out of central funds (from the Ministry of Justice budget) of such amount as the court considers reasonably sufficient to compensate a private prosecutor for any expenses properly incurred in the proceedings.<sup>235</sup> This includes both legal and investigative costs and any expert fees that were necessary for the prosecution.

Where a court makes an order for costs but is of the opinion that there are circumstances which make it inappropriate for the prosecution to recover the full amount, the court shall assess what amount would be “just and reasonable.”

An order for costs should be made by the court save where there is good reason for not doing so, for example where proceedings have been instituted or continued without good cause, or there has been misconduct on behalf of the prosecutor.

It is important to note that the court can make an award for costs out of central funds irrespective of the result, so it does not matter if the defendant is convicted or acquitted; the private prosecutor can still be compensated for the costs of bringing the prosecution providing the prosecution was properly brought.

In the event that the CPS takes over the private prosecution and continues with it, the private prosecutor can still apply for costs up to the point in the proceedings where the CPS took over.

An order for costs will be applied for at the conclusion of the proceedings; therefore it is important that the private prosecutor is able to cover the cost of the investigation, preparation of the case, and the subsequent proceedings with a view to recouping these expenses at the end of the case. The costs will necessarily depend on the scope and complexity of the allegations and, where lawyers are instructed, any agreement that it is in place. The source of such funds could be raised through crowd funding, or in certain cases litigation funders may be willing to assist to meet the costs that will be incurred.

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## CONCLUSION

The right of an individual or entity to pursue a private prosecution continues to be of fundamental importance in ensuring access to justice and to see that those responsible for committing criminal acts are punished. This is particularly so in times of austerity and where “conventional” authorities are unable or unwilling to take action. This right is a powerful tool in the arsenal of litigation, which can often be quicker and more effective than other civil legal remedies that are available to victims, or those who seek to take action on their behalf.

There are safeguards to prevent improper use of private prosecutions and which allow public prosecutors to reserve the most serious types of allegations to themselves or to have oversight over allegations that involve certain sensitive issues. However, if there is evidence to prove an allegation, there is no reason why a private prosecution should not succeed.

A private prosecutor is, rightly, not afforded any more leeway than a public prosecutor in bringing a prosecution. Where the liberty of a subject is at stake it remains of fundamental importance that the fairness of the proceedings is maintained and that the private prosecutor proves any allegation beyond reasonable doubt. As a result, a private prosecutor will need to be sure that sufficient evidence to prove an offense has been gathered, or can be gathered, using the court powers available to them. A failure to meet this obligation is likely to lead to the case’s being taken over and stopped by the DPP.

The financial burden placed upon a private prosecutor in investigating and prosecuting an offense, which is ultimately for the benefit of the whole of society, is recognized in the ability to recover costs from central funds in cases that have been properly brought, irrespective of whether they succeeded.

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The right of an individual or entity to pursue a private prosecution...is a powerful tool in the arsenal of litigation, which can often be quicker and more effective than other civil legal remedies...

# LEGAL REMEDIES FOR VICTIMS OF CORRUPTION UNDER U.S. LAW

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**RICHARD E. MESSICK**

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Litigation in the United States to recover damages for bribery was until recently rare—perhaps the occasional suit between merchants when one caught the other bribing its employee. But what was once a narrow, sleepy corner of the law is now expanding rapidly thanks to passage of the Foreign Corrupt Practices Act (FCPA). By making it illegal for those subject to American law to bribe a “foreign official,” the act created a new class of claimants: foreign governments injured when their employees were bribed. It has also prompted a wave of suits by the shareholders, business partners, and competitors of those who bribed an employee of a foreign government. All have filed “follow on” actions in the wake of FCPA conviction, asserting the violation caused them compensable injury.

Most of this litigation is quite recent, brought since the surge in FCPA enforcement actions in the mid-2000s,<sup>236</sup> and most cases either have been settled out of court or await final disposition. Many questions about the legal remedies available when a foreign official is bribed thus remain to be decided. Is the foreign government that employed the bribe-taker always entitled to compensation? Even if senior officials were complicit in the bribery scheme? If compensation is appropriate, how should damages be computed? Are shareholders really harmed if the company paid a bribe? How much oversight must a corporation’s officers and directors exercise to avoid liability when the employees are caught paying bribes? Does the payment of a bribe harm the bribe payer’s competitors?

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Many questions about the legal remedies available when a foreign official is bribed...remain to be decided.

Cases underway today in both criminal and civil courts raise these and related questions. In criminal court this is because, as part of the resolution of an FCAP enforcement action, a foreign government can petition for compensation for the losses suffered from the bribery. In civil court it happens in cases where, to the various damage theories taken from commercial bribery law, private parties are pressing new ones based on securities fraud, antitrust violations, and racketeering. How are such cases faring as of 2016, and how are remedies for bribery victims likely to evolve in the future?

## COMPENSATING FOREIGN GOVERNMENTS FOR FCPA VIOLATIONS

The 1977 enactment of the Foreign Corrupt Practices Act coincided with a sea change in American criminal law. Traditionally, the adjudication of a criminal case in the United States had been a two-party affair between the prosecutor on one side and the defendant on the other. Save for appearing as witnesses, victims of the crime had no place in the process. A prosecutor might require a defendant to return stolen property as part of a plea bargain, but a victim had no right to its return. Nor indeed did the victim have any rights at all: not the right to know the progress of the case, nor where and when the defendant would be tried, nor even to be protected from intimidation by defendants or their cohorts.

Holding the victim at arm's length throughout the criminal process is now history thanks to the victims' rights movement, a grassroots effort that arose in the 1960s to give crime victims a voice in the criminal justice system. At the federal level the movement prompted a trio of statutes—the 1982 Victims and Witness Protection Act, the 1996 Mandatory Victim Restitution Act, and the 2004 Crime Victims' Rights Act—that have progressively expanded the rights victims can exercise during the investigation, prosecution, and sentencing of criminal defendants. Although technically the three do not cover an FCPA violation, conspiring to violate the FCPA is covered, and a conspiracy charge is almost always one of those brought in an FCPA prosecution.<sup>237</sup> Thus a foreign government that is a victim of an FCPA violation can assert the full panoply of rights accorded crime victims during an FCPA criminal enforcement action.

For foreign governments, the most important right granted a crime victim is the right to compensation for losses the offense caused. Whenever a bribe-payer is found guilty of, or pleads guilty to, conspiring to violate the FCPA, under both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act a foreign government “directly harmed” by the conspiracy has a claim for damages.<sup>238</sup> Many FCPA actions do not end with a plea or a verdict but with a deferred prosecution agreement, and although victims' compensation laws apply only when a final judgment has been entered, a May 2015 amendment to the victims' rights law covers this gap. It provides crime victims the right to timely notification “of any . . . deferred prosecution agreement” federal prosecutors offer a defendant. Courts have asserted the authority to approve deferred prosecution agreements,<sup>239</sup> and the right to advance notification of an agreement offers a claimant-government the opportunity to challenge an agreement that lacks a compensation provision.



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## Foreign Governments as FCPA Victims

Even before passage of victims' rights legislation, the Department of Justice (DOJ) had recognized that foreign governments suffered compensable injury when their officials were bribed. In the first FCPA enforcement action ever filed, a 1979 case arising from the bribery of the leader of a Cook Island political party, the DOJ required defendants to compensate the Cook Islands government as part of the plea agreement. The DOJ included compensation provisions in plea agreements in two other early cases as well, one involving the bribery of a Nigerian government official and the second a German official. Both were resolved after enactment of the 1982 Victims and Witness Protection Act, which gave courts the discretion to award compensation, but before the 1996 Mandatory Victim Restitution Act, which requires the department to include a compensation provision in a plea agreement.

To date there are five cases in which a foreign government has received compensation for an FCAP violation. Besides the three resolved before compensation was made mandatory, there is a 2009 case arising from the bribery of Haitian officials and a 2010 case from the bribery of Thai government personnel. The five are listed in Table 1 along with the dates the cases were resolved and the amount of compensation. Save for the Thai case, all cases were resolved through defendants' agreements to plead guilty. One consequence of a plea agreement is that few of the case's details are put on the public record; as a result, the information available on the four FCPA plea deals provides neither an explanation for why the DOJ conditioned the plea bargain on payment of compensation nor the rationale for the amount.

The one case in which compensation was ordered as part of a verdict is *United States v Green*.<sup>240</sup> Gerald and Patricia Green were convicted by a jury of bribing officials of the Thai government's official tourist agency, and at sentencing the trial judge ordered the two to pay \$250,000 compensation. The court stated that "there was an identifiable victim or victims" who suffered "a pecuniary loss" as a result of the bribery and compensation was thus warranted.<sup>241</sup> The Greens appealed the compensation order on procedural grounds, contending that the compensation question should have been submitted to the jury, but the Ninth Circuit rejected the argument.

## Foreign Government's Right to Compensation

Although the DOJ has never opposed treating a foreign government as a victim during an FCPA enforcement action, in one case it did oppose a claim for compensation. The claim was pressed by a corporation owned by the government of Costa Rica. The record disclosed that officers and directors of the company, Instituto Costarricense de Electricidad (ICE), had accepted

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bribes not only from the defendant's Costa Rican subsidiary but from a number of other firms as well, in a case called *United States v Alcatel-Lucent France, SA*. As the DOJ explained in opposing ICE's compensation petition, during the proceedings it had accorded the company "the rights typically reserved for victims and provided ICE with an opportunity to make its arguments," but because so many ICE employees had been involved in the bribery scheme, it argued that the company was not a victim but a co-conspirator. Even if ICE were a victim, it contended, compensation should not be ordered because the Mandatory Victims Restitution Act provides an exception to compensation where, as the department argued here, determining the amount would be so complex that it would unduly delay resolution of the criminal case. The trial court agreed with both arguments, holding that ICE was a co-conspirator, not a victim, and that in any event the computation of damages would take too long. The Eleventh Circuit

### **FCPA Cases in which a Foreign Government Received Compensation**

- ***United States v Kenny International Corp.***, No. Cr. 79-372 (D.D.C. 1979) (plea agreement): \$337,000 paid to the government of the Cook Islands, the amount of financial assistance provided to a political party in return for promise it would continue a government contract with defendant if it won election.
- ***United States v Napco International, Inc.***, No. Cr. 3-89-47(1) (D. Minn. 1989) (plea agreement): \$140,000 paid to U.S. Defense Department to be credited to Niger's foreign military sales account as compensation for bribery scheme involving Nigerien officials.
- ***United States v F.G. Mason Engineering, Inc.***, No. B-90-29 (D. Conn. 1990) (plea agreement): \$160,000 payment plus discounts on future sales to compensate the German government for bribing one of its military intelligence service officers.
- ***United States v Diaz***, No. 20346-CR-JEM (S.D. Fla. 2009) (plea agreement): defendant ordered to pay \$73, 824 to the government of Haiti, its fee for serving as intermediary in bribery scheme between government officials and U.S. firm.
- ***United States v Green***, No. CR 08-00059(B)-GW (C.D. Cal. 2010) (conviction): DOJ sought compensation of \$1.8 million, the total amount of bribes paid to Thai officials; the court reduced this to \$250,000 without explanation.

upheld the trial court, ruling that the “pervasive, constant, and consistent illegal conduct” of ICE employees the trial court had identified was enough for it to conclude that ICE “actually functioned as the offenders’ coconspirator.”<sup>242</sup>

How much of a shadow the *ICE* decision casts over future compensation claims remains to be seen. So many bribes were paid for so long to so many ICE employees, and even to company directors, that in opposing its petition for compensation the DOJ contended that “ICE as an organization appears to have had a deeply ingrained culture of corruption”<sup>243</sup> Furthermore, as the department argued, defendant Alcatel had already paid ICE \$10 million in damages to resolve a criminal case in Costa Rica, and there was ongoing civil litigation by which ICE stood to obtain more. And finally, in *ICE* the government of Costa Rica did not pursue compensation in its own name but in the corporation’s. *ICE* thus presents a much different case than one in which a single government official accepted a bribe one time. Determining how close to the facts of the latter and how far from the former future governments claims must fall to merit compensation will require more guidance from the Department of Justice, or more litigation, or, more likely, both.

If *ICE* shows the Department of Justice is prepared to resist compensation when it believes payment is not warranted, two recent cases show DOJ’s willingness to find ways to force defendants to pay compensation when it believes it is warranted. The first involved a prosecution arising from the same bribery scheme as the 2009 *Díaz* case listed in Table 1. In that one, Haitian citizen Robert Antoine had been one of several employees of Haiti’s state-owned telecom company who had accepted the bribes that led to the FCPA conviction, and although a foreign public official’s acceptance of a bribe is not itself an FCPA violation, if, as Antoine did, the official deposits the bribe proceeds into an American bank account, he or she violates American anti-money laundering laws. Antoine was prosecuted for conspiring to commit money laundering; as part of his plea he agreed to pay the government of Haiti \$1.8 million, the total amount of bribes he and other company employees received.<sup>244</sup>

A more creative effort arose from the settlement of a civil forfeiture case that accompanied an FCPA enforcement action. U.S. law permits prosecutors to file a civil suit seeking the forfeiture of money or other assets they believe to be the proceeds or instrumentalities of a crime. Suit can be filed at the time a suspect is formally charged and it progresses separately from the criminal case. The filing of a suit also allows prosecutors to seek an order freezing, or preventing, the assets from being sold or transferred pending resolution of the case. If the assets are located abroad, the department’s prosecutors will ask the government where the assets are held to obtain an order from its courts freezing the assets pending the outcome of the U.S. action.

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## U.S. law permits prosecutors to file a civil suit seeking the forfeiture of money or other assets they believe to be the proceeds ...of a crime.

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James Giffen was indicted in 2003 for bribing officials of the government of Kazakhstan. At the same time as the indictment was issued, the Department of Justice filed a civil suit seeking the forfeiture of \$84 million Giffen held in a Swiss bank, money the department alleged was going to be used to bribe Kazakh officials. The DOJ asked the Swiss government to freeze the funds, but before the Swiss could execute the freeze order, the funds were transferred to an official account of the Kazakh government.

The FCPA case against Giffen ended in a plea agreement by which Giffen surrendered any claim to the funds in question. This left the governments of the United States, Switzerland, and Kazakhstan each with a claim to the money. The three agreed to transfer the monies to the BOTA Foundation, a Kazakh entity subject to international oversight, created to distribute the money to needy Kazakh children. An international NGO was appointed to administer the monies, and the \$115 million, the original amount plus accrued interest, was disbursed over a five period that ended December 2014.<sup>245</sup>

## AMOUNT OF COMPENSATION

Court records in two of the five FCPA victim-compensation cases shown in Table 1, *Kenny* and *Diaz*, show how the amount of compensation was calculated. In *Kenny*, it was the amount of the bribe paid; in *Diaz* it was the amount of the profit the defendant reaped from serving as the intermediary between the bribe payer and the recipients. In a third, *Green*, the Department of Justice had asked for compensation of \$1.8 million, the total amount of bribes paid, but for reasons not explained on the public record, the court reduced it to \$250,000. In the two other cases, *Napco International* and *F.G. Mason Engineering*, the court records do not disclose how compensation was determined.

None of these awards comply with the provisions of the Victims and Witness Protection Act or the Mandatory Victim Restitution Act for awarding compensation. Both explicitly state that compensation is to be measured by what the victim lost rather than by what the defendant gained.<sup>246</sup> Yet the latter is the precisely the measure used in *Diaz* and was apparently the rationale behind the award of the bribe amount in *Kenny* and the department's request in *Greene*. But as the Fourth Circuit ruled in *United States v Harvey* and the Sixth Circuit ruled in *United States v Kilpatrick*, decisions interpreting the compensation provision in cases arising from the bribery of U.S. office holders, both statutes require that compensation awards be measured by the defendants' gain. There may be instances, as the *Kilpatrick* court

recognized, in which the defendants' gain is a "reasonable estimate" of the victim's loss, but the government must present evidence showing it is a good proxy for the loss, and gain cannot be used simply to avoid the time and effort required to calculate the victim's actual loss.

*Kilpatrick* and *Harvey* offer hints of the kind of loss evidence prosecutors must present to support an award. In *Kilpatrick*, defendants claimed that the bid rigging resulting from their bribery scheme had caused no loss because the Detroit Water and Sewer Department, the victim, would have had to pay a contractor to have the work done anyway. While recognizing that it would not be easy to show what the department would have paid to other contractors had the bidding not been rigged, the court's discussion of the compensation issue implies that this is the type of evidence that should be developed. In *Harvey*, where, thanks to bribery, additional work beyond that called for in a contract with the U.S. Army Intelligence and Security Command was performed, the opinion suggests evidence of why the work was unnecessary, or over-priced, or both, should be provided.

Federal courts determine the compensation due victims on the basis of a report prepared by the unit of the U.S. Probation and Pretrial Services System attached to the local court. The statute requires the prosecution to furnish the department with the information necessary for it to provide "a complete accounting of the [victim's] losses" although victims may submit data on their losses directly to the service.<sup>247</sup> Both the prosecution and the defendant are given a copy of the probation service's report, and in the event of disagreement, an evidentiary hearing is held. The burden is on the government to prove the amount of the victim's losses by a preponderance of the evidence.

## CIVIL SUITS FOR DAMAGES

FCPA enforcement actions have spawned a variety of "follow on" actions, civil suits instituted after the Department of Justice or the Securities and Exchange Commission (SEC) has begun an enforcement action. There is no bar to filing such suits, and the civil plaintiff can use the evidence gathered by the Department of Justice or the SEC in its case. Suits have been filed in both state and federal courts by foreign governments, and by the competitors, business partners, and shareholders of the bribe-paying companies.

The principal challenge these plaintiffs face is showing that the payment of the bribe caused them economic harm. If they can establish that, they have considerable leeway in computing the actual amount of damages, for a wrongdoer cannot escape liability simply because its wrongdoing makes it hard for plaintiff to show the precise amount of the harm.<sup>248</sup> Plaintiffs must also establish a sufficient link between their claim and the United States, in order to warrant an American court's taking jurisdiction. How much of a link is not clear, but in a recent case the Second Circuit Court of Appeals held that the Mexican state-owned oil company *Petroleos Mexicanos* had to show more than that invoices issued as a result of bribe payments had been processed through, and payments been deposited in, a U.S. bank.<sup>249</sup>

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FCPA enforcement actions have spawned a variety of “follow on” actions, civil suits instituted after the Department of Justice or the Securities and Exchange Commission (SEC) has begun an enforcement action.

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## Foreign Governments as Plaintiffs

At common law, a merchant whose employee accepted a bribe had an action for fraud against the bribe payer.<sup>250</sup> The essence of fraud is deceit, and in secretly paying an employee to favor the briber’s interests over her employer’s, the payer both deceived the employer about the employee’s loyalty and deprived it of the employee’s undivided loyalty. An action by a foreign government for the bribery of its officials fits squarely within this theory and has formed the basis of four suits brought by governments or the enterprises they own. Two, those filed by a Bahrain state-owned company and the government of Trinidad and Tobago, resulted in settlements. The other two were dismissed before trial, the Mexican action noted above and one brought by the government of Iraq. Iraq’s claim was dismissed because, as was the case with ICE’s attempt to secure compensation as a crime victim, numerous Iraqi government officials participated in the bribery scheme.

The largest recovery to date has been in the case involving Bahrain, a 2008 suit pursued by Alba, a company majority-owned by the government of Bahrain, against Alcoa Aluminum and other defendants for bribing employees. Alba alleged that its bribe-taking employees had conspired with the defendant-bribe payers to have Alba pay above-market prices for defendants’ products. On one contract alone, it claimed, it was overcharged \$65 million in one year for alumina, the product Alcoa had sold it, thanks to defendants’ bribery.

To its common law fraud claim, Alba added a second claim, that the bribery and the illegal acts committed to facilitate it constituted a violation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO). Although the FCPA does not permit private suits to enforce its provisions, the RICO statute does. Anyone “damaged in [their] business or property” by an “enterprise” engaged in a “pattern of racketeering” can sue for damages. While written to attack organized crime, the statute’s definition of “pattern of racketeering” and criminal “enterprise” sweeps more than organized criminal gangs within its ambit. In *Alba*, the plaintiff’s allegation that the defendants violated laws prohibiting the use of the U.S. mail or travel across state lines to further the bribery scheme would, if true, be sufficient to establish a pattern of racketeering. The law does not require that the racketeering “enterprise” be formally constituted; it can be enough, as Alba alleged, that in bribing Alba employees the defendants acted in concert.

Alba added a RICO claim to its common law claims for a reason; RICO allows plaintiffs to recover enhanced damages. Had the company pursued a fraud claim alone, it would have been entitled only to its actual damages and would have had to pay its own attorneys’ fees. But if

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## Although the FCPA does not permit private suits to enforce its provisions, the RICO statute does.

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Alba recovered under RICO, it would be entitled to three times its damages plus attorneys' fees. Because RICO provides for an enhanced recovery, the four civil actions for damages lodged to date by foreign government victims of FCPA violations have included claims under RICO.

In *Alba*, the inclusion of a RICO claim worked to the plaintiff's advantage. Once the defendants failed to strike it from the complaint, they moved quickly to settle. As in many civil suits, the defendants weighed the risk of having to pay treble damages plus attorneys' fees if they lost at trial against settling for a lesser sum; they apparently decided the risk of loss was too great and in October 2012 settled the case for \$85 million. On the other hand, there are, as will be discussed in the Iraqi case below, risks plaintiff governments run when adding a RICO claim.

*Alba* is the rare case in which the victim's lawsuit prompted a government enforcement proceeding. According to press reports, once *Alba's* management discovered the bribery scheme, it filed suit immediately, and its suit caught the attention of the DOJ and the SEC, which then opened their own investigations. Alcoa and several of its affiliates subsequently settled those cases, paying \$384 million in fines and penalties, with one affiliate pleading guilty to an FCPA violation.

Florida state court was the venue the government of Trinidad and Tobago chose to bring its 2007 action for damages for the bribery of its officials by companies that bid on and built its new airport.<sup>251</sup> To common law claims arising from that bribery, the government added a claim based on Florida's racketeering law which, like the federal statute, provides for treble damages plus attorneys' fees. It also sought damages under Florida's antitrust laws for bid rigging, alleging that the bidding firms had conspired to inflate the bid prices. The case was brought in Florida state court because several of the contractors were based in Florida. The most recent press on the case (Florida trial court records are not online) reports settlements totaling \$4.5 million have been reached with several defendants.<sup>252</sup>

As noted above, a suit by the government of Iraq, based on the bribery of its officials, failed. The suit arose from corruption in the UN Oil-for-Food Program, a program meant to provide Iraqi citizens relief from the sanctions imposed after their country's invasion of Kuwait. The program allowed the government, then headed by Saddam Hussein, to sell oil on the world market to purchase food, medicine, and other humanitarian supplies for its citizens. After Saddam's government fell, investigations revealed that many citizens had not benefited from the program because it was riddled with corruption.

The government that succeeded Saddam's brought suit in 2008 for damages, asserting RICO and common law claims against 90 individuals and companies that it alleged had had a hand in corrupting the program. These same investigations had also revealed that many officials in



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## *Alba* is the rare case in which the victim's lawsuit prompted a government enforcement proceeding.

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Saddam's government had been involved in the corruption, and at the time the government filed suit both the Fifth and Eleventh Circuit Courts of Appeal held that *in pari delicto* ("in equal fault") was a defense to RICO. That is, where defendants can show the plaintiff's actions were as much a cause of the damage as defendants, recovery would be denied.

To avoid this result, the government sued not on its own behalf but on behalf of the citizens of Iraq, using a procedural device known as *parens patriae*, Latin for "parent of the nation." Thus, technically the plaintiff was not the government itself but its citizens, the actual victims of the corruption in the program. In addition, the post-Saddam government tried to separate itself from Saddam's, contending that governments are agents of the citizenry, that the Saddam Hussein government had been a disloyal agent, and that, as the new agent, the wrongs of the previous one should not be imputed to it. Neither argument succeeded, however. The trial court followed an earlier ruling by the First Circuit limiting *parens patriae* to Puerto Rico and the states of the United States. It also rejected Iraq's agency theory of government, holding that under U.S. law the actions of previous governments will be imputed to the current one.

On appeal, Iraq abandoned its *parens patriae* argument but renewed its agency theory argument. To no avail. The current government's "attempts to escape the ramifications of [the conduct of the previous government] . . . is meritless," the Second Circuit opined in upholding the trial court. "Our law has long recognized that the legal position of a foreign state survives changes in its government."<sup>253</sup>

The facts alleged in the plaintiff's complaint provided ample support for the *in pari delicto* defense. This was not a case of one or two rogue employees accepting bribes in violation of national law. Rather, as the trial court had concluded, "[t]he Complaint allege[d] a public goal [undermining the sanctions by corrupting Oil-for-Food], undertaken with public resources, pursued for political purposes, and using means available only to state actors." Hence, the government was as at least as much at fault as the defendants for the damages caused from the program's corruption, and hence its RICO claim must fail.

## Private Parties

### **Shareholders**

The most common follow on civil actions are those brought by the shareholders of a company charged with violating the FCPA.<sup>254</sup> The suits are of two kinds, one against the company and its officers for securities fraud and the second against the officers and directors only, for failing to prevent the company from paying bribes. The latter, brought in the name of the company by its shareholders, was until recently the more common of the two.

In such shareholder derivative suits, the shareholders allege that the bribery inflicted financial losses on the company, and that its officers and directors should be held liable for failing to prevent it. Normally, the company's management brings suit on the corporation's behalf, but because management was the one at fault for the bribery, corporate law allows the shareholders to sue on the company's behalf. While damages are paid to the corporation, the attorneys pursuing the claims are paid, and paid well, by the corporation, giving rise to a form of "entrepreneurial litigation," where plaintiffs' lawyers press a claim in the hopes of a large payoff and with little input from clients.<sup>255</sup> Though the chance of a lucrative fee may result in the filing of meritless cases, procedural and substantive obstacles are in place to weed such cases out before trial.

To begin with, before filing a derivative action a plaintiff must demand that the company's board itself sue to enforce the corporation's rights; if the plaintiff does not make a pre-filing demand, it must include in its complaint particular facts showing why such a demand would have been futile. In a case against Dow Chemical's officers and directors involving claims the officers had bribed officials of Kuwait's Supreme Petroleum Council, shareholders claimed board members had such financial and personal interests in the matter that they would not have been able to make an informed business judgment in response to a demand they sue the officers. Plaintiff-shareholders argued that, thanks to a web of business or personal relationships with Dow's CEO, a majority of directors were unable to act independently of his influence. In an illustration of how high a hurdle shareholder plaintiffs must clear to proceed with a suit, the court ruled that without particular facts showing how and why the directors could not act independently, the case must be dismissed.<sup>256</sup>

Whether or not the plaintiff shareholder makes a pre-filing demand, it must overcome the presumption that the directors' decisions in overseeing the company are a reasonable exercise of their business judgment. In the Dow Chemical action, shareholder-plaintiffs had alleged that Dow's directors had ignored reports in a Kuwait newspaper that company officers had bribed members of the country's Supreme Petroleum Council and that the failure to investigate these reports, together with a previous case in which Dow had settled an FCPA action, was enough to show the directors had been negligent. But allegations of bribery in a country where such claims are often hurled for political reason are not enough—even when coupled with the argument that "because bribery may have occurred in the past . . . by different members of management, in a different country (India), and for a different transaction." The court held the plaintiffs had failed to produce sufficient facts to show the directors had "consciously disregard[ed] their duty to supervise against bribery" and thus dismissed the case.

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Only a few plaintiffs in FCPA-spawned actions have cleared these hurdles, and in all cases where they have, the result has been an out-of-court settlement. In 2011, drug manufacturer SciClone paid derivative-plaintiffs \$2.5 million in legal fees, and agreed to: (i) recover any incentive-based compensation from its officers if the company's earnings had to be restated after the government's FCPA enforcement action; (ii) create a new position in the company called "Compliance Coordinator;" (iii) establish a detailed code of employee ethics; and (iv) tighten up its internal controls to settle a derivative suit.<sup>257</sup> And in a 2009 settlement, Faro Technologies' directors agreed to implement corporate governance changes and pay \$400,000 in plaintiffs' attorneys' fees in settlement of a derivative suit. But most FCPA-based derivative suits have been dismissed before trial, and recent commentary notes a decline in new filings, the result surely of the general decline in shareholder derivative actions generally coupled<sup>258</sup> with the failure of so many earlier cases to survive a motion to dismiss.

The other remedy open to an investor in a bribe-paying company is an action for securities fraud. Under Section 10(b) (5) of the Securities Exchange Act of 1934, anyone injured by reason of an "untrue statement of a material fact" or the failure "to state a material fact" which affects the price of a publicly traded security can bring suit for damages. In the days after the *New York Times* reported that Wal-Mart's Mexican subsidiary had bribed Mexican officials, its share price dropped eight percent,<sup>259</sup> and an employee pension fund that had invested in Wal-Mart quickly filed suit to recover its losses. The fund alleged that, by failing to disclose the company's involvement in a bribery scheme, Wal-Mart's stock traded at an artificially high price. Similar claims were brought against the Avon Products Corporation, maker and seller of women's beauty products, after it revealed it was under investigation for bribing Chinese officials. Plaintiff-shareholders claimed the company's failure to disclose that it had obtained licenses for direct sales operations in China through bribery, and its subsequent failure to report that its growing revenues in China were the result of bribery, had inflated its stock price.

As with other securities fraud actions, the plaintiffs that sued Wal-Mart and Avon brought their actions as class actions, on behalf of themselves and all other shareholders who suffered from the companies' failure to disclose the bribery. Save for pension funds, shareholders rarely have a big enough stake in a company to justify bringing a case alone. Filing a class action allows for the costs, as well as the amount recovered through an out-of-court settlement or judgment, to be distributed among class members according to the percentage of shares they own.

Class actions also provide a way for the costs of the litigation to be deferred until settlement or judgment. Plaintiffs' attorneys will agree not to seek their fees from class members but look to be paid from a settlement or judgment. Because recoveries in class actions can be quite large, the lawyers' fees can be substantial and thus, as with shareholder derivative suits, there are incentives for lawyers to press weak or meritless claims.

As with shareholder derivative actions, lawmakers concluded that too many frivolous suits were being brought and have enacted reforms making it easier at the outset of the case to cull suits with no merit. In addition to showing the company or a company officer misstated or failed to state an important ("material") fact, a plaintiff must show that: (i) the statement was made with an intent to deceive (*scienter*); (ii) a connection between the statement and the purchase or sale of a security; (iii) the plaintiff relied upon the misrepresentation or omission; and (iv) the plaintiff suffered an economic loss caused by that reliance. With these substantive law hurdles there are procedural ones as well. Most importantly, the Private Securities Litigation Reform Act of 1995 requires that plaintiff plead "with particularity" facts giving rise to a "strong inference" the statements were fraudulent, must identify the identity of the speaker and when the statements were made, and must explain why the statements were fraudulent.<sup>260</sup>

Again, as with shareholder derivative actions, the challenges to maintaining a class actions securities fraud case are taking their toll. Many of the cases filed shortly after the uptake in FCPA enforcement actions have been dismissed, and commentators again predict a decline in new filings. Thus, despite filing a 164-page complaint in an attempt to meet the specificity requirements imposed by 1995 reform legislation, the trial court in Avon found plaintiffs had failed to allege with sufficient specificity that when making statements about the company's business in China its senior executives knew or had reason to suspect bribes were being paid.<sup>261</sup> At the same time, well-pleaded cases with solid factual bases are surviving motions to dismiss, as have plaintiffs in *Wal-Mart*,<sup>262</sup> helped surely by the extensive details revealed in a *New York Times* series on the case and the sharp drop in the company's share price after the first story appeared.

### **Competitors**

A firm in competition with a bribe-payer can claim damages under two different theories: one, that its business was harmed as a result of the bribe, and two, that the bribery harmed the competitive process itself. The former can be brought under various state law unfair competition statutes and, if the plaintiff lost an existing customer thanks to the bribe, under a common law theory of tortious interference with contractual relations. The latter, harm to the competitive process, gives rise to a private right of action to enforce the federal antitrust laws or a particular state antitrust statute. In *Korea Supply Co. v Lockheed Martin Corp.*, plaintiff Korea Supply had represented an American defense contractor bidding to provide radar systems to the Republic of Korea. Though its bid was lower and its equipment superior, Korea Supply and its principal lost to defendant Lockheed Martin because of alleged bribes and sexual favors Lockheed allegedly provided Korean officials. Korea Supply sued for damages under the California unfair competition law, and the state's highest court upheld the lower court's decision that a violation of the FCPA was an unfair act under the state statute.<sup>263</sup>

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While a competitor need only show it suffered injury to recover under an unfair competition or tortious interference theory, recovery under federal and state antitrust laws requires a showing that the bribery injured competition. An example would be where a pattern of bribery allowed a firm to gain monopoly power in the market. Although a difficult showing to make,<sup>264</sup> the advantage is that, like federal and state racketeering laws, damages for violating the antitrust laws are trebled and attorneys' fees awarded.

The most successful competitor action against an FCPA violator to date is *NewMarket Corporation v Innospect*. Both companies manufactured a gasoline additive, and in 2010 Innospect admitted in settling an FCPA action that it had paid the Iraqi officials responsible for approving the sale of fuel additives to flunk the field tests NewMarket's additive had to pass to be offered for sale in Iraq. NewMarket brought suit under both Virginia and federal antitrust laws alleging Innospect was attempting to monopolize the gasoline additive market in Iraq and in Indonesia, where there was also evidence the company had bribed officials to keep NewMarket from selling its additive. In 2011, Innospect paid NewMarket \$45 million to settle the suit.<sup>265</sup>

### ***Business partners***

Companies doing business with FCPA violators have also filed private suits under a variety of theories. In *Grynberg v BP PLC*, Colorado oilman Jack Grynberg sued under RICO and common law fraud and loss of reputation theories for damages because his joint venture partners had bribed Kazakh officials. He claimed the bribes constituted a diversion of his share of the joint venture profits and "harm[ed his] hard-earned and well-justified reputation as a crusader against bribery and other corruption within the petroleum industry."<sup>266</sup> Argo-Tech, an Ohio-based aerospace manufacturer, sued its Japanese distributor for allegedly bribing high-ranking officials in Japan's Ministry of Defense to secure contracts. Argo-Tech claimed the distributor breached the provision in the parties' distribution agreement requiring it to comply with the FCPA.<sup>267</sup> *Grynberg* was subsequently dismissed in favor of arbitration; *Argo-Tech* settled for an undisclosed amount.

## **CONCLUSION**

There are several remedies open to those injured when an American or a company subject to American law bribes an official of a foreign courts. But as this review demonstrates, the path is littered with obstacles. Foreign governments must show they are indeed victims and not, as was the case with the Costa Rica and Iraq litigation, that their employees were deeply involved in wrongdoing. Private parties must clear several hurdles, from establishing that their cases belong in an American court to pleading with particularity how the bribe paying harmed them.

But as this review also demonstrates, these hurdles are not insurmountable, and when the bribery of a foreign official causes real economic loss, to a foreign government or to private entities, a remedy is available.

# SOUTH AFRICA: PUBLIC TRUST THEORY AS THE BASIS FOR RESOURCE CORRUPTION LITIGATION

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Africa battles with corruption, and South Africa is no exception. South African jurisprudence is, however, not void of legal remedies intended to address corruption. In support of, and in adherence to, international instruments aimed at eradicating corruption, several statutes have been promulgated, and the Promotion of Administrative Justice Act 3 of 2000 and the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (PACCA) have been the most prominent. The aim of this article is, however, not to provide an overview of existing anticorruption measures in South African jurisprudence<sup>268</sup> but to focus on ways in which the novel concept of public trusteeship may influence the future course of anticorruption efforts in the country.

Like many African states, South Africa is endowed with a wealth of natural resources, including gold and diamonds, which should go toward improving the lives of its citizens. But as with many African states, corruption often stands in the way of citizens realizing the full benefit of these resources. This paper reviews how the legal theory of public trust could be used by South African civil society to combat grand corruption involving land and natural resources.

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The theory of public trust derives from the sovereign's duty to act as the guardian of certain interests for the benefit of the nation as a whole.

While the analysis is confined to South African statutes and precedents, the same reasoning might well provide a basis for litigation to fight corruption in other African states as well. The theory of public trust derives from the sovereign's duty to act as the guardian of certain interests for the benefit of the nation as a whole. It has its roots in the writings of authors as different as John Locke, Roscoe Pound, and Karl Marx, and its appeal is reflected in its incorporation into the laws of France, Germany, the United Kingdom, and those countries whose legal systems have been influenced by them. In the United States, it has been particularly influential, serving as the basis for citizens' suits to vindicate environmental rights. Moreover, Article 21 of the African Charter on Human and Peoples' Rights, to which 53 countries are party, provides that the wealth derived from a nation's resources is for "the exclusive interest of the people . . . [and in] no case shall a people be deprived of it."

## PUBLIC TRUST THEORY IN SOUTH AFRICA

The creation of a constitutionally recognized environmental right in Section 24 of the South African Constitution laid the foundation for several statutes that incorporate doctrines of public trust into South African environmental and natural resources law.<sup>269</sup> The first instance of public-trust language used in South African law is found in the National Water Act (NWA) 36 of 1998. The preamble to the NWA states that water is a natural resource that belongs to all people. The national government was thereafter appointed as public trustee of the nation's water resources. It is not a coincidence that public-trust language was used in the NWA. *The White Paper on a National Water Policy for South Africa* very clearly states that the government of the day intended to create a doctrine of public trust:

**To make sure that the values of our democracy and our Constitution are given force in South Africa's new water law, the idea of water as a public good will be redeveloped into a doctrine of public trust which is uniquely South African and is designed to fit South Africa's specific circumstances.**

The water law was soon followed by the National Environmental Management Act 107 of 1998 (NEMA), stating in Section 2 that the "environment is held in trust for the people," and the state is appointed as the custodian thereof. In 2004, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) followed suit by declaring in Section 3 that mineral and petroleum resources are the common heritage of all the people of South Africa, with the state the duly appointed custodian thereof for the benefit of all South Africans. In 2008, the concept was applied once again in the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMA: ICM). This Act declares that ownership of coastal public property vests in the citizens of the republic, and that the state is the public trustee thereof.

Although all the statutes mentioned above function in their own spheres (with the exception of national law on environmental management, which provides the framework for all legislation related to the environment), they display a number of common characteristics. One of the most important is that a fiduciary responsibility pertaining to a particular natural resource will be imposed on the state or national government with the sole aim of protecting intergenerational interests. Although a specific minister is appointed in each law to act on behalf of the



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The public trustees' responsibilities are...to protect and preserve the specific resource and to manage resource use in a sustainable and equitable manner for the benefit of current and future users...

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government or the state, it is either the state or the entire national government that bears the responsibility of public trusteeship. Despite the fact that specific functions may be delegated to subordinate structures or functionaries in terms of these statutes, the public trustee or custodian ultimately will remain accountable for the resource assigned to it.

The public trustees' responsibilities are set out in the particular acts as the fiduciary responsibility to protect and preserve the specific resource and to manage resource use in a sustainable and equitable manner for the benefit of current and future users and stakeholders.

A particular class or category of citizens or stakeholders who are the beneficiaries of the state's fiduciary responsibility towards a particular resource is also identified in each Act. The national water law unequivocally states that "water is a natural resource that belongs to all people." The National Environmental Management Act states that the "environment must be protected as the people's common heritage." The mineral and petroleum development law affirms that "South Africa's mineral and petroleum resources belong to the nation" and the coastal management act that "the ownership of coastal public property vests in the citizens of the Republic." Although different terms have been used to identify the beneficiaries under the different statutes—namely "all people," "the people," "the nation," "the citizens of the Republic"—it is submitted that the South African nation as a whole will be the beneficiary under all these statutes. Although the "nation" has no legal personality, the term has been used as a collective noun to denote a community of people associated with a particular territory. This community of people has shared interests in the sound management of the particular natural resource that is the subject matter of the particular Act. In conjunction with the constitutional declaration in Section 24 that the environment should be protected for the benefit of current and future generations, all these statutes specifically include future generations as stakeholders (and thus as beneficiaries).

The Constitutional Court recently held that the scheme of the mining and petroleum resource law abolished private ownership of mineral rights and vested the ownership of mineral and petroleum resources in the nation.<sup>270</sup> It also held that the law vested all minerals in the state.<sup>271</sup> It is submitted that this apparent contradiction in actual fact contextualizes the property-rights regime within which not only mineral and petroleum resources, but all the country's natural resources are managed. By acknowledging that ownership of a resource simultaneously vests in both the nation and the state, the existence of a public trust has been confirmed. It is submitted that the statutory doctrines of public trust fundamentally acknowledge that the nation's mineral and petroleum resources (as well as its other natural resources) vest in the state as the legal entity representing the nation.<sup>272</sup>

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## PUBLIC TRUSTEESHIP AS A BASIS FOR AN ACTION FOR DAMAGES BY CIVIL SOCIETY

Although the statutory creation of doctrines of public trust did not introduce new or novel legal remedies through which corruption can be addressed, they strengthen and support existing legal remedies in appropriate circumstances.

In South African jurisprudence, civil litigation for damages would most likely be founded on either a delictual claim (a civil claim under South Africa's law of delict) for damages or a claim for constitutional damages.<sup>273</sup> Where an act of corruption constitutes an infringement of a constitutionally entrenched fundamental right, "appropriate relief" may be obtained through the provisions of Section 38 of the constitution.<sup>274</sup> Constitutional damages will be regarded as a particular manifestation of appropriate relief. In theory, any person whose fundamental rights have been infringed may claim constitutional damages, and in *Fose v Minister of Safety and Security*,<sup>275</sup> the Constitutional Court held that it would be "strange if damage could not be claimed . . . for loss occasioned by the breach of a right vested in the claimant by the Supreme law." The constitutional remedy should, however, aim to vindicate the infringement of a constitutional right, to affirm constitutional values, and to deter future violations of fundamental rights. It is not primarily aimed at providing compensation.

The principle has also been established that delictual and statutory remedies often vindicate the infringement of fundamental rights, and despite the fact that constitutional relief and delictual remedies are not concurrent, the applicable delictual remedy may at the same time be the appropriate constitutional remedy. In fact, case law not only supports the idea that constitutional damages will not be awarded where a plaintiff has already succeeded with a delictual claim for damages,<sup>276</sup> but also indicates that constitutional damages might only be awarded in the appropriate circumstances as appropriate relief where no statutory remedies are applicable or adequate common-law remedies exist.<sup>277</sup> In support of this approach, the Supreme Court of Appeal, in its ruling in *Jayiya v MEC for Welfare*, stated that where the lawgiver has legislated statutory mechanisms for securing constitutional rights, they must be used.<sup>278</sup> Hence, before constitutional damages are claimed for the violation of a fundamental human right brought about by an act of corruption,<sup>279</sup> a plaintiff must ensure that no delictual<sup>280</sup> or statutory remedies are available to address the violation.

The simple question addressed in this paper is therefore: To what extent does public trust theory support the institution of common-law damages claims based on acts of corruption? If the requirement stated by the Supreme Court of Appeal in *Jayiya* were to be considered, the question can be rephrased: Can a statutory doctrine of public trust be regarded as a "legislated statutory mechanism" to assist citizens in instituting delictual claims for damages caused by corruption?

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To what extent does public trust theory support the institution of common-law damages claims based on acts of corruption?

## ELEMENTS OF A CIVIL CLAIM FOR DAMAGES

To succeed with a civil claim for damages, a plaintiff has to prove that loss was caused by a wrongful act or omission committed with the necessary degree of fault with a clear causal link between the conduct and the damages suffered. These elements constitute the *facta probanda*, or “facts to be shown,” of a claim. However, before a plaintiff can even consider instituting an action for damages, it must be clear that he has the necessary standing, or *locus standi*, to do so. In *Gross v Pentz*,<sup>281</sup> Harms JA stated that *locus standi* concerns the sufficiency and directness of interest in litigation and that that sufficiency and interest depends on the particular facts of each individual case. It is submitted that every citizen in the country obtained sufficient and direct interest in those resources statutorily cloaked with the doctrine of public trust. If the decision of the Constitutional Court in *Minister of Mineral Resources v Sishen Iron ore Company (Pty) Ltd*<sup>282</sup> were to be used as a yardstick, the citizens of the country acquired a public-property interest in the particular natural resources encapsulated within the statutory doctrines of public trust. This public-property interest establishes *locus standi* for citizens to approach the court in appropriate circumstances, and may thereby be regarded as additional and supplementary to Section 38 of the Constitution and Section 32 of the National Environmental Management Act.<sup>283</sup>

After *locus standi* has been established, a plaintiff must prove all the *facta probanda* of the remedy. As stated above, in cases where an action based on monetary loss (an aquilian action under South Africa’s Roman-Dutch influenced legal system) is used to claim damages, the elements of the cause would be conduct, wrongfulness, causality, fault, and damages. Public trust theory will assist in establishing the element of wrongfulness, particularly in those circumstances where it is asserted that an omission by an organ of state is the conduct causing the loss. This may typically be relevant for scenarios where: (i) an act of corruption was committed by a state official; (ii) the act is deemed to be outside the scope of the official’s employment; and (iii) it is clear that the relevant organ of state failed to take the necessary steps to create an environment wherein corruption is not only not tolerated but actively prevented.

Conduct, whether an act or an omission, is wrongful if it either infringes a legally recognized right of the plaintiff or constitutes the breach of a legal duty owed by the defendant to the plaintiff. It has been established in case law that breach of a duty recognized in law for the purposes of liability is per se wrongful.<sup>284</sup> This is of particular importance in finding liability in cases where no infringement of a right is evident. The existence of a legal duty to act is a conclusion of law reached after all the circumstances of a case have been considered.<sup>285</sup> As legal duties may originate from the Bill of Rights or the common law,<sup>286</sup> it is submitted that the statutory doctrines of public trust established a legal duty that rests on the respective trustees and custodians of natural resources to ensure that the resources will be managed for the benefit of the nation. This would include the duty to ensure that the necessary mechanisms have been provided, as this would deter and prevent corruption, and to implement appropriate measures to identify and remove corrupt officials. The fiduciary responsibility assigned to public trustees and custodians of specific natural resources entrenches this legal duty.

It is further submitted that where acts of corruption have been committed in the execution and during the course of a state official’s employment, the relevant public trustee or custodian may be held vicariously liable for the harm or loss occasioned by such corruption.

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Where acts of corruption have been committed in the execution... of a state official's employment, the relevant public trustee or custodian may be held vicariously liable for the harm or loss occasioned by such corruption.

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A plaintiff will succeed with a claim for damages only if a loss has indeed been suffered as a result of corruption. Actual loss and the existence of corruption are questions of fact, and the doctrines of public trust cannot be employed to prove that these elements exist. A strong, and I would argue compelling, argument can be made that the fiduciary duties of state officials dealing with the country's natural resources, and the public-property interest acquired by citizens of the country, establish an imperative to conduct transparent transactions in relation to the relevant resource. This claim opens the door to acquire evidence that may assist in proving corruption.

But claims for damages are not the only legal remedies by means of which civil litigation may be instituted. An interdict—a court order restraining a person, or an organ of state, from continuing with or committing wrongful conduct—is another. There are three primary requisites for an interdict. The applicant must show: (i) a clear right; (ii) the wrongful invasion or threatened invasion of a right through which harm<sup>287</sup> will be caused; and (iii) the absence of another suitable remedy.<sup>288</sup> It is noteworthy that fault is not a requisite for granting an interdict.<sup>289</sup> Here, public trust theory can assist by establishing in appropriate instances the existence of a clear right. Whether an applicant has a clear right is a matter of substantive law that must be proved on a balance of probabilities.<sup>290</sup> If one uses the statutory doctrine of public trust, as created in the Mineral and Petroleum Resources Development Act<sup>291</sup> as an example, it is clear that the state is custodian of the mineral and petroleum resources that are the common heritage of all the people of South Africa, for the benefit of all South Africans.<sup>292</sup> Thus, where an Act expressly states that a particular resource must be used, managed, and protected for the benefit of all South Africans, it would seem unconstestable that a definite and clear right vests “in all South Africans” to insist on the beneficial management of the resource in accordance with the aims of the Act.<sup>293</sup> An act, or imminent act of corruption, would impact negatively on this right and cause harm or injury. It is therefore submitted that the particular construction of the doctrine of public trust in the relevant law will determine whether citizens will be awarded such a definite and clear right. Accordingly, it follows that Section 24 of the Constitution and Section 32 of the National Environmental Management Act jointly create such a right in matters concerning the environment.<sup>294</sup>

Once it has been understood that natural resources like water, minerals, and the ocean's riches are not reserved for the exclusive use of a privileged few but statutorily bequeathed to the whole nation (including future generations), it might awaken an unprecedented civil responsibility...

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## CONCLUSION

Public trusteeship embodies the notion that the state is the custodian or trustee of a particular natural resource, but only on behalf of the people. Public trust theory should therefore essentially foster a notion of entitlement among the citizens of South Africa. It is a fact that the incorporation of the notion of public trusteeship has fundamentally altered the property-rights regime according to which the country's mineral and petroleum resources in particular had been regulated.<sup>295</sup> As a result, the concept does not appeal to proponents of private property rights. However, it is that once the extent of the acquired public interest has been truly grasped and the lamentations of what is perceived to have been lost have died down, public trust theory will reach its full potential. Once it has been understood that natural resources like water, minerals, and the ocean's riches are not reserved for the exclusive use of a privileged few but statutorily bequeathed to the whole nation (including future generations), it might awaken an unprecedented civil responsibility that could fuel civil action aimed at eradicating corruption that detrimentally influences the use, management, and protection of these resources.

It is submitted that civil society's reluctance to engage with government is currently the major stumbling block that prevents more civil litigation in response to corruption. This reluctance may be attributed basically to three main reasons. The first is the absolute private-property regime within which natural-resource exploitation had been regulated under the apartheid regime—people have to be educated to grasp the fact that they have a real interest in the nation's natural resources and that those resources should not be exploited by a particular group based on their skin color only. Secondly, it is submitted that the majority of the South African population has to date been overwhelmed to such an extent by the joy of political victory that a blind eye has been turned on systemic corruption. The third reason is the practical reality that litigation is costly and that companies rarely sponsor litigation against the state through which they themselves can be exposed. An additional factor may also be that citizens feel so completely overwhelmed by poor service delivery and an apparent tolerance of corruption that they lose confidence in both the government and the courts, and therefore withdraw from the public sector in order to fend for themselves in their own small secluded living spaces.

Despite these hurdles it is submitted that public-trust theory has a supportive role to play in combatting corruption regarding the use and allocation of South Africa's natural resources. It is hoped too that the doctrines that underlie it will serve to provoke similar responses in other African states.

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# EMPOWERING THE VICTIMS OF CORRUPTION: THE POTENTIAL OF SLEEPING THIRD-PARTY BENEFICIARY CLAUSES

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**ABIOLA MAKINWA**

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This paper proposes that third-party beneficiary clauses, rights *ius quaesitum tertio*,<sup>296</sup> can be used to create platforms for private actor intervention in the fight against corruption and can help to shape an environment that discourages corruption in a self-regulatory manner. In the course of my PhD research work on private remedies for corruption, I came to believe that people affected by corruption should be empowered to act against it. In the words of Simon Young, an expert on financial crime at the law faculty of the University of Hong Kong, corruption is “unique in many ways”:

**The gains and losses can be massive. The state or government is often the victim. The proceeds of corruption, if traceable, are often in another jurisdiction, thereby complicating recovery . . . [;] civil actions against corruption are indicative not necessarily of a failing of the criminal justice system but of the absence of a better alternative to recovery.**<sup>297</sup>

My work in this area was inspired by an illiterate farmer in Nigeria’s Osun State. In 2008, as part of my research on private remedies for corruption, I had been interviewing selected Nigerians on their experiences of corruption. My discussion with this farmer was quite accidental as he was not one of the persons I had selected to interview.

I happened on him while visiting my father in my hometown of Erin-Oke. From his dress I could see that he was a local farmer. I greeted him, and, out of curiosity, I explained that I had been speaking to several persons about their experiences of corruption. I asked whether he had

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any experience he would like to share. To my surprise, he launched into a very passionate discourse in Yoruba. He lamented at length the lack of basic public services such as electricity, running water, roads, and drugs at the local health center. He explained his difficulties in obtaining fertilizer at an affordable price, and described a general lack that made his life “very hard.” His weathered face was filled with frustration as he attributed the cause of all this to corruption—to big men who came with big promises and delivered nothing. He was articulate. He was passionate. He was also angry, and his anger and experiences belied the idea that corruption is somehow a victimless crime. I looked at him and wondered to myself as he spoke how this energy might be harnessed in the fight against corruption.

By linking those who bear the brunt of the negative consequences of corruption to public contracts tainted by corruption, third-party beneficiary clauses would give victims of corruption—such as the farmer in Erin-Oke—a seat at the table, a right to sue, and a right to be engaged in the sanctioning processes with regard to such corrupt transactions. This approach can also act as a check on the actions of government officials and corporations by increasing the risk they incur through corrupt activity.

Until legal regulations translate to real change in the experience of people, the mechanisms for fighting corruption will at best be still evolving. New strategies that anticipate and overcome the challenges of existing approaches remain an urgent priority. Empowerment—giving victims legal standing to challenge corruption—has the potential to address two main challenges that flow from the existing regulatory framework:

- The conflict of interest created by criminalization. Most legal systems give the state a monopoly on the right to initiate criminal sanctions, making it typically the primary enforcer of anticorruption rules. When corporations or governments commit crimes, as in the case of public contracts affected by corruption, the state has a conflict of interest that may prevent it from finding the political will to investigate or conduct prosecutions. The United Kingdom supplies an illustrative example: in 2006, the government successfully claimed that investigations into bribery payments made to a Saudi official as part of a deal with BAE Systems over the supply of military equipment would pose a threat to national security.<sup>298</sup> Government actors may be the primary beneficiaries of contracts tainted by corruption. This is a strong argument for empowering other actors against corruption.<sup>299</sup>
- The lack of attention traditional criminal law approaches pay to contracts that result from successful acts of bribery. Bribery in transnational business is a means to a contract and not an end in itself. Yet international regulations have focused on punishing the giver and the taker of the bribe. They have rarely addressed the contracts tainted by corruption.

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It is possible to provide third-party redress, while also providing mechanisms to avoid encouraging excessive litigation, through establishing a *sleeping* third-party beneficiary clause in procurement contracts.

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Empowerment of victims, however, like any new proposal, faces several challenges, including the challenge of the enforcement of judgments. The enforcement of domestic and international anticorruption rules has been lax in many countries, especially those where corruption is endemic.

Empowerment also faces the limitations of legal standing to sue. There are good reasons for rules of standing; the machinery of justice might otherwise break down under the weight of a multiplicity of claims or, worse, an onslaught of frivolous claims. But I argue that it is possible to provide third-party redress, while also providing mechanisms to avoid encouraging excessive litigation, through establishing a *sleeping* third-party beneficiary clause in procurement contracts. Such clauses remain dormant unless the third party can demonstrate evidence of corrupt activity relating to the award of a specific contract. Such a clause would be most successful if the specter of direct intervention discourages corruption so effectively that the clause is never triggered into operation.

Inserting sleeping third-party beneficiary clauses as standard clauses in procurement contracts would usher in a new dynamic in the fight against corruption by linking discrete layers of interactions that corrupt transactions simultaneously affect. In taking a transaction approach to fighting corruption, these clauses would trade on the notion of restoring interactions damaged by a corrupt exchange. These clauses would work by identifying and addressing broken interactions at the mandate, violation, and consequence levels.<sup>300</sup>

By creating a direct link among: (i) the public that grants government officials the mandate to represent the public interest in contracts with a public dimension; (ii) the parties to contracts that result from the exercise of this mandate; and (iii) the contracts that result from the exercise of that mandate, sleeping third-party beneficiary clauses can positively influence the environment in which a corrupt exchange takes place by creating more awareness and multi-level opportunities for dialogue between all parties affected by a corrupt exchange.

## THE LEGAL CASE FOR EMPOWERING VICTIMS OF CORRUPTION

A 2008 report of the Special Representative of the UN Secretary-General points out that “States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations based in their territory, while also protecting against frivolous claims.”<sup>301</sup>

However, the United Nations Convention against Corruption (UNCAC) acknowledges that while the prevention and eradication of corruption is a responsibility of all states, if their efforts are to be effective they must cooperate not just with other states but also with citizens and groups outside the public sector, such as civil society, non-governmental organizations, and community-based organizations.<sup>302</sup> Article 13 of the UNCAC expatiates more fully on the participation of civil society, calling on states to take measures “to promote the active participation of citizens and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.”<sup>303</sup> The UNCAC had 186 parties and 140 signatories at the time of writing. The logical extension of the framework the UNCAC created is the empowerment of third parties.<sup>304</sup> This criminalization is one of the major achievements in the fight against corruption in the last two decades.

The emergence of a global standard criminalizing corruption in international business transactions reflects a crisscross of international, regional, and domestic instruments.<sup>305</sup> The effect of this network of rules is a new norm repudiating corruption that transcends national boundaries and criminalizes transnational bribery.<sup>306</sup> While it does not provide for a third-party right to sue, its logical extension does. Article 35 of the UNCAC, for example, demarcates corrupt acts established under the convention as wrongs for which there is a concurrent private right of redress, stating:

**Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.**<sup>307</sup>

Such codifications recognize any legal wrong that has caused injury as founding a right of civil action in both civil and common law.<sup>308</sup> Wrongs may be criminal, civil, or both.<sup>309</sup> Where a party acts contrary to obligations imposed by the anticorruption instruments, the breach of this obligation creates corresponding infringements of rights. The party whose rights the corruption infringes implicitly has the right to oppose such infringements.<sup>310</sup>

Not least because Article 35 subjects its provisions to the principle of sovereignty and non-interference, it does not bestow a third-party right to sue. The fundamental principles of domestic laws of participating states supersede it. Further, by virtue of its preconditions, it permits only parties who suffered a direct, quantifiable harm from corruption to seek redress, and only in a case involving a clear causal link to actions by a particular party. This places a significant evidential burden on the plaintiff seeking redress under Article 35, and severely curtails such claims.

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Article 34 of the UNCAC's address of secondary contracts that result as consequence of the corrupt exchange likewise paves the way for third-party beneficiary clauses.<sup>311</sup> It raises the possibility of declaring such transactions invalid, rescinding contracts tainted by corruption, and withdrawing contracts or other concessions entered into by government authorities, thereby broadening the sanctioning environment for corrupt activities:

**[W]ith due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.**

Such a shift brings into focus the contracts, assets, and liability for harm to the victims of corrupt government contracting. This allows the process of contracting for public contracts, the transparency of the process, and the performance of such contracts to serve as additional avenues for intervention in the fight against corruption.

Empowering the victim of corruption to commence private actions for corrupt acts can occur independently of an unwilling state. Therefore, such victims can have a welcome deterrent effect by piercing the veil of impunity that a state monopoly on anticorruption measures creates. An alternative trigger for enforcement that exists wherever there is a jurisdictional link would help to create an environment where victims are more prepared to take steps and wrongdoers are mindful of the risk of litigation. The criminal process is predictable, with predetermined fines and punishment that corrupt actors can readily factor into the decision as to whether or not to give a bribe. Private claims also introduce an element of uncertainty in terms of the number, duration, and costs (both financial and reputational) of private suits. Empowering victims of corruption to bring private actions with respect to contracts awarded through corrupt activity addresses two challenges simultaneously.

## **CLAIMS ON CONTRACTS TAINTED BY CORRUPTION**

Two types of contracts accompany a corrupt exchange. The first is the primary contract for the exchange of the bribe itself. Contracts for special fees, kickbacks, consultancies, and commissions are examples of such agreements. This agreement, the primary contract, evidences the payment of a bribe and kicks off the sequence of actions and contracts that this original act of bribery taints. The secondary contract results from the success of the primary agreement.<sup>312</sup> Such secondary contracts include public contracts awarded because of bribes.

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Empowering the victim of corruption to commence private actions for corrupt acts can occur independently of an unwilling state.

A secondary contract might involve building a school, equipping a hospital, or providing telecommunications, electricity, roads, or clean water. Such contracts are intended to benefit the public as well as the signatories to the contract; the justification for the use of public funds entirely rests on this benefit.<sup>313</sup> Yet tradition bars the public as a beneficiary of the contract from addressing the harm when a company that won a contract did so through bribery, even though poor performance affects the public directly. The general principle of privity of contract in most jurisdictions, as well as the requirement for consideration in common law jurisdictions, ordinarily bars such victims from the right to sue on a contract. While a private right of action exists, it conforms to the classic traditional basis for actions based on non-contractual obligations in tort, namely to compensate the plaintiff for injury caused by another party. Only a direct causal link between the damage suffered by a victim and a proven act of corruption confers the legal standing to initiate legal proceedings. Furthermore, only where a party has provided consideration does a right of suit on a contract arise with respect to contractual obligations. Both barriers almost always prevent the ultimate victim of corruption, who is not a direct party to a public contract and cannot quantify the specific loss he or she personally experiences, from bringing legal action in the absence of third-party beneficiary clauses.

## EXPLOITING THIRD-PARTY BENEFICIARY PRINCIPLES

It is possible, in most jurisdictions, for parties to a contract to extend the right to sue on the contract to parties that have not participated in the negotiation of the contract and that have not signed the contract. As Farnsworth notes, “[i]f the parties have provided either that the third party has the right to enforce the agreement or that the third party does not have the right the court will give effect to that provision.”<sup>314</sup> With such a move, the parties who ultimately stand to gain (or lose) from a public contract can acquire the legal standing to play a role in the proper execution of such a contract.

In general, the third party has to become a beneficiary of the contract within the contemplation of the parties to the contract. In the United Kingdom, for example, the Contracts (Rights of Third Parties) Act 1999 provides a statutory exception to the doctrine of privity by providing for a limited right of action for a person who is not a party to a contract (referred to as a third party) if the contract expressly provides that the third party may enforce a contractual term,<sup>315</sup> or where the contract purports to confer a benefit on the third party.<sup>316</sup> However, if on a proper construction of the contract it appears that the parties to the contract did not intend the term to be enforceable by the third party,<sup>317</sup> or the third party is not expressly identified in the contract by name as a member of a class or as answering a particular description, the third party has no right of enforcement.<sup>318</sup> U.S. law functions similarly.<sup>319</sup> The Dutch Civil Code provides for a limited right by third parties to seek performance where “the contract provides the right for a third party to claim performance from one of the parties or to otherwise invoke the contract against any of them if the contract contains a stipulation to that effect and the third party so accepts.”<sup>320</sup> Once the third party has accepted the stipulation, the third party is deemed to be a party to the contract.<sup>321</sup>

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Inserting a third-party beneficiary clause as a standard clause in a government public procurement would require identifying and describing the ultimate beneficiaries of the contract.

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These examples from common law and civil law suggest a third-party beneficiary clause must fulfill certain conditions. Firstly, while the third party must be expressly identified in the contract by name, as a member of a class, or as answering a particular description, the class or description need not be in existence when the contract is entered into. The third party must be ascertainable with certainty at the time when the right to enforce the contract has arisen. Depending on the particular public contract, a class of persons can be identified as representative of the public at large by virtue of the location, service, and targeted public or other linking element of the public contract. To give some examples, a defined community association, farmers' union, neighborhood association, association of residents of a defined area, or workers' union of a defined establishment might be third-party beneficiaries empowered to sue.

Inserting a third-party beneficiary clause as a standard clause in a government public procurement would require identifying and describing the ultimate beneficiaries of the contract. Therefore, contracting parties would need to identify the eventual beneficiaries of the contract with sufficient certainty to create a meaningful right to sue. Satisfying this requirement would justly involve government, corporations, and the communities that ultimately stand to benefit from a public contract.

This process of identification and definition gives a public contract a public face. By increasing consumers' awareness of corruption, and therefore the reputational implications of corruption, it can increase the risks of corrupt activity and positively influence compliance. The abstraction of public corruption becomes more concrete and evokes a desire for more direct repercussions for the offenders in the eyes of the general public.<sup>322</sup> Beneficiaries and representatives of beneficiaries become more aware of public contracts and their potential ramifications. Civil society gains an opportunity to play a partnering role with government and corporations to ensure transparency and accountability in government contracting. It enables governments to show that they are willing to be transparent and accountable to their public while contracting on their behalf. It gives corporations the opportunity to demonstrate their willingness to be socially responsible in a manner that is directly linked to the financial interests of the corporation. All players become united in a common interest to ensure that the contracting process is transparent and that contracts are duly executed.

## THE SLEEPING CLAUSE AS A CARROT

It is important to devise a third-party beneficiary clause in such a way as to avoid creating an excessive financial burden through a multitude of claims, as well as impairments of services, which would deter investment.<sup>323</sup> The need to avoid frivolous suits or opening the floodgates to litigation is an important consideration that supports a very restrictive approach to third-party beneficiary rights. Accordingly, this article proposes that third-party beneficiary clauses be *sleeping*. That is, they should stipulate a threshold of evidence of corruption or fraud that will be required to trigger the clause into operation, upon which it automatically comes into effect, making the identified third-party beneficiaries parties to the contract and giving them standing to sue on the contract.

## CONCLUSION

The European Union estimates that corruption alone costs the EU economy € 120 billion per year, just a little less than its entire annual budget.<sup>324</sup> Three-quarters of respondents in the European Union say that corruption is widespread in their own country.<sup>325</sup> The 2014 Transparency International Corruption Perceptions Index measures the perceived levels of public sector corruption worldwide, finding that more than two-thirds score less than 50 on a scale from 0 (highly corrupt) to 100 (very clean).<sup>326</sup> The list of corporations that have entered into settlements with a U.S. agency for allegations of bribery in their business affairs include Weatherford International Ltd., Diebold (an Ohio-based manufacturer of ATMs and bank security systems), Stryker Corporation (a Michigan-based medical technology company), Total, S.A. (a France-based oil and gas company), Ralph Lauren Corporation, Parker Drilling Company (a worldwide drilling services and project management firm), and Koninklijke Philips (a Netherlands-based health care company).<sup>327</sup> The need for remedies is urgent.

A sleeping third-party beneficiary clause would serve as an incentive for parties to contract in such a manner as not to activate the clause. Such a clause will be to the benefit of the government seeking to fight corruption by providing an incentive for companies to comply with government anticorruption rules. It would also be an incentive for corporations engaged in the procurement process not to succumb to demands for bribes by providing a strong argument for the choice to comply with anticorruption rules. It would level the playing field, because triggering the sleeping clause would affect all parties bidding for the public contract equally.

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Third-party beneficiary clauses ... should stipulate a threshold of evidence of corruption or fraud that will be required to trigger the clause into operation...

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Corporations, whistle blowers, or other agents involved in a competitive bid for a public contract may be more willing to come forward with concrete evidence of corruption in the procurement process knowing that this will trigger the third-party clause embedded in the contract. The interventions of strongly motivated third-party beneficiaries to redress a lack of performance or lack of transparency in the public procurement processes can have a positive impact on the fight against corruption. The process by which such a sleeping third-party beneficiary clause is drafted and included in public contracts would require cooperation between funding agencies, governments, corporations, and local communities. Civil society will play a crucial role as the channel for the identification and representation of intended beneficiaries. The sleeping nature of the clause would avoid creating an excessive burden. It also means that the clause would simultaneously provide a reward for good behavior and a sanction for noncompliance in a self-regulatory manner. Compliance with anticorruption laws becomes a function of the “smart” sanctioning environment independent of government authorities.



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# LITIGATING CORRUPTION BEFORE INTERNATIONAL HUMAN RIGHTS TRIBUNALS: SERAP BEFORE THE ECOWAS COURT

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## ADETOKUNBO MUMUNI

*Adetokunbo Mumuni is executive director of the Social and Economic Rights and Accountability Project (SERAP). Based in Lagos, SERAP was established in 2004 and works to promote transparency and accountability in Nigeria's public and private sectors.*

In a country where systemic corruption and the resulting poverty, inequality, and discrimination deprive many Nigerians of dignity and a path towards development and prosperity, our goal at the Social and Economic Rights and Accountability Project (SERAP) is to hold the government accountable for acts of corruption and violations of economic, social, and cultural rights guaranteed under international and regional human rights treaties.

In November 2010, SERAP won a landmark decision from the Court of Justice of the Economic Community of West African States (ECOWAS), which declared that the right to education is a legally enforceable human right in Nigeria.<sup>328</sup> In this article I discuss the process involved in litigating the case, the arguments canvassed, the ECOWAS Court decision, and the follow-up we have done and plan to do.

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## BACKGROUND

In 2005, during the administration of President Olusegun Obasanjo, Nigeria's anticorruption watchdog launched an investigation into allegations of corruption at the Universal Basic Education Commission (UBEC), a government agency set up in 2004 to provide additional federal funding support for schooling in disadvantaged areas of the country.

The investigation by the Independent Corrupt Practices and Other Related Offences Commission (ICPC) was launched in response to a petition filed by SERAP, backed by information from whistleblowers and SERAP's own investigative efforts. Its final report detailed extensive corruption and mismanagement in the handling of N54.78 billion (approximately \$270 million) in government funds during 2005 and 2006; the report found evidence that funds meant for building and repairing schools and classrooms had been diverted to fraudulent front companies, while in other cases state officials had overpaid favored contractors for work that was either substandard or not done at all.

The ICPC investigation resulted in several states repaying N3.4 billion (about \$17 million) to the federal government. The outcome of the investigation was widely welcomed in the Nigerian media, as was the role played by SERAP in initiating the ICPC investigation.

## CASE BEFORE THE ECOWAS COURT

In 2007, SERAP used the findings of the ICPC as the basis of an approach to the ECOWAS example of systematic high level corruption and theft of funds meant for primary education in Nigeria.

It argued that this type of corruption is the reason Nigeria has been unable to attain the level of education that its citizens deserve, and provides a plausible explanation for the sordid statistic that more than five million Nigerian children have no access to primary education, as well as the poor learning environment across the country. It also argued that the Nigerian government contributed to these problems by failing to seriously address allegations of corruption at the highest levels of government or the impunity that facilitates corruption in Nigeria. This in turn has contributed to the denial of the rights of the people to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights, such as the right to education. Finally, the case was made that corruption destroys the people's natural wealth and resources and is the primary cause of the problems denying the majority of citizens access to quality education.

Overall, the case was based on the provisions of Article 4(g) of the 1993 Revised Treaty of ECOWAS, as well as Articles 1, 2, 17, 21, and 22 of the African Charter on Human and Peoples' Rights (ACHPR). The core substantive rights involved are: the right to education, the right of the people not to be dispossessed of their wealth and natural resources, and the right of people to economic and social development. SERAP asked the court for:

- A declaration that every Nigerian child is entitled to free and compulsory education by virtue of Article 17 of the African Child's Rights Act, Section 15 of the Child's Rights Act 2003 and Section 2 of the Compulsory Free and Universal Basic Education Act 2004.
- A declaration that the diversion of the sum of N3.5 billion from the Universal Basic Education (UBE) fund by certain public officers in 10 states of the Federation of Nigeria was illegal and unconstitutional as it violated Articles 21 and 22 of the ACHPR.
- An order directing the defendants to make adequate provisions for the compulsory and free education of every child forthwith.
- An order directing the defendants to arrest and prosecute the public officers who diverted the sum of N3.5 billion from the UBE fund forthwith.
- An order compelling the government of Nigeria to fully recognize primary school teachers' trade union freedoms and to solicit the view of teachers through the process of educational planning and policy-making.
- An order compelling the government of Nigeria to assess progress in the realization of the right education with particular emphasis on Universal Basic Education; appraise the obstacles, including corruption, impeding access of Nigerian children to school; review the interpretation and application of human rights obligations throughout the education process.

The arguments in support of the right to education were straightforward and canvassed under international, regional, and domestic law; Article 13 of the International Covenant on Economic, Social and Cultural Rights says, "education shall be directed to the full development of the human personality and the sense of his or her dignity, and shall strengthen the respect for human rights and fundamental freedoms," and Article 17 of the ACHPR, which guarantees that every individual shall have the right to education, Article 17 of the African Child's Rights Act.

## OBJECTIONS BY THE NIGERIAN GOVERNMENT

Not surprisingly, the Nigerian government rejected each of SERAP's claims, raising three issues for the court to consider:

- that the court lacks jurisdiction over the case;
- that SERAP failed to exhaust local remedies before approaching the ECOWAS Court; and
- that SERAP failed to satisfactorily establish its claim against the government.

The court correctly and firmly dismissed all of these objections.

## THE COURT'S DECISION

The court held that on the basis of ECOWAS protocols and agreements SERAP was not required to exhaust domestic remedies before seeking a remedy from the court. The court then assumed subject-matter jurisdiction on the basis of Article 9 of the Supplementary Protocol on the Court of Justice. Article 9 of the Supplementary Protocol, which governs the jurisdiction of this court, has eight subsections, which grant the court jurisdiction on several different issues.

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Relevant to SERAP's case is Article 9(4) of the Supplementary Protocol, which grants the court jurisdiction to adjudicate on applications concerning the violation of human rights that occur in member states of ECOWAS. Article 9(4) stipulates in part that "...the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State."

The court said that it "clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS."

Furthermore, the government—while not contesting that every Nigerian child is entitled to free and compulsory basic education—claimed that this right was not justiciable in Nigeria.

As expected, the court disagreed and held that the right to education is justiciable under the African Charter on Human and Peoples' Rights. According to the court, "It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold."

The government had also contended that SERAP lacked the requisite *locus standi*, or standing, to initiate the case because it had failed to show that it had suffered any damage, loss, or personal injury as a result of the acts alleged in the suit. In roundly rejecting this objection, the court stated:

**The authorities cited by both second defendant and plaintiff support the viewpoints canvassed by them. However, we think that the arguments presented by the plaintiff are more persuasive for the following reasons. The doctrine "Actio Popularis" was developed under Roman law in order to allow any citizen to challenge a breach of public right in Court. This doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in Court. Plaintiff cited authorities from around the globe to support the position that in human rights litigation, every spirited individual is allowed to challenge a breach of public right. Decisions were cited from the United States, Ireland, Bangladesh, Pakistan, India, the United Kingdom and other jurisdictions which all concur in the view that the plaintiff in a human rights violation cause need not be personally affected or have any special interest worthy of protection. A close look at the reasons above and**

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The government had also contended that SERAP lacked the requisite *locus standi*, or standing, to initiate the case because it had failed to show that it had suffered any damage, loss, or personal injury as a result of the acts alleged...

**public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.**

The court found that the UBEC, by the law establishing it, has a responsibility to ensure that the funds it disburses to the Nigerian states are utilized for the purposes for which they were disbursed. Thus, the UBEC cannot argue that if funds given to the states are not properly accounted for it is not responsible. According to the court, the language of the UBEC Act places on it the onus to be satisfied that the funds are properly utilized, hence the power given to the UBEC to refuse further disbursements.

As to the status of the report produced by the ICPC, the court said that such a report only constituted *prima facie* evidence of the facts investigated. Thus, it was the responsibility of the authorities to act further on it, and secure a judicial verdict. The court agreed that embezzling, stealing, or even mismanagement of funds meant for the education sector would have a negative impact on education because “it reduces the amount of money made available to provide education to the people.”

The court, however, emphasized that “there must be a clear linkage between the act of corruption and a denial of the rights to education.” According to the court, “whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that [the government] should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.”<sup>329</sup>

## CONCLUSION

The crux of this landmark decision of the ECOWAS Court is clear: for the first time, an international tribunal declared that a set of socioeconomic rights, like the right to education, is something to which every Nigerian child is entitled, beyond simple principles of state policy. The ruling made clear that the right to education imposes obligations on states that are justiciable in a higher court.

Secondly, although the court did not find conclusive evidence of corruption in the case (despite stating that there was *prima facie* evidence), it considered in its ruling that corruption in education could constitute a violation of the right to education, if efforts are not made to prosecute corrupt officials and recover stolen funds.

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## Significantly, the ruling...underlined the right of civil society groups such as SERAP to bring litigation of this kind before the ECOWAS Court...

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SERAP was also successful in securing an order from the court to the government to provide the necessary funds to cover the shortfall lost to corruption, “lest a section of the people should be denied a right to education.”

Significantly, the ruling also underlined the right of civil society groups such as SERAP to bring litigation of this kind before the ECOWAS Court, establishing it as another mechanism through which to seek enforcement of the rights protected under the African Charter of Human and Peoples’ Rights.

But regrettably, and despite the active efforts of both Nigerian and international civil society groups, the 2010 judgment has not yet been implemented—neither by the administration of President Goodluck Jonathan, in power in November 2010, when the judgment was issued, nor by his successor Muhammadu Buhari, elected in 2015.

The law clearly requires implementation: Article 15(4) of the ECOWAS Treaty makes the judgment of the Court binding on member states, including Nigeria. Also, Article 19(2) of the 1991 Protocol provides that the decisions of the court shall be final and immediately enforceable. Also, Article 19(2) of the 1991 Protocol provided that the decisions of the court should be final and immediately enforceable. The court could also refuse to entertain any application brought by the offending member state until such a state enforces the court’s decision.

Meanwhile, more than five million Nigerian children of school age still roam the streets with no access to primary education. Some 115 million Nigerian adults are still illiterate. Corruption continues to afflict the funding of education and the provision of other basic services across Nigeria.

Ultimately, implementing decisions of the ECOWAS Court requires genuine political will. Civil society has a role to play in mobilizing this political will.

From a strategic standpoint, the case highlighted the high impact that a national civil society organization such as SERAP can have in utilizing public interest litigation, through human rights law, as a means to tackle corruption. Further, the very act of taking a public case to a regional court, and that court ordering the government of Nigeria to address the shortfall in funds lost to corruption, drew attention to the issue not only in the country but internationally as well. This assists SERAP and others in keeping the issue in the public eye—and ensuring that the social and economic rights enumerated in the African Charter turn into reality on the ground.

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# LITIGATION LESSONS FROM CONTESTING A CORRUPT LAND GRAB IN CAMBODIA

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## BUNTHEA KEO

*Bunthea Keo is a Cambodian public interest lawyer based in Phnom Penh.*

In July 2013, a friend and former colleague asked if I would look into a land grabbing case near Sihanoukville City, Cambodia. Capital of the province of the same name, Sihanoukville is located on the Gulf of Thailand. It is home to the country's only international port and endowed with long stretches of pristine beaches. Tourism and industrialization are both booming and land values thus skyrocketing. My former colleague explained that a port authority executive connected to powerful government officials was trying to acquire a prime plot of land on the city outskirts, just west of the Angkor Beer Factory and near Route 4, a major national highway. Identified in the cadastre as the O-3 village, the land was occupied by 137 families, many of whom had farmed it for generations. The Provincial Court had ruled that the port authority executive was the rightful owner, and he had instigated a criminal case against the villagers for trespass.

Manipulating the judicial system to grab peasant land is unfortunately common in Cambodia.<sup>330</sup> A powerful or wealthy person fabricates evidence showing the land is "his" and then goes to court to have villagers removed. The judiciary goes along, accepting the evidence without question and ordering the villagers off the land. If the villagers resist, government security forces or private security guards forcibly remove them from the land, often with the consent of the local authorities. The confrontations frequently end in the villagers' arrest.

This is not surprising. It is normal when a person's land is taken away without consent or proper compensation for him or her to fight back, which can lead to verbal or physical violence between the victims and security forces. The security forces commonly provoke the confrontation to create circumstances allowing for the arrest of the victims of land grabbing. An arrest helps the land grabber, for with the threat of a criminal prosecution hanging over them, victims are often reluctant to resist the unlawful taking. The courts' disregard of applicable legislation (in particular the 2001 Land Law), the unlawful use of security forces to threaten and evict people with legitimate claims to land, and the abuse of judicial processes to wrongfully rule on ownership and harass those who protest are all consequence of the weak rule of law in Cambodia and a corrupt judiciary.



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Communities can fight land grabbing, but those who confront the powerful and wealthy face many risks. The experience of those living around Lake Boeung Kak provides one example. The lake is in the center of urban Phnom Penh and the surrounding land was a residential area for some nine villages, where more than 4,000 families lived. It was also a major source for food and income generation for the residential families, based on the use of related natural resources (i.e., fishing and water plants), as well as an important local water source. When the villagers resisted the taking of the land for development, the government withheld all public services, leaving them with poor infrastructure and subject to frequent flooding.

The difficulties of challenging land grab cases are exacerbated by an unequal legal playing field: while most seizures are carried out via the courts, because the government wants to avoid public criticism, most of the cases are settled outside the court due to lack of a lawyer to present the cases of affected people. Current data on access to legal aid and legal assistance in Cambodia primarily comes from two major reports: The Council for Legal and Judicial Reform's 2006 report and a 2010 survey conducted by the Cambodian Human Rights Action Committee.<sup>331</sup> Both studies indicated the availability of legal aid services in rural Cambodia is grossly inadequate. Less than five percent of the lawyers practicing outside of Phnom Penh offer legal aid services, yet the demand for legal aid is very high, especially in the countryside where the majority of vulnerable poor populations live.

Fighting a corrupt legal system requires three things: motivation, knowledge, and financial resources. Going to court to overturn an unjust decision can be long, hard, and dangerous, and both the victims and their lawyers must be determined to see the case through to the end. The lawyer must know the law inside and out to ensure opponents cannot raise some technicality to escape justice. And resources are needed to defray the costs of litigation. This paper is the story of how all three elements are coming together to prevent the families of village O-3 from losing their land.

## FACTS OF THE CASE

The Sihanoukville case I reviewed had all the marks of a corrupt land grab. The port authority official had brought a civil case in November 2005, claiming the villagers' land was his and asking the court to order them off "his" property. This claim was based on a June 2005 contract for sale with a Chinese-Singaporean businessman who was said to be the previous owner—although under Cambodian law foreigners cannot own land.<sup>332</sup> It should have been obvious to the court and provincial authorities that this individual could not have sold a valid land title to the port official. But they disregarded this issue, and in May 2011 the court ruled that the villagers were living on the port official's land.<sup>333</sup>

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**Communities can fight land grabbing, but those who confront the powerful and wealthy face many risks.**

The aim of the prosecution was to intimidate the villagers, and for some it succeeded. One group of families had given up hope, and after the criminal case was filed they fled the area to avoid arrest.

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Other evidence also showed that this land title was defective. According to the local authority,<sup>334</sup> some of the 137 families had been living on the land for more than 10 years. Under Cambodian law, families gain ownership rights after living peacefully on land for 10 years. And again according to Cambodian law, for the land to be legally transferred, the local authority would have had to be involved in the transfer. Despite all these flaws in the case, on October 19, 2011, the presiding judge ordered the villagers to voluntarily move off the disputed land within seven days. Otherwise, the court would have them removed forcefully and without any guarantee of compensation or damages caused by the relocation process.

The public prosecutor should have charged the port authority executive with forging the title document. But he did not. Instead, in a criminal complaint dated January 6, 2006, only three months after the civil suit against the villagers was filed, the prosecutor charged the villagers with living on private property illegally and also asked the court to evict them.<sup>335</sup> The court agreed with the prosecutor and in a May 20, 2011 decision ordered not only that they be evicted but that each villager pay the land grabber 1,000,000 riel, approximately \$250, in compensation—an enormous sum for a poor Cambodian villager.

The aim of the prosecution was to intimidate the villagers, and for some it succeeded. One group of families had given up hope, and after the criminal case was filed they fled the area to avoid arrest. A second group had decided to fight, however, and filed a lawsuit of its own in March of 2009 objecting to the removal. They also began demonstrating in front of the Provincial Hall to call attention to the injustice and win compensation for the damage caused by the judiciary. Fearing that the demonstration might lead to unrest, possibly violence, and perhaps unwanted attention by the international community,<sup>336</sup> the provincial governor called for reconciliation by asking the villagers to accept the Sihanoukville Provincial Court's decision.

As a result of the reconciliation process, in the spring of 2012 some 71 families were awarded plots of land in another area in return for settling their claims. The settlement plots were not as large or as valuable as those they were forced off, however. The settlement also did not compensate them for the value of the houses they had built on their land, and it further required that, as a condition of accepting the new plots, they stop any further legal action. The settlement split the claimants into two groups: those who accepted the plots to avoid a lengthy judicial process and therefore had no motive to pursue the case further, and a second group who refused the offer and decided to continue to fight the court's decision instead.

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## ENGAGING WITH THE CLIENTS

My co-counsel, Sam Chamroeurn,<sup>337</sup> and I met with this second group in February 2014. It soon became clear during our initial meeting that the second group had the motivation to fight what they saw as the unjust taking of their land. What they needed was a lawyer with the requisite knowledge, one who understood their problem, the legal principles involved, and what was required to prevail. For a public interest lawyer, it is also critical to understand the larger issues the case raises. Seeking a local remedy is one thing, but creating precedent to be a guide in subsequent cases is another important thing. I felt I could help the victims of this particular land grab recover their land and contribute to the fight for broader change in the Cambodian legal system.

I began by asking the villagers to draw up a list of the claimants who wanted to resist the taking of their land. After a series of phone calls and visits with different sources, they provided a list of 65 individuals willing to pursue a legal battle. I told the group to find out how long each of the 65 had settled on the land, using as evidence communications sent to their addresses by the local authority—an announcement of a vaccination program, a birth certificate registration, a national ID card, and any type of family registration. These are the types of documents needed to show they had been peaceful occupants for 10 years, as required by the land law.

After receiving the documents, I started to look into case very carefully and cautiously before offering any advice to them. It was at this point that I learned about the case that the port authority executive had brought and the apparent collusion with the Sihanoukville Provincial Court. I concluded that in the first instance the court of Sihanoukville had seriously violated the villagers' ownership rights and that its decision did not conform to the provision of land law. The group could therefore file an appeal to overturn the Provincial Court's decision.

I also concluded that the villagers also had a right to ask the public prosecutor to open a criminal investigation against the port authority executive for forging public documents. They did so on April 16, 2014. This demonstrated the villagers' willingness to resist the arbitrary act of the court and to show they were aware of their right to seek a remedy as stipulated under the Cambodian national Constitution.<sup>338</sup> Not only that, by their actions they showed that they were also willing to pressure the judicial system to operate fairly and apply the same principles of justice to the poor as to the rich. They believed strongly that they deserved to be treated equally when it came to justice.

At our February meeting I had asked the group to select five individuals to represent the group and to work on their behalf. An agreement among the group was quickly reached underlining the obligation of the representatives. The five were selected from among those willing to fight the eviction.

When the land grab began, the community had tried to hire a private lawyer, but it couldn't afford one. Even if it had, private lawyers rarely litigate public interest cases. They worry that the courts will resent their taking on public interest cases and take it out on them by ruling against them in cases where they represent businesses. They also fear they will lose future clients because of the way lawyering in Cambodia works: being a successful private,

commercial lawyer requires building a close relationship with the judiciary and other powerful individuals who will intervene in the lawyer's case to meet the expectations of the clients. That is not likely to happen if the lawyer becomes known for representing land-grabbing victims or handling other public interest cases.

Public interest litigation requires not only a motivated client and a knowledgeable lawyer but money as well. My main constraint in taking the case was funding. I am affiliated neither with an NGO nor a law firm and I can't afford to work free of charge. Aside from my fee as the lawyer, I had to find a way to cover the costs of filing the case, traveling to Sihanoukville to copy the case records, and meeting with each member of the group to ensure they shared the objective of fighting against the unjust system.

In land grabbing cases, a fee is not only important to compensate the lawyer. It also strengthens clients' commitment to the case, ensuring that they are active in the case and collaborating with the lawyer in gathering all necessary documents and making them feel that it's their case. They have to fight alongside their lawyer. There have been many instances where, when a lawyer offered services free of charge to victims of land grabbing, they simply ignored the case, relying heavily on the lawyer to act alone, because they felt that they didn't have any money at stake. When the lawyer works alone there is no impact on the community after the case is ended, because the main goal of a lawyer working with a community is more about transferring knowledge and training individuals to become activists to defend their community's interest in the future. If the victims rely solely on the lawyer, they won't learn anything.

The fee we agreed upon was based on the economic ability of the victims. The minimum amount was \$10 per family. However, not all of the villagers could afford the \$10 fee. Some have given \$5, while some of them simply do not have enough money to pay even that. But the agreed formula was that those who had money would cover it for those who could not pay. This helped build solidarity. The fee will help the lawyer to pay the costs of traveling to the court and other expenses such as the court fees.<sup>339</sup>

Representing victims of land grabbing requires that counsel be highly motivated. Lawyers who take such land cases risk being pressured by the government and in some instances may themselves face criminal charges. I took the case because I wanted to test the legal culture of Cambodia. I had found the court had made many mistakes, especially in its interpretation of the rights of ownership and the transfer of rights of ownership. These mistakes included the failure to obtain the local authority's approval and the disregard of Cambodian land law. Had the court not made these mistakes, it would have rejected the port authority executive's ownership claim from the very beginning.

As I studied the background of the case more deeply, I learned that the villagers had even been cheated by a lawyer some had originally hired in March 2009 to contest the action. According to the villagers, he had collected a fee from them but he had never gone to court—perhaps because he did not want to upset the court. He is a corporate lawyer and must be on good terms with the court to win cases in the future.

I also learned that one week after the group had split into those who took the spring 2012 settlement and those who wanted to fight, bulldozers were sent in to destroy the houses

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**Lawyers who take such land cases risk being pressured by the government and in some instances may themselves face criminal charges.**

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remaining on the land. Those villagers who had refused to settle decided to take collective action. On August 14, 2012, they held a peaceful protest in front of the Provincial Hall, requesting the provincial authority to intervene to stop the relocation process and the court to adhere to the law and respect the national constitution.

Two weeks later, a man who would become one of the five representatives was summoned to Sihanoukville Provincial Court for questioning on allegations of illegal possession of private property—despite the fact that no evidence had been presented against the man. The summons was the result of a criminal complaint filed by the lawyer for the port authority official. The representative was imprisoned for six months on illegal possession of private property. The prosecution was meant as a warning to others not to stand against the system.

## OUTCOMES

At this stage, it was not a matter of simply winning the case but also educating the villagers to be united and determined to stand for their own cause. Using litigation to pursue a judicial solution is an enormous challenge in Cambodia, but it can help to set a precedent and combat corruption when the basic legal system is broken. Working together to prod the system and to set new precedents for justice is the main challenge. However, there has to be a starting point, where deterrence against those who operate through a corrupt system is created so that other affected communities can build on earlier cases to stand up against arbitrary acts of judicial and government authorities. In addition, challenging the system is a way to change the mindset of mainstream media to focus more on social injustice issues. Corruption is so ingrained that it is commonly accepted and thus hard to tackle. Challenging the corrupt system is a way to change the mindset of the media to be more sensitive and aware of the impact of corruption. When the media fails to highlight social injustice, corruption remains immune to accountability.

Since the villagers' appeal of the Provincial Court's eviction decision was filed in early 2014, no further steps have been taken to determine the legitimate owners of the land. To date the appeal has helped prevent the families from losing their land, although the final decision has not been made as yet. So we can see some positive results from the process of litigation even though we are not yet at the end of the legal battle.

As noted above, we also filed a request with the public prosecutor asking that a criminal case be opened against the port authority executive, based on Articles 247 and 248 of the 2001 Cambodian Land Law, regarding his fraudulent acquisition and forging public documents.

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## The case shows that not everyone will tolerate injustice and oppression by the powerful and wealthy.

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This is permitted by Cambodian law, which provides that a victim of a crime can demand the prosecutor open a criminal case against the perpetrator of a criminal act when the prosecutor has failed to do so.

In this particular case, we highlighted all the provisions related to the unlawfulness of the port authority executive's act in the forging of the land title.

Under Cambodian law, the court cannot validate a land title without supporting documentation from the cadastral office. In this case, the cadastral office did not provide any documentation to the court, stating that the supporting documents had been lost. This means that the claim made against the villagers was completely illegitimate; the port authority executive therefore has to be responsible for the relocation of the 137 families, including the damages caused by his act.<sup>340</sup>

Filing this case slowed down the lawsuit that the port authority executive brought against villagers living on land he claims is his. Although the prosecution against him has yet to commence—more than two years now after it was filed—the case shows him that not everyone will tolerate injustice and oppression by the powerful and wealthy. This is a message that must be sent to all affected communities through Cambodia to encourage them to stand up for the same cause.

There is always a challenge working with a large group, for there is always the possibility of conflict among the members if the rules and objectives are not clearly understood. Ensuring members freely communicate among themselves honestly and that they keep internal communications confidential is critical. It is also important that members agree not to accept any deal from the other side without collective consent. In addition, the number of families must not be increased, to avoid creating any loophole to weaken the case. Lawyers working on the case have to thoroughly and rigorously study who is on the list to avoid including any who have fabricated claims. Moreover, the objective of the litigation must be clear from the outset. If there is no consensus among the group, holding members together and determining the direction of the case becomes difficult, if not impossible.

The reason for this precaution is people who had already chosen to accept the deal from the other party may change their minds and join the group seeking a legal remedy, because they see the opportunity of winning the case. It may also be that a member or members of the group willing to pursue a legal remedy may sometimes want to give up and accept a settlement to avoid the possibility of a lengthy legal battle.

After a clean list of claimants is created, the lawyer has to begin studying the case carefully to determine legal theory and strategy. First of all, looking into the legal aspect of the case to

see whether there are any errors in the application the court relied upon in its decision that the community be evicted from their lands. Secondly, the lawyer must determine whether the relocation is for a public purpose or a private one.<sup>341</sup> The Land Law of Cambodia states that if the relocation is for a private purpose, compensation must be paid. In the Sihanoukville case, we found that the court applied the principle of relocation unlawfully. The Cambodian Constitution states that only “legal ownership” is protected by law.<sup>342</sup>

Legal protection means fair and just treatment in the case of relocation done by private investment. Relocation can take place only following appropriate procedure established by laws and regulations, including public inquiry. The Cambodian Constitution also guarantees legal private property and assures that the deprivation of the private property can be done only for the public interest with fair and just compensation in advance. But in this particular case, the relocation was carried out for a private purpose. If they are private properties the court must follow the principle of fair and just compensation.<sup>343</sup> Article 17 of the Universal Declaration of Human Rights also stipulates that “[e]veryone has the right to own property alone as well as in association with others” and that “[n]o one shall be arbitrarily deprived of his property.”

This is the argument which lawyers in land grabbing cases should advance both in writing and orally. In the O-3 case, I strongly believe that the transfer of land ownership was done in the absence of local authority. That makes it illegal and the court should have rejected the port authority executive’s bid to assert control of the land the outset. One explanation for why it did not may be that the villagers’ previous lawyer colluded with the land grabber and thus failed to raise a defense.

## LACK OF LEGAL ACCESS STRATEGY

Mobilization is the key to ensuring the community works together, organizes itself, resists arbitrary acts of the justice system, and prods the court to observe rule-of-law principles. Promoting the rights of the vulnerable and poor by providing access to justice can be very difficult. But building a litigation strategy to work on a land grabbing case is even more difficult. Work effectively in this particular field requires innovative approaches and knowledge of the community’s issues, as well as understanding the mindset of the judges and the prosecutors in a corrupt and poor governance context. One of the main challenges in supporting communities through litigation is lack of funding, because the Cambodian government fails to adequately support legal aid services to protect the rights of the vulnerable and poor, and, as explained above, not only is it unlikely that victims could afford a commercial lawyer but these lawyers are reluctant to represent the poor because paying clients may then be reluctant to hire them.

On the other hand, as a result of people’s increased awareness of their freedom of expression and assembly, villagers are now more willing to fight illegal or unjust court decisions, and civil society now mobilizes to push the implementation of civil and political rights. This provides people at the grassroots level with an opportunity to work closely with lawyers on their collective problems. Engagement with lawyers on cases such as land grabbing has significantly increased people’s ability to analyze their own issues more broadly and critically, from legal, social, and economic points of view. In particular, they have learned how to organize



themselves to resist an unjust and corrupt system. When people are united, it is easy for a lawyer to work with them in collectively determining the goal, the objective, and the strategies to push for respect of the rule of law.

## CONCLUSION

Three conclusions emerge from the Sihanoukville case. First, considering the current ineffective law enforcement and unjust social situations, robust accountability mechanisms are needed to ensure that individuals and stakeholders granted land-use decision-making authority are held responsible for the public consequences of their deliberation and do not abuse their authority.

Second, when local stakeholders, particularly the poor, have a voice in decisions over policies, regulations, and investments, it creates opportunities for their interests to be taken into account. Yet often more direct measures for decisions over land management are needed to ensure public accountability of decision-makers at commune, district, provincial, and national levels.

Finally, given the slow progress in improving accountability through the courts, building institutions for conflict resolution and access to justice for poor individuals requires a multifaceted approach. This means simultaneous efforts to strengthen the judicial sector, administrative processes for dispute resolution, and alternative dispute resolution mechanisms, while protecting the ability of communities to organize and advocate for their rights.

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# CHALLENGING PILLAGE: ARGOR-HERAEUS AND GOLD FROM THE DEMOCRATIC REPUBLIC OF CONGO

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## BÉNÉDICT DE MOERLOOSE

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In November 2013, the Swiss federal prosecutor's office (*Ministère Public de la Confédération*) launched an investigation into a complaint alleging that Argor-Heraeus SA, one of the world's largest refiners of precious metals, was guilty of aggravated money laundering and complicity in the war crime of pillage. The complaint, filed a few days before by the non-governmental organization TRIAL,<sup>344</sup> alleged that Swiss-based Argor had refined almost three tons of gold looted from the Democratic Republic of Congo (DRC) between 2004 and 2005.

As part of the criminal investigation, the federal police searched the refiner's premises and seized computers and documentation.<sup>345</sup> Although the federal prosecutor ultimately declined to file charges, the case nonetheless contributed to the current discourse on litigation against corporations involved in international crimes. It established important precedents under Swiss law that will be of value to claimants in future cases, while providing guidance to those considering bringing similar actions in the courts of other nations.

## THE CONTEXT

The vast region of Ituri is located in the northeast of the DRC, on its border with Uganda; for years, the region has been the focus of brutal conflicts fought over its natural resources—principally gold, coltan, oil, and timber.

In 1998, Ituri was swept up in the Second Congo War, a conflict involving the adjacent states of Uganda and Rwanda, as well as a plethora of local armed groups, including some functioning as proxies for Uganda and Rwanda. The United Nations Forces in the DRC noted that “[t]he

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For years, the region has been the focus of brutal conflicts fought over its natural resources—principally gold, coltan, oil, and timber.

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competition for the control of natural resources by combatant forces, exacerbated by an almost constant political vacuum in the region, [was] a major factor in prolonging the crisis in Ituri.”<sup>346</sup>

Ugandan troops were actively involved in both the violence and the pillage of the region’s natural resources. As an occupying force, the Ugandan army illegally exploited gold in Ituri,<sup>347</sup> and its role did not end with the formal withdrawal of its troops from DRC territory in 2003.

Subsequently, an armed group backed by Uganda, the *Front Nationaliste et Intégrationniste* (FNI), filled the void left by its sponsor, taking control over the Ituri town of Mongbwalu and its immense adjacent gold producing area, known as Concession 40.

The FNI quickly started to exploit the mines in a well-organized manner, copying the methods of the former state-owned concessioner, “OKIMO,” issuing record books to miners there, and taxing the extraction of the gold. Forced labor was also a means used by the group to extract the gold.

The export of the raw materials was later facilitated by middlemen, who shipped the gold to Uganda, from where it was exported to world markets. According to a 2005 Human Rights Watch report, the proceeds were used by the armed groups to “sustain their war effort, including payment for recruits, weapons, landmines, and a steady supply of ammunition.”<sup>348</sup>

The FNI stayed in control of the Mongbwalu region at least until April 2005, when a contingent of the UN forces deployed to stabilize the situation in the Congo managed to install a military base in the town.<sup>349</sup> Even after this point, the FNI and its offshoots continued to exercise influence in the region.<sup>350</sup>

## THE ROUTE OF THE GOLD

In addition to stepping up the deployment of UN forces in Ituri, in 2003 the UN imposed an arms embargo on armed groups and movements operating in the DRC.<sup>351</sup> The following year saw the UN Security Council launch an effort to monitor the embargo, establishing the UN Group of Experts (UNGE), whose members included globally recognized experts in arms trafficking and the illegal exploitation of natural resources. One of them, Kathi Lynn Austin, an arms trafficking investigator, continued her research into the illegal trading of Ituri’s gold following her tenure with the UNGE. Austin and the UNGE exposed a sophisticated network of economic actors benefiting from the pillage of gold in Ituri, gathering compelling evidentiary materials in the DRC, Uganda, the United Kingdom, and Jersey, in the Channel Islands. This evidence included export and shipping documents, accounting documents, and email exchanges.

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The documentation showed that a significant amount of the gold looted by the FNI in Concession 40 was exported to Uganda by Kisoni Kambale, described by the UNGE as the “most significant gold trader of Ituri.”<sup>352</sup> Without any licence to export, Kisoni Kambale was nevertheless shipping the gold to Uganda through his airline Butembo Airlines (BAL), thanks to what the report called his “almost exclusive landing rights into Mongbwalu, on the condition that BAL facilitate(d) the outward shipment of FNI gold.”<sup>353</sup>

Once in Uganda, the gold was sold to the Kampala-based Uganda Commercial Impex (UCI), the largest gold exporter in Uganda at that time.<sup>354</sup> UCI resold the gold in turn to the Jersey-based company Hussar, “one of the key importers of Congolese gold from Kampala” at that time, according to the UNGE.<sup>355</sup>

The investigation clearly showed that every single link of the supply chain was perfectly aware about the illegal origin of the gold. Hussar, for instance, continued trading the gold even after its representatives were put on notice by the UNGE and the company was mentioned in several UN reports.<sup>356</sup> To market the looted gold, Hussar needed to send it for refining. Until the summer of 2004 the gold was refined by South Africa’s Rand Refinery, which allegedly stopped refining Hussar’s gold after evidence emerged about its illicit origin.<sup>357</sup>

Hussar then turned to the Swiss refinery Argor-Heraeus SA, based in the Swiss canton Ticino. From July 2004 to May 2005, the investigation showed, Argor refined almost three tons of DRC-looted gold, directly shipped from Uganda to Switzerland.<sup>358</sup>

Argor’s involvement as the refiner of the looted gold was first mentioned in the UNGE report from July 2005. The company publicly denied the allegations in this report, maintaining that it had ceased to refine gold for Hussar’s account in June 2005, after “learning from the press regarding the disorders in the region of the DRC with potential implication for the gold trade.”<sup>359</sup>

This line of defence did not persuade the UNGE, which was convinced that the company could not have been unaware of the illicit origin of the gold. Consequently, the UNGE recommended that Argor be sanctioned for violating the UN Arms Embargo on the DRC, since refining this gold constituted support for the FNI.<sup>360</sup>

Despite this recommendation, the Sanctions Committee of the UN Security Council declined to sanction Argor, which had been defended by the Swiss government before the UN. In contrast, African businesses, including both UCI and those of Kisoni Kambale, were subject to robust sanctions.

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**The investigation clearly showed that every single link of the supply chain was perfectly aware about the illegal origin of the gold.**

## THE CRIMINAL COMPLAINT AGAINST ARGOR-HERAEUS

The Open Society Justice Initiative, part of the Open Society Foundations, had been involved in funding Kathi Lynn Austin's research work after she left the UNGE. The Justice Initiative subsequently approached TRIAL to assess the question of Argor's potential criminal liability in light of the evidence collected by Austin.<sup>361</sup>

Consequently, TRIAL assessed the feasibility of judicial action under Swiss and international law and concluded that there were sufficient suspicions of the commission of a crime to lodge a complaint (*denunciation pénale*) against Argor. The alleged charges were: (i) complicity in the war crime of pillage; and (ii) aggravated money laundering.

### The War Crime of Pillage

Pillage committed during times of war has long been prohibited. As long ago as 1863, the Lieber Code, which established the law of war for Union forces in the American Civil War, stated that "all pillage or sacking, even after taking a place by main force are prohibited." The prohibition of pillage was later reaffirmed in the treaties that codify the laws of war, in particular in the Hague Regulations of 1907 and in the Geneva Conventions of 1949, which bind all states.<sup>362</sup>

The statutes of international tribunals also consider pillage an offense and have established the prohibition as also binding upon non-state actors.<sup>363</sup> Thus, pillage is prohibited not only in international conflicts but also in times of civil wars,<sup>364</sup> and the prohibition of pillage is recognized as a customary and universally binding rule.<sup>365</sup>

Following international standards, Swiss criminal law prohibits acts of pillage committed in international and internal conflicts.<sup>366</sup> This prohibition applies to Swiss citizens as well as foreign citizens present in Swiss territory (on the principle on universal jurisdiction).

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Not only was the FNI committing pillage, but so were subsequent buyers, including Hussar, who knew about the illicit origin of the gold purchased.

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The elements of the crime of pillage are not described precisely in Swiss law and no case has ever been judged in this country for this offense. Therefore, the Swiss judicial authorities will presumably draw on international law, in particular the ICC Elements of Crimes,<sup>367</sup> which define pillage as:

- the perpetrator appropriated certain property;
- the perpetrator intended to deprive the owner of property and to appropriate it for private or personal use;<sup>368</sup>
- the conduct took place in the context of and was associated with an international armed conflict; or
- the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

In the case submitted by TRIAL, it was alleged that the FNI committed the initial illicit appropriation, exploiting Concession 40 for its personal benefit and against the will of its legitimate owner (the State of Congo). This appropriation was done in the frame of an internal armed conflict as defined by international law, which requires, among other conditions, a certain level of violence and an organized rebel force controlling a territory.<sup>369</sup> This was irrefutably the case at the time of the fact, since the FNI was an organized force controlling a vast area and carrying on large-scale military operations.<sup>370</sup>

The doctrine, the case law, and the interpretation of the ICC Elements of Crimes' wording show that "the purchase by commercial actors of 'appropriated' natural resources falls within the meaning of pillage, irrespective of whether the commercial actors were implicated in the initial extraction of the resources."<sup>371</sup> Consequently, not only was the FNI committing pillage, but so were subsequent buyers, including Hussar, who knew about the illicit origin of the gold purchased.

Argor's representatives have always claimed that the company did not itself buy the pillaged Congolese gold. Even if true, Argor could have aided and abetted the commission of the crime, for Swiss criminal law defines an accomplice as "any person who wilfully assists another to commit a felony or a misdemeanor."<sup>372</sup> Swiss case law and doctrine consider the assistance punishable when it actually favors the commission of the crime.<sup>373</sup> The contribution of the accomplice might be realized through a *material or a psychological* assistance to the perpetrator. The psychological accomplice contributes to the infraction when the accomplice strengthens the perpetrator's will to commit the crime. Such is the case, for example, when the accomplice suggests an opportunity or promises assistance after the commission of a crime,

for instance if he helps to dispose of or sell the loot.<sup>374</sup> Subjectively, the accomplice has to know or accept the possibility that he is assisting in the perpetration of a crime.<sup>375</sup>

In short, TRIAL alleged that Hussar would not have been able to commercialize the looted gold without Argor's refining support. This assistance was indispensable to Hussar, because the transformation of the gold from raw to standardized gold bars was the (only) way to penetrate the legal market. Hence, it is likely that without Argor's readiness to refine the gold, Hussar's acts of looting would have been seriously hampered: Hussar would potentially not have been able to sell the looted gold.

For its part, Argor, with its own compliance department, could not have been unaware of the conflict in the DRC and the illegal trade in gold that had been going on for several years in the Great Lakes region and which had been the subject of intense media coverage.<sup>376</sup> It was also well known (especially by gold experts) that gold exported from Uganda, which itself produced negligible quantities of the metal, had most probably been looted in the DRC. Moreover, Argor continued to refine gold from Hussar after January 2005, despite the fact that Hussar and UCI had been identified for their role in gold pillage by a broadly publicized UNGE report.<sup>377</sup>

As a consequence, TRIAL asked the Swiss judicial authorities to determine if Argor was responsible for complicity in the war crime of pillage.

## Aggravated Money Laundering

According to Article 305bis of the Swiss Criminal Code (SCC), money laundering is defined as the act of preventing the "identification of the origin, the discovery or the confiscation of assets when the author knows, or should know that they are the proceeds of a crime." Laundering can involve any act that is aimed at preventing the establishment of a link between a preceding crime (in this case, the war crime of pillage) and the assets resulting from it (in this case, the gold), or keeping these assets away from the control of the relevant authorities.

By turning this illegally obtained gold into ingots, Argor made it impossible to identify the criminal origin of the gold, and, in doing so, could have perpetrated the act of disguising the identification of the gold's origin, as defined in Article 305bis. TRIAL alleged that this act of laundering should be considered as aggravated (Article 305bis, Section 2 SCC), because of the gravity of the preliminary crime (a war crime) and the quantities of gold involved.

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TRIAL also asked the authorities to analyze the company's criminal responsibility in its capacity as a financial intermediary, subject to the Swiss law on money laundering, and in its capacity as a refiner, under the Swiss law on precious metals.<sup>378</sup> These laws appear to require companies to clarify the origin of any raw materials that are of doubtful origin, and if unable to do so, to hold them until the proper authorities establish their provenance. TRIAL alleged that the gold coming from DRC had clearly doubtful origins and that as such, Argor should have kept it in a safe place until the authorities decided its fate. By failing to do so, the company could be held responsible for money laundering by omission to act, according to Swiss Supreme Court case law.<sup>379</sup>

## SUBSEQUENT JUDICIAL DECISIONS

On November 1, 2013, a few days after the complaint was filed, it was announced that a criminal investigation had been opened by the Swiss Federal Attorney. Argor was formally accused of complicity in the war crimes of pillage and aggravated money laundering. The prosecutor also searched Argor's premises and seized several computers and documents.<sup>380</sup>

The company challenged the investigation before the Swiss courts, asserting that there was insufficient evidence to justify the opening of a criminal investigation, and that the search of its offices and seizure of material were not justified.

The Swiss Federal Criminal Court rejected Argor's appeal and noted that it was based on "credible" and "plausible" evidence sufficient to justify an investigation. Moreover, the court considered the measures taken by the prosecuting authority (search and seizure) as fully justified. The decision also pointed out contradictions in the company's behavior, among them the fact that while it publicly stated its eagerness to collaborate with the authorities the company was at the same time trying to get back the seized documentation.

This decision gave the Swiss federal prosecutor's office the power to continue its investigation.

## OUTCOME OF THE CASE

In March 2015, the federal prosecutor announced that it would not proceed with prosecution of Argor-Heraeus under the complaint. However, the investigation concluded that:

- Argor-Heraeus did indeed refine three tons of dirty gold pillaged by Congolese rebels;
- numerous reports linking the armed conflict in the DRC and the Congolese origin of dirty gold had been published at the time of the events;
- proceeds from the refining of such gold were a key element of the war effort in the eastern DRC; and
- the company violated a regulation it had itself adopted in order to meet the requirements of the Law on Laundering and the Law on the Control of Precious Metals—the violation of an anti-laundering regulation can lead to a criminal conviction.

According to the prosecutor, indications of the origin of the gold “should have raised Argor’s suspicions....It failed to clarify the origin of the gold although its internal regulations required it to do so if there were any doubts as to the origin of the raw material for refining.”

Nevertheless, the prosecutors concluded that “it is not clear ... that the defendants had any doubts as to, or concealed any evidence of, the criminal origin of the gold.”

For those who brought the complaint, the decision marked a disappointing end to the proceedings (and a puzzling end, given the prosecutor’s findings). But the Argor case still marked an important step forward in the battle against resource corruption.

First, it threw a spotlight on the role of Western intermediaries in the trade and processing of pillaged resources. Within Switzerland, and beyond, the case attracted significant media coverage,<sup>381</sup> including coverage in trade and mining publications, possibly acting as a deterrent against similar practices in the future.<sup>382</sup>

Second, we believe the legal strategy adopted in the case could also inspire individuals and NGOs seeking to litigate cases of pillage and related crimes: the legal construct of money laundering should not be underestimated, as companies have often no direct activity abroad (or are acting through a corporate veil often hard to pierce) but might process or trade goods that could stem from international crimes. Practitioners should keep this powerful approach in mind when analyzing the activities of companies dealing with products originating from conflict zones. By targeting Western intermediaries, as well as actors in the zones of conflict, such actions also reinforce the broad, international effort to address conflict-based grand corruption as a global issue in which actors in the developed world are implicated.

In Switzerland, the case also served to stimulate the ongoing discussion about corporate responsibility for human rights abuses. Switzerland is indeed home to myriad multinational corporations and numerous companies involved in the business of raw materials. At the announcement of the case, Swiss human rights organizations active in promoting corporate accountability pointed out that it highlighted the need for a comprehensive legal framework that could effectively prevent raw materials of illicit origin to enter Switzerland. By raising the prospect of legal sanction, the litigation has increased pressure on industry and regulators to ensure an end to Swiss involvement in the processing of illegally acquired conflict-zone resources.<sup>383</sup>

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## ENDNOTES

- 1 One common definition of the term “grand corruption” was formulated in 2016 by Transparency International, which qualified it thus: “Grand Corruption occurs when: A public official or other person deprives a particular social group or substantial part of the population of a State of a fundamental right; or causes the State or any of its people a loss greater than 100 times the annual minimum subsistence income of its people; as a result of bribery, embezzlement or other corruption offence.” [https://www.transparency.org/news/feature/what\\_is\\_grand\\_corruption\\_and\\_how\\_can\\_we\\_stop\\_it](https://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it).
- 2 Article 21 provides, in relevant part:
  1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
  2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
- 3 SERAP’s 2009 case affirming the right to education and its 2012 case affirming the right to a clean and healthy environment are both based, in part, on the rights contained in Article 21. See *SERAP v. Nigeria*, Judgment No. ECW/CCJ/APP/0808 (October 27, 2009), available at [http://www.worldcourts.com/ecowasccj/eng/decisions/2009.10.27\\_SERAP\\_v\\_Nigeria.htm](http://www.worldcourts.com/ecowasccj/eng/decisions/2009.10.27_SERAP_v_Nigeria.htm); and *SERAP v. Nigeria*, Judgment No. ECW/CCJ/JUD/18/12 (December 14, 2012), available at [http://www.courtecawas.org/site2012/pdf\\_files/decisions/judgements/2012/SERAP\\_V\\_FEDERAL\\_REPUBLIC\\_OF\\_NIGERIA.pdf](http://www.courtecawas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_REPUBLIC_OF_NIGERIA.pdf). See also “Litigating Corruption before International Human Rights Tribunals” in this volume.
- 4 In October 2017, a civil society coalition presented to the Swiss Federal Council proposed constitutional amendment to hold Swiss businesses to account for violations abroad. The initiative was supported by 140,000 valid signatures. Unfortunately, the politicians are still not ready to move. While recognizing the validity of the concerns, the Federal Council prefers to rely on voluntary measures to address the problems. See Swiss Coalition for Corporate Justice, “The Swiss Federal Council has published its message on the Swiss Responsible Business Initiative” (September 2017), available at <http://konzern-initiative.ch/message/?lang=en>. See also Swiss Coalition for Corporate Justice, “Swiss quality must include the protection of human rights and the environment” (October 16, 2017), available at [https://business-humanrights.org/sites/default/files/documents/161010%20SCCJ%20Press%20Release%20-%20Filing%20of%20citizen%20initiative\\_EN.pdf](https://business-humanrights.org/sites/default/files/documents/161010%20SCCJ%20Press%20Release%20-%20Filing%20of%20citizen%20initiative_EN.pdf).
- 5 See BBC, “Equatorial Guinea VP Teodorin Obiang Sentenced in France” (October 26, 2017), available at <http://www.bbc.com/news/world-europe-41775070>. Teodorin was given a suspended fine of €30 million and a suspended prison sentence of three years, while his posh Avenue Foch townhouse and other assets, valued at more than €100 million, were forfeited to the French state. See also Shirley Pouget and Ken Hurwitz, “French Court Convicts Equatorial Guinean Vice President Teodorin Obiang for Laundering Grand Corruption Proceeds,” Global Anticorruption Blog (October 30, 2017), available at <https://globalanticorruptionblog.com/2017/10/30/french-court-convicts-equatorial-guinean-vice-president-teodorin-obiang-for-laundering-grand-corruption-proceeds/>.
- 6 The report was updated in June 2009 under the title *Biens mal acquis: à qui profite le crime?* and is available at [http://ccfd-terresolidaire.org/IMG/pdf/BMA\\_totalBD.pdf](http://ccfd-terresolidaire.org/IMG/pdf/BMA_totalBD.pdf).
- 7 A figure that, unfortunately, in view of the developments in the BMA affair, now seems to be very short of the mark.
- 8 Sherpa proposed that TI France should file a petition to join the case as an injured civil party: because of its anticorruption organizational purpose, TI France had, it was believed, a greater chance of being deemed admissible as a civil party in the proceeding than did Sherpa (whose organizational mandate went beyond anticorruption).
- 9 Under Article 85, the petition to join the case as an injured civil party would be admissible only if the party had first filed a simple complaint with the Public Prosecutor and shown either a decision by the Public Prosecutor declining to prosecute, or the passage of a period of at least three months since the initial filing before this magistrate.
- 10 See Assemblée nationale, XIIIe legislature session ordinaire de 2008-2009, May 12, 2009. [http://www.assemblee-nationale.fr/13/cri/2008-2009/20090238.asp#P221\\_36264](http://www.assemblee-nationale.fr/13/cri/2008-2009/20090238.asp#P221_36264).
- 11 Unlike other associations defending collective interests (such as environmental associations), anticorruption groups were not at that time allowed to bring criminal prosecution.
- 12 The principle reflected in the decision by the Court of Cassation would subsequently be enacted into statutory law.
- 13 Des Sellmeyer, “11 Supercars of Teodoro Obiang Nguema Mbasogo Seized by French Police,” September 29, 2011. <http://gtspirit.com/2011/09/29/11-supercars-of-teodoro-obiang-nguema-mbasogo-seized-by-french-police/>.

- 14 See the press release published by the Equatoguinean government: Equatorial Guinea, “The Minister of Agriculture, the new Permanent Assistant Delegate of Equatorial Guinea to UNESCO,” October 19, 2011. See <http://www.guineaequatorialpress.com/noticia.php?id=1994>.
- 15 Sherpa, “Letter to Mme Irina Bokova, General Director, UNESCO,” March 16, 2012. See [https://asso-sherpa.org/sherpa-content/docs/newsroom/UNESCO\\_TNO\\_16%2003%2012\\_Final.pdf](https://asso-sherpa.org/sherpa-content/docs/newsroom/UNESCO_TNO_16%2003%2012_Final.pdf).
- 16 Sherpa et al., “Letter to M. Laurent Stefanini, Chief of Protocol, Ministry of Foreign and European Affairs,” March 16, 2012. See [http://ccfd-terresolidaire.org/IMG/pdf/mae\\_tno\\_09.05.12.pdf](http://ccfd-terresolidaire.org/IMG/pdf/mae_tno_09.05.12.pdf).
- 17 See the press release published by the Equatoguinean government: Equatorial Guinea, “Ignacio Milam Tang, new Vice President of the Nation,” May 22, 2012, at <http://www.guineaequatorialpress.com/noticia.php?id=2668>.
- 18 See <http://www.icj-cij.org/files/case-related/163/163-20160613-APP-01-00-EN.pdf>.
- 19 See “Swearing in of Teodoro Nguema Obiang Mangue, Ignacio Milam Tang and Vicente E Hate Tomi,” *Guinea Equatorial*, June 23, 2016 at <http://www.guineaequatorialpress.com/noticia.php?id=8030&lang=en>.
- 20 See <http://www.icj-cij.org/files/case-related/163/163-20160929-WRI-01-00-EN.pdf>.
- 21 See <http://www.icj-cij.org/files/case-related/163/163-20161207-ORD-01-00-EN.pdf>.
- 22 See Michael Stothard, “Equatorial Guinea accuses SocGen bankers of being ‘spies,’” *Financial Times*, December 24, 2016, <https://www.ft.com/content/1e896c2a-c8fc-11e6-8f29-9445cac8966f>.
- 23 Note that in 2011, Sherpa and TI France engaged in a new series of BMA-type proceedings against Hosni Mubarak (Egypt), Zine el-Abidine Ben Ali (Tunisia), Muammar Gaddafi (Libya), and Bashar al-Assad (Syria), as well as a number of members of their respective entourages. These various complaints allowed for the rapid commencement of judicial investigations into these new cases of large-scale corruption.
- 24 In fact, we note that the prosecuting authorities’ attitude did not change until the election of François Hollande, leader of the Socialist Party, as president of France in 2012.
- 25 See “Laundering the Proceeds of Corruption in Equatorial Guinea” in this volume.
- 26 Note that numerous jurisdictions—importantly, including the United States—do require dual criminality as a condition for prosecution of the laundering of proceeds of an underlying offense committed abroad.
- 27 Philippe Bernard, “‘Les ‘biens mal acquis’ africains gênent la France,” June 9, 2011, [http://www.lemonde.fr/afrique/article/2011/06/09/les-biens-mal-acquis-africains-genent-la-france\\_1533874\\_3212.html](http://www.lemonde.fr/afrique/article/2011/06/09/les-biens-mal-acquis-africains-genent-la-france_1533874_3212.html).
- 28 By expanding the media coverage of the initial complaint, Sherpa received enormous volumes of testimonies and information from various sources: witnesses, members of the opposition, members of civil society, and so on. We note in this regard that for many people it is much less intimidating to approach an NGO than judicial authorities, which once again demonstrates the advantages of civil society participation in judicial processes.
- 29 Sherpa worked closely with the Open Society Justice Initiative and APDHE, which enabled Sherpa to monitor the development of proceedings filed in the United States and Spain.
- 30 TI France also requested that the magistrates undertake a certain number of additional investigations (hearings, etc.) which facilitated the progress of the examining magistrates.
- 31 It goes without saying that neither Equatorial Guinea, Congo-Brazzaville, nor Gabon provided support to the French judicial authorities.
- 32 We note in this regard that it is not strictly necessary to have the investigative powers of law enforcement authorities or to resort to necessarily costly private investigation services to establish the *prima facie* existence of acts of corruption. The information is there (witnesses, press articles, reports from civil or international organizations, company records, etc.): all that is needed is to exploit it skillfully.
- 33 Including Gregory Ngbwa Mintsu, who tried to join the BMA proceeding, and Marc Ona, coordinator of *Publiez ce que vous payez* (Publish What You Pay, or PCQVP), Gabon.
- 34 See Reporters sans frontières, “Rapport d’enquête sur la mort du journaliste franco-congolais Bruno Jacquet Ossébi” [Report of the Investigation into the Death of Franco-Congolese Journalist Bruno Jacquet Ossébi], July 9, 2009 at <https://rsf.org/fr/rapports/rapport-denquete-sur-la-mort-du-journaliste-franco-congolais-bruno-jacquet-ossebi>.
- 35 Aboubacar Yacouba Barma, “‘Destabilisation de l’Afrique’: 1,800 ONG vont porter plainte contre Sarkozy!” [“‘Destabilization of Africa’: 1,800 NGOs file complaint against Sarkozy!”, *La Tribune Afrique*, November 30, 2016.

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- 36 Emmanuel Jarry, “Equatorial Guinea leader’s son found guilty of embezzlement by French Court,” Reuters, October 27, 2017, <https://www.reuters.com/article/us-france-equatorial-trial/equatorial-guinea-leaders-son-found-guilty-of-embezzlement-by-french-court-idUSKBN1CW1BO>. See also Shirley Pouget and Ken Hurwitz, “French Court Convicts Equatorial Guinean Vice President Teodorin Obiang for Laundering Grand Corruption Proceeds,” Global Anticorruption Blog, October 30, 2017, <https://globalanticorruptionblog.com/2017/10/30/french-court-convicts-equatorial-guinean-vice-president-teodorin-obiang-for-laundering-grand-corruption-proceeds/>.
- 37 See the full report at [http://hdr.undp.org/sites/default/files/2016\\_human\\_development\\_report.pdf](http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf).
- 38 See Terence O’Hara, “Riggs Bank Agrees to Guilty Plea and Fine,” *The Washington Post*, January 28, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A41584-2005Jan27.html>.
- 39 See US Department of Justice, Federal Bureau of Investigation, *Financial Crimes Report 2006*, [https://www.fbi.gov/stats-services/publications/fcs\\_report2006](https://www.fbi.gov/stats-services/publications/fcs_report2006).
- 40 See <https://www.hsgac.senate.gov/imo/media/doc/ACF5F8.pdf>, p. 6. United States Senate, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the PATRIOT Act, Case Study Involving Riggs Bank, Report Prepared by the Minority Staff of the Permanent Subcommittee on Investigations*, July 15, 2004.
- 41 See <https://www.hsgac.senate.gov/imo/media/doc/ACF5F8.pdf>, pp. 3, 51.
- 42 See Open Society Foundations, “Litigation: APDHE vs. Obiang Family,” updated February 23, 2017, <https://www.opensocietyfoundations.org/litigation/apdhe-v-obiang-family>.
- 43 See Asociación Pro Derechos Humanos de España, “Quiénes Somos,” at <http://www.apdhe.org/quienes-somos/>.
- 44 See US Department of Justice, Office of Public Affairs, “Department of Justice Seeks to Recover More Than \$70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea,” October 25, 2011, <https://www.justice.gov/opa/pr/departament-justice-seeks-recover-more-708-million-proceeds-corruption-government-minister>. That case was eventually resolved by settlement; see US Department of Justice, Office of Public Affairs, “Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased With Corruption Proceeds,” October 10, 2014, <https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>.
- 45 See José María Rujo, “La familia de Obiang ingresó dinero de una cuenta investigada en España,” *El País*, October 25, 2009, [https://elpais.com/diario/2009/10/25/espana/1256421609\\_850215.html](https://elpais.com/diario/2009/10/25/espana/1256421609_850215.html).
- 46 See José María Rujo, “The Long Hunt for the Kokorevs,” *El País* Investigation, September 23, 2015, [https://elpais.com/elpais/2015/09/23/inenglish/1443001757\\_417136.html](https://elpais.com/elpais/2015/09/23/inenglish/1443001757_417136.html).
- 47 The 2014 US settlement with Teodorin Nguema Obiang (the EG president’s first son and apparent designated successor) attempts to deal with this knotty problem through a structure whereby approximately \$20 million of the \$30+ million settlement funds will be given to a charitable organization agreed on by the United States and Teodorin, such funds to be “used for the benefit of the people of the Republic of Equatorial Guinea”; and another \$10.3 million will be forfeited to the United States and then also applied for the “benefit of the people of the Republic of Equatorial Guinea,” subject to certain US legal restraints, but without requirement of agreement by Teodorin (or the EG government). It remains to be seen how well these creative and ambitiously conceived arrangements will work. See US Department of Justice, “Second Vice President.”
- 48 For example, a 2009 review of practice in nine European countries (Bulgaria, Denmark, Estonia, France, Germany, Poland, Spain, Sweden, and the United Kingdom) concluded that there had been relatively little attention given to the possibility of using private lawsuits as an anticorruption tool, even when such suits were available under existing law. See Olaf Meyer, ed., *The Civil Law Consequences of Corruption* (Baden-Baden: Nomos, 2009).
- 49 See United Nations Convention against Corruption, art. 35.
- 50 This is one reason why even relatively restrictive standing limitations may not necessarily contravene UNCAC Article 35, which after all requires state parties only to grant the right to initiate legal proceedings to those who “have suffered damage as a result of” corruption. A country’s standing doctrine can be viewed as determining what sorts of injuries count as “damage,” and what sorts of causal connection between the corruption and the damage are required to establish that the damage was the “result of” corruption. Here it is also important to recall that Article 35 requires a state party only to take such measures that are “in accordance with principles of its domestic law,” which would include its law of standing.
- 51 See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *Suffolk U. L. Rev.* 881 (1983).

- 52 See David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 *Mod. L. Rev.* 44, 54-55 (1992).
- 53 See Richard S. Kay, "Standing to Raise Constitutional Issues," in *Standing to Raise Constitutional Issues: Comparative Perspectives*, ed. Richard S. Kay (Brussels: Bruylant, 2005).
- 54 See, e.g., Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 *Envtl. Law.* 321, 324, 343 (2001).
- 55 Significantly, state courts in the United States can and often do have approaches to standing doctrine that are different from, and often more liberal than, the doctrine adopted in the US federal courts. For a discussion of standing issues in the context of anticorruption suits at the state level, see Beth A. Levine, *Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials*, 48 *Tenn. L. Rev.* 347 (1981).
- 56 See Jonathan R. Siegel, *Zone of Interests*, 92 *Geo. L.J.* 317 (2014).
- 57 See Roxane Reiser, *Towards an Actio Popularis? Standing and Constitutional Values: A Comparative Analysis*, 2 *Oxford U. Undergraduate L.J.* 24, 29 (2013); Michael S. Greve, *The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law*, 22 *Cornell Int'l L.J.* 197, 200 (1989).
- 58 Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 *Rutgers L.J.* 569, 629 (2004); Obinna B. Okere, *Judicial Activism or Passivity in Interpreting the Nigerian Constitution*, 36 *Int'l & Comp. L.Q.* 788, 804 (1987); Tunde I. Ogowewo, *Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria*, 26 *Brook. J. Int'l L.* 527, 529 & 529 n.9 (2000).
- 59 Civil Litigation Procedure Act, art. 108 (2007) (China); see also Zhu Xiao & Charles Warren, *The Development of Legal Standing within Chinese Environmental Social Organizations and an American Comparative Perspective*, 1 *China Legal Sci.* 76, 78-79 (2013). This is not to say that public interest litigation is impossible in China. Indeed, interest in such litigation, particularly in the environmental context, has been growing in recent years, and there have been a few notable successes, including cases in which Chinese courts have construed the "direct interest" standard in Article 108 of the Civil Litigation Procedure Act broadly enough to allow challenges alleging various sorts of environmental pollution. Nonetheless, Chinese standing law is very much on the stricter end of the spectrum.
- 60 See Li-Ann Thio, *Administrative and Constitutional Law*, 14 *S.A.L. Ann. Rev.* 13 (2013); and Tham Lijing, "Locus Standi in Judicial Review: Two Roads Diverge in a Singapore Wood," *Singapore Law Gazette* (February 2013): 14-18.
- 61 L.J.C.A. Title II, Ch. II, §19.1.h (Spain).
- 62 S. Afr. Const. ch. 2 §34; see also Jack Greenberg, *A Tale of Two Countries, United States and South Africa*, 41 *St. Louis U. L.J.* 1291, 1292 (1997); Eric C. Christiansen, *Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights*, 32 *Stan. Env'tl. L.J.* 215, 217 (2013); Edwin Cameron, *Constitutionalism, Rights, and International Law: The Glenister Decision*, 23 *Duke J. Comp. Int'l. L.* 389, 396 (2013).
- 63 Constitución Política de Colombia [C.P] arts. 241-42 (Colon.); see also Victor Ferreres Comella, *Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition*, 89 *Tex. L. Rev.* 1967, 1969 (2011).
- 64 See Allan R. Brewer-Carías, "Standing to Raise Constitutional Issues in Venezuela," in *Standing to Raise Constitutional Issues: Comparative Perspectives*, ed. Richard S. Kay (Brussels: Bruylant, 2005).
- 65 Constitution of Kenya, art. 22.
- 66 Constitution of India, art. 32(1); see also Reiser, *supra* at 31; Josh Gellers, *Righting Environmental Wrongs*, 26 *Env'tl. L. Litig.* 39, 59 (1991).
- 67 See Arghya Sengupta, "Anticorruption Litigation in the Supreme Court of India" (this volume).
- 68 *Gupta v President of India*, A.I.R. 1982 S.C. 149; *Raju v State of Karnataka*, I.L.R. 1986 K.A.R. 587.
- 69 *Common Cause v Union of India* (1999).
- 70 See Arghya Sengupta, "Anticorruption Litigation in the Supreme Court of India" (this volume).
- 71 *Narain v Union of India* (1988), 1. S.C.C. 226.
- 72 Writ of Protection, Habeas Corpus, and Constitutionality Act, Decree 1-86, art. 134 (2002) (Guat.); see also Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 *Tex. Int'l L.J.* 185, 218 (2008).
- 73 Peru Constitution, art. 203. The 1998 Ecuadorian Constitution appears to have had a similar provision, granting standing to bring constitutional challenges to any group of at least 1,000 citizens, but that provision appears not to have been retained in the new Ecuadorian Constitution, adopted in 2008. Ecuador. Const, art. 277; see also Oquendo, *supra* at 185, 218.



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- 74 Philippines Constitution, art. VII, §1 (1987); Owens, *supra* at 321, 361–362. See Solomon Lumba, *The Problem of Standing in Philippine Law* 8 (Asian Law Institute Working Paper Series No. 3, 2009); Bryan Dennis G. Tiojanco, *Stilted Standards of Standing, the Transcendental Importance Doctrine, and the Non-Preclusion Policy They Prop.*, 86 Phil. L.J. 606, 606, 613, 620 (2012).
- 75 *Biraogo v Philippine Truth Commission*, G.R. No. 192935 (S.C., Dec. 7, 2010) (Phil.).
- 76 11 Halsbury's Laws of England §208 (Lord Mackay of Clashfern, ed., 5th ed., 2009); Senior Courts Act, 1981, §31(3) (Eng. and Wales); see also Matt Handley, *Why Crocodiles, Elephants, and American Citizens Should Prefer Foreign Courts: A Comparative Analysis of Standing to Sue*, 21 Rev. Litig. 97, 116 (2002).
- 77 *Watkins v Sec'y of State for Home Dep't* [2006], UKHL 17.
- 78 Transparency International UK, *Closing Down the Safe Havens* (London: Author, 2013), 19.
- 79 See Rule 54.1 Scope and Interpretation, Civil Procedure White Book §54.1.11 (2014 ed.); See, e.g., Owens, *supra* at 321, 345–346; Reiser, *supra*.
- 80 Art. 81 of the Italian Code of Civil Procedure, art. 100 of the Italian Code of Civil Procedure. See also Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 Colum. J. Transnat'l L. 259, 276–277 (1995).
- 81 *Id.* at 259, 282–295.
- 82 Constitution of Spain, art. 125; Ley de Enjuiciamiento Criminal, arts. 101 & 270; Elena Merino-Blanco, *Spanish Law and Legal System* (2nd ed., 2006), 29, 140–142.
- 83 See Ken Hurwitz, "Introductory Remarks," Conference on Legal Remedies for High-Level Corruption (Said Business School, University of Oxford, June 28, 2014).
- 84 See 27 Halsbury's Laws of England §21 (Lord Mackay of Clashfern, ed., 5th ed., 2010); Prosecution of Offences Act, 1985, c. 23, §6 (UK).
- 85 See Lord Wilberforce, *Gouriet v Union of Post Office Workers* [1978] A.C. 435.
- 86 Prosecution of Offences Act, 1985, § 6(2); *R. (Gujra) v Crown Prosecution Serv.* [2011] EWHC 472.
- 87 Bribery Act of 2010, c. 23, § 10 (UK).
- 88 Powers of Criminal Courts (Sentencing) Act, 2000, c. 6, § 130 (U.K.); *R v Stapylton*, [2012] EWCA Crim 728.
- 89 Merino-Blanco, *Spanish Law and Legal System*, 141, 153–154.
- 90 Criminal Procedure Code of the Swiss Confederation, art. 126.
- 91 *Her Majesty's Advocate v Stuurman* [1980], J.C. 111.
- 92 See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v Chaney*, 52 U. Chi. L. Rev. 653 (1985).
- 93 See Cecily Rose, *The Corner House Case and the Incomplete Incorporation of the OECD Anti-Bribery Convention in the United Kingdom*, 20 Tulane J. Int'l & Comp. Law 351 (2012).
- 94 See Heidi Li Feldman, *Divided We Fall: Associational Standing and Collective Interest*, 87 Mich. L. Rev. 733 (1988).
- 95 See Parker, *supra* at 282–295.
- 96 See Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 Fla. J. Int'l L. 745, 769–770 (2006).
- 97 Daniel R. Ortiz & Juan Cruz Azzarri, Abstract, *Associational Standing: A Comparison between the American and Argentinian Systems*, *El Derecho* (forthcoming).
- 98 See Mario Gomez, *Emerging Trends in Public Law* (Sri Lanka: Vijitha Yapa, 1998), 20–40.
- 99 See Tom Zwart, "Standing to Raise Constitutional Issues in the Netherlands," in *Standing to Raise Constitutional Issues: Comparative Perspectives*, ed. Richard S. Kay, (Brussels: Bruylant, 2005), 357–358; and Owens, *supra* at 321, 357 (2001).
- 100 Loi no. 2013-1117; French Code of Criminal Procedure, art. 2-23.
- 101 *Decret no. 2014-327 du 12 mars 2014 relatif aux conditions d'agrément des associations de lutte contre la corruption en vue de l'exercice des droits reconnus à la partie civile*. The Italian environmental statute granting broader standing to environmental CSOs contains similar limitations; to qualify under that statute, the CSO must be a national organization operating in at least five regions, and must be formally recognized by the Minister for the Environment, who must certify the organization's programmatic goals, its internal democratic character, the continuity of its actions, and its external importance. Presidential Decree No. 316, art. 13.
- 102 *Farooque v Bangladesh* (1997) 17 BLD (AD) 1, 19.



- 103 Handley, *supra* at 97, 129.
- 104 Constituição Federal [C.F.], art. 1 (Brazil).
- 105 Civil Public Action Act No. 7.347, art. 5 (1985) (Brazil); see also Handley, *supra* at 97, 129.
- 106 Debora Chaves Martines Fernandes et al., *The Effectiveness of the “Anti-Corruption” Legal System in Brazil*, Serie Pensando o Direito no. 34 (São Paulo: Pensando o Direito, 2011).
- 107 The only explicit reference to the issue of immunity is in UNCAC Article 30.2, which deals with domestic immunities (that are granted by states to their own public agents such as parliamentarians, cabinet members and heads of states). Domestic immunities and immunities enjoyed under special rules of international law by States (sovereign immunity), by persons connected with diplomatic missions, consular posts, special missions, or international organizations are beyond the scope of this paper which only deals with the immunity of State officials from the jurisdiction of another State.
- 108 Source: StAR, Fact Sheet: Barriers to Asset Recovery (Washington D.C. no date) <https://star.worldbank.org/star/sites/star/files/EnglishBARFacts.pdf>.
- 109 ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, para. 51), <http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>. The ICJ reproduced this *obiter dictum* in *Certain Questions of Mutual Assistance in Criminal Matters (ICJ; Djibouti v. France)*, Judgment of 4 June 2008, para. 170).
- 110 This broad immunity privilege derives from the traditional conceptual identity of the ruler and the state in international law: in fact, heads of state were considered as personifications of the State itself and therefore ought to be granted equivalent jurisdiction privilege. However, following the significant increases in international business and related changes in state economic systems that occurred after World War II, many countries progressively reconsidered the absolute jurisdiction privilege of states to ultimately conform to a restrictive theory of sovereign immunity. Under this approach (which mainly applies in civil matters), foreign states' activities that are strictly commercial (referred to as *acta jure gestionis*) are exempted from the immunity privilege, which is therefore limited to acts falling inherently within the sphere of governmental functions (referred to as *acta jure imperii*). This approach has also been followed within the European Union (European Convention on State Immunity; signed in 1972 and entered into force in 1976) and more recently within the United Nations (United Nations Convention on Jurisdictional Immunities of States and Their Property; signed in 2004, not yet entered into force). In spite of this, the immunity privilege enjoyed by foreign heads of state and other high-ranking officials has never been properly re-evaluated.
- 111 Cass. crim., 13 mars 2001, n° 00-87.215.
- 112 Senior District Judge at Bow Street, *Tatchell v. Mugabe*, Judgment of January 14, 2004.
- 113 ATF 115/1989 ib496.
- 114 The only notable exception to be found is the case against General Manuel Antonio Noriega, then de facto leader of Panama, who was brought to the United States to stand trial for narcotics-related charges, his head-of-state immunity claim being rejected (*United States v. Noriega*, 117 F.3d 1206; 11th Cir. 1997). The United States, however, had never recognized Noriega as the legitimate President of Panama because he had assumed power after the Panamanian Parliament deposed the then-President, Eric Arturo Delvalle, and subsequent elections were disputed.
- 115 See in particular Articles 2 and 15 of the resolution of the Institute of International Law concerning the “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law” (Session of Vancouver—2001), according to which both heads of states and heads of governments should enjoy immunity from criminal “jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity.” Full text available at [http://www.idi-iil.org/app/uploads/2017/06/2001\\_van\\_02\\_en.pdf](http://www.idi-iil.org/app/uploads/2017/06/2001_van_02_en.pdf). Founded in 1873 by 11 international lawyers of renown, the Institute of International Law is an institution independent of any governmental influence which seeks to highlight the characteristics of the *lex lata* (literally, “the law as it exists”) in order to promote its respect.
- 116 Re General Shaul Mofaz, Judgment; Bow Street Magistrates' Court, February 12, 2004.
- 117 Re Bo Xilai, England, Bow Street Magistrates' Court, November 8, 2005.
- 118 See Roman Anatolevich Kolodkin, Special Rapporteur, *Immunity of State Officials from Foreign Criminal Jurisdiction: Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction*, (New York: International Law Commission, 2008). Available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_601.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_601.pdf).

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- 119 Cass. crim., December 15, 2015, n° 15-83156. The indictment was issued by French magistrates as part of their criminal investigation over allegations of money laundering by several foreign high-ranking officials, their family members, and close associates who have allegedly used embezzled and/or illicit funds to acquire vast assets in France (known in France as the *Biens Mal Acquis* case).
- 120 See additional comments, below, for a clearer idea of how Teodorin Nguema Obiang has abused international rules on immunity.
- 121 The prison sentence and the fine, but not the property forfeiture, were suspended, meaning they will only be implemented if he commits another crime in France within the next five years. See Transparency International Secretariat, “Obiang Verdict: Transparency International Welcomes the Corruption Conviction and Seizure of Assets,” October 27, 2017, [https://www.transparency.org/news/pressrelease/obiang\\_verdict\\_transparency\\_international\\_welcomes\\_the\\_corruption\\_conviction](https://www.transparency.org/news/pressrelease/obiang_verdict_transparency_international_welcomes_the_corruption_conviction).
- 122 The International Law Commission was established by the United Nations General Assembly in 1947 to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification,” <http://legal.un.org/ilc/>.
- 123 See draft article 3 on “Persons enjoying immunity *ratione personae*” provisionally adopted by the Drafting Committee at the 65th session of the International Law Commission (A/CN.4/L.814). More information about this work available at <http://legal.un.org/docs/?symbol=A/CN.4/L.814>.
- 124 In fact, since it is attached to the official acts performed by state officials in the exercise of their functions, functional immunity is not limited by the tenure of the office and continues to protect former state officials after they leave office.
- 125 See in particular Articles 13 and 16 of the Resolution of the Institute of International Law concerning “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law” (Session of Vancouver—2001), according to which both former heads of state and heads of government “[do] not enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof.” Full text available at [http://www.idi-ii.org/app/uploads/2017/06/2001\\_van\\_02\\_en.pdf](http://www.idi-ii.org/app/uploads/2017/06/2001_van_02_en.pdf).
- 126 ICJ, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, para. 61) (emphasis added).
- 127 A great majority of legal scholars are also of the view that corruption-related crimes are not official acts. See Alvaro Borghi, “L’immunité des dirigeants politiques en droit international” (Thèse, Genève / Bâle / Munich / Paris / Bruxelles, L.G.D.F., 2003, 165); J. Verhoeven, “Sur la récupération à l’étranger des sommes détournées par d’anciens chefs d’Etat,” in *Etudes de droit international en l’honneur de Pierre Lalive*, ed. Christian Dominicé, Robert Patry, Claude Reymond (Bâle / Francfort-sur-le-Main, Helbing und Lichtenhahn 1993, 359); Lawrence A. Collins, “Recovery of Stolen Property from Deposed Rulers,” in *Etudes de droit international en l’honneur de Pierre Lalive*, (op. cit., 221); Adam C. Robitaille, “The Marcos Cases: A Consideration of the Act of State Doctrine and the Pursuit of the Assets of Deposed Dictators,” *Boston College Third World LJ* 9 (1989): 81.
- 128 The cases mentioned in this section involve only *former* high-ranking officials (i.e., who no longer enjoy personal immunity). See also, below, the landmark decision rendered in France against the *incumbent* foreign senior official, Teodorin Nguema Obiang.
- 129 Venezuela’s complaint, upon which the extradition proceedings under attack were based, charged Jimenez (first as a member of a three-man junta, then as provisional president and later as president) with financial crimes for his own gain. In his defense, Jimenez claimed that these acts were “acts of state” and therefore ought to be covered by immunity. Full decision available at <https://openjurist.org/311/f2d/547/jimenez-v-aristeguieta-e>.
- 130 We are not aware of any other conviction precedents; however, it is worth noting that a lot of foreign jurisdictions opened their own criminal investigations after the fall of the corrupt regimes of Ben Ali of Tunisia, Hosni Mubarak of Egypt, and Viktor Yanukovich of Ukraine.
- 131 Lazarenko was also sentenced by a Geneva court in June 2000. However, media sources indicate that the acts for which he was convicted were committed prior to his taking office as prime minister. See Sylvie Arsever, “Pavlo Lazarenko condamné à 18 mois de prison avec sursis,” *Le Temps*, June 30, 2000, <https://www.letemps.ch/suisse/2000/06/30/pavlo-lazarenko-condamne-18-mois-prison-sursis>.
- 132 See US Department of Justice, Federal Bureau of Investigation, “Former Ukrainian Prime Minister Sentenced to 97 Months in Prison Fined \$9 Million for Role in Laundering \$30 Million in Extortion Proceeds,” November, 19, 2009, <https://archives.fbi.gov/archives/sanfrancisco/press-releases/2009/sf111909a.htm>.

- 133 On June 10, 2003, Pierre Falcone was, according to the French courts, “opportunistically designated” Minister Plenipotentiary Representative of the Republic of Angola to UNESCO, which, Falcone argued, then allowed him to evade the judicial supervision measures to which he was subject in France as part of the investigation into alleged illicit arms sales to Angola (the Angolagate case). After several months of proceedings, the privileges and immunities that Falcone sought to rely on were held inapplicable (because of Falcone’s French citizenship) and a criminal conviction was successfully secured against him. But, for a time, the immunity issue seriously hampered the proper course of justice in France.
- 134 On October 13 2011, a few days after the seizure of Teodorin’s luxury cars by the French police, the government of Equatorial Guinea decided to appoint him to the post of Deputy Permanent Delegate of Equatorial Guinea to UNESCO. However, thanks to the massive public outcry that followed this decision, Teodorin Nguema Obiang did not, in the end, take the diplomatic post at UNESCO.
- 135 See in particular Article 5 of the Resolution of the Institute of International Law concerning “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law” (Session of Vancouver—2001) according to which “neither family members nor members of the suite of the Head of State benefit from immunity before the authorities of a foreign State.” Full text available at [http://www.idi-ii.org/app/uploads/2017/06/2001\\_van\\_02\\_en.pdf](http://www.idi-ii.org/app/uploads/2017/06/2001_van_02_en.pdf).
- 136 Swiss Federal Tribunal; judgments of March 8, 1999; Ref. 1P.631/1998 and 1P.633/1998.
- 137 In fact, the case did not involve personal immunity but sovereign immunity which, as noted above (cf. footnote 4), is much more restrictive because its applicability depends on the distinction between private acts (*acta jure gestionis*) and sovereign acts (*acta jure imperii*). Nonetheless, the case articulates the proposition that immunity will apply only to assets held in the real name of the person or entity asserting the immunity.
- 138 This decision is of particular interest because it is the first application of the distinction between *acta jure imperii* and *acta jure gestionis* in relation to criminal matters.
- 139 Swiss Federal Tribunal; judgments of December 24, 1999 (1P628/1999), December 8, 2000 (1P.582/2000) & June 25, 2001 (1A.94/2001) This ruling led to negotiations between the Kazakh, Swiss, and United States governments, which ultimately resulted in the return of the monies to Kazakhstan to be used for development purposes under World Bank supervision (the now famous BOTA Foundation project. See Kara Scannell, “Corruption: Moving money out of Purgatory,” *Financial Times*, July 5, 2016, <https://www.ft.com/content/10d8679c-228b-11e6-9d4d-c11776a5124d>).
- 140 Article 4 § 2; Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, Session of Vancouver 2001.
- 141 See US Department of Justice, Office of Public Affairs, “Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased With Corruption Proceeds, October 10, 2014, <https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agrees-relinquish-more-30-million-assets-purchased>.
- 142 At a minimum, this case confirms that in NCB forfeitures as well, acts of corruption committed while in office are not covered by functional immunity.
- 143 *Stolen Asset Recovery: A Good Practices Guide for Non-conviction based Asset Forfeiture*, (Washington, StAR, 2009), p15, at [http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Stolen\\_Asset\\_Recovery.pdf](http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Stolen_Asset_Recovery.pdf).
- 144 See <http://www.transparency.org/country#IND>.
- 145 Report of the Comptroller and Auditor General of India, Performance Audit Report on the Issue of Licences and Allocation of 2G Spectrum by the Department of Telecommunications, Ministry of Communications and Information Technology (Union Govt. [Civil] No. 19 of 2010–11) at [http://www.cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Performance\\_Civil\\_Allocation\\_2G\\_Spectrum\\_19\\_2010.pdf](http://www.cag.gov.in/sites/default/files/audit_report_files/Union_Performance_Civil_Allocation_2G_Spectrum_19_2010.pdf).
- 146 As stated by Shri V. Narayanasamy, Minister of State in the Prime Minister’s Office, in the Rajya Sabha on December 6, 2012. See Press Information Bureau, Government of India, “Cases Pending under Prevention of Corruption Act.” See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=90084>.
- 147 For an insightful analysis, see Sumanta Banerjee, “Anna Hazare, Civil Society and the State,” *Economic and Political Weekly* 46, no. 36 (2011): 12-14.
- 148 For an analytical assessment of the rise of the Aam Aadmi Party, see Gopal Guru, “Two Conceptions of Morality: A Political Reading,” *Economic and Political Weekly*, 49, no. 17 (2014).
- 149 Ashok H. Desai and S. Muralidhar, “Public Interest Litigation: Potential and Problems” in B. N. Kirpal et al., eds., *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000), 159.

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- 150 Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Bombay: NM Tripathi, 1985).
- 151 For the connections between weak coalition governments and strong courts, see Lavanya Rajamani and Arghya Sengupta, "The Supreme Court" in Niraja Gopal Jayal and Pratap Bhanu Mehta, eds., *The Oxford Companion to Politics in India* (New Delhi: Oxford University Press, 2010), 80.
- 152 For an explanation of traditional remedies of quashing (*certiorari*) and declarations, see Durga Das Basu, *Constitutional Remedies and Writs*, 3rd ed. (Kolkata: Kamal Law House, 2009), 22.
- 153 (1998) 1 SCC 226. <http://www.indiankanoon.org/doc/1203995>.
- 154 The Central Bureau of Investigation was set up under the Delhi Special Police Establishment (DSPE) Act, 1946, as a special police force to investigate offenses anywhere in India that may be notified for this purpose by the central government. This is an exception to routine investigations, which are conducted by the different state police forces depending on jurisdiction. For a description of the history and operation of the CBI, see Joginder Singh, *Inside CBI* (New Delhi: Chandrika Publications, 1999).
- 155 For more information on the petitioner, see his website: <http://www.vineetnarain.net>.
- 156 This was an adaptation of the writ of *mandamus* provided for in Article 32 of the Constitution vesting the Supreme Court with the power to enforce fundamental rights by ordering state authorities to take certain mandatory actions which they have failed to perform. By the writ of continuing *mandamus* the court issued *mandamus* orders over a period of time by keeping the writ petition pending till its orders were complied with and the violation of fundamental rights remedied. For examples of use of continuing *mandamus*, see Das Basu, *Constitutional Remedies and Writs*, 76-79.
- 157 The filing of the charge-sheet or police report under Section 173 of the Code of Criminal Procedure, 1973, is the stage of the criminal prosecution where the police report to the magistrate as to whether, in their opinion, an offense has been committed, and if so, by whom. On the basis of the merits of this report, and after hearing the accused, the magistrate decides whether formal charges ought to be filed or not.
- 158 Article 14 reads, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." In *EP Royappa v State of Tamil Nadu*, (1973) 4 SCC 3, the Supreme Court held, "Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and Constitutional law and is therefore violative of Article 14." See <http://indiankanoon.org/doc/1327287>.
- 159 Article 32(2) reads, "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."
- 160 Article 142(1) reads, "The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."
- 161 For traditional remedies, see Das Basu, *Constitutional Remedies and Writs*, 22. It is not as if continuing *mandamus* replaced these remedies. Another remedy in *Vineet Narain* was to strike down the Single Directive by which any CBI investigation had to commence after seeking prior permission from the designated authority (i.e., the executive).
- 162 There is now a formalized practice by which the Registry of the Court maintains an *Amicus Curiae* Panel of Senior Advocates, Advocates-on-Record, and other advocates with minimum 10 years of experience, revised every two years. For the present panel, see Notice dated February 13, 2014, [http://supremecourtindia.nic.in/notice\\_circular.htm](http://supremecourtindia.nic.in/notice_circular.htm).
- 163 *SP Gupta v Union of India*, (1981) Supp SCC 87. Per Bhagwati J., para. 18.
- 164 The Law Commission of India undertook a close analysis of the impediments to fair investigation and free trial in cases involving "influential persons in public life" in pursuance of a direction of the Supreme Court. See Government of India, Law Commission of India, *Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities* [LCI Report No. 239] (New Delhi: LCI, 2012). <http://lawcommissionofindia.nic.in/reports/report239.pdf>.
- 165 Section 3 of the Prevention of Corruption Act gives both the central government and state governments the power to appoint Special Judges.
- 166 AIR 1996 SC 1515, <http://indiankanoon.org/doc/1829856>. This was a public interest litigation before the High Court of Patna under Article 226 (Order dated 11.3.96 of the Patna High Court in C.W.J.C. No. 459 of 1996-R), which came to the Supreme Court by way of appeal under Article 136 of the Constitution.

- 167 S. K. Ghosh, *Indian Democracy Derailed: Politics and Politicians* (Calcutta: APH Publishing, 1997), 314–317.
- 168 (2012) 7 SCC 407. <http://indiankanoon.org/doc/37541448>.
- 169 *State of Andhra Pradesh v Obulapuram Mining Co. (P) Ltd.*, (2011) 12 SCC 491.
- 170 (2012) 7 SCC 407, para. 60. <http://indiankanoon.org/doc/37541448/>.
- 171 (2012) 7 SCC 407, para. 60. <http://indiankanoon.org/doc/37541448/>.
- 172 Section 6-A, DSPE Act was struck down in *Subramanian Swamy v Central Bureau of Investigation*, W/P (Civil) No. 38 of 1997 and W/P (Civil) No. 21 of 2004. <http://supremecourtindia.nic.in/outtoday/41503.pdf>.
- 173 (2014) 2 SCC 532. <http://supremecourtindia.nic.in/outtoday/wr120.pdf>.
- 174 Per Lokur J., (2014) 2 SCC 532, para. 61. <http://supremecourtindia.nic.in/outtoday/wr120.pdf>.
- 175 Section 6A (1) of the DSPE Act, under which the CBI is constituted, read:
- “The Delhi Special Police Establishment shall not conduct any enquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988), except with the previous approval of the Central Government where such allegation relates to:
- “(a) the employees of the Central Government of the Level of Joint Secretary and above; and
- “(b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government Companies, Societies and local Authorities owned or controlled by that Government.”
- 176 Per RM Lodha J. (as he then was), in relation to the coal blocks allocation scandal. BS Reporter, “CBI a Caged Parrot Speaking in its Masters’ Voice, Observes SC,” *Business Standard*, June 2, 2014. [http://www.business-standard.com/article/current-affairs/cbi-a-caged-parrot-speaking-in-its-masters-voice-observes-sc-113050900032\\_1.html](http://www.business-standard.com/article/current-affairs/cbi-a-caged-parrot-speaking-in-its-masters-voice-observes-sc-113050900032_1.html).
- 177 The Supreme Court has also clearly said so. See *Centre for Public Interest Litigation v Union of India*, (2012) 3 SCC 1 para. 102. See <http://indiankanoon.org/doc/70191862>.
- 178 Ayesha Arvind and Mansi Tewari, “A Raja Targets SC for ‘Unfair’ Trial,” *Business Today*, May 6, 2014. <http://businesstoday.intoday.in/story/a-raja-targets-sc-for-unfair-trial/1/205921.html>.
- 179 A thorough case record search and interviews with counsels involved in several cases where the Supreme Court has monitored investigation have revealed no such instance.
- 180 *Centre for Public Interest Litigation v Union of India*, (2012) 3 SCC 1 para. 102, see <http://indiankanoon.org/doc/70191862/>. This was apart from the criminal investigation monitored by the court, which led to the arrest of the incumbent minister of telecommunications, and subsequent criminal trial in a Special CBI Court.
- 181 *Centre for Public Interest Litigation v Union of India*, (2012) 3 SCC 1 para. 102. See <http://indiankanoon.org/doc/70191862/>.
- 182 Timothy Endicott, *Arbitrariness*, 27 Can. J.L. & Jur. 49 (2014); Agencies, “2G Judgement Went Beyond Limits of Judicial Review: Govt,” *The Indian Express*, March 2, 2012. <http://indianexpress.com/article/news-archive/politics/2g-judgement-went-beyond-limits-of-judicial-review-govt>.
- 183 (1996) 6 SCC 530. See <http://indiankanoon.org/doc/1155600>.
- 184 (1996) 6 SCC 593.
- 185 (1996) 2 SCC 593, para 16.
- 186 (1999) 6 SCC 667.
- 187 *Shiv Sagar Tiwari v Union of India* [1996], 6 SCC 558. It has also been awarded in other public interest litigations: *MC Mehta v Kamal Nath* [2002], 3 SCC 653.
- 188 Association for Democratic Reforms, *Select Media Coverage of NEW/ADR Reports* (Lok Sabha 2009). [http://adrindia.org/sites/default/files/0.9%2Ofinal%20report%20\\_%20lok%20sabha%202009.pdf](http://adrindia.org/sites/default/files/0.9%2Ofinal%20report%20_%20lok%20sabha%202009.pdf).
- 189 *Qui tam* is short for a longer Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates to “who as well for the king as for himself sues in this matter.” *Black’s Law Dictionary* (10th ed. 2014).
- 190 For historical background, see J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000); and John Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003).
- 191 See US Department of Justice, “Fraud Statistics—Overview,” 2014. See <http://www.justice.gov/civil/pages/attachments/2014/11/21/fcastats.pdf>. For more empirical evaluation, see David Kwok, *Does Private Enforcement Attract Excessive Litigation? Evidence from the False Claims Act*, 42 Pub. Cont. L. J. 225 (2013); David Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244 (2012).
- 192 See US ex rel. *Franklin v Parke-Davis, Div. of Warner- Lambert Co.*, 147 F. Supp. 2d 39 (D. Mass. 2001).



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- 193 See US ex rel. *Hobbs v MedQuest Assocs., Inc.*, 711 F.3d 707 (6th Cir. 2013).
- 194 See Organisation for Economic Co-operation and Development, *Using Leniency to Fight Hard Core Cartels [Policy brief]*, OECD Observer, September 2001. See <http://www.oecd.org/daf/competition/1890449.pdf>.
- 195 See *Ab-Tech Const., Inc. v United States*, 31 Fed. Cl. 429, 434 (1994).
- 196 See Crown Prosecution Service, *The Code for Crown Prosecutors*, January 2013. See [https://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf).
- 197 *R (on the application of Gujra) (FC) (Appellant) v Crown Prosecution Service (Respondent) [2012] UKSC52*, para. 1 per Lord Wilson.
- 198 (1975) AC 435.
- 199 In accordance with s.6(2) of the Prosecution of Offences Act 1985.
- 200 Irish case of *Kelly & Anor v District Court Judge Ryan* 5 [2013] IEHC 321, in which a private prosecution was brought against two bankers for fraud.
- 201 *Regina (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52. See <http://www.bailii.org/ew/cases/EWCA/Crim/2014/52.html>.
- 202 James Ball and Harry Davies, "UK Authorities 'Lack Resources' to Investigate Trafigura Over Toxic Waste," *The Guardian*, July 23, 2015. See <http://www.theguardian.com/world/2015/jul/23/uk-authorities-lack-resources-to-investigate-trafigura-over-toxic-waste>.
- 203 David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th ed., 2015), 3.
- 204 S.25(2)(a) Prosecution of Offences Act 1985.
- 205 Pursuant to the International Criminal Court Act 2001.
- 206 S.153 Police Reform and Social Responsibility Act 2011. This was the result of private prosecutors obtaining warrants for the arrest of several high profile individuals for war crimes, including Bo Xilai, Henry Kissinger, Tzipi Livni, Ehud Barak, and others.
- 207 David Ormerod and David Perry, eds., *Blackstone's Criminal Practice* (27th ed., 2016).
- 208 See the Criminal Justice Act 1993.
- 209 Pursuant to the Geneva Conventions Act 1957 and the International Criminal Courts Act 2001.
- 210 Pursuant to the Criminal Justice Act 1988.
- 211 S.9 Offences Against the Person Act 1861.
- 212 *Dacre v City of Westminster Magistrates Court* C [2008] EWHC 1667, per L. J. Latham.
- 213 *R v Bow Street Stipendiary Magistrates, ex P. South Coast Shipping Co. Ltds* (1993) Cr. App. Rep. 405.
- 214 *R (Axa) v Gatley (2014)* and *R (Axa) a) Paul Havert* (2015).
- 215 S.130-133 Powers of Criminal Courts (Sentencing) Act 2000.
- 216 The ability of a private prosecutor to make use of such proceedings was confirmed in the case of *R (Virgin Media Ltd) v Zinga [2014] EWCA Crim*.
- 217 Sec. 6(2) Prosecution of Offences Act 1985.
- 218 Secs. 23 and 23A Prosecution of Offences Act 1985.
- 219 See Crown Prosecution Service, *Private Prosecutions*, [http://www.cps.gov.uk/legal/p\\_to\\_r/private\\_prosecutions/](http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/).
- 220 *R (Gujra) v CPS [2012] 1 WLR 254*.
- 221 See Crown Prosecution Service, [http://www.cps.gov.uk/publications/docs/vrr\\_guidance\\_2014.pdf](http://www.cps.gov.uk/publications/docs/vrr_guidance_2014.pdf).
- 222 Rule 7.2 Criminal Procedure Rules 2014.
- 223 Rules 7.3 Criminal Procedure Rules 2014.
- 224 Sec. 1 Magistrates Courts Act 1980.
- 225 *R v West London Justices, ex parte Klahn* [1979] 2 All ER 221.
- 226 Sec. 1(4) Magistrates Courts Act 1980.
- 227 Sec. 9 Criminal Justice Act 1967.
- 228 Sec. 29 Data Protection Act 1998.
- 229 Sec. 25(2) Data Protection Act 1998.
- 230 Schedule 2 Data Protection Act 1998.

- 231 *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133.
- 232 Rule 28.5 Criminal Procedure Rules 2014.
- 233 Sec. (2) Criminal Procedure and Investigations Act 1996 (as amended).
- 234 *Molton v Chief Constable of West Midlands* [2010] All ER (D).
- 235 Sec. 17 Prosecution of Offences Act 1985.
- 236 Through 2004 the Justice Department and Securities and Exchange Commission filed 71 enforcement actions between them. From 2004 through 2015 the number more than quadrupled. Calculated from US Department of Justice Foreign Corrupt Practices Act, Related Enforcement Actions; see <https://www.justice.gov/criminal-fraud/related-enforcement-actions> and US Securities and Exchange Commission, SEC Enforcement Actions: FCPA Cases, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.
- 237 Crime victims' laws apply only to offenses listed in title 18 of the United States Code, and the FCPA appears in title 15. But a conspiracy, including one to violate the FCPA, is a title 18 offense. Shane Frick, "'Ice' Capades: Restitution Orders and the FCPA," *Richmond Journal of Global Law & Business* 12 no. 3 (2013): 433–452, 440–441.
- 238 18 U.S.C. § 3663(a)(2) (Victim and Witness Protection Act); 18 U.S.C. § 3663A(a) (Mandatory Victim Restitution Act).
- 239 *United States v Saena Tech Corporation*, Criminal No. 14-66 (D.D.C. 2015) discussed in "The Latest Judicial Opinion Regarding the DOJ's Use of DPAs," *FCPA Professor*, October 26, 2015. See <http://fcpaprofessor.com/reading-assignment-the-latest-judicial-opinion-regarding-the-doj-s-use-of-dpas/>.
- 240 Court decisions and public filings in FCPA criminal cases are available on the Department of Justice's web page cited note 1. To avoid cluttering this paper with footnotes, full citations to cases are provided only for those cases and documents neither available on the department's web page nor easily retrievable by plugging the case name into a search engine, or when needed for clarification.
- 241 Cited in *United States v Green*, 722 F.3d 1146 (9th Cir. 2013) (9th Cir. 2011).
- 242 *Instituto Costarricense de Electricidad*, No. 11-12708G (11th Cir. June 17, 2011).
- 243 Government's Response to ICE's Petition For Victim Status and Restitution, 12.
- 244 *United States v. Robert Antoine*, No. 09-CR-2100 (S.D. Fla. 2010).
- 245 IREX, *The BOTA Foundation: A Final Summative Report*, February 2015. See <https://www.irex.org/sites/default/files/BOTA%20Summative%20Report%20FINAL.pdf>.
- 246 Both statutes use the term "restitution" to mean compensating victims for their losses, but at least in civil suits that term can mean one of two things: either the disgorgement of the benefits a wrongdoer realized from his or her wrongful act, or damages paid to a victim to compensate for the losses the wrongdoing caused. To avoid confusion, this paper follows the recommendation of the American Law Institute and uses "victim compensation" to describe payments to crime victims to make up for losses caused by the commission of a crime. Model Penal Code: Sentencing § 6.04A cmt. A (Preliminary Draft No. 10, September 3, 2014) cited in Courtney E. Lollar, *What is Criminal Restitution?* 100 Iowa L. Rev. 19, 93-153 (2004).
- 247 Procedure for Issuance and Enforcement of Order of Restitution, 18 U.S.C. §3664 (a).
- 248 *Story Parchment Co. v Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).
- 249 *Petroleos Mexicanos et al v Conproca S.A. DE C.V.*
- 250 Dan B. Dobbs, *Handbook on the Law of Remedies* (St. Paul, MN: West Publishing, 1973), 700–703.
- 251 Complaint, *Republic of Trinidad and Tobago ex rel. John Jeremie Attorney General v Birk Hillman Consultants*, No. 04-11813 CA 30 (11th Judicial Circuit Court, Florida, April 13, 2007).
- 252 "Attorneys Win Settlement of \$4.5 Million in Trinidad Fraud," *Daily Business Review*, January 7, 2010. <http://www.dailybusinessreview.com/id=1202466489331/Attorneys-win-settlement-of-45-million-in-Trinidad-fraud?slreturn=20160127123117>.
- 253 *The Republic of Iraq ex rel. Citizens of Republic of Iraq v ABB AG*, 768 F.3d 145, 163 (2d Cir. 2014).
- 254 Amy D. Westbrook, "Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations," 73 Ohio St. L.J. 5, 1217–1252 (2013).
- 255 John C. Coffee, Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge: Harvard University Press, 2015) 1-7.
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- 260 Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).
- 261 *City of Brockton Ret. Sys. v Avon Prods., Inc.*, No. 11 Civ. 4665 (S.D.N.Y. Sept. 29, 2014).
- 262 *City of Pontiac Gen. Emps.' Ret. Sys. v Wal-Mart Stores, Inc.*, 12-CV-5162 (W.D. Ark. Sept. 26, 2014).
- 263 *Korea Supply Co. v Lockheed Martin Corp.*, 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003).
- 264 Arthur H. Travers, "Commercial Bribery and the Antitrust Laws," *Antitrust Bulletin* 40 (1995): 779-782.
- 265 Hilary Russ, "Judge OKs Innospec's \$45M Deal To End Antitrust Suits," Law360, September 22, 2011. See <http://www.law360.com/articles/273374/judge-oks-innospec-s-45m-deal-to-end-antitrust-suits>.
- 266 *Complaint, Grynberg v BP P.L.C.*, Docket No. 1:08-cv-00301 (D.D.C. Feb. 21, 2008), p. 7.
- 267 *Argo-Tech Corporation v Yamada Corporation*, No. 1:08-cv-00721 (N.D. Ohio March 24, 2008).
- 268 For a concise exposition of available legal remedies see L van Tonder and Peter Goss, "Effective Use of Legal Remedies for Corruption," 9th International Anti-Corruption Conference (Durban, South Africa, July 14, 2014). See [9iacc.org/papers/day3/ws1/d3ws1\\_pricewaterhouse.html](http://9iacc.org/papers/day3/ws1/d3ws1_pricewaterhouse.html).
- 269 Elmarie van der Schyff, *Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?* 130 SALJ, 369-389, 380 (2013).
- 270 *Minister of Mineral Resources and Others v Sishen Iron ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) paras. 16, 65.
- 271 *Minister of Mineral Resources and Others v Sishen Iron ore Company (Pty) Ltd and Another* [2014 (2) SA 603 (CC) para. 63.
- 272 Because this paper does not deal specifically with the property-rights regime whereby the country's natural resources are regulated, the discussion will not dwell on this aspect.
- 273 The reader should note that damages may also be claimed, *inter alia*, in administrative-law proceedings and enrichment actions, and where a contract has been breached.
- 274 Constitution of the Republic of South-Africa, 1996, Section 38: "Enforcement of rights: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."
- 275 *Fose v Minister of Safety and Security* 1997 (3) SA 786.
- 276 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC). *Gxibeka v MEC for Health* 2005 JOL 13458 TK confirmed that a court will not allow constitutional damages if it boils down to a duplication of general damages.
- 277 *Jayiya v MEC for Welfare* 2004 (2) SA 611 (SCA). In, among others, *S v Mhlungu* 1995 (3) SA 867 (CC), *Motsepe v Commissioner for Inland Revenue* 1997 (6) BCLR 692 (CC), and *Minister of Education v Harris* 2011 (11) BCLR 1157 (CC), the subsidiarity principle was laid down. This principle determines that "where it is possible to decide any case civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
- 278 *Jayiya v MEC for Welfare* 2004 (2) SA 611 (SCA).
- 279 It is submitted that the mere act of corruption is an infringement of the right to just administrative action contained in Section 33 of the Constitution.
- 280 The South African delictual remedies are also referred to as common-law remedies because they derive from the Roman-Dutch-based common-law heritage of the South African legal system.
- 281 *Gross and Others v Pentz* 1996 (4) SA 617 632 B-C.
- 282 *Minister of Mineral Resources and Others v Sishen Iron ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) para. 63.
- 283 National Environmental Management Act 106 of 1998, hereafter referred to as NEMA. Section 32 allows any person or group of persons to seek appropriate relief in respect of any breach of, *inter alia*, "any statutory provision concerned with the protection of the environment" in the public interest and in the interest of the protection of the environment.

- 284 *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Administrateur, Natal v Trust Bank van AfrikaBpk* 1979 3 SA 824 (A) 833; *Osborne Panama SA v Shell & BP SA Petroleum Refineries (Pty) Ltd* 1982 4 SA 890 (A) 901; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 769; *Minister of Law & Order v Kadir* 1995 1 SA 303 (A) 317.
- 285 *Carmichele v Minister of Safety & Security* 2001 1 SA 489 (SCA).
- 286 *Knop v Johannesburg City Council* 1995 2 SA 1 (A).
- 287 If an interim interdict is applied for, imminent irreparable harm must be proven. This is, however, not a requirement for granting a final interdict: *Hydro Holdings (Edms) Bpk v Minister of Public Works* 1977 (2) SA 778 (T); *Mbaba v Mbaba* (474/12) [2013] ZASCA 137 (September 27, 2013).
- 288 The *locus classicus* stating the requirements for an interdict is *Setlogelo v Setlogelo* 1914 AD 221 227. See also O 1946 AD 1049 at [1053]–[1054]; *Bankorp Trust Bpk v Pienaar* 1993 (4) SA 98 (A) 109; *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (3) BCLR 271 (CC), 2013 (2) SA 613 (CC); *Wishart and Others v Blieden NO and Others* [2013] 1 All SA 485 (KZP) at [50]; *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) at [40]–[45].
- 289 *Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd* 1961 (2) SA 505 (W); *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Hawker v Life Offices Association of SA supra* 780; *Elida Gibbs (Pty) Ltd v Colgate-Palmolive (Pty) Ltd* (1) 1988 (2) SA 350 (W) 353; *R & I Laboratories (Pty) Ltd v Beauty Without Cruelty International (SA Branch)* 1990 (3) SA 746 (C) 753–755.
- 290 *Berg River Municipality v Zelpy 2065 (Pty) Ltd* 2013 (4) SA 154 (WCC) at [43].
- 291 Sec. 28 of the Mineral and Petroleum Resources Development Act 28 of 2002, hereafter referred to as the MPRDA.
- 292 Sec. 3 of the MPRDA.
- 293 Sec. 2 of the MPRDA.
- 294 Michael Kidd, *Public Interest Environmental Litigation: Recent Cases Raise Possible Obstacles*, 13 PER/PELJ 5, 27–46 (2010).
- 295 *Xstrata SA v SFF Association* 2012 (5) SA 60 (SCA) 62 B-D.
- 296 See, generally, David Ibbetson and Eltjo Schrage, “*Ius quaesitum tertio*: A Comparative and Historical Introduction in the Concept of Third Party Contracts,” in *Ius Quaesitum Tertio*, ed. Eltjo Schrage, (Berlin: Duncker & Humblot, 2008), 1–34; Jan Hallebeek and Harry Dondorp, *Contracts for a Third-Party Beneficiary: A Historical and Comparative Account* (Leiden: Martinus Nijhoff, 2008); Neil Andrews, *Strangers to Justice No Longer: The Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999*, 60 Cambridge L.J. 2 (2001), 353–381; Andrew Burrows and Christoph Busch, eds., *Contract Terms in Favour of Third Parties* (Oxford: Oxford University Press, 2004).
- 297 Simon Young, “Why Civil Actions against Corruption?” *Journal of Financial Crime* 16 no. 2 (2009): 144–145.
- 298 See *R (On the Application of Corner House Research and Others) v Director of Serious Fraud Office* [2008] UKHL 60.
- 299 Rose-Ackerman includes the private litigant in her checklist of international actors who may play a role in the fight against corruption. See Susan Rose-Ackerman and Paul Carrington, eds., *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (Durham, NC: Carolina Academic Press, 2013), 6.
- 300 See Chapter 10, “Towards a Transaction Approach,” in Abiola Makinwa, *Private Remedies for Corruption: Towards an International Framework* (The Hague: Eleven, 2013), 437–462. In his seminal work, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002), John Braithwaite argues that restorative practices may serve as more effective deterrent systems than traditional criminal punitive sanctions.
- 301 See John Ruggie, “Protect, Respect and Remedy: A Framework for Business and Human Rights,” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, April 7, 2008, para. 91. See <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.
- 302 Preamble, UNCC.
- 303 See United Nations Convention against Corruption, New York, October 31, 2003, in force December 14, 2005, 2349 UNTS, 41; (2005), 43 *ILM*, 37.
- 304 See Makinwa, *Private Remedies for Corruption*, 383–384.

- 305 In 1996, the Organization of American States adopted the Inter-American Convention against Corruption in Caracas, Venezuela (35 ILM, p. 724). In 1997, the Organisation for Economic Co-operation and Development adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (37 ILM, p. 1). Also in 1997, the Council of the European Union adopted a convention drawn up on the basis of Art. K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (Official Journal C 195, June 25, 1997, pp. 0002–0011). This prohibition was extended to private sector bribery with the Council Framework Decision on combating bribery in the private sector (see Council Framework Decision 2003/568/JHA of July 22, 2003 on combating corruption in the private sector, Official Journal L 192, 31/07/2003 pp. 0054–0056). In 1999, the Council of Europe adopted the Criminal Law Convention on Corruption in force July 1, 2002 (173 CETS) as well as the Civil Law Convention on Corruption (174 CETS). In 2000, the United Nations Convention against Transnational Organized Crime (40 ILM, p. 353) was adopted, followed by the adoption of the African Union Convention on Preventing and Combating Corruption in 2003 (43 (1) ILM, p. 1). Finally, in 2003, the United Nations Convention against Corruption (UNCC) was adopted (43 ILM, p. 37). At the domestic level, the U.S. 1997 Foreign Corrupt Practices Act (15 USC Sec. 78dd-1, et seq.) and the UK 2010 Bribery Act (C.23) have a universality of application for multinational corporations that gives them a special status in the international framework of rules regulating corruption in international business.
- 306 Philip Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 Yale J. Int'l. L. 257, 302–303 (1999).
- 307 Article 35, UNCC.
- 308 For example, Sec. 7 of the US Restatement (2nd) Torts explains that injury is the violation of some legally protected interest while harm is the infliction of any loss or detriment on the person of the plaintiff. Recognized heads of legal injury, which are of relevance to the issue of corrupt acts as the damage suffered, are the common law causes of breach of fiduciary duty and fraud; damages that result from misrepresentation (Chapter 22 Restatement (2nd) Torts), interference with contractual relations (Chapter 37 Restatement (2nd) Torts), as well as interference with economic relations (Chapter 37A Restatement (2nd) Torts). The European Principles of Private Law speak in terms of legally relevant damage as a loss or injury that results from a right conferred by law or worthy of protection by law. See Book 6 Sec. 2:101, C. von Bar, E. Clive, H. Schulte-Nölke (Eds.), *Principles, Definitions and Model Rules of European Private Law*, Draft Common Frame of Reference (DCFR) Outline Edition, Sellier, Munich, 2009. Particular instances of legally relevant damage that have a bearing on the act of corruption are losses that result from the reliance on incorrect advice or information (Book 6, Sec. 2:207 DCFR); losses incurred upon unlawful impairment of business (Book 6, Sec. 2:208 DCFR); and losses resulting from the inducement of non-performance of an obligation (Book 6, Sec. 2:210 DCFR).
- 309 Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. R. 85, 1 (1998).
- 310 John Goldberg and Benjamin Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. (2010); Fordham Law Legal Studies Research Paper No. 1576644.
- 311 Emphasis added. The Civil Law Convention on Corruption predates the UN Convention but is an intergovernmental instrument of Council of Europe member states. See the Council of Europe Civil Law Convention on Corruption, April 1999, EUROP. T.S. 127 (entered into force November 2003).
- 312 See Makinwa, *Private Remedies for Corruption*, 11–12.
- 313 Ivar Alvik states that part of the dilemma occasioned by state contracts is the political and economic development issues that are usually tied up with such contracts. See Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Oxford: Hart, 2011), 2–4.
- 314 E. Allan Farnsworth, *Contracts*, 4th ed. (New York: Aspen, 2004), 657–661.
- 315 UK Contracts (Rights of Third Parties) Act 1999 Sec. 1(1) (a).
- 316 *Id.* at Sec. 1(1) (b).
- 317 *Id.* at Sec. 1(2).
- 318 *Id.* at Sec. 1(3).
- 319 In the United States, parties to a contract can by agreement give rights to a beneficiary that is not a party to the contract. Sec. 302 of the Restatement (2nd) Contracts provides that (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. An intended beneficiary can be distinguished from an incidental beneficiary who has no enforcement rights, as there was no intention or promise by the parties to the agreement to confer rights on such a person. See Sec. 302 (2) Restatement (2nd) Contracts.

- 320 Article 6:253(1) DCC.
- 321 Article 6:254(1) DCC.
- 322 See Eduardo Salcedo-Albarán, Isaac de León-Beltrán, and Mauricio Rubio, "Feelings, Brain and Prevention of Corruption," *International Journal of Psychology* 3, no. 3 (2008): 2, 11ff.
- 323 See Farnsworth, *Contracts*, 667.
- 324 European Commission, *EU Anti-Corruption Report* (Brussels: Author, 2014), 3. See [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf).
- 325 *Id.*, 6.
- 326 See Transparency International, *Corruption Perceptions Index* 2014. See <http://www.transparency.org/cpi2014/results>.
- 327 The US Department of Justice website provides full details of DOJ FCPA cases since 1977; see [www.justice.gov/criminal/fraud/fcpa/cases/2013.html](http://www.justice.gov/criminal/fraud/fcpa/cases/2013.html). The US Securities and Exchange Commission website provides full details of SEC cases since 1978; see [www.sec.gov/spotlight/fcpa/fcpa-cases.shtml](http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml).
- 328 *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Another*, ECW/CCJ/APP/12/07, November 30, 2010. See [http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas\\_right\\_to\\_education.pdf](http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/ecowas_right_to_education.pdf).
- 329 Para. 28.
- 330 LICADHO, 2012 in Review: *Land Grabbing, the Roots of Strife*, February 12, 2013. See <http://www.licadho-cambodia.org/articles/20130212/133/index.html>.
- 331 Cambodian Human Rights Action Committee, *Legal Aid Services in Cambodia, Report of a Survey Among Legal Aid Providers* (Phnom Penh: Author, 2010), 8 (hereinafter referred to as the *2010 Legal Aid Survey*).
- 332 Art. 8 of the 2001 Land Law provides that only natural or legal entities of Khmer nationality have the right to ownership of land in Cambodia and a foreigner who falsifies national identity to become an owner of land in Cambodia shall be punished.
- 333 The court's decision was decided *in absentia* on May 20, 2011.
- 334 Letter of Commune Chief Chit Sophat issued on November 5, 2012, recognizing the settlement of villagers in O-3 village. The letter was sent to the Sihanoukville Provincial Court asking it to take into consideration the duration of the settlement. However, the court refused to accept such a certificate, alleging the villagers did not have land titles to prove their settlement.
- 335 Provincial Court of Sihanoukville, *Criminal Case N.15*, January 1, 2006.
- 336 Leah M. Trzcinski and Frank K. Upham, "Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia," *Asian Journal of Law and Society* 1, no. 1 (2014): 55-77.
- 337 Sam Chamoeurn is a public interest lawyer and a member of Cambodian Defenders' Project, which has engaged in public interest litigation for the past 10 years; see <http://www.cdpcambodia.org>.
- 338 The Cambodian National Constitution, art. 39, states that "Khmer citizens have the right to denounce, make complaints, or claim for compensation for damages caused by any breach of the law by institutions of the state, social organizations or by members of such organizations. The settlement of complaints and claims for compensation for damages is the responsibility of the courts."
- 339 Art. 61 of the Cambodian Civil Code of Procedure provides for a sliding fee based on the amount in issue. Up to 10,000,000 (approximately \$2,500), the fee is 1,000 riels (\$.25) for each 100,000 riels. When the amount is above 10,000,000 but less than 100,000,000 riels the fee is 700 riels per 100,000 riels; for amounts exceeding 100,000,000 riels but less than 1,000,000,000 riels, the fee is 300 riels for each 100,000 riels; and for suits where the amount exceeds 1,000,000,000 riels, it is 100 riels for each 100,000 riels.
- 340 Art. 239, para 2: "Cadastral offices at all levels are legally responsible to ensure the due and proper maintenance of such Land Registers and the accuracy of survey operations and to preserve the documents."
- 341 The Cambodian National Constitution, art. 4, para. 3 states that the right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance.
- 342 *Id.* at art. 4
- 343 Law on Expropriation, art. 1, para. 2.
- 344 TRIAL is a Geneva-based NGO that litigates human rights and international crimes cases; see [www.trial-ch.org](http://www.trial-ch.org).

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- 345 *The Prosecutor v Argor*, Swiss Federal Criminal Court, BB.2013.173, January 24, 2014.
- 346 *United Nations Organization Mission in the DRC, Special Report on the Events in Ituri*, January 2002–December 2003, S/2004/573, June 16, 2004.
- 347 International Court of Justice, case concerning armed activities on the territory of the Congo (*Democratic Republic of the Congo v Uganda*), December 19, 2005. The Court found that Uganda had “by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the DRC and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of Congo under international law.”
- 348 Human Rights Watch, *The Curse of Gold* (New York: Author, June 2005). See <https://www.hrw.org/report/2005/06/01/curse-gold>.
- 349 Conflict Awareness Project, *The Pillage of Eastern Congo Gold: A Case for the Prosecution of War Crimes* (San Francisco: Author, November 2013): 5: “While the DRC government began to assert control over certain parts of Ituri in 2005, armed conflict did not effectively conclude there until 2007. By that time, overall, more than 6 million Congolese were estimated to have died as a result of nearly a decade of armed conflict in the country. Some of the most brutal atrocities occurred in Ituri.”
- 350 Report of the Group of Experts (UNGE) concerning the DRC, S/2014/42, January 23, 2014.
- 351 Security Council resolution 1493 (2003).
- 352 UNGE Report, S/2005/436, July 25, 2005, para. 80.
- 353 *Id.* at para. 80; Kisoni Kambale and his airline were sanctioned by the Security Council Sanctions Committee in 2007. He was killed a few months later by armed men.
- 354 *Id.* at para. 80; Uganda Commercial Impex was sanctioned in 2007 for the breach of the UN embargo.
- 355 *Id.* at para. 126.
- 356 Conflict Awareness Project, *Eastern Congo Gold*, 10.
- 357 *Id.*
- 358 UNGE Report, para. 79.
- 359 Argor-Heraeus SA, *Communiqué concernant le rapport édité par le groupe d’experts de l’ “UN Security Council on the Democratic Republic of the Congo,”* August 17, 2005.
- 360 UNGE Report, S/2006/53, January 27, 2006, paras. 110-113.
- 361 At that time, OSJI was already partnering with Kathy Lynn Austin and her NGO Conflict Awareness Project on the investigation and on litigating the case of Hussar before the UK and Jersey judicial authorities.
- 362 Hague Regulations 1907, arts. 28 and 47; Geneva Convention IV of 1949, art. 33, para. 2.
- 363 Statute of the International Criminal Tribunal for Rwanda, art. 4(f); Statute of the Special Court for Sierra Leone, Article 3(f).
- 364 Protocol additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflict, art. 2, para. 4 litt. G.
- 365 James G. Stewart, *Corporate War Crimes, Prosecuting the Pillage of Natural Resources* (Washington, DC: Open Society Justice Initiative, 2011): paras. 1 and 2.
- 366 Article 108-109 former Swiss Military Penal Code (fSMP) cum Protocole II, art. 2, para. 4 litt. G. and art. 264 SCC.
- 367 The Rome Statute of the ICC was adopted in Swiss law in 2011.
- 368 This requirement is controversial: it does not tally with international customary law. On this question, see Stewart, *Corporate War Crimes*, paras. 16-20.
- 369 In particular Common Article 3 of the Geneva Conventions as well as Additional Protocol II, Article 1.
- 370 *The Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Pre-trial Chamber I, Decision on the confirmation of charges (January 2007), para. 237.
- 371 Stewart, *Corporate War Crimes*, paras. 40-49.
- 372 Art. 25 Swiss Criminal Code.
- 373 Swiss Supreme Courts rulings ATF 132 IV 49 c. 1; ATF 121 IV 109 c. 3a and ATF 129 IV 124 c. 3.2.
- 374 *Basler Kommentar Strafrecht I*, (Stämpfli, 2007), art. 25 N 23-24; Philippe Graven, *L’infraction pénale punissable*, (Stämpfli, 1995) para. 309.

- 375 Swiss Supreme Courts rulings ATF 119 IV 289, c. 2 and ATF 113 IV 90.
- 376 Confidential annexes to the complaint.
- 377 UNGE Report, January 25, 2005, S/2005/30, para. 126.
- 378 *Loi sur le blanchiment d'argent* (LBA) and related ordinances; *Loi et Ordonnance sur les métaux précieux*.
- 379 Swiss Supreme Court, ATF 134 IV 255 c. 4.2.1.
- 380 *The Prosecutor v Argor*, Swiss Federal Criminal Court, BB.2013.173, January 24, 2014.
- 381 For instance, coverage was given by the *Financial Times*, *the New York Times*, *Forbes*, the *Washington Post*, *the Wall Street Journal*, *Bloomberg*, *Le Temps*, *Tages Anzeiger*, TV5 Monde, Radio Okapi, and Jeune Afrique.
- 382 For instance, Mining.com, *Mining Examiner*, and Forex Talk.
- 383 Droit sans frontière, “*Droit sans frontières examine la possibilité d’une initiative populaire*,” Press release, November 5, 2013, and Déclaration de Berne, “*Une procédure ouverte contre une raffinerie helvétique montre l’acuité de la problématique du blanchiment des matières premières sales*,” Press release, November 5, 2013.





Around the world, grand corruption flourishes. Perpetrated by the powerful and well-connected, high-level corruption is often abetted by networks of banks and shell companies, supported by armies of lawyers and accountants. Civil society groups seeking to combat these complex, transnational crimes would seem hopelessly overmatched.

Yet the narratives compiled here tell a different story, illustrating how civil society has successfully contributed to pursuing accountability for grand corruption, and exploring how activists can build on the foundations of these earlier efforts. This survey of current practices and potential tools shows how civil society can prompt investigations, assist prosecutors in building cases, mobilize public opinion, and in some jurisdictions even initiate and litigate cases directly.

***Legal Remedies for Grand Corruption*** catalogues lessons learned from attempts—both successful and not—to bring to justice those responsible for corruption. In assessing the state of the field, it looks at crimes such as money laundering, pillage, and land grabs; considers tools including private prosecutions and the use of regional courts; and examines jurisdictions as disparate as France, South Africa, and Cambodia. ***Legal Remedies for Grand Corruption*** demonstrates that civil society—building on its own distinctive strengths—can drive accountability for the corruption of dictators and kleptocrats.

The Open Society Justice Initiative uses strategic litigation, research, legal advocacy, and technical assistance to defend and promote the rule of law, and to advance human rights. We collaborate with a community of dedicated and skillful human rights advocates across the globe, as part of a dynamic and progressive justice movement that reflects the diversity of the world.