LEGAL POLICY SERIES

Legal Remedies for the Resource Curse

A digest of experience in using law to combat natural resource corruption

OPEN SOCIETY
JUSTICE INITIATIVE

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Open Society Justice Initiative

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Preface

On February 17, 2005, the Open Society Justice Initiative held a colloquium with legal advocates and policy professionals to assess the status of legal remedies to curb large-scale corruption arising from natural resource extraction, primarily in Africa. The meeting followed several months of research, consultation, and interviews, driven by three questions: What is the present state of efforts to pursue legal remedies for corruption arising from the exploitation of natural resources, especially in Africa? Why have there not been more—and more successful—efforts to secure legal remedies? Which legal strategies are particularly promising and, generally, what more could be done? The present report is a digest of the February colloquium, together with preceding and subsequent research and interviews with experts.

When resource extraction companies can access oil, diamonds, gold, coltan, timber, and other natural resources through private and corrupt contacts with unaccountable government officials, the losers are those located in the very places where the wealth originates. The power of corrupt governments frequently derives from monopoly access to natural wealth and the support of private and governmental industry allies elsewhere in the world. Local populations suffer destruction of their immediate environment and official unaccountability, together with the social and economic devastation that follows: arbitrary eviction and dispossession, unlawful arrest or harassment, and neglect of healthcare, housing, and education.

Natural resource corruption is often associated with a lack of transparency in the generation, transfer, and investment of the resulting revenues. Recent efforts, including some sponsored by the Open Society Institute (OSI), have aimed to create preventive transparency mechanisms—both voluntary and mandatory—aimed at corporations, banks, and governments in natural resource-rich countries. Legal remedies are here explored as a possible complement to these initiatives.

This report reviews some of the main legal instruments used to date, and others as yet untested. Focusing on resource spoliation in Africa, it provides case studies to demonstrate what has and has not worked. The report treats the "home countries" of resource extraction companies separately from the "host countries" where they operate.[1] It looks at both criminal and civil means of redress.

Although the report finds that corruption in transnational resource extraction is generally subject to weak or nonexistent safeguards, there are grounds for action. The international law framework has not yet addressed trans-jurisdictional spoliation in a coherent, enforceable manner. Regional treaties have provided some basic legal tools to address spoliation, but national incorporation and enforcement are not robust in much of the world. The pursuit of corruption in foreign countries is a low priority for criminal prosecutors. Civil litigation, on the other hand, is obstructed by cross-jurisdictional complexity and extremely high costs.

Nevertheless, there have been efforts in a number of countries to hold corrupt companies and governments to account and find redress for spoliation, using the available legal tools. To date these efforts have had mixed results.

Freedom of information laws offer another option for litigators in both home and host countries. Intergovernmental groups and others can also promote transparency through imposed or recommended measures on companies and governments alike, demanding that they "publish what they pay."

The present report is intended as a point of departure—it is not a legal treatise or comprehensive statement of available remedies. The focus is not on legal documents and collections of laws, but rather on the experience of legal experts and advocates on the ground. The hope is that this effort will spark further research, dialogue, and action on this important subject.

There will likely be many postpublication developments in the cases discussed here. Nevertheless, by framing and assessing the critical—often seemingly intractable—problems in securing legal remedies, and by cataloging tentative strategies to address them, the report aims at helping law professionals and nongovernmental organizations combating natural resource corruption.

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I. Introduction

The Problem: "Spoliation"

Over the past decade, development economists have remarked that, in many cases, the richer a country is in natural resources, the slower its economic growth. This problem has been described as the "resource curse."[1] Africa presents a special challenge because exports from resource-rich African countries tend to be dominated by primary commodities, in contrast to those in Latin America and Southeast Asia, which have often succeeded in diversifying their export bases.[2] Studies have linked primary commodity–dependent economies to higher rates of corruption.[3]

"Corruption" is a notoriously broad term with multiple meanings. The newly adopted United Nations Convention against Corruption, for example, avoids a definition altogether.[4] The present report focuses on two narrow areas of corruption: the bribery of public officials by multinational corporations in resource-rich countries, and money laundering of these bribes and/or stolen proceeds arising from natural resource sectors, generally in third countries. Collectively, these processes amount to "spoliation"—that is, the sale or use of natural resources for the benefit of private actors, rather than for the public good.

The benefits of natural resource spoliation to corrupt government officials can be tremendous. Individuals often accumulate fabulous personal wealth while billions of dollars generated by the sale of natural resources disappear from state coffers.[5] One legal scholar has coined the term "patrimonicide" to describe the phenomenon of indigenous spoliation of natural resources, observing that it has three contemporary characteristics: the huge amounts of wealth involved—amounting to billions of dollars; the great mobility of capital today, and the many ways to hide and disguise it; and "the social and economic devastation that follows when capital of this magnitude is allowed to leave any state, particularly a capital-poor developing state. The ultimate losers and victims are the ordinary citizens."[6]

Corruption overall costs African states dearly: some U.S. $148 billion a year by one African Union estimate, or about 25 percent of the continent's official GDP.[7] In many countries rich in oil, gas, and minerals, a majority live in severe poverty, lacking the most basic health, sanitation, and educational services. Indeed, half of the world's 25 most mineral-dependent, and 6 of the most oil-dependent, states are classified by the World Bank as "highly indebted poor countries," with the world's worst UNDP human development indicators.[8] Natural resource spoliation is also a common cause of war, as competing groups struggle for power over natural wealth, frequently aided by actors from resource-consumer countries. Battle for control of natural resources has been a driving force behind armed conflict in Angola, the Democratic Republic of the Congo, Liberia, Sierra Leone, and elsewhere.[9]

To date, the public interest legal community has focused primarily on human rights violations and environmental damage associated with the extractive industries. Legal responses to corrupt practice itself remain relatively rare, despite the fact that spoliation can occur independently of human rights or environmental abuse, and often underlies these broader problems where they occur. The establishment of a legal environment that renders the theft of public assets, bribery, and money laundering impossible, or at least unprofitable, would be a significant (if insufficient) step toward ending resource spoliation, and diminishing the human rights and environmental violations that accompany it.

The principal agents of spoliation, as the term is used here, are public officials in natural resource-rich "host" countries, multinational corporations in the extractive industries, and banks. The latter two generally operate out of the world's largest economies ("home countries"), and are often members of the OECD (Organization for Economic Cooperation and Development).[10] It is true that large-scale natural resource extraction operations utilize very different refining and delivery-to-market processes, and extraction operations occur in vastly different geographical and political environments. Nevertheless, large-scale natural resource extraction deals are often structured very similarly across industries (from oil to precious metals), regions, and political circumstances. For example, they inevitably require huge capital investments, often from large multinational corporations. These corporations need sophisticated multinational banks to manage their capital investments through financial instruments such as letters of credit and multitranche financing, and to receive and reliably retain the huge revenues. Such operations cannot be managed by local banks in poor countries.

In a pattern described repeatedly by experts, the acquisition by a multinational corporation of the extraction rights to a state's natural resource assets is frequently accompanied by bribery of government officials. Public officials then funnel the proceeds of the sale out of the national treasury through large multinational banks, or avoid the national treasury—or indeed the host country—altogether. Bribes too can be deposited directly into offshore banks. Meanwhile, international financial institutions, private and commercial banks, and export credit agencies provide significant loans and technical assistance to both governments and corporations for extraction operations.

These three actors—governments, banks, and corporations—may be involved in several "families" of legally recognizable crimes and civil wrongs associated with natural resource spoliation. Public officials in resource-rich countries may accept bribes relating to the extraction of a state's natural resources and/or embezzle state assets and launder the proceeds. Extractive industry multinational corporations may be involved in conspiracy to commit any of the above crimes, in bribing foreign officials, and in secondary wrongdoings such as the failure to disclose material information to investors and regulators. Banks may fail to maintain adequate anti–money laundering procedures. Finally, individual executives, accountants, and attorneys of corporations may also be liable for their participation in any of the above. Indeed in some countries, only individuals can be held liable for these crimes—corporations ("legal persons") cannot.

CASE STUDY 1

Oil, Bribery, and Money Laundering in Equatorial Guinea

The oil industry in Equatorial Guinea provides an excellent case study in spoliation, illustrating the general contours of corruption in resource extraction, the specific difficulties associated with finding robust legal remedies, and the opportunities that exist in various jurisdictions. This tiny West African country on the Gulf of Guinea made international news twice in 2004. First, the country's president, Teodoro Obiang Nguema, claimed foreign powers were involved in a plot to overthrow him when in March 2004 an aircraft carrying alleged mercenaries was intercepted in Zimbabwe on its way to Equatorial Guinea. Second, a July 2004 U.S. Senate report described suspicious transactions relating to accounts held by top Equatorial Guinean officials at the prominent Washington D.C.-based Riggs Bank, involving hundreds of millions of dollars in oil revenues. The report also describes how U.S. energy companies both engaged business ventures with, and made payments to, the president and his family and associates, that "raise concerns about corruption and profiteering."[11] The combination of state, corporate, and banking actors possibly engaged in bribery, embezzlement, and money laundering makes the Riggs Bank case an apt illustration of spoliation and the challenges for legal remedy.

Equatorial Guinea is now sub-Saharan Africa's third-largest oil producer (after Nigeria and Angola), following the discovery of oil in the mid-1990s. As a result, foreign investment has poured into the country's oil sector in recent years, primarily from U.S. companies. Equatorial Guinea produced more than 300,000 barrels of oil per day in 2004, which translates into nearly U.S. $5.5 billion per year at current oil prices.[12]

But few Equato-Guineans benefit from the oil windfall. In 2004, an international public health expert visited Equatorial Guinea—having last visited in 1993 before the oil boom—and found no noticeable improvement in conditions.[13] More than 70 percent of the population lives below the poverty line, and the majority of those in the largest cities lack access to safe drinking water and sanitation services. Almost 20 percent of children under five years of age are malnourished. Maternal mortality rates, an indicator of the quality of health services, are high. Meanwhile, numerous reports relate how President Obiang, his family, and his associates, are the main beneficiaries of the country's wealth, with businesses and property all over the world.[14] One writer described Equatorial Guinea as "a parody of an oil kleptocracy."[15]

In addition to providing poor social services, the Obiang government has been accused of widespread human rights abuses. International human rights groups have documented extrajudicial killings by security forces, the suppression of political opposition and the media, and routine torture in places of detention.[16] There is no independent civil society to speak of.[17]

The International Law Framework

At present, no hard international law framework exists to address natural resource spoliation. While there are some regional antibribery and anti–money laundering mechanisms, especially the 1997 OECD Anti-Bribery Convention and similar treaties in Africa and Europe, the current international architecture remains inadequate and many countries lie outside existing legal regimes.

States are liable under international law for "internationally wrongful acts"[18]—which include human rights violations within domestic jurisdictions, but not corruption or theft of public resources per se. Corruption is not within the core mandate of the World Trade Organization, currently the international mechanism with the strongest binding complaints procedure. Efforts to introduce corruption in the current Doha round of negotiations—notably by mandating transparency in public procurement contracting—failed to rally consensus.[19]

Yet, the notion of state accountability for the theft, spoliation, or destruction of natural resources is not absent from international law. A number of treaties and declarations have affirmed state responsibility to protect and maintain natural resources for the benefit of populations, arising from the right to self-determination.[20] Article 21 of the African Charter on Human and Peoples' Rights (ACHPR), for example, asserts that all those living in signatory states "shall freely dispose of their wealth and natural resources," that "dispossessed people have a right to recovery of the property and compensation," and that each state has the obligation to avoid "foreign economic exploitation" that would prevent its people from "fully benefit[ing] from the advantages derived from their national resources."[21] These instruments supply potential avenues for remedy (the ACHPR is explored further below) but have hardly established an enforceable international anticorruption norm as yet.

There is also a growing move to recognize criminal liability in international law for individuals, most notably in the Rome Statute of the International Criminal Court (ICC). Articles 75, 77, and 79 of the Rome Statute together allow for the "forfeiture of proceeds, property, and assets derived directly or indirectly" from a crime, for these forfeited assets to be placed in a trust fund for victims, and for the ICC to order a convicted person to "directly make appropriations to victims" or "where appropriate, order reparations." Yet these provisions apply only to the extent that the proceeds in question were critical to ICC crimes, such as genocide, crimes against humanity, and war crimes. Thus, individuals (the Statute only applies to "natural persons") guilty of corrupt practices relating to or arising from natural resource spoliation would have to be shown to have aided or abetted an ICC-related crime.[22]

Corporate liability under international law is even more limited, although recent counterterrorism initiatives suggest the possibility of an evolving international norm here also, dependent as yet upon states' "domestic legal principles."[23] The OECD Anti-Bribery Convention requires states to introduce measures "in accordance with [each state party's] legal principles, to establish the liability of legal persons" acting transnationally.[24] As yet, however, international jurisdiction has not been asserted over corporations, often the primary actors in resource spoliation. No international forum has the power to prosecute business entities for international crimes.[25]

In the realm of international "soft" law, the United Nations Global Compact, a "voluntary international corporate citizenship network," added a tenth principle in June 2004, affirming that "Businesses should work against all forms of corruption, including extortion and bribery."[26] While clearly important in reinforcing anticorruption norms, the Compact is not binding and has no forum for legal remedy.

Mechanisms for international cooperative legal assistance are critical because corruption in natural resource spoliation is generally cross-jurisdictional in scope. For numerous reasons, prosecutors in the home countries of perpetrators might not launch investigations into crimes committed elsewhere. The recently adopted United Nations Convention Against Corruption was developed in part in recognition of this problem.[27] It calls for national-level measures and international cooperation in the prevention and prohibition of corrupt practices, and is the first agreement to provide for international cooperation in the recovery of stolen assets. The latter provision was included because, in Secretary-General Kofi Annan's words: "corrupt high officials have plundered the national wealth . . . where new governments badly need resources to reconstruct and rehabilitate their societies."[28] The Convention is expected to enter into force by the end of 2005.[29] However, it is considered by some a weak instrument, lacking a monitoring mechanism and resources for implementation.

The long-term need for multilateral legal solutions is especially true given trends in oil and gas markets. Demand for energy is growing fast in India and China, countries that have not subscribed to the OECD-based mechanisms.[30] The activities of companies from increasingly wealthy Asian countries in natural resource-rich countries in Africa and elsewhere will likely present a growing challenge that is not currently addressed by the nascent international anticorruption framework. In the meantime, the continued capacity for corporations from OECD countries to strip resources in weaker jurisdictions with virtual impunity, or assist corrupt governments in doing so, stands counter to the trend toward more robust international justice in other areas.

Legal Remedies in "Home" Countries

In "home" countries—those in which multinational corporations or banks are headquartered—spoliation of natural resources in foreign countries as such is usually not a criminal offense, but bribery of foreign public officials and money laundering generally are. The 1997 OECD Anti-Bribery Convention was a critical step in combating the "supply side" of bribery. The Convention requires parties, including 30 OECD members, to prohibit bribery of foreign public officials by their nationals. However, it has been unevenly implemented and spottily enforced. In Europe, Latin America, and Africa, regional agreements similar in content and aim to the OECD Anti-Bribery Convention were initiated in the late 1990s.

Additionally, over the past two decades, there have been growing moves to limit bank secrecy and improve anti–money laundering enforcement. The Financial Action Task Force (FATF) was created by the G-7 (the group of seven leading industrial nations) in 1989 to combat money laundering, and has received increased intergovernmental support since September 2001. FATF members, also comprising mainly OECD countries, are expected to apply FATF recommendations on the legal and institutional prohibition of money laundering. The FATF also blacklists countries that act as money laundering havens.

A number of problems complicate the implementation of criminal laws prohibiting bribery and money laundering in cases involving two or more jurisdictions. First, government prosecutors exercise discretionary powers to open investigations and bring charges in countries home to powerful banks and multinational corporations. Economic competition between governments supportive of national trade and industry can thus give rise to a *collective action problem*—with countries fearing to move first lest it put national companies at a competitive disadvantage against others.

Second, the operations of extraction companies and banks are opaque. Contracts are inaccessible and cases brought against public officials or corporations must often contend with *bank secrecy laws* that slow or sever the supply of needed financial information to investigators.

Third, countries vary in their approaches to *corporate liability*. Whereas in most common law countries, corporations ("legal persons") may be liable for crimes, this is not the case in many civil law countries (although signatories to the OECD Anti-Bribery Convention are required to recognize corporate liability). This can complicate the task of assigning responsibility and gathering evidence, particularly where crimes take place across borders.

Fourth, *statutes of limitations* in many countries are very short—often as little as three years. Given the complexity of corruption cases, by the time the relevant information has been gathered from banks in multiple jurisdictions, assembled, and analyzed, it can be too late to prosecute.

Finally, journalists and others who research and publish reports of corporate misdeeds that might trigger government investigations may be intimidated by the threat of crushing *libel suits*, often conducted by organizations with greater economic wherewithal than the individual journalist or newspaper.

Litigation in home countries for civil remedies for harms suffered due to natural resource spoliation presents its own set of challenges. Three related legal concepts inform the extent to which civil remedies are available to discourage spoliation: jurisdiction, standing, and *forum non conveniens*.

While jurisdiction is a primary consideration to bringing any civil action, it is a particularly knotty issue in the case of natural resource spoliation, which generally occurs in countries with ineffective courts. Remedy must often be sought elsewhere. This is possible because corporations active in resource-rich countries—or their wholly or partly owned subsidiaries—are often domiciled in wealthier home countries with effectively functioning court systems. Consequently, the most promising venue for plaintiffs to bring civil suits will often be the home jurisdiction of the extractive corporation (or bank), or of its "parent" entity. Suits might also be brought in jurisdictions where a company's subsidiaries or business partners are registered, or alternatively in jurisdictions in which members of a kleptocratic regime hide assets, hold property, or maintain business operations.

Standing—the legal capacity of an individual or body to present a claim in a given court—is also given a great deal of consideration by attorneys who bring spoliation actions. For example, to have standing in a U.S. court, a plaintiff must establish a concrete injury, a causal link ("causation") between the injury and the alleged conduct of the defendant, and redressability (i.e., there must be a meaningful remedy for the harm).[31] In addition, in most cases, the plaintiff must assert his or her own particular rights, and the complaint must fall within the zone of interests protected by the statute or constitutional guarantee in question.[32] Harms suffered by an entire population—such as a lack of sanitary water, or the absence of hospitals or schools—that can result from massive diversion of public natural resource revenues are not generally justiciable under traditional concepts of standing. Nor will courts be inclined to read a statute in such a way as to grant an entire nation a legally enforceable right to responsible government. Advocates of victims of spoliation must therefore attempt to find individuals who have—in addition to suffering general harms—endured a specific harm, such as losing a business or property as a result of spoliation.

Even if jurisdiction is successfully established and standing asserted, a case may still be dismissed by a given court applying the doctrine of *forum non conveniens*. This common law principle allows a court to refuse a plaintiff's action within its jurisdiction when the court determines that a case is better brought in another forum, due, for example, to reasons of language or the location of defendants or evidence. In cases involving natural resource extraction, courts in home countries may indicate that host country courts are the more appropriate fora. It is often difficult to demonstrate that legal remedy in the alternative forum "is so clearly inadequate or unsatisfactory as to be no remedy at all."[33] Overcoming the assertion of *forum non conveniens* is a common, costly, and time-consuming enterprise for lawyers fighting natural resource cases.

A well-known case illustrating the obstacle of *forum non conveniens* was the attempt to assign responsibility to chemical company Union Carbide (UCC) for the lethal gas leak from their plant in Bhopal, India, in 1984, which killed 7,000 people within days and 15,000 more in following years.[34] UCC's legal team successfully moved to dismiss actions brought against it in the United States by invoking the doctrine of *forum non conveniens*:

> the practical impossibility for American courts and juries, imbued with U.S. cultural values, living standards and expectations, to determine living standards for people living in the slums or 'hutments' surrounding the UCIL [Union Carbide's Indian subsidiary], Bhopal, India, by itself confirms that the Indian forum is overwhelmingly the most appropriate. Such abject poverty and the vastly different values, standards and expectations which accompany it are commonplace in India and the third world. They are incomprehensible to Americans living in the United States.[35]

The U.S. District Court in New York agreed that Indian courts were the best forum for the case, despite contrary claims by the Indian government itself, which was representing the plaintiffs.[36] UCC's motion to dismiss was granted on condition that it submit to the Indian courts.[37] The case went ahead in the Indian courts until an out-of-court settlement was reached between the Indian government and UCC.[38]

Legal Remedies in "Host" Countries

In natural resource–rich host countries, legal capacity frequently presents an acute problem. Laws prohibiting bribery, embezzlement, and money laundering, if they exist at all, may be ineffectively drafted and/or full of loopholes.[39] There may be few effective or politically independent prosecutors or judges to enforce them. And there may be no political space for civil society groups to pursue remedies under existing laws; victims may be subject to reprisals if they complain. In addition, even where governments have the political will to fight massive resource spoliation, they are unlikely to have the financial resources and legal expertise to prosecute transnational bribery and money laundering—which can require the navigation of a byzantine jurisdictional maze hedged with tax havens and often opaque accounting and bank secrecy rules.

Nevertheless, in several relevant African cases, remedies for certain aspects of natural resource spoliation have been found. Where local remedies are available and functional in resource-rich countries, these should be pursued to address spoliation, for reasons beyond the increased capacity they may bring to the local justice system. A clutch of wrongdoing multinationals in a given sector can be targeted together, rather than having to navigate multiple jurisdictional hurdles: witness the recent trials in Lesotho, where 18 international companies were prosecuted simultaneously (see page 29). Further, companies can be pursued that are based in home countries lacking either effective laws or the requisite political will. Evidence and witnesses are nearby or more easily located. And the signal that corrupt behavior from multinationals will not be tolerated may be stronger when it emanates from a resource-rich host country.

In general, however, the absence of strong legal mechanisms, combined with the fact that money laundering activities are more likely to take place in wealthy countries, means that remedies for spoliation crimes originating in Africa must often be pursued outside the continent. Thus proceeds from alleged crimes committed in the Democratic Republic of Congo (DRC) are investigated in Belgium, and those committed in Equatorial Guinea are pursued in the United States. In the Nigerian assets recovery case (see page 38), mutual legal assistance treaties were used by the government that succeeded the Abacha regime to shift the costs and burdens of investigation to the European countries where laundering took place.

II. Criminal Sanctions

The critical criminal acts associated with corruption in resource extraction are bribery and money laundering. Bribery is generally a predicate offense for money laundering, i.e., one of the crimes which, once established, creates a basis for prosecution of subsequent laundering activities. While both crimes are illegal—formally at least—in most home and host countries, difficulties arise at the trans-jurisdictional level. In the extractive industries, home country–based multinational corporations may commit acts of bribery in host countries, whereas the proceeds of these crimes are generally laundered in home countries.

A central impediment to the enforcement of antibribery and anti–money laundering laws in many countries is prosecutorial discretion not to open investigations and bring criminal charges, leaving action vulnerable to political will. Nevertheless, there are several promising strategies for public interest law groups and other nongovernmental organizations to encourage investigations.

Given the vast divergence in available remedies between home and host countries, these jurisdictions are best treated separately. Anticorruption remedies in African countries are often derivative of conventions and laws originating in home countries, which have historically held out greater promise of success.

A. Antibribery Laws in Home Countries

Until the late 1990s, there were no international treaties proscribing the bribery of foreign public officials. Today, several international and regional conventions have entered into force and are being transposed into the domestic legislation of signatory states.[1] Much domestic legislation is quite new and untested by case law. In some countries, even the legislation is lacking. However, two high profile scandals have recently galvanized interest in pursuing prosecutions, the U.S. Riggs Bank case mentioned above, and a second involving French oil company Elf Aquitaine.

The United States

The United States' Foreign Corrupt Practices Act of 1977 (FCPA)[2] is the world's first major statute aimed at preventing nationals and corporations from bribing public officials abroad. The FCPA serves as a model for other national and international anticorruption instruments, notably the OECD Anti-Bribery Convention. It proscribes bribery of foreign officials and the issuing of false or misleading audit reports and financial statements.[3] In brief:

- Antibribery provisions make unlawful a corrupt payment, directly or through an intermediary, to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. The provisions apply to U.S. persons, certain foreign issuers of securities, and, since 1998, foreign firms and persons who commit bribery while in the United States.

- Accounting provisions require corporations to keep books and records that accurately and fairly reflect their transactions, and to devise and maintain an adequate system of internal accounting controls. These provisions, applicable to all companies whose securities are listed in the United States, ensure that information needed to prosecute violations of the FCPA is available.

In order to constitute an FCPA violation, the payment constituting the bribe must be unlawful in the recipient's jurisdiction.[4] The FCPA may thus help to enforce the national anticorruption laws of foreign countries.

The U.S. Department of Justice is charged with enforcement of the FCPA's antibribery provisions, which includes both criminal and civil penalties. A separate federal agency, the Securities and Exchange Commission (SEC), has civil jurisdiction over the FCPA, including enforcement of accounting and disclosure requirements as applicable to publicly reporting companies. The SEC's commitment to enforcing the FCPA is central to its mandate to ensure full and accurate disclosure of financial information by publicly reporting companies.[5]

The SEC and the Justice Department sometimes work together in parallel investigations. However, the decision to launch an investigation can be a highly political matter, particularly as enforcement in many FCPA cases must be coordinated with the State Department, which judges "the wisdom of bringing a proceeding in light of the exigencies of foreign affairs."[6] Individuals cannot bring private actions under the FCPA.

Implementation of the FCPA

For the past two years, U.S. law firm Shearman and Sterling has produced a digest and analysis of cases relating to the bribing of foreign officials under the FCPA.[7] The analysis shows a recent upswing in Justice Department and SEC investigations and enforcement actions:

- The number of criminal cases brought by the Justice Department in the past five years has increased compared to the preceding five years, although it is still very low, averaging one or two per year.[8] The number of reported Justice Department and/or SEC investigations (both civil and criminal) has increased from 7 in 2002, to 11 in 2003, to 16 in 2004.[9] There may, of course, be more investigations in the pipeline as yet unreported.

- Since 1998, criminal prosecutions brought by the Justice Department have targeted individuals. Only two have involved corporations, in both cases foreign. Prosecutions tend to take years and generally end with pleas rather than verdicts.[10] Apparently, no criminal prosecutions have been brought against U.S. companies operating in foreign jurisdictions.

- Between 1990 and 1994, the SEC did not initiate any formal proceedings for civil violations of the FCPA. From 2000 to 2004, however, the SEC averaged about two enforcement actions per year.

Analysis of the digest shows that approximately 36 percent of total Justice Department and SEC enforcement actions since the FCPA's enactment in 1977, including current reported investigations, concern bribery relating to natural resource extraction. SEC actions make up the majority of these cases, indicating that the FCPA is enforced primarily in civil cases. Although civil enforcement can have a deterrent effect, it is nevertheless striking that U.S. prosecutors rarely pursue criminal actions against multinational natural resource producers under the FCPA.

As the FCPA has been in force for close to 30 years, a number of obstacles to its enforcement have been identified. In addition to the political and economic grounds (the possible damage to the finances and reputation of major national companies) for prosecutors to avoid initiating an investigation, primary obstacles include the FCPA's requirement of *mens rea* to trigger a violation. Payments must be made “with a corrupt intent,” and the person making the payment must have a “reason to know” that the receiver will act corruptly. Thus, a corporation that places a bonus payment in a country’s treasury in return for a contract award might not be liable even when the money lands in a personal Swiss bank account, because (a) the payment went to the national treasury not a private account, and (b) it would be very difficult for prosecutors to prove that a corporation knew a country’s leaders would loot the treasury.

An ongoing case of FCPA enforcement is the Riggs Bank scandal (see page 11). In August 2004, the SEC launched preliminary investigations into possible violations of the FCPA involving the payment of millions of dollars by four U.S. oil companies, including oil giant ExxonMobil, into Riggs accounts controlled by Equatorial Guinean President Obiang Nguema or his associates.[11] Investigations into the oil company activities are currently ongoing. Another FCPA investigation underway relates to U.S., French, and Nigerian concerns about alleged bribes paid for a contract to build a Nigerian liquefied gas plant (see page 23).

Other OECD Countries

Antibribery laws in other OECD countries are loosely derived from the FCPA. The United States, believing that its companies were at a competitive disadvantage against those of its trading partners who were not prohibited from bribing, negotiated with other OECD members for the enactment of legislation similar to the FCPA. The resulting OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention”) entered into force in 1999.[12] The United States is a signatory and the FCPA serves as its implementing legislation.[13]

The central requirement of the OECD Convention is for each party to establish that it is a crime for any person to bribe a foreign public official in order to obtain improper advantage in the conduct of international business. The Convention requires parties to impose criminal liability on an extraterritorial basis, to hold legal as well as corporate persons liable under its statutes, to create anti–money laundering proscriptions, and to establish accounting standards to prevent and detect bribery.

A peer-review mechanism, led by the OECD Working Group,[14] monitors and promotes the Convention’s implementation by means of periodic country reports. Working Group evaluations have thus far identified numerous problems in national legislation, such as inadequacies in the definitions of “foreign public officials,” insufficient liability for “legal persons” (i.e., corporations, as opposed to “natural persons”), short statutes of limitations, and weak whistleblower protections.[15]

In 1999, the U.S. Department of Commerce was tasked with reporting annually, for a period of five years, on the progress made by parties in implementing and enforcing the OECD Anti-Bribery Convention.[16] A final report, issued in July 2004, described the overall enforcement of the Anti-Bribery Convention as uneven.[17] For example, other than the

United States, only South Korea and Sweden had obtained convictions under their respective implementing laws for bribery of a foreign public official, and Canada, France, Italy, and Norway had initiated investigations or legal proceedings. The report notes that the United States has urged that the Convention be strengthened by prohibiting bribes to political parties, party officials, and candidates for public office, currently included in the FCPA, but not in the OECD Convention.

Transparency International (TI), the anticorruption watchdog, recently surveyed 24 countries' compliance with the OECD Convention. TI concluded that there remains insufficient awareness in OECD countries that foreign bribery is a crime, and recommended that the monitoring mechanism be extended beyond its current stop date of 2007.[18]

The following case study illustrates some of the possibilities of, and obstacles to, bringing charges in cases related to natural resource extraction using antibribery legislation, in this case in France.

CASE STUDY 2

Elf Aquitaine and the Nigeria Construction Consortium Bribery Investigations

France's largest corruption case in recent history, the Elf Aquitaine scandal, increased public awareness of corruption by French companies operating abroad, and of the possible benefits of putting the OECD Anti-Bribery Convention to work. The case also led to ongoing French, U.S., and Nigerian investigations into possible bribery of Nigerian public officials by a multinational consortium.

In 1994, French investigating magistrate Eva Joly began to probe a scandal that would eventually reveal massive financial kickbacks to French politicians through the siphoning off of proceeds from Elf Aquitaine's contracts in Africa. Elf, a state-owned oil company until 1994, used French political influence to sign favorable contracts in countries such as Gabon, Angola, Cameroon, and Congo-Brazzaville.[19] Bribes also allegedly went to politicians in those countries.

In 2003, 37 defendants went on trial in France, with, among other outcomes, three former Elf executives receiving prison sentences of up to five years. They were convicted of "misuse of company assets" because "[t]here was nothing illegal under French law about the largesse distributed by Elf at the time."[20] Anti-corruption provisions adopted in 2000, following France's ratification of the OECD Anti-Bribery Convention, which would have led to bribery charges, did not apply retroactively.

A related case currently being investigated in France concerns the U.S. firm Halliburton, the world's leading provider of oil and gas production support services. The case arose out of the Elf Aquitaine scandal and is the first investigation in France to be launched under the 2000 French antibribery law.[21]

In 2002, a French investigating magistrate began to examine alleged bribes paid by a consortium of four multinational construction companies, including a Halliburton subsidiary, Kellogg Brown & Root (KBR), to Nigerian federal government officials to win bids on the construction of a liquefied natural gas plant. The French investigation was launched when an official of one of the French partners of the construction consortium in Nigeria agreed to give evidence after he was charged with embezzlement in the long-running Elf case. He described an alleged $180 million "slush fund" that the consortium maintained to bribe Nigerian officials relating to the natural gas plant in Nigeria.[22] As yet no charges have been brought in France. However, spurred by the French investigation, the U.S. Justice Department and the SEC have been investigating KBR's role in these payments since June 2004, as a possible violation of the FCPA.[23] Nigerian legislative and executive agencies, successors to the administration implicated in the case, are reportedly investigating the same allegations.[24]

The 2000 antibribery statutes in France allow for charges of bribery of foreign public officials to be brought in connection with international business transactions in cases like the Elf scandal. However, the French statute of limitations is notoriously short—three years in the case of most crimes—which can pose serious obstacles to prosecuting cases of this sort.[25] Even after the enactment of antibribery legislation, French prosecutors have continued to rely on prohibitions on "corporate waste" in order to prosecute the bribery of foreign officials.

Legal Strategies to Combat Bribery and Related Crimes

Several OECD countries' laws allow private parties to initiate criminal actions, either in their own capacity or by prompting prosecutorial or judicial investigation. In most civil law countries, prosecutors are obliged to investigate reported crimes over which the courts have jurisdiction. In a private party-initiated criminal prosecution, the victim petitions the state to redress harms resulting from criminal conduct. Actions of this kind can therefore lead to criminal sanctions—i.e., punishment of the perpetrators—although they may also have the advantage of allowing for the collection of civil damages by victims.

In assessing the applicability of this approach in cases of spoliation-related crimes committed abroad, potential petitioners must examine (i) the jurisdiction of the country's criminal courts over the crime in question, (ii) the petitioner's standing to bring criminal charges, and (iii) the appropriate target of accusations (the legal entity or "natural persons" who directed or carried out the crime). The two examples given below explore similar, but not identical, possibilities for private actors to initiate criminal actions, in Spain and France respectively.

Private initiation of criminal action in Spain

Spanish law grants its courts jurisdiction over many crimes committed by Spanish nationals abroad, so long as the offense is established as a crime in both Spain and the country where it is committed.[26] Bribery of a foreign official is among the crimes subject to Spanish extraterritorial jurisdiction.[27] Corporate criminal liability, not currently available under Spanish law,[28] is however required by Spain's ratification of the OECD Anti-Bribery Convention.[29]

As to standing, depending on the crime, criminal actions in Spain can be initiated by private aggrieved persons, the judicial authorities (police and investigating magistrates), or the prosecutor's office.[30] In addition, in cases involving crimes known in Spanish law as "public offenses," third parties may launch an *acción popular*, not to remedy individual harms, but to vindicate a broader public interest.[31] According to Article 23 of Spain's Organic Law of the Judicial Power, prosecutions for crimes committed abroad can be initiated by the aggrieved party or the office of the prosecutor.[32] For certain major crimes, listed in Article 23.4 and including genocide, terrorism, drug-trafficking, and crimes which Spain has an obligation to prosecute under an international treaty, Spanish courts exercise near-universal jurisdiction.[33] Prosecution of these major crimes can also be initiated using the *acción popular*.

Spanish jurisdiction over crimes committed abroad may be relevant in cases of spoliation, even where the respective crimes are not listed in Article 23.4 of the Organic Law. In Equatorial Guinea, for example, most citizens born before 1968 qualify for Spanish citizenship. Some of these may have had their land or businesses forcibly sold to oil companies, or have otherwise suffered harms. Spanish responsibility or complicity may be found in the form of public or private financial aid to state or private actors, Spanish subsidiary or consortium interests in multinational actors, or Spanish banks involved in money laundering in Spain or elsewhere.[34] Aggrieved parties might have standing to bring a spoliation-related case against Spanish perpetrators or accomplices, once Spanish jurisdiction is established. Third parties, including NGOs, might additionally explore the possibility of using the *acción popular* in cases involving serious international crimes where a Spanish connection can be established.

Alternatively, were a criminal investigation into bribery charges already underway in Spain, interested parties can explore ways to cooperate, perhaps by filing an *amicus curiae* brief—or its Spanish equivalent, a *parte coadyuvante*—a written argument submitted to a court by a third party who is not an actual party to the lawsuit.

Private initiation of criminal action in France

French criminal law is usually directly applicable to crimes committed by French legal and natural entities anywhere, as long as the act is criminalized in the relevant country.[35] In addition, for many crimes, French law also allows private parties to initiate criminal investigations, provided they "have personally suffered damage directly caused by the offense" in question.[36] NGOs have standing to initiate criminal proceedings for a number of crimes.[37] However, an important caveat applies to crimes related to resource spoliation. According to the French statute implementing the OECD Anti-Bribery Convention, the public prosecutor has sole discretion over the initiation of legal actions resulting from bribery of a foreign official.[38] Nevertheless, complaints might promote prosecutions of other spoliation harms (including those indirectly caused by bribery, so long as they are themselves criminal offenses) that fall within French jurisdiction.[39] An attempt to pursue such a strategy, which is still underway, was initiated by the French Association Sherpa on behalf of Cameroonian victims of logging activities undertaken by a subsidiary of French company Rougier in Cameroon.

CASE STUDY 3

Civil Party Initiation of Criminal Proceedings in France on Behalf of Cameroonians

In 2002, two French NGOs, Association Sherpa and Friends of the Earth–France attempted to initiate a criminal investigation into a case of natural resource spoliation by a French company, Rougier, and its Cameroonian subsidiary, logging company SFID.[40] The NGOs filed a joint civil and criminal complaint in Paris on behalf of seven Cameroonian villagers, charging the directors of SFID and Rougier on various counts of criminal destruction of property and corruption.[41] The plaintiffs argued that the French investigating judge should take into account the impossibility of the villagers obtaining a conviction in Cameroon, given the close ties of the defendants with the authorities in that country and the prevalence of corruption throughout the government and judiciary. The Paris prosecutor refused to launch an investigation, however, claiming in September 2002 that the alleged crimes were not sufficiently grave to warrant French prosecutorial action. The group appealed to the investigating judge of the Paris *Tribunal de Grande Instance*, who ruled the complaint inadmissible in June 2003.

The ruling viewed Rougier as an accomplice to the alleged crimes, rather than directly responsible. According to the judge, a criminal investigation could not be pursued in France, because SFID had not been convicted of the crimes in question in Cameroon. In February 2004, on appeal, the *Chambre de l'Instruction* of the Paris Court of Appeals confirmed this ruling, declaring the case "provisionally inadmissible." The plaintiffs claim that the rulings to date have interpreted French law unduly narrowly. One observer notes that Rougier could be considered directly responsible for crimes committed by SFID, given that Rougier publishes SFID's accounts, the two companies share certain personnel, and the subsidiary was a "simple performer" of Rougier directives.[42] The case is currently on appeal before the *Cour de Cassation* (France's highest appellate court).

Whistleblowing

Given the difficulty of tracking financial networks and the opacity of the operations of the principal actors in the natural resources extraction industry (corporations, banks, and host country governments), corporate whistleblowing is an often critical method for detecting spoliation and ancillary crimes. Until recently, however, in many jurisdictions, absent a public duty to report, an employee who reported wrongdoing by an employer was deemed to be acting maliciously and faced possible civil liability, unless he or she had suffered actual harm.[43]

Although the OECD Working Group recommends whistleblowing protections in its monitoring reports, the Anti-Bribery Convention does not impose specific obligations regarding whistleblowing. Many OECD countries have nevertheless improved whistleblowing protections in national law. The United Kingdom codified whistleblower protections in the Public Interest Disclosure Act of 1998. The United States recently enhanced whistleblower protections through the 2002 Sarbanes-Oxley Act. Canada amended its criminal code in 2003 to provide for whistleblower protections.

But while some countries now have protections for whistleblowers on their books, these are not widely known or readily applied. According to the OECD Working Group, citizens of France, Italy, and Germany are not often aware of whistleblower protections and judges and magistrates do not generally invoke them.[44]

In many countries, stronger legal protection is still needed against wrongful termination of employment, in order to encourage employees to report bribery of foreign public officials to the applicable oversight agency (usually on an anonymous basis). Public interest groups could help remedy these shortcomings by raising public awareness of protection for whistleblowers and undertaking selectively to represent whistleblowers and to publicize such cases.

Additionally, civil society groups can themselves provide information to international and domestic oversight agencies. OECD Anti-Bribery Convention violations can, in principle, be reported directly to the OECD Secretary-General (although there is no hotline).[45] In the United States, advisories on violation of the FCPA can be provided to the SEC, which has an official policy of encouraging enforcement tips,[46] and to the Department of Commerce's online Trade Compliance Center.[47] In the United Kingdom, advisories pursuant to applicable domestic antibribery laws can be submitted to the Financial Services Authority, in Germany to the Federal Office for Oversight of Financial Services, in France to the Ombudsman of the

Financial Markets Authority, and in Canada to the provincial securities regulators. Similar mechanisms exist in most OECD countries.

B. Antibribery Laws in Host Countries

Anticorruption norms are currently developing in Africa, as signaled by two regional conventions now in the process of ratification by African states and a number of recently enacted national laws. Many African countries have also signed, but have yet to ratify, the UN Convention Against Corruption. Strong antibribery and money laundering legislation has been adopted in South Africa and Nigeria, and there have been some recently successful cases challenging spoliation, notably in Lesotho (see page 29).

In August 2001, the 14 member states of the Southern African Development Community (SADC) adopted the Protocol Against Corruption, the first subregional anticorruption treaty in Africa.[48] Its goals are to harmonize and promote anticorruption legislation and foster interstate cooperation. The Protocol requires parties to criminalize the bribery of foreign officials and adopt measures to allow for confiscation and seizure of proceeds of corrupt practices. It also makes corruption (and all offenses under the Protocol) extraditable, even in the absence of a bilateral extradition treaty. By the end of 2004, the SADC Protocol had eight of the nine ratifications needed for entry into force.[49]

Anticorruption measures have been recognized as a core competence of the African Union (AU), and in 2003 the African Union Convention on Preventing and Combating Corruption was opened for signature. The main provisions of the AU Convention are similar to those of the SADC Protocol. Ratification is still outstanding in most countries.[50]

South Africa has taken the lead on the continent with its 2004 Prevention and Combating of Corrupt Activities Act, supplementing the Corruption Act of 1992.[51] The newer Act is ambitious, providing state anticorruption agencies and courts with a list of codified corruption offenses related to specific persons (including public officials, agents, members of the legislature, judicial officers, and members of the prosecuting authority). Bribery of foreign public officials by South African citizens and companies is prohibited. Moreover, certain designated officials and managers and directors of companies have a duty to report corruption and face stiff penalties for failing to do so. Unexplained wealth can be grounds for investigation and seizure. There are strict penalties for firms and individuals found guilty of offenses such as evading restrictions on bidding for government contracts.[52] However, as of July 2004, the Act remains untested.[53]

Several other African countries have recently adopted legislation attacking corruption, notably Nigeria. When running for office in 1999, President Obasanjo of Nigeria made the fight against corruption key to his campaign. He presented an anticorruption bill to parliament just weeks after coming to power. The resulting Nigerian Independent Corrupt Practices and

Other Related Offenses Act, adopted in 2000, enumerates and prohibits a broad range of corrupt practices by public officers and others. It established an Independent Corrupt Practices and Other Related Offenses Commission, an independent body with considerable power of investigation and prosecution of suspected offenders. But these efforts have not so far been effective—no major figures have been prosecuted, and the Commission's true prosecutorial independence remains in question.

CASE STUDY 4

The Lesotho Highlands Water Project Prosecutions

This case concerns corruption in a dam-building project and provides an example of host country actions to tackle corruption. In 2003, Lesotho's High Court found 18 multinational construction companies guilty of bribery in the course of the country's Highlands Water Development Project. The Canadian engineering firm Acres, the first company tried in the case, might be the first corporation tried for complicity in bribing a public official outside its own jurisdiction, according to one observer.[54]

The case arose out of a civil suit against the Lesothan chief executive of the project. Once financial irregularities were uncovered, the government made an application to the Swiss authorities for the disclosure of the executive's Swiss bank accounts. The application was granted, and the resulting banking records showed that contractors and consultants were paying the chief executive through intermediaries: approximately U.S. $1 million was deposited in his accounts over the course of several years. Lesotho's attorney general then decided to mount criminal prosecutions for bribery against the chief executive, the multinationals, and the intermediaries in 1999.

The multinationals were convicted of having paid bribes to the Lesotho national directors of the multimillion dollar project to influence the awarding of contracts for the dam project. The chief executive of the project was imprisoned for accepting bribes, and, after a series of trials, all 18 multinationals were fined. The Lesotho minister of justice, commenting on the case, stated, "unless the world rids itself of such practices, there will never be the rule of law and confidence in democracy."[55]

Transparency International prepared a detailed study of the Lesotho corruption trials.[56] According to the study, when Lesotho's attorney general first initiated criminal proceedings, the country turned to the international community for financial assistance to support the investigation. A meeting was held in Pretoria in which aid was promised by a number of parties, including the major development banks, the EU, the commercial banks involved in financing the dams, and individual governments. The Lesotho government was promised substantial support for the legal costs and ultimately did receive significant legal and forensic accounting expertise from South Africa. But, in the end, no financial support has been forthcoming from any of the parties.[57]

Despite its relative success, Lesotho may not be a representative precedent for other host countries interested in pursuing similar prosecutions. The valuable expertise provided by South Africa may not be available for other countries. Otherwise, the low levels of international financial support ultimately delivered, despite promises, and uneven international cooperation throughout the investigation send a discouraging message to others considering similar initiatives.[58] If Lesotho could present evidence of "anticorruption dividends," such as a better investment climate following its willingness to crack down on corruption, this might encourage others to follow its lead.

C. Anti–Money Laundering Laws in Home Countries

The crime of money laundering involves "the conversion or transfer of property [money], knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person" in so doing.[59] The UN describes the money laundering process as follows:[60]

> Money laundering has three stages: placement, layering and integration.
>
> - Placement, the initial entry of funds into the financial system, serves the purpose of relieving the holder of large amounts of actual cash and positioning these funds in the financial system for the next stage. Placement is the most vulnerable stage of the process, as the chance of discovery of the illicit origin of the money is greatest at the beginning.
> - Layering, the next stage, describes a series of transactions designed to conceal the money's origin. At this level, money is often sent from one country to another and then broken up into a variety of investments, which are moved frequently to evade detection.
> - Integration is the final stage. In this stage, the funds have been fully assimilated into the legal economy, where they can be used for any purpose.

In the United States, "laundering" also refers to money moved in order to *promote* illegal activities.[61] Over time, sanctions have become heavier. Laundered proceeds are now subject to confiscation by the government, and the 2001 USA Patriot Act added further predicate offenses to the list of specified unlawful activities creating a basis for charges of money laundering: crimes committed abroad, corruption of foreign public officials, and the operation of illegal money remission businesses.[62]

Money laundering may be seen as a second phase of natural resource corruption. In order to enrich themselves, corrupt public officials must launder both bribes paid by multinationals and stolen public funds derived from concession contracts. The dispersion of corrupt proceeds into bank accounts throughout the world, where they can easily be hidden, is one of the major obstacles to remedies for spoliation.[63] Stolen money is generally lodged outside the host state, but it may be seized by foreign courts—if investigators can trace and intercept it at some point in the money laundering cycle.

Tracking stolen funds in any given case often entails a "shell game" in which assets are hidden in a handful of businesses that comprise a small part of an intentionally complicated ownership structure involving possibly hundreds of companies domiciled in dozens of jurisdictions worldwide. Consequently, in order to locate stolen funds, investigators must gain access to the accounts of the numerous shells before they finally locate the company that is actually holding the stolen assets. Obtaining access to the bank account records of any single company is time-consuming and demands showing proof of wrongdoing. The shell game requires investigators to have plenty of time and resources to locate the stolen assets.

The OECD Anti-Bribery Convention requires signatory states to establish bribery of a foreign public official as a predicate offense for money laundering.[64] In practice, however, proving either bribery or money laundering in spoliation cases tends to involve prosecuting both, in processes that can overlap considerably.

Prosecuting those responsible for money laundered in home countries presents a special problem, as the primary perpetrators—the bribe recipients—are often ranking officials in host countries. Their successful prosecution, in either the host or the banking country, is exceedingly difficult, given the lack of prosecutorial and judicial independence in many host countries, and the widespread persistence of notions of "sovereign immunity" internationally.[65] However, money laundering also depends on the willingness of banks to unquestioningly accept large amounts of money from corrupt sources. Thus, the likely targets for criminal investigations are banks, although their role in natural resource spoliation has to date been largely neglected by civil society groups. A successful investigation must show that the banks either knowingly harbored the proceeds of illegal activity or failed to take appropriate measures to guard against doing so. Investigators must be able to gain access to the relevant records in banks. Recent anti–money laundering initiatives have required banks to report on suspicious deposits and to grant access to investigators in such cases.

The primary international coordinator for strengthening anti–money laundering laws is the intergovernmental Financial Action Task Force on Money Laundering. The FATF aims to develop and promote policies to combat money laundering, both nationally and internationally. It was augmented following the events of September 11, 2001, to encompass terrorist financing.[66] FATF issues non-binding recommendations for governments, treated as "extremely persuasive soft law" by member and nonmember nations.[67] Additionally, the European Union,[68] the Council of Europe,[69] the United Nations,[70] and the Organization of American States[71] are also playing an increasingly important role in global anti–money laundering efforts.[72]

In its 2003 Forty Recommendations, which effectively set international anti–money laundering standards, the FATF calls on countries to criminalize money laundering (not just its predicate acts, such as bribery), to enact legislation that prioritizes law enforcement over bank secrecy, and to require their financial institutions to implement anti–money laundering controls.[73] These controls should oblige financial institutions to conduct due diligence in order to "know their customer," and have sufficient grounds for believing that funds deposited in their accounts are not the proceeds of criminal activity. In addition, financial institutions should be obliged to file suspicious activity reports with a regulator if the movement of funds by their clients raises reasonable questions as to their legitimacy. Finally, the FATF addresses international cooperation—countries should respond promptly to another country's request for the freezing or seizing of assets, for example.[74]

After the events of September 11, 2001, the problem of money laundering gained new prominence, especially in the United States. Following amendments introduced under the 2001 USA Patriot Act, the Bank Secrecy Act of 1970 now grants the U.S. Secretary of the Treasury the authority to develop and implement various record-keeping and reporting requirements that certain financial institutions must follow. These include certain FATF recommendations, such as "know your customer" due diligence, the establishment and implementation of an anti–money laundering compliance program, and the filing of suspicious activity reports.[75]

Many home country jurisdictions have explicitly expanded the application of predicate acts in respect of international money laundering purposes beyond proceeds arising from bribery of a (foreign) public official. For example, the USA Patriot Act added the movement of proceeds of *any* foreign crime to the list of predicate offenses giving rise to money laundering.[76] Channeling the illicit proceeds of natural resource sales into the United States through a U.S. financial institution can now be deemed money laundering. Thus, U.S. prosecutors may bring actions against any legal person (such as a bank) over which they can assert jurisdiction for laundering the proceeds of activities that occur completely beyond U.S. borders, so long as such activities are illegal in the jurisdiction where they occurred or are otherwise deemed foreign corruption under the FCPA. In addition, U.S. prosecutors may bring actions against a foreign person whose only U.S. connection is having committed a money laundering offense involving a financial transaction within the United States, having converted funds that have been forfeited by order to the United States, or maintaining a bank account in the United States.[77]

Implementation of anti–money laundering laws

Today, entire jurisdictions, including within Europe, continue to serve as havens for money laundering. Overall, the most commonly cited obstacles to anti–money laundering enforcement include bank secrecy traditions, privacy rights, lack of due diligence on the part of regulated financial institutions, lack of adequate regulation of institutions such as casinos and insurance companies, the use of correspondent bank relationships (when a reputable bank lends its name to the activities of a less reputable, in this case foreign, bank), insufficient oversight by attorneys and accountants, and lack of coordinated enforcement across jurisdictions.[78] In addition, some note that government resources to combat money laundering are often scarce, and tend to focus narrowly on the proceeds of drug trafficking and terrorism.

CASE STUDY 5

Riggs Bank and Money Laundering Controls

Problems with money laundering oversight in the United States came to light in the Riggs Bank scandal. In early 2003, *LA Times* reporter Ken Silverstein first reported concerns about the diversion of oil proceeds to Equatorial Guinea's president and his associates and on the country's oil funds being held by Riggs Bank. Pressure from human rights groups, such as Global Witness and Human Rights Watch, followed, and U.S. Senator Carl Levin initiated an investigation to evaluate the enforcement and effectiveness of key anti-money laundering provisions of the Patriot Act, using Riggs Bank as a case history. The resulting July 2004 Senate report, *Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act—Case Study Involving Riggs Bank*, provides striking examples of how oil companies sometimes operate in corrupt and natural resource-rich developing countries and how a bank may facilitate these operations.[79]

According to the Senate report, Riggs "turned a blind eye to evidence suggesting the bank was handling the proceeds of foreign corruption and allowed numerous transaction reports to take place without notifying law enforcement."[80] Among the suspicious transactions were deposits by U.S. oil companies and transfers from official Equatorial Guinean oil accounts, made directly into the personal accounts or business entities owned by members of the Obiang family. These payments amounted to tens of millions of dollars.[81]

Thanks to the Senate report, there have since been a number of federal-level inquiries. The U.S. Justice Department has been investigating the federal regulator who oversaw Riggs during a period of deficient money laundering controls and later became a senior executive at the bank.[82] The Office of the Comptroller of the Currency imposed a U.S. $25 million fine—the largest ever under the Bank Secrecy Act of 1970—on Riggs Bank, for its failure to report suspicious transactions in the Equatorial Guinean accounts.[83]

In addition, in January 2005, following the Department of Justice investigation, Riggs pleaded guilty to a federal criminal violation of the Bank Secrecy Act due to its failure to accurately report suspicious monetary transactions associated with bank accounts owned and controlled by Augusto Pinochet of Chile and by the government of Equatorial Guinea. It was sentenced to a $16 million criminal fine in April 2005. The federal judge involved in the case called the bank "a greedy corporate henchman of dictators and their corrupt regimes."[84]

Observers wonder whether even this limited enforcement action by U.S. federal authorities would have occurred absent the attention of the press and the Senate.[85] And given the enormous sums of money apparently laundered by Riggs for the Obiang regime, some question whether the civil settlement and criminal fine provide a meaningful example of government enforcement. Riggs Bank was put on "corporate probation" until it changed hands, which the government knew was forthcoming (Riggs was acquired by PNC Financial Services Group Inc. in May 2005). Notwithstanding these limitations on enforcement, the case demonstrates the power of capital markets to deter FCPA violations: the sale price of Riggs Bank to PNC dropped by approximately $100 million as a result of the settlement.

Legal Strategies to Combat Money Laundering in Home Countries

In general, nongovernmental organizations will be unable to access bank records or the hard evidence needed to prove money laundering. They are often well placed, however, to gather substantial background information pointing to corrupt capital flight in troubled countries. A training manual for "following the money," has been developed by the Coalition for International Justice (CIJ):

> Following "the money trail" is inevitably a complex task, but it is by no means unattainable. Indeed, in CIJ's experience, nongovernmental researchers can synthesize and centralize information in a way that governmental agencies and law enforcement cannot. Statutory responsibilities, limited resources and restricted missions often prevent governments and international bodies from considering the full spectrum of available evidence. Poor interdepartmental and intergovernmental communication only compounds this problem. Consequently, NGOs and other organizations can, with persistence, provide powerful evidence of illegal transactions and cast light on the underground economies that facilitate political corruption and human rights abuse.[86]

Nongovernmental organizations wishing to pursue "follow the money" research related to money laundering must be realistic about technical capacity, including language skills, people on the ground, and the likely costs. In cases of spoliation, even professional forensic auditors can have difficulties uncovering credible hard evidence, as there are usually no paper trails to follow. Experts consulted by the Justice Initiative noted that in the effort to trace and stem the flow of funds relating to the trade in "conflict diamonds" in violation of UN sanctions in Angola, a UN panel hired an internationally renowned forensic accounting firm, but was still unable to uncover very much.

If "follow the money" investigations are to be used to contribute toward civil litigation or state prosecution, civil society organizations need to determine in advance what kind of evidence will be most useful to collect, and what will hold up in court.

Given the difficulty of accessing banking records (not normally available under freedom of information laws when they concern money not known to be public), NGOs could also take advantage of the civil petition provisions in civil law countries, whereby parties harmed directly or indirectly by money laundering might benefit from prosecutorial and magisterial subpoena powers.[87] Civil society organizations could (i) informally provide information to appropriate investigating magistrates and (ii) locate individuals who have standing to bring a private or popular petition in one or both of the respective jurisdictions. This approach was taken in Spain in a Pinochet-related Riggs Bank legal action.

CASE STUDY 6

Riggs Bank and Pinochet—Privately Initiated Action Against Money Laundering

In one publicized action, lawyers in Spain representing Chilean General Augusto Pinochet's Spanish torture victims petitioned a Spanish judge to add directors and officers of Riggs Bank as targets in his long-running criminal investigation.[88] They alleged that Riggs was concealing the bank accounts of the former Chilean leader. In September 2004, Baltasar Garzón, the Spanish investigating judge, allowed a complaint to be brought against seven current and former directors and employees of Riggs as defendants for the alleged concealment of assets and money laundering offenses.[89] Soon after, in February 2005, under a settlement between Riggs and the private plaintiffs, the bank agreed to pay U.S. $8 million and to provide the plaintiffs with information concerning Pinochet's accounts at Riggs. Judge Garzón dismissed all criminal claims against Riggs' former and current directors and officers as well as civil claims against the bank.

Demonstrating standing as a victim to initiate a private criminal case for money laundering under Spanish law may be a challenge. The Pinochet-Riggs case was tied to a series of well-documented severe human rights abuses, but it may be difficult in money laundering cases such as those affecting Equato-Guineans to prove that the predicate offense—corruption—is the "proximate cause" of their injuries. Yet Spain has relatively far-reaching anti–money laundering laws. Following the implementation of the OECD Anti-Bribery Convention into Spanish domestic law, the Spanish Penal Code extended the offense of money laundering to the hiding or concealing of the true nature, source, location, and ownership of goods, knowing them to be the proceeds of a serious crime.[90] This provides greater latitude for pursuit than an enumerated list of predicate crimes, the norm in most common law countries. Moreover, the Code clarifies that the offense of money laundering is committed regardless of whether the predicate offense has been totally or partially committed abroad.[91] Additionally, while statutes of limitations are an obstacle in many countries, in Spain, the statute of limitations for serious crimes such as money laundering and bribery is ten years.

CASE STUDY 7

Euatorial Guinea: Bank Controls in Spain and Luxembourg

In addition to Riggs Bank, the U.S. Senate report shows that President Obiang of Equatorial Guinea and his associates may have channeled oil money through banks in Spain and Luxembourg. The Senate report alleges that Banco Santander in Madrid and HSBC Bank USA's affiliate in Luxembourg engaged in suspicious wire transactions with Riggs Bank involving Equato-Guinean oil accounts.[92] The report indicates that Spanish and Luxembourg bank secrecy rules prevented the U.S. Office of the Comptroller from obtaining information regarding the beneficial owners of the Obiang accounts at both the Banco Santander in Spain and HSBC in Luxembourg.[93]

Both Spain and Luxembourg may provide opportunities for NGO intervention. Luxembourg in particular has been famously lax in the enforcement of its money laundering regulations.[94] The notoriety of the Riggs case, with investigations underway in several countries, may provide an opportunity for reform organizations to encourage a money laundering investigation in Luxembourg.

The Luxembourg Criminal Code allows a judge to invoke the criminal responsibility of natural persons (but not corporations) involved in the laundering of assets or money derived from bribery. Under the Code, individuals who assist in the investment, concealment, or conversion of the proceeds of bribery, may be found guilty of money laundering.[95]

As in France and Spain, Luxembourg too allows for civil petitions in the context of criminal proceedings, but they are little used.[96] Reform organizations could consider how to structure a civil party petition by aggrieved parties, demanding that an investigation be undertaken and a prosecution filed. In Spain, given that the money laundering involves a Spanish bank, NGOs may locate victims of harms associated with money laundering, to promote criminal investigation of the bank's role in laundering the proceeds of spoliation crimes.

D. Anti–Money Laundering Laws in Host Countries

In general, revenues generated corruptly in Africa are laundered outside the continent. There is often little that domestic African prosecutors can do to reach into jurisdictions in Europe or the United States unless they can trigger mutual legal assistance.

Within the continent itself, anti–money laundering mechanisms are nascent. Observers note the difficulty for many African nations of developing the transparency and institutional capacity needed to meaningfully reduce money laundering. Nigeria's poor anti–money laundering efforts, for example, have earned it a place on the FATF list of noncooperating countries for several years.

Fourteen African nations are members of the Eastern and Southern Africa Anti–money Laundering Group, part of an FATF-driven effort to establish regional bodies. Member countries of the group commit to implementing the FATF Forty Recommendations. However, although evaluations of member countries' relevant existing legislation are foreseen, they have yet to be completed.[97] There is no consensus among countries on the range of predicate activities for money laundering, partly because there is such divergence in criminal laws in the region.[98] The SADC Protocol Against Corruption and the AU Corruption Convention may precipitate a convergence of criminal prohibitions against predicate acts for money laundering, such as bribery.

South Africa offers tax breaks for foreign investors, a fact that has been cited as creating a favorable environment for stashing stolen assets.[99] South Africa is also a regional financial center with a modern financial system and banking infrastructure, and the only African member of the FATF. The country's 1998 Prevention of Organised Crime Act establishes all "unlawful activity"—both within and outside South Africa—as predicate crimes for money laundering.[100] Intentional or negligent acts that facilitate money laundering are also indictable, with liability attaching to both individuals and legal entities. However, although the Act establishes broad anti–money laundering prosecutorial powers, there have been few convictions to date.[101] A specialized body was established in 2003 to receive, analyze, and disseminate suspicious transaction reports—which businesses have been obliged to file since 1996 whenever they encounter property or transactions of no lawful business purpose.[102] But the FATF is concerned that "since 1997 a total of 4,523 [suspicious transaction reports] generated only 41 criminal investigations, which led to five convictions."[103]

E. Stolen Asset Recovery

There are means to pressure banks into returning monies stolen from national coffers through natural resource spoliation. The Nigerian government recently managed to recover oil wealth assets stolen and laundered by former ruler Sani Abacha. This rare example of successful stolen asset recovery involved complex transnational efforts to trace money, freeze assets in another jurisdiction, and then repatriate them. Nigeria relied heavily on the use of mutual legal assistance treaties, described below.

CASE STUDY 8

Mutual Legal Assistance—Nigeria's Stolen Assets Recovery

Nigeria was ruled by military dictator Sani Abacha from 1993 until his death in 1998, during which time he allegedly stole at least U.S. $3 billion from the country.[104] Following the election of Nigerian President Olusegun Obasanjo in 1999, Nigeria applied to Switzerland and other countries for judicial assistance in tracing and freezing stolen assets. In 2002, in a breakthrough development, Switzerland released substantial relevant records, including bank documentation. In August 2004, the Swiss government agreed to repatriate U.S. $493 million to Nigeria (over U.S. $200 million had already been repatriated). In May 2005, Switzerland's Federal Tribunal rejected an appeal from the family of Sani Abacha and reconfirmed the August 2004 government decree ordering the return of most of the frozen funds. Investigations have also led to the freezing of Abacha's accounts in Liechtenstein, Luxembourg, the United Kingdom, and the British island of Jersey (a separate jurisdiction from mainland UK). To date, however, only Switzerland and Jersey have agreed to return funds.

The recovery process began when the Obasanjo government filed criminal charges against members of the Abacha family and their associates for stealing public funds, which gave the country a basis to seek mutual legal assistance from other countries harboring Abacha's money.[105] Mutual legal assistance is a bilateral or multilateral treaty-based diplomatic avenue that, in effect, places investigative costs onto the petitioned country. It generally requires the existence of a criminal investigation or prosecution in a home country. Nigeria's requests for mutual legal assistance led to criminal complaints in the European countries (and civil orders against banks in the UK). This enabled the Nigerian investigators to start to get assets frozen through criminal procedures in European countries.

Under Switzerland's 1983 Federal Act on Mutual Legal Assistance in Criminal Matters, assets may be returned on the basis of a legally enforceable seizure order from the applicant state. In exceptional cases—such as where the frozen assets are obviously of criminal origin—assets can be returned without such an order.[106] Nigeria was able to repatriate Abacha assets from Switzerland using this exception: the Swiss Federal Office of Justice ruled that the greater part of funds linked to Abacha were "clearly of criminal origin." This ruling was upheld by the Federal Court on appeal.[107] Although Swiss authorities found that several of the banks had broken Swiss due diligence regulations in accepting the Abacha funds, they did not recommend that the banks be fined or charged with any offence.[108]

Recovery attempts in Liechtenstein, Luxembourg, and the UK have been hampered by the lack of underlying criminal convictions in Nigeria and challenges put forward by the Abacha family. Jersey has returned U.S. $160 million from accounts held by Abacha associates in nine financial institutions, following an investigation by Jersey's attorney general and Financial Services Commission in response to Nigeria's request for legal assistance.[109]

Legal Strategies for the Recovery of Stolen Assets

Asset recovery is a complex undertaking. Mutual legal assistance treaties are limited in their substantive and geographical scope, so no standard procedure can be applied across the board. Recovery strategies likewise vary from common law to civil law jurisdictions, and from civil to criminal recovery. Governments seeking to recover stolen assets must therefore develop an appropriate strategy, which requires specialized, expensive legal expertise about financial procedures in each of the relevant jurisdictions.[110] Governments also need specialized knowledge to meet the technical requirements of mutual legal assistance treaties. Legal costs can be immense. How should these efforts be funded?

Stolen asset recovery generally occurs only after the collapse of a corrupt regime. There are generally few well-trained professionals in the country to undertake asset recovery when the fleeting moment for such efforts appears. Yet the chances of recovering stolen assets are greatly increased if preparations for recovery are made in advance. Preparation might include training a cadre of professionals with expertise in assets recovery and firsthand knowledge of the country whose stolen assets are sought. Success is more likely if international legal assistance, either financial or in the form of donated legal expertise, is forthcoming.

Jack Blum of the law firm Lobel, Novins and Lamont, a leading expert in asset recovery, has suggested the creation of an international revolving fund that would act as a funding mechanism for tracking assets, to be replenished with a percentage of the money recovered in successful cases.[111] The revolving fund would allow governments recovering from corrupt extractive regimes to hire a case management body, which would in turn locate lawyers, investigators, forensic experts, and others to work to retrieve stolen money.

A revolving fund might be preferable to finance such cases than the standard contingency fees paid to legal teams for their services. According to the contingency fee model, a legal team recovering stolen assets is awarded a portion of the recovered money, sometimes as much as a third. Lawyers explain that such high fees are necessary to cover the costs not only of recovery but also of the many likely unsuccessful investigations, which can be costly and time-consuming but fruitless. Additional costs include the time and expense of developing expertise in the legal systems of countries where assets are hidden and corporate shells domiciled. Furthermore, in countries whose stolen assets are ultimately recovered, great political controversy may arise when attorneys request a large percentage of those monies, as happened in the case of recovered Philippine assets stolen by the former President Ferdinand Marcos.[112] In addition, the danger of contingency fee models is that lawyers will seek "low hanging fruit" and ignore assets that are more difficult to track down.

Blum notes that: "The most important impact of a successful asset recovery program will be deterrence. If countries are successful in getting the money back, government officials in other countries will face the reality that they will not be able to keep what they steal. The day that the first banker or lawyer has to pay significant damages to a country for laundering corrupt officials' money will be the last day bankers and lawyers take on corrupt officials as clients."[113]

A problem that arises following stolen asset recovery is how to prevent the repatriated money from being relooted all over again in countries with high levels of corruption. In the Nigerian case, the government agreed with Switzerland to use the repatriated assets to finance development projects in the healthcare and education sectors, as well as for infrastructure projects, under Swiss supervision.[114] In October 2004, 40 Nigerian NGOs in Abuja founded the Nigerian Civil Society Network on Stolen Assets in order to monitor whether the Abacha money, once released, will really go toward the welfare of the Nigerian people.[115]

III. Civil Causes of Action

Civil causes of action for private citizens can arise from the operations of corporations, banks, and officials in host country jurisdictions. Actionable operations may include the wrongful expropriation of property, interference with business, and extortion. Again, remedies may be more accessible in the home jurisdictions of extractive corporations and banks than in the host countries of their activities. Causes of actions may also be available to shareholders of corporations and banks in North America and Europe.

Civil Actions in Home Countries

The U.S. Alien Tort Claims Act

U.S. courts have recently seen a surge in civil litigation under the Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute.[1] The ATCA, in effect, allows non-U.S. citizens to file suit against both natural and legal persons found in the United States who are alleged to have committed serious human rights violations anywhere in the world. A number of ATCA cases currently underway involve natural resource spoliation—oil and mining companies have been recent targets of claims.[2] This is part of a growing trend in common law countries for multinationals to face litigation in their countries of domicile for crimes in host countries.

In general, however, these lawsuits have focused primarily on the human rights consequences of corrupt extractive industry activity, rather than on spoliation itself.[3] In June 2004, the U.S. Supreme Court's decision in the case of *Sosa v. Alvarez-Machain* essentially limited actionable claims under the Act to serious "law of nations" violations such as genocide, war crimes, crimes against humanity, slavery-like practices, torture, disappearance, summary execution, and prolonged arbitrary detention.[4] Currently, lawyers involved in ATCA suits are analyzing the implications of *Sosa* for ongoing cases. Three prominent ATCA litigators recently wrote that, after *Sosa*, there are still many unsettled issues that may take years for the courts to unravel.[5]

A significant ATCA case involving resource spoliation claims, *Doe v. Unocal*, was recently settled without reaching judgment on the merits, and so left unresolved the norms actionable under ATCA and whether corporations can be held accountable for aiding and abetting ATCA violations. Unocal was, in 1996, one of the first companies sued under the statute.[6] The charges stemmed from widespread human rights abuses relating to Unocal's investment in the Yadana gas pipeline project in Burma. In December 2004, the parties announced a settlement, and, although the terms are confidential, the settlement in principle will compensate the plaintiffs.[7] Before this, plaintiffs had never collected any awards from ATCA claims. At the same time, there appears to be a growing judicial recognition of corporate criminal liability in the context of ATCA, as demonstrated in a May 2005 ruling involving oil extraction in Sudan.[8]

Nevertheless, it is highly unlikely following *Sosa* that ATCA will be found to encompass natural resource spoliation claims unconnected to serious human rights violations. Indeed, in a recent case, one court decided that environmental destruction does not give rise to a tort actionable under ATCA.[9] Thus U.S. courts might be hostile to an argument to extend ATCA-eligible claims to encompass spoliation.

Other Common Law Foreign Direct Liability

In common law jurisdictions such as Canada, the UK, Australia, and the United States, civil actions based on traditional theories of tort law have over the past decade targeted multinational parent corporations for a wide variety of violations. These cases have generally concerned environmental damage and personal injuries, rather than economic harms resulting from bribery or extortion.[10] The suits have focused on how multinational corporations' activities as direct investors in other countries do not match the standards expected in their home jurisdictions.[11] For example, Thor Chemicals, headquartered in England, faced litigation in 1994 in the English High Court over mercury poisoning suffered by workers at its South African mercury recycling plant after it relocated there following complaints in England.[12] The plaintiffs argued that the company was directly responsible for setting up and maintaining factories in South Africa, which it knew, or should have known, would be unsafe for plant workers. Also in the UK, Rio Tinto was taken to court for injuries arising out of its management of a uranium mine in Namibia,[13] and Cape Plc. faced claims over its asbestos mining operations in South Africa.[14]

Plaintiffs in such cases benefit from the more effective judicial systems of corporate home countries. They must, however, overcome claims that legal action should be pursued in courts in the country where the alleged harm occurred, and where the evidence and witnesses may be located. They must often also establish the liability of the parent company for the actions of a subsidiary. In some countries, plaintiffs may benefit from the possibility of obtaining legal aid. For example, in *Lubbe v. Cape Plc.*, the award of legal aid by the English House of Lords made it possible for the plaintiffs to pursue the case.

Unfair Business Practices in the State of California

An alternative legal avenue explored by ATCA litigators in the recently settled *Doe v. Unocal* case was the use of state unfair business practices statutes. U.S. state courts may have looser standing requirements for plaintiffs than federal courts. California's Business and Professions Code, for example, prohibits "any unlawful, unfair, or fraudulent business act or practice."[15] An action may be brought by anyone: standing to enforce California's unfair business practices statute is universal. (In the *Doe v. Unocal* ATCA case, a Californian court allowed the claims of Burmese villagers to be brought under the statute).[16] Moreover, there is no transactional nexus required between the specific practice complained of and the plaintiff: the person bringing the lawsuit need not be harmed by the challenged conduct. Furthermore, the California Business and Professions Code imposes strict liability: it is not necessary to show that the defendant *intended* to injure anyone. Remedies for violations include injunctive relief, restitution, and disgorgement of profits. This avenue may be worth further research by civil society organizations.

Civil RICO Actions

Conduct that violates the antibribery provisions of the FCPA or constitutes money laundering is a predicate act under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act and may give rise to a private cause of action.[17] RICO permits civil suits (for treble damages) by private plaintiffs who are harmed by the acquisition or investing activities of a racketeering enterprise, where defendants have engaged in a "pattern or racketeering activity," i.e., the commission on at least two occasions of any of a host of offenses traditionally associated with organized crime, from murder and kidnapping to bribery, fraud, and money laundering.[18] For bribery of a foreign official to come within the jurisdictional reach of the United States for purposes of a RICO claim, it must be part of a criminal enterprise and reach a level that "affect[s] interstate or foreign commerce."[19]

Lawyers who have filed RICO actions in connection with natural resource extraction activities in Africa and elsewhere point to several serious obstacles to bringing a RICO claim.[20] First, actions brought against wealthy corporations for acts committed outside the United States can be costly and take many years of evidence gathering and pretrial motions (initial hearings where procedural rules and objections are addressed). Second, plaintiffs and witnesses may be afraid to make their identities known for fear of retaliation. Court protection orders, if provided, are difficult or impossible to enforce in foreign countries.

Additionally, a RICO action requires proof of causation—i.e., it must be shown that the activities of the enterprise were the likely cause of harm to the plaintiff. This is often difficult.[21]

Finally, extraterritorial jurisdiction in RICO cases remains an unsettled area of law. There is little case law as to the level of impact on U.S. "interstate or foreign commerce" necessary for bribery to give rise to an offense under RICO in areas such as oil production. While currently small compared to U.S. oil imports from Nigeria and Angola, Equatorial Guinean exports of crude oil to U.S. markets are expected to grow. How sizeable must U.S. imports be to trigger RICO? The jurisprudence in this area is not well developed.[22]

Nevertheless, RICO suits have been appended to ATCA cases against oil companies operating in Nigeria, Burma, and elsewhere.[23] In one such case, *Bowoto v. Chevron*, U.S. lawyers filed an ATCA suit in a federal court in San Francisco on behalf of Nigerian villagers against the Chevron Corporation in 1999. The villagers claimed that Chevron, as parent company of its Nigerian subsidiary, acted in concert with Nigeria's military and police to commit systematic human rights violations to suppress local protests about environmental destruction in the course of oil extraction in the Niger Delta. In 2002, the court allowed a civil RICO suit to proceed against Chevron on the basis of claims that the parent company had sought to cover up its subsidiary's role in the attacks.[24] In March 2004, the court ruled that Chevron could be held legally responsible for its subsidiary's actions if a reasonable jury could find that the latter acted as Chevron's agent.[25] Trial is expected to begin in 2005.[26]

In addition to federal RICO lawsuits, more than half of the U.S. states presently have their own civil RICO laws allowing private causes of action for harms suffered due to racketeering.[27] These laws are generally modeled on the federal law, but they vary in subtle but legally significant ways. Depending on the facts of a case, a state-level RICO statute may allow a potential plaintiff more easily to establish a pattern of illegal activity, the existence of an ongoing racketeering enterprise, or causation between the activities of a government, corporation, or bank, and the harm suffered by a plaintiff.[28]

It may be possible for plaintiffs in a poor, resource-rich country to seek legal remedy under civil RICO for embezzlement and bribery by U.S. corporations and/or their subsidiaries relating to the proceeds of natural resource revenues. Potential plaintiffs include those whose land was taken and sold to extraction companies, and those whose business enterprises were harmed by government monopolies, seizures, or other government-imposed restrictions that are the product of RICO predicate offenses.

The Council of Europe Civil Law Convention on Corruption

The Council of Europe recently adopted an instrument to ensure that member states have machinery in place to provide domestic remedies for civil claims resulting from corruption. The Civil Law Convention on Corruption entered into force in November 2003,[29] and represents the first attempt anywhere to define common, international civil remedies for corruption. It requires parties to provide in their domestic laws "for effective remedies for persons who have suffered damage as a result of acts of corruption."[30] In addition to outlining national measures, the Convention also provides for international cooperation in "obtaining evidence abroad, jurisdiction, recognition and enforcement of foreign judgements and litigation costs."[31] The Council of Europe's Group of States Against Corruption (GRECO), created in 1998, monitors states' commitments under the Convention through a combination of mutual evaluation and peer pressure.[32]

The Convention's application to transnational acts of corruption is not entirely clear. An Explanatory Report specifically contemplates a civil remedy for corrupt payments to foreign government officials: "[C]orruption in international business transactions has become an increasingly common phenomenon. For example, it is possible that a company in country A may find that it has lost a contract in country B on the basis of a bribe which was paid to a company in country C, or to a public official in that country."[33] Whether civil damages for acts of this kind are available through transnational suits or "international cooperation" is a question that courts, prodded by creative litigants, may decide.

As of July 2005, the Convention has been ratified by 24 countries, primarily east and southeast European states. Few of the wealthier members of the Council of Europe, home to some of the world's largest multinationals, have acceded to the Convention as yet.[34]

Secondary Civil Liability: Shareholder Actions

Another possible legal strategy in the United States to address spoliation abroad is to bring shareholder lawsuits against companies caught by government enforcers. Although this strategy provides remedies only for the shareholders—not for persons in the host country where the spoliation occurs—it does, however, pressure the multinational corporation in question to reform.

The U.S. Securities Act expressly provides a person who acquires a security that carries a registration statement containing an untrue statement or misleading omission regarding violations of, for example, the Foreign Corrupt Practices Act or the Bank Secrecy Act, has a cause of action against the issuer of the security, including company directors and partners.[35] The Exchange Act provides further that a person purchasing a security has a cause of action against any other person who purchases or sells securities of the same kind while in possession of information indicating a relevant violation.[36]

These mechanisms were applied, for example, following revelation of improprieties in the U.S. Senate report on Riggs Bank (see page 33), when Riggs shareholders filed actions against certain current and former members of the company's board of directors. The complaints, ongoing as of August 2005, allege that Riggs "violated its fiduciary duties in relation to a variety of matters, including, among others, the compliance by the Company with various anti-money laundering laws and various aspects of the Bank's international and embassy businesses."[37] The lawsuits each seek, on behalf of the Company, among other things, monetary damages and certain types of equitable relief.

Most shareholder suits for corporate wrongdoing are brought by large, institutional investors. In addition, plaintiffs' bars at both federal and state levels in the United States can bring suits based on violations of U.S. securities laws, on behalf of noninstitutional shareholders in cases where the shareholders of a publicly reporting company have demonstrably lost share value. The plaintiff must generally establish that a drop in share price was caused by a market reaction to the wrongful actions or omissions of a defendant corporation (or its directors). In a downwardly moving market, this will require econometric examinations, such as the comparison of the defendant corporation's share price to that of companies operating in a similar line of business and under similar circumstances, but who have not engaged in wrongdoing.

NGOs with on-the-ground knowledge of the operations of oil companies and banks in natural resource-rich host countries could, for example, cooperate with actions taken by a plaintiffs' bar in order to enhance their success. Very often, attorneys operating in this field do not have access to the kind of information that local NGOs can supply regarding the wrongdoing in question. As successful cases of this kind can yield substantial awards of damages, these activities could be funded by the plaintiffs.[38] Plaintiffs' attorneys too might be required to make contributions to a trust to be used for additional evidence gathering, thereby providing income for organizations operating in this field in host countries.

Shareholders of U.S. companies have attempted in recent years to compel corporations to adopt policies of financial disclosure in respect of amounts paid to foreign governments and officials.[39] However, corporations have so far argued successfully that these issues concern the day-to-day management of corporations and are not properly the concern of shareholders.

Civil Actions in Host Countries

There have been some promising in-country legal efforts by local NGOs to curb natural resource spoliation in Africa. However, attempting to enforce private rights against a confiscatory state and multinational corporations in most African countries today may be both fruitless and dangerous. Confronted with the violence, lawlessness, and greed of the Obiang regime, the reaction of many Equato-Guineans has been to flee to Spain, not file lawsuits.

However, pursuit of legal remedies by determined public interest organizations can highlight, at a minimum, certain fundamental values of the rule of law, as case study 9 from Liberia demonstrates.

Illegal Shipment of Iron Ore from Liberia

In August 2004, six Liberian NGOs filed a petition with the Liberian Supreme Court to prevent a second shipment of Liberian iron ore to a Chinese company, due to procedural irregularities and lack of revenue transparency in a first sale and shipment in June 2004.[40] The plaintiffs alleged that the Chinese company had bribed Liberian officials, who then refused to disclose any information about the iron ore contract and sale.

The NGOs' petition to the Liberian Supreme Court argued that it was illegal for the National Transitional Government of Liberia (NTGL) to have shipped the first consignment of ore in June 2004 without the consent and participation of the Contract and Monopoly Commission (CMC), established by the Comprehensive Peace Agreement in August 2003[41] to ensure that

> all public financial and budgetary commitments entered into by the NTGL are transparent, non-monopolistic and in accordance with the laws of Liberia and internationally accepted norms or commercial practice; [and to ensure] that public officers will not use their positions to benefit from any contract financed by public funds.[42]

The groups alleged that the transitional government had been trying to dispose of the iron ore, stockpiled since the beginning of the civil war in 1990, by concluding secret contractual agreements with a Chinese company without disclosure to the public about the nature, content, or value of the contracts, or the potential benefits or losses to the Liberian people.

Following submission of the NGO petition, the Court immediately issued a writ of prohibition, ordering a hold on the shipment until all parties could meet before a judge the following week, and commanding relevant Liberian authorities not to allow any further shipments to take place before the hearing. But the Chinese cargo vessel violated the stay order and transported the iron ore out of the port of Buchanan (south of the capital Monrovia) less than 24 hours after the Supreme Court prohibition. The government denied knowledge of the stay order and subsequently issued conflicting information about the sale and two shipments. The government has since refused to disclose how the iron ore sale was managed or the revenues involved. Despite another Supreme Court injunction in September 2004, the government allegedly allowed a third shipment to leave the port. The NGOs subsequently filed a bill of information before the full bench of the Supreme Court, charging the government with contempt of court. As of July 2005, the case was still ongoing.

In an October 2004 press conference, the groups expressed frustration regarding "those who bribe public officials in order to keep the Liberian people impoverished in their own country while enriching themselves and siphoning our resources to distant places."[43] Meanwhile, the groups have called for the international community to impose sanctions on senior government officials in response to the iron ore sales and have promised to "work as hard as we can to ensure that the public coffers are never raided again and that unscrupulous business persons will not corrupt our body polity with impunity."[44]

This case, which pits the judiciary against the executive branch at a critical time (elections are to be held in October 2005) demonstrates the importance of host country legal remedies for resource corruption. Had action not been taken in Liberia, other sources of remedy are difficult to conceive, given that China, home to the purchasing company and a country experiencing unprecedented demand for natural resources, is not a signatory to the OECD Anti-Bribery Convention or other mechanisms explored in this report.[45]

The African Commission on Human and Peoples' Rights

Africa's regional human rights bodies, the African Court and African Commission on Human and Peoples' Rights, provide possibilities for legal claims resulting from resource spoliation in Africa. The African Charter on Human and Peoples' Rights sets forth a list of specific rights related to the disposition of natural resources, notably under Article 21 (see page 13).[46] NGOs may file communications with the Commission—the Court is expected to be functional from 2006.

In 2001, the Nigeria-based Social and Economic Rights Action Centre and the U.S. based Center for Economic and Social Rights filed a communication with the African Commission alleging a violation of Article 21. According to the petition, the Nigerian government was "directly involved in oil production through the state oil company, the Nigerian National Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation, and ... these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People."[47] The Commission found that Nigeria had violated Article 21, among other Charter provisions,[48] because oil extraction in Ogoniland, in the Niger Delta, was pursued in a destructive fashion without any material benefit to the local population. The Commission recommended that the new Nigerian government take remedial action.

Commission decisions are not always enforced either quickly or thoroughly, but at a minimum they add the weight of judicial authority to a broader political struggle. Eventually, in an attempt to stem the conflict over local development in the Niger Delta, the Nigerian federal government agreed to a "derivation formula," that requires at least 13 percent of natural resource revenue to be returned to the Nigerian state where it is produced. Local communities are thereby granted some compensation for (if not participation in) natural resource extraction. However, as noted in a Human Rights Watch report, there have been critical problems in implementing the agreement at federal level, and state and local government spending, once the revenues have been received, have not always reached those directly affected by the oil production.[49]

Legal Strategies for Civil Causes of Action in Host Countries

Equatorial Guinea provides an illustration of the opportunities for African Commission claims addressing spoliation under Article 21.[50] Based on the evidence in the U.S. Senate report on Riggs Bank, a petition might describe how, soon after oil companies entered into production-sharing contracts with the government of Equatorial Guinea, President Obiang ensured that revenues flowed directly into his and his relatives' pockets. According to the U.S. Senate report, the president and his associates allegedly diverted monies from the Equatorial Guinea oil account at Riggs to at least one business owned by the president, and oil companies operating in Equatorial Guinea "may have contributed to corrupt practices in that country by making substantial payments to, or entering into business ventures with, individual E.G. officials, their family members, or entities they control, with minimal public disclosure of their actions."[51] These activities and others documented in the report effectively diverted revenues stemming from the country's rich oil supply that should have been for the benefit of the people of Equatorial Guinea.

The African Charter on Human and Peoples' Rights states that the African Commission may consider communications from nonstate actors so long as they "[a]re sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."[52] Procedurally, if a communication is denied admissibility for failure to exhaust domestic remedies (or for other reasons) it can be resubmitted with a request for reconsideration.[53] In considering when to waive the requirement of exhaustion of domestic remedies, the Commission considers whether the remedy would be "available, effective and sufficient."[54] Many Equato-Guineans say the country's judiciary is unlikely to meet this standard today.

Linkages between lawyers in home and host country jurisdictions can be nurtured with the long-term goal of increasing the number and capacity of African groups that perform public interest litigation. Today, although many remedies to combat spoliation would have to be pursued within home country legal systems, legal efforts in host countries are not impossible, as the Liberian example shows (see page 47). Moreover they can serve as a foundation for exhausting domestic legal remedies necessary for bringing a case to the African Commission on Human and Peoples' Rights.

The possibilities for building capacity among local groups are demonstrated by the Environmental Law Alliance Worldwide (E-LAW), a network of environmental lawyers from 60 countries that marshals legal expertise to aid local partners. E-LAW has drawn attention to the significant role of corruption in exacerbating environmental destruction. Advancing environmental rights can involve local civil society in anticorruption efforts against repressive regimes.[55]

IV. Access to Information and Transparency Mechanisms

Access to government and corporate information is critical to curbing the corruption associated with natural resource extraction and to successful litigation, both in home and host country jurisdictions. This information can be obtained through the exercise of freedom of (or access to) information laws, in countries where they exist, and by means of transparency mechanisms that require disclosure of monies paid and received, thereby making the spoliation of natural resources difficult or impossible to conceal.

Access to Information

Civil society organizations can make use of the right to access information to obtain government—and even corporate—information. The freedom of information movement has made great progress in the last decade: about 60 countries worldwide now have laws ensuring access to government-held information, including many in central and eastern Europe, Asia, and Africa.[1]

Access to information laws establish mechanisms by which an individual member of the public may request specific information held by a public body. Early freedom of information laws tended to focus on providing access to information held by government agencies, but more recent laws also cover private companies providing public services, and businesses partially owned by governments, given that many public functions are now carried out by corporations.[2]

In addition, much information pertaining to private companies is lodged with various government departments and state regulators by means of routine reporting requirements. Private companies often submit information during tenders for public works contracts, service provision, and as part of contracts concluded with the state for resource extraction. An effective access to information law should in principle cover such information.[3]

In practice, however, there are a number of challenges. The first is that all access to information laws contain exemptions for information that might breach commercial confidentiality or damage free trade. For example, the UK Freedom of Information Law establishes that information is exempt from disclosure if it constitutes a trade secret or the information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).[4] The Information Commissioner, tasked to oversee the Act's implementation, draws a distinction between commercial interests (ability to compete) and financial interests (information relating to a company's financial status); only the former may be withheld from disclosure.[5]

The normal test for deciding whether corporate information should be withheld under an access to information law is whether it would harm a protected interest, such as fair trade or a legitimate trade secret. Even if such harm might occur, consideration must be given to whether there is an overriding public interest in obtaining the information. When information relates to corruption or human rights violations, there may be strong public interest reasons for releasing it.

In cases where the commercial confidentiality exemptions are broadly framed or ill-applied, or where the public interest test is not properly considered and information is refused, it may be necessary to bring a court challenge. This has been done successfully to secure access to government contracts with private companies in a number of countries.[6]

A second challenge is that functioning access to information laws are more common in entrenched democracies, where corporate transparency is generally better developed and human rights violations less severe. Many resource-rich countries do not have access to information laws at all. However, relevant information about resource extraction can still be sought in the home countries that trade or contract with host countries, or where multinationals are headquartered and subject to reporting regimes. This has been done to great effect by environmental activists and human rights researchers in many parts of the world, who have made use of the U.S. Freedom of Information Act, for example, to obtain information about corporate and government activity in their own countries.

A third challenge is that only a handful of countries have laws that make it possible to access information directly from private companies, even where they are not operating with public funds or performing public functions. In 2005, Save the Children UK published a survey of access to information laws in ten countries that are home to significant multinational oil, gas, and mining corporations.[7] South Africa was the only country of the ten surveyed to provide a comprehensive legal right to access private company information—and then only where access is necessary to protect or exercise another right.[8]

In countries that do not yet have access to information laws, advocates may make use of constitutional provisions that grant the right of access to government-held information.[9] This has been done successfully in a number of countries, including in Mexico prior to the introduction of its freedom of information laws,[10] and regularly in the Philippines where as yet no freedom of information law exists.[11] The constitutional right to access information was invoked in the Liberian iron ore case (see page 47). The coalition of NGOs involved claimed that the government had, in addition to selling iron ore without the appropriate regulatory approval, also violated the right of the public to information about the government, by concluding secret contracts with a Chinese company. According to Article 15 of Liberia's Constitution: "Every person shall have the right to freedom of expression, being fully responsible for the abuse thereof. This right shall not be curtailed, restricted or enjoined by government save during an emergency declared in accordance with this Constitution.... In pursuance of this right, there shall be no limitation on the public right to be informed about the government and its functionaries."[12] As of this writing, there has not been a decision on the case.

Transparency Mechanisms

The need for freedom of information requests is lessened where extractive companies are required to publish contractual and revenue information as a matter of course. To date, few countries have legislation requiring disclosure of extractive industry revenues, although pressure to introduce laws of this kind has recently increased. In the meantime, certain voluntary disclosure mechanisms provide avenues of action.

The World Bank and domestic law in host countries

Given the important role of international financial institutions in developing extractive industries, the World Bank has long been pressured to adopt revenue and contract transparency in its lending policy and development and technical assistance programs. In July 2001, the Bank launched an Extractive Industries Review (EIR), which drew up a series of recommendations for Bank-funded natural resource initiatives.[13] To date, however, the Bank has steered away from mandatory measures. Although the Bank accepted some EIR recommendations, the transparency requirements in Bank-supported projects remain voluntary rather than mandatory, and oversight mechanisms are poor.[14] The Bank now also backs the Extractive Industries Transparency Initiative (see below).

World Bank influence tends to be greatest in host countries, where enforcement mechanisms are likely to be weakest. It exercises less suasion over multinationals or home country governments. A Bank-supported oil pipeline project in Chad (commenced before the EIR) demonstrates both the potential and the pitfalls of Bank leverage over recipient governments. Chad's 1999 oil revenue management law, developed with Bank assistance, aimed to direct the country's new oil wealth toward poverty relief and social development, and to require transparency of the government's management of oil revenues. But a recent report notes "weaknesses and loopholes in the revenue management system, problems with corruption, transparency deficits, and severe government capacity constraints."[15] Billions of dollars may be evading the safeguards, as new oil fields are discovered but escape the law's terms. The project has been in effect since July 2003: its ultimate success (or failure) remains unclear.

Another example of host country transparency legislation is São Tomé and Príncipe's 2004 oil revenue management law. Oil discovery is relatively recent in this small African country, and revenues have not yet begun to flow. The law, prepared with assistance from Columbia University's Earth Institute and the World Bank, creates a transparent revenue inflow control mechanism. It mandates a National Oil Account, controlled by an international custodian, into which all oil revenues, very broadly defined, shall be deposited directly, and it introduces mechanisms to ensure that such revenues will not be used indiscriminately and that information on the revenues is made public both by the government and individual companies.[16] In the obligations it places on private parties, the law goes one step further than the transparency mechanism proposed by the Publish What You Pay initiative (see below), which applies only to stock-market listed companies. The São Tomé law provides for a petroleum oversight board, comprised of government and civil society members who have significant powers to ensure compliance. The law envisions supplemental legislation for its full implementation, but provides an interim regime for enforcement, including penalties for violations.

Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI), spearheaded by the UK government, aims to increase transparency over payments between companies and governments in both home and host countries. Funded by the UK and Norway, the initiative comprises oil and mining companies, home and host country governments, and NGOs, and calls for voluntary disclosures of payments by governments and the extractive industry.[17] A central tenet is the regular publication, widely and in an accessible and comprehensive manner, of all payments from governments to oil, gas, and mining companies and of all revenues and taxes from those companies to governments.

To date, 20 governments, including resource-producing Azerbaijan, Ghana, Kyrgyzstan, and Nigeria, have committed to the EITI principles as have 14 companies.[18] Other countries such as Equatorial Guinea, the Democratic Republic of the Congo, Angola, and Sierra Leone have endorsed the EITI and are presently considering how they will implement the initiative.

It remains to be seen whether this voluntary mechanism will prove effective in stemming the problems outlined in this report.[19]

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises are nonbinding recommendations on transparency and corporate social responsibility that signatory states pledge to promote among multinational companies operating within their jurisdictions.[20] Governments are expected to publicize the Guidelines through entities called National Contact Points (NCPs), and to respond to complaints against companies in breach.

This mechanism has been used by NGOs, including Rights and Accountability for Development (RAID UK), Friends of the Earth, and OECD Watch, to file complaints against multinational corporations allegedly involved in the plundering of natural resources in the Democratic Republic of the Congo. The NGOs base their complaints on a report of a UN Security Council's panel of experts on the exploitation of natural resources in the DRC that found 85 multinational companies operating in the DRC in breach of the Guidelines.[21] RAID has been pressing the UK government to reprimand the six UK companies that appeared on that list. However, the Guidelines' complaints mechanism is relatively toothless—there are no real penalties—and is additionally hampered by a lack of political will. The OECD itself recognizes that, although the Guidelines have become widely recognized, they have not yet had sufficient impact on the way that companies conduct business.[22]

Publish What You Pay

A leading nongovernmental initiative to promote revenue transparency in the oil, gas, and mining industries is the Publish What You Pay (PWYP) campaign. Launched in 2002, PWYP is an international campaign now backed by a coalition of over 200 NGOs worldwide.[23] The campaign's founding principles are:

> Natural resources are held in trust by the state for the citizens of a country. Those citizens have a clear right to information about the management of revenues associated with their resources. PWYP calls for multinational oil, mining and gas companies to reveal the same basic information about net payments to a state in the developing world that they already routinely disclose in the developed world.[24]

The PWYP campaign calls for mandatory disclosure of payments by extractive industry companies to governments. It advocates that governments institute legislation requiring companies in the extractive industries to "publish what they pay" if they are to be listed in that country's stock listings. In the United States, for example, Congress is being lobbied to pass a law to require the Securities and Exchange Commission to implement such a requirement.

V. Conclusion

In a recent issue of *Foreign Affairs*, three scholars articulated the broad challenge of addressing transnational natural resource corruption in the following way:

> [R]ich countries can play a large role in the reform process, for the simple reason that corruption has two sides—demand and supply. For every leader who demands a bribe there is usually a multinational company or a Western official offering to pay it. For every pile of illicit wealth, there is usually a European or American financial institution providing a safe haven for the spoils. The governments of wealthy countries need to take steps to block these activities.[1]

The richer industrial countries might start at home, by ensuring, among other things, that national laws address foreign corruption, that international structures are strengthened to facilitate the prosecution of transnational actors, and that prosecutors, investigators, and courts are equipped and prepared to put the laws to work. A coordinated mechanism to promote such activities is needed in order to avoid wrongly favoring countries that serve as safe heavens for dirty business, while disadvantaging law-abiding companies and governments.

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 prosecute and try offenders systematically.

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.

The following measures would facilitate prosecution of spoliation-related crimes and the availability of remedies for those affected:

Recommendations to Governments

1. *The OECD Anti-Bribery Convention.* Convention signatories should amend their legislation and institutional structures to comply with recommendations of the OECD Working Group. These include recognition of corporate criminal liability, creation of robust oversight mechanisms, and assertion of criminal jurisdiction over the commission of, and complicity in, spoliation crimes committed abroad. Countries should also ensure standing for victims of spoliation—and for civil associations acting on their behalf—to present legal claims in judicial fora. In addition, every effort should be made to ensure that countries not yet parties—particularly non-OECD homes of companies involved in transnational resource extraction—ratify and apply the Convention.

2. *The Financial Action Task Force (FATF) Forty Recommendations on combating money laundering.* The FATF monitors application by its 33 (mainly OECD) members of its 40 recommendations and suggests areas to improve anti–money laundering law and practice. However, a number of governments not yet signed up to the FATF are known for lax financial supervision. They should adopt FATF recommendations and closely monitor the activities of their financial institutions for spoliation-related crimes.

3. *Strengthening international mechanisms.* Resource extraction companies often rely on subsidiaries and shell companies for corrupt deal-making, permitting parent companies to escape responsibility. Prosecution of companies is often complicated by a complex of jurisdictional barriers that are costly for victims to challenge or impossible to surmount. The absence of a binding international mechanism for the prosecution of corporate crimes further impedes the pursuit of trans-jurisdictional corruption. Several European and UN treaties and declarations—in particular, the OECD Anti-Bribery Convention, the UN Convention Against Corruption, the UN Global Compact, and the Council of Europe's Civil and Criminal Law Conventions on Corruption—comprise a nascent accountability framework. At a minimum, each of these

instruments requires stronger enforcement mechanisms. In addition, nonparties should ratify relevant treaties.

4. *Transparency and freedom of information laws.* Bank secrecy laws and inadequate freedom of information provisions present a significant obstacle to the pursuit of institutions that engage in money laundering. Both home and host countries should improve legislation requiring disclosure of revenues and activities of both government and corporate actors, as recommended by the Extractive Industries Transparency Initiative and the Publish What You Pay campaign. São Tomé and Príncipe's 2004 oil revenue management law provides a model disclosure law for resource-rich countries. But governments of home countries too must ensure that the activities of oil and other extractive industry companies in foreign countries are open to public scrutiny. Where money laundering of resource corruption proceeds is a concern, reform of bank secrecy rules, consistent with legitimate privacy protections, may be needed to allow investigators and prosecutors to access relevant bank records.

Recommendations to Donors and Civil Society Organizations

5. *Training local legal teams.* For countries whose present governments are complicit in spoliation, recovery of lost wealth will become feasible only following a political transition. Given short statutes of limitations and the need to preserve evidence, actors in those countries must move quickly if successful claims are to be made. Civil society and international organizations might help by training teams of local lawyers to collect information while it is current, and prepare for action when the moment arrives.

6. *Creation of a revolving global fund.* To mitigate the costs of mounting investigations and tracking stolen assets, an international fund should be created, to be replenished from a percentage of the money recovered in successful cases.[2] The revolving fund would allow new and transitional governments to retain the professional expertise—lawyers, investigators, forensic experts, and others—needed to retrieve stolen money.

7. *Civil society advocacy and engagement.* The present report identifies a range of areas where civil society actors can intervene to address natural resource corruption. These include advocating legal reforms in both home and host countries; investigating cases of corruption and providing information to the media and prosecutors; identifying suitable plaintiffs and victims; launching civil litigation; filing criminal complaints; (in certain countries) pursuing criminal prosecution; and submitting petitions to intergovernmental bodies such as the African Commission on Human and Peoples' Rights. Civil society actors can also train lawyers and pursue freedom of information requests in home

and host countries alike. They can press governments to ratify and implement relevant treaties and declarations, and advocate for more powerful international and regional accountability regimes.

Natural resource corruption is increasingly recognized as a critical obstacle to economic development and democratic participation. It is often associated with grave human rights violations and armed conflict. In a rapidly changing field, it is likely that some of the activities and case studies suggested in this paper will soon be superseded. The present report therefore offers ideas both for immediate action and longer term reform, in the hope that, over time, bribery by international corporations, money laundering by banks, and plundering by oligarchs of their peoples' natural resources will become unacceptable everywhere.

Notes

Preface

1. “Home” and “host” country are used here as terms of convenience to refer to a general (if not universal) geographic differentiation between countries where large extractive companies are based and those where they operate. Use of the terms is not meant to imply any inherent political or economic relationship between the countries so designated, nor to indicate any assumption about the legal or physical origin, or the probity, of extractive companies wherever they are based or operate.

I. Introduction

1. See, for example, Jeffrey D. Sachs and Andrew M. Warner, “The Curse of Natural Resources,” 45 *European Economic Review* 827 (2001).

2. Gumisai Mutume, “Against the Odds Africa Strives to Rebuild Its Domestic Industries” *Africa Renewal,* United Nations Dept. of Public Information (October 1, 2004).

3. For example, Carlos Leite and Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth*, IMF Working Paper WP/99/85 (1999). Not all natural resources can be treated the same way: studies have linked extraction of oil and minerals to greater corruption than agricultural products because of the comparatively greater returns, see Xavier-Sala-i-Martin and Arvind Subramanian, “Addressing the Natural Resource Curse: An Illustration from Nigeria,” NBER Working Paper No. W9804 (June 2003).

4. The United Nations Convention Against Corruption lists targets for legislative prohibition by States Parties, including bribery of public officials, embezzlement by public officials, trading in influence, illicit enrichment, bribery in the private sector, and laundering of the proceeds of crime. The Convention was adopted by the UN General Assembly on October 31, 2003. As of this writing, it has 15 of the 30 ratifications required for entry into force. The full text of the Convention is available at: http://www.unodc.org/unodc/en/crime_convention_corruption.html.

5. See James C. Owens, "Governmental Failure in Sub-Saharan Africa: The International Community's Options," 43 *Va. J. Int'l L.* 1011 (2003) (describing "insulated ruling regimes continu[ing] to live in opulence by diverting public revenues"); Jennifer M. Hartman, "Government by Thieves: Revealing the Monsters Behind the Kleptocratic Masks," 24 *Syr. J. Int'l L. & Comm* 158 (1997) (arguing that indigenous spoliation "destroys the essential foundations of the economic lives of societies").

6. Ndiva Kofele-Kale, "Patrimonicide: The International Economic Crime of Indigenous Spoliation," 28 *Vand. J. Transnat'l L.* 59 (1995).

7. See "African Union Approves Anti-corruption Policy," *Reuters,* September 19, 2002.

8. Cited in Global Witness, *Time for Transparency: Coming Clean on Oil, Mining and Gas Revenues* (March 2004), available at: http://www.globalwitness.org/reports/show.php/en.00049.html.

9. See Paul Collier, "Economic Causes of Civil Conflict and Their Implications for Policy," in *Turbulent Peace: The Challenges of Managing International Conflict*, Chester A. Crocker et al. eds., Washington, D.C.: USIP Press (2001).

10. The 30 OECD members are Australia, Austria, Belgium, Canada, Denmark, the European Community, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

11. U.S. 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), 7, available at: http://hsgac.senate.gov/_files/071504miniorityreport_moneylaundering.pdf. The U.S. oil companies have generally responded that there were no findings in the report to show that they violated any laws and that they are cooperating with ongoing federal inquiries.

12. Estimate from Peter Maass, "A Touch of Crude," *Mother Jones,* (January/February 2005), available at: http://www.motherjones.com/news/feature/2005/01/12_400.html.

13. Cesar Chelala, "The Boom that Only Oils the Wheels of Corruption: Wealth and Ill-health," *International Herald Tribune* (August 6, 2004).

14. See, for example, U.S. Senate Report; Global Witness (2004); Maass, "A Touch of Crude"; Ken Silverstein, "Oil Boom Enriches African Ruler," *Los Angeles Times,* January 20, 2003.

15. Maass, "A Touch of Crude."

16. See for example Amnesty International's entry on Equatorial Guinea in *Amnesty International Report 2005: The State of the World's Human Rights,* London: Amnesty International (May 25, 2005); Global Witness (2004); and International Bar Association, *Equatorial Guinea at the Crossroads: Report of a Mission to Equatorial Guinea*, London: IBA (October 2003). See also the U.S. Department of State, *Equatorial Guinea: Country Reports on Human Rights Practices 2004*, Bureau of Democracy, Human Rights and Labor, (February 28, 2005), available at: http://www.state.gov/g/drl/rls/hrrpt/2004/41601.htm.

17. The U.S. State Department's human rights report on Equatorial Guinea noted that there "were no effective domestic human rights nongovernmental organizations." U.S. State Department (2005).

18. See Article 1 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Annexed to G.A. Res. 56/83, December 12, 2001.

19. See Peter Eigen, "Controlling Corruption: A Key to Development-Oriented Trade" in *Trade, Equity and Development* No. 4 (November 2002). Guy de Jonquieres and Frances Williams, "Top WTO Nations Hail Deal on Doha" *Financial Times*, (August 2, 2004); Third World Network, "Report on Final Pre-Cancun Meeting of WTO Working Group on Transparency Government Procurement: Deep Divisions Remain," TWN Info Service on WTO Issues (July 4, 2003), available at: http://www.twnside.org.sg/title/twninfo39.htm.

20. Common Article 1(2) of both the International Covenant on Economic, Social and Cultural Rights (1966, entered into force 1976) and the International Covenant on Civil and Political Rights (1966, entered into force 1976): "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." See also UN General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources (XVII) (1962); UN Convention on Biological Diversity (1992) (Preamble and Art. 3). See generally, Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal,* Hersch Lauterpacht Memorial Lectures, Cambridge: Cambridge University Press (1998).

21. African Charter on Human and Peoples' Rights, June 27, 1981, Doc. OAU/CAB/LEG/67/3/Rev.5, 21 ILM 59 (1982), Art. 21, available at: http://www.achpr.org/english/_info/charter_en.html.

22. Rome Statute of the International Criminal Court, available at: http://www.un.org/law/icc/statute/romefra.htm. The possibilities for redress laid out in these articles have so far proven controversial. Important terms remain largely undefined and the functioning of these articles within the ICC's larger mandate remains untested at the time of writing, although the ICC's current investigations into crimes in the DRC and Uganda may clarify these issues.

23. See the International Convention for the Suppression of the Financing of Terrorism, Adopted December 9, 1999, entered into force April 10, 2002, 2178 UNTS 229. Art. 5(2) states: "Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offense set forth in article 2... Such liability may be criminal, civil or administrative." There are 129 parties to the Convention, including the United States. See also the United Nations Convention against Transnational Organized Crime, adopted November 15, 2000, 40 ILM 335 (2001), Art. 10.

24. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997, Art. 2, available at: http://www.olis.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br(97)20.

25. Fafo and the International Peace Academy, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004), available at: http://www.fafo.no/liabilities/index.htm.

26. The United Nations Global Compact is available at: http://www.unglobalcompact.org.

27. For more on the background to the UN Convention Against Corruption, see: http://www.unodc.org/unodc/en/crime_convention_corruption.html.

28. Jim Wurst, "General Assembly Unanimously Approves Anti-Corruption Treaty," *UN Wire,* November 3, 2003.

29. See United Nations Information Service, "UN Convention Against Corruption Becoming Global Standard for Strong Anti-Corruption Regime, Crime Congress Committee II Told" (April 20, 2005). For status, see: http://www.unodc.org/unodc/en/crime_signatures_corruption.html.

30. See Andrew Browne, Bhushan Bahree, Patrick Barta, and John Larkin, "Asian Rivals Put Pressure on Western Energy Giants: In a String of Recent Deals, China, India Display Clout, Funds and Stomach for Risk," *The Wall Street Journal,* January 10, 2005, A1.

31. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

32. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*, 454 U.S. 464, 474–75 (1982).

33. U.S. Supreme Court in *Piper Aircraft Co. v. Reyno,* 454 U.S. 253, 254 (1981).

34. The following discussion on *forum non conveniens* in the Bhopal cases is taken from Richard Schwadron, "The Bhopal Incident: How the Courts have Faced Complex International Litigation," 5 *B.U. Int'l L.J.* 445 (1987); Rajeev Dhavan, "For Whom? And for What? Reflections on the Legal Aftermath of Bhopal," 20 *Tex. Int'l L.J.* 295 (1985); Marc Galanter, "Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy," 20 *Tex. Int'l L.J.* 273 (1985).

35. Kelley, Drye and Warren (law firm), *Memorandum in Support of Union Carbide*, US Southern District Court of New York, *In Re: Union Carbide Gas Plant Disaster at Bhopal, India in December 1984*, MDL Docket No. 626, 85 Civ. 2696 (JFK), 12–13, cited in Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (2004), 51, available at: http://web.amnesty.org/library/pdf/ASA200152004ENGLISH/$File/ASA2001504.pdf.

36. Schwadron, 459–461.

37. The condition that defendants submit to foreign courts is common in *forum non conveniens* rulings. See Schwadron, 451. UCC then appealed this condition, unsuccessfully, before the U.S. Second Circuit Court of Appeals, claiming that "Indian courts, while providing an adequate forum, do not observe due process standards that would be required as a matter of course in this country [i.e., the United States]." *In Re: Union Carbide Corporation Gas Plant Disaster*, 809 F 2d 195, 204 (2nd Cir. 1987).

38. The settlement was for $470 million. Estimates of the costs of the gas leak range from $3–6 billion. The victims were not consulted, and liability was never established. Amnesty International (2004), 58–67.

39. Transparency International's National Integrity System is a valuable resource for tracking and evaluating national anticorruption laws in Africa and around the world. Since 2000, TI has produced over 60 country studies. These examine eight interrelated elements that contribute to accountability and integrity, including the presence of independent anticorruption agencies and the state of public sector procurement laws. The country studies provide a good point of departure for groups researching ways to promote reform and pursue public interest litigation. Jeremy Pope (now of TIRI) pioneered the NIS concept. For more, see http://www.transparency.org/activities/nat_integ_systems/country_studies.html.

II. Criminal Sanctions

1. They are, in addition to the OECD Anti-Bribery Convention, the Inter-American Convention Against Corruption (1997) and the Council of Europe's Criminal (2002) and Civil (2003) Conventions on Corruption. In addition, the African Union is in the process of ratifying a regional corruption convention as are the SADC countries. Finally, the UN Convention Against Corruption, adopted in 2003, has not yet entered into force.

2. 15 U.S.C. 78dd *et seq*.

3. See the Department of Justice web site on FCPA: http://www.usdoj.gov/criminal/fraud/fcpa.html. The summary is from the Department of Justice's general explanation of the FCPA.

4. 15 U.S.C. § 78dd-1 (c).

5. Failure to disclose payments made in furtherance of bribery may give rise to charges of fraud. Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Act of 1934 provide sanctions for various types of fraud.

6. *Clayco Petroleum Corp. v. Occidental Petroleum Corp*. 712 F.2d 404, 409 (9th Cir. 1983).

7. The version used here is Danforth Newcomb, *Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977*, New York: Shearman & Sterling LLP (November 4, 2004), available at: http://www.shearman.com/documents/LT_digest2004.pdf.

8. Danforth Newcomb, 3.

9. Danforth Newcomb, 2.

10. Danforth Newcomb, 3.

11. Miren Gutiérrez, "Northern Laundromats for Southern Fat Cats," *Inter Press News Service Agency,* August 20, 2004.

12. Signatories are the 30 OECD members, plus Argentina, Brazil, Bulgaria, Chile, and Slovenia.

13. The International Antibribery and Fair Competition Act of 1998. Pub. L. No. 105–366, 112 Stat. 3302, November 10, 1998 implements the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in the United States by amending the FCPA.

14. All parties to the Convention take part in the OECD Working Group on Bribery in International Business Transactions. The Working Group carries out monitoring of countries' compliance with the Convention. Monitoring takes place in two phases: the first phase evaluates the adequacy of countries' legislation to implement the Convention and the second assesses whether a country is applying this legislation effectively. Thirty-three countries have now been examined in Phase 1 and eight countries have undergone Phase 2 examinations. For each country reviewed, the Working Group has adopted a report and evaluation, which are available on its website.

15. See the country reports on the implementation of the Convention, available at: http://www.oecd.org/document/24/0,2340,en_2649_33797_1933144_1_1_1_1,00.html. *France–Phase 2: Report on Implementation of the OECD Anti-Bribery Convention* (January 2004), *United Kingdom–Phase 2: Report on Implementation of the OECD Anti-Bribery Convention* (March 2005), *Luxembourg–Phase 2: Report on Implementation of the OECD Anti-Bribery Convention* (June 2004) *Germany–Phase 2: Report on Implementation of the OECD Anti-Bribery Convention* (June 2003); *Italy–Phase 2: Report on Implementation of the OECD Anti-Bribery Convention* (December 2, 2004).

16. The International Anti-Bribery and Fair Competition Act of 1998 (Pub. L. 105-366, 112 Stat. 3202).

17. *Addressing the Challenges of International Bribery and Fair Competition 2004: The Sixth Annual Report under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998,* U.S. Department of Commerce, International Trade Administration (July 2004), available at: http://www.tcc.mac.doc.gov/pdf/2004bribery.pdf.

18. Transparency International, *TI Progress Report: Enforcement of the OECD Convention on Combating Bribery Of Foreign Public Officials* (March 7, 2005), available at: http://www.transparency.org/building_coalitions/oecd/oecd.html

19. See Nicholas Shaxson, "The Elf Trial: Political Corruption and the Oil Industry," *Global Corruption Report 2004,* Berlin: Transparency International (2004).

20. Global Witness, *Time for Transparency: Coming Clean in the Oil, Mining and Gas Revenues,* London: Global Witness (March 2004), available at: http://www.globalwitness.org/reports/show.php/en.00049.html.

21. Eric Decouty, "A Nigerian Contract at the Heart of a Corruption Affair," *Le Figaro,* December 20, 2003 [translated by Leslie Thatcher], available at: http://www.globalpolicy.org/nations/launder/regions/2003/1220heart.htm.

22. Michael Isikoff and Mark Hosenball, "Another Halliburton Probe," *Newsweek,* February 4, 2004.

23. Robert O'Harrow Jr., "Justice Broadens Halliburton Inquiry" *The Washington Post,* August 5, 2004.

24. The French investigating magistrate is Judge Renaud van Ruymbeke, also involved in investigating the Elf scandal. See also Mike Oduniyi and Ahamefula Ogbu, "$180m Bribe: Halliburton Submits FG Officials' Names to French Judge," *This Day,* September 2, 2004, available at: http://allafrica.com/stories/200409020580.html; and "Halliburton Venture in Nigeria Investigated by SEC," *Bloomberg,* June 11, 2004.

25. OECD Working Group, *France–Phase 2.*

26. The Organic Law of the Judicial Power, Art. 23.2. Jurisdiction is also exercised over those who acquire Spanish nationality subsequent to the crime. See OECD, *Spain–Phase 1: Report on Implementation of the OECD Anti-Bribery Convention* (June 2000), 12.

27. Spanish Penal Code, Art. 445 *bis,* makes the bribery of foreign officials an offense in Spain. See generally OECD, *Spain–Phase 1.* 12 ("The Spanish authorities explain that the requirement [of criminalization of bribery in the foreign country] is broadly interpreted so that it is not necessary that the country where the bribery is committed has established the offence of bribing a foreign public official, as long as the act of bribery is established as an offence.")

28. The Organic Law of the Judicial Power, Art. 23.2 (b).

29. A second ("phase 2") report on Spain's progress in the implementation of the OECD Anti-Bribery Convention is due in the second half of 2005.

30. Law of Criminal Procedure, Art. 101; Statute of the Public Prosecutor, Arts. 1 and 5.

31. The *acción popular* is cited in several provisions of Spanish law, including the Spanish Constitution, Art. 125, and the Law of Criminal Procedure, Arts. 101 and 270. Article 270 states that "[a]ll Spanish citizens, whether or not they are victims of the crime, may file an action [querellarse], by exercising the popular action established in article 101 of this Law." See Richard J. Wilson, *Spanish Criminal Prosecutions Use International Human Rights Law to Battle Impunity in Chile and Argentina*, available at: http://www.Derechos.org/koaga/iii/5/wilson.html?pinochet+extradition, originally published in ACLU International Civil Liberties Report (January 1997).

32. OECD, *Spain–Phase 1*, 13.

33. The Organic Law of the Judicial Power, Art. 23.4. Universal jurisdiction is the capacity for a country's courts to prosecute serious crimes even where the crime was not committed in, and did not involve actors from, the country in question. In the case of Former Guatemalan President General Rioss Montt, the Spanish Supreme Court limited the reach of article 23.4 to crimes with an identifiable Spanish dimension. Sentencia del Tribunal Supremo sobre el caso Guatemala por genocidio, Tribunal Supremo Nº: 327/2003 (February 25, 2003). The crime of bribery does not qualify as an international obligation for purposes of Art. 23.4.

34. See U.S. Senate Report, 54.

35. French Penal Code, Arts. 113-6 and 121-2.

36. French Code of Criminal Procedure, Arts. 1 and 2. Petitions can be made to the public prosecutor, the judicial police or the judicial investigator. See French Code of Criminal Procedure, Arts. 51 and 75. See generally, Fafo, *A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions: France*, available at: http://www.fafo.no/liabilities/France.pdf.

37. French Code of Criminal Procedure, Arts. 2–1 to 2-20 lists the criteria for standing to bring charges for relevant crimes.

38. French Penal Code, Art. 435-3.

39. French Penal Code, Arts. 113–5 and 113–8 require that where the party based in France is an accomplice to a crime committed abroad, a conviction must first be obtained in the relevant country.

40. Justice Initiative interview with William Bourdon, president of Association Sherpa. On this case, see Les Amis de la Terre France and Sherpa, "Forêts camerounaises- La plainte déposée contre Rougier jugée provisoirement irrecevable" Press Release (February 24, 2004), available at: http://

www.amisdelaterre.org/article.php3?id_article=899. See also Press dossier, available at: http://www.amisdelaterre.org/IMG/pdf/dossier_presse_rougier_190204.pdf. See also Abigail Hansen, "Case Study: Crimes in Cameroon and the Role of North-South Cooperation in Seeking Justice in French Courts." Presentation at the 11th Annual Anti-Corruption Conference, Seoul, May 26, 2003, and Fafo, *Comparative Study: France*.

41. Fafo, *Comparative Study: France,* 3.

42. Fafo, *Comparative Study: France,* 3.

43. OECD Working Group on Bribery in International Business Transactions, *Procedure and Self-Assessment and Mutual Evaluation of Implementation of the Convention and the Revised Recommendation–Phase 2,* (January 1, 2001), 3; OECD Working Group, *France–Phase 2,* 15.

44. OECD Working Group, *France–Phase 2,* 15; *Italy–Phase 2,* 17; *Germany–Phase 2,* 25.

45. "Making the OECD Anti-Bribery Convention Work," *Workshop Report*, 11th International Anti-Corruption Conference, May 26, 2003.

46. Procedures for filing enforcement tips are available at: http://edgar.sec.gov/complaint.shtml.

47. See the Trade Compliance Center website: http://www.tcc.mac.doc.gov.

48. The SADC member states are: Angola, Botswana, the DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. The text of the Protocol is available at: http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/protcorrupt.pdf.

49. Institute for Security Studies (ISS), *A Comparative Analysis: SADC Protocol Against Corruption (2001), the AU Convention on Preventing and Combating Corruption (2003), and the UN Convention Against Corruption (2003),* Cape Town, South Africa: ISS (November 2004).

50. At time of writing, 35 countries (of 53) had signed the AU Convention, and 8 (Comoros, Libya, Lesotho, Madagascar, Mali, Namibia, Rwanda, and Uganda) had ratified it. The Convention requires 15 ratifications for entry into force. The text of the AU Convention and a list of ratifications are available at: http://www.africa-union.org/home/Welcome.htm.

51. Prevention and Combating of Corrupt Activities Act 12 of 2004, entered into force April 28, 2004; Corruption Act No 94 of 1992, entered into force July 3, 1992. For a summary of the 2004 Act, see Transparency International, *National Integrity Systems TI Country Study Report: South Africa 2004,* Berlin: Transparency International (September 2004). See also "South Africa: Tough Legislation Puts Firms in the Dock," *Africa News,* July 16, 2004.

52. See ISS Anti-Corruption Strategies Programme, "Seminar Programme: The South Africa Prevention and Combating of Corrupt Activities Act: The Challenge of Implementation," Leriba

Lodge, Centurion, Pretoria, November 29–30, 2004, available at: http://www.iss.co.za/SEMINARS/2004/2911programme.pdf.

53. In the recent case of *State v. Schabir Shaik*, which led to the dismissal of South African Deputy President Jacob Zuma on June 14, 2005, the accused were found guilty on charges amounting to bribery under the Corruption Act of 1992, not the more recent Act, which had not entered into force at the time the crimes were committed. See *The State versus Schabir Shaik & 11 Others*, Case No: CC27/04, Judgment 31 May 2005.

54. Fiona Darroch, *The Lesotho Corruption Trials: A Case Study*, prepared for Transparency International (May 2003), 5. On file with the Justice Initiative.

55. See Tom Mbakwe, "Lesotho: No Business as Usual," *New African,* November 2003, 26.

56. Darroch, *The Lesotho Corruption Trials*.

57. Darroch, *The Lesotho Corruption Trials*; also L.F. Maema, Attorney General of Lesotho, "Prosecuting Bribery in Lesotho," presented at the 11th International Anti-Corruption Conference, Seoul, Republic of Korea (May 25, 2003), available at: http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=8288.

58. Maema, "Prosecuting Bribery in Lesotho," 5.

59. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime, E.T.S. No. 141, adopted November 8, 1990, entered into force September 1, 1993, Art. 6.1(a), and the United Nations Convention Against Transnational Organized Crime, U.N. Doc A/55/383, adopted November 15, 2000, entered into force September 29, 2003, ("the Palermo Convention"), Art. 6.1.

60. United Nations General Assembly, *Special Session on the World Drug Problem*, Fact Sheet 5: Money Laundering (June 8–10, 1998), available at: http://www.un.org/ga/20special/presskit/themes/money-5.htm.

61. See 18 U.S.C. 1956(c)(7) (2002). Predicate offenses that can lead to a prosecution for money laundering include robbery, bribery, counterfeiting, arms exports, computer fraud, and narcotics violations, among others. See also the Money Laundering Control Act of 1986, 18 U.S.C. 1956 (2000) (original version at Pub. L. No. 99-570, 100 stat. 3207-18 (1986)). The Bank Secrecy Act contains the requirement that banks must report all such transactions. See Bank Secrecy Act, 12 U.S.C. 1830, 1831 (2000) (original version at Pub. L. No. 91-508, 84 Stat. 1114 (1970)). For commentary, see Elwood Earl Sanders, Jr. and George Edward Sanders, "The Effect of the USA Patriot Act on the Money Laundering and Currency Transaction Laws", 4 *Rich. J. Global L. & Bus.* 47 (2004). On the constitutionality of U.S. money laundering laws see, for example, *United States v. Antzoulatos* 962 F2d 720 (CA7 Wis, 1992), cert denied 506 US 919 (1992).

62. 18 U.S.C. 1956. In some cases, proceeds may also be forfeitable under 18 U.S.C. 981-985 (2000) (detailing civil and criminal forfeiture provisions). "Proceeds" as used in the statute is not limited to cash or money, but includes anything that results or accrues from the transaction. On the USA Patriot Act, see 18 U.S.C. 1956(c)(7)(B) (2002) and 18 U.S.C. 1960 (2002).

63. W. Michael Reisman, "Harnessing International Law to Restrain and Recapture Indigenous Spoliations," 83 *Am. J. Int'l. L.* 57 (1989), 58 (describing how "bank secrecy laws have shielded spoliations").

64. Article 7 of the OECD Anti-Bribery Convention.

65. "Sovereign immunity" is the controversial doctrine that sitting public officials are immune from prosecution. For a recent discussion, see Philippe Sands, "After Pinochet: the Role of National Courts," in Philippe Sands, ed., *From Nuremberg to The Hague*, Cambridge: Cambridge University Press (2003).

66. See the FATF website: http://www.fatf-gafi.org. FATF was established by the G-7 Summit in 1989. The Task Force was convened from the G-7 member states, the European Commission, and eight other countries. As of this writing, it has 33 members.

67. Ilias Bantekas, "The International Law of Terrorist Financing," 97 *Am. J. Int'l L.* 315 (2003), 319.

68. Directive on the "Prevention of the Use of the Financial System for the Purpose of Money Laundering" (1991).

69. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990, E.T.S. No. 141, available at: http://conventions.coe.int/treaty/en/Treaties/Html/141.htm.

70. United Nations Global Programme Against Money Laundering, available at: http://www.imolin.org/gpml.htm.

71. Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses, AG/RES 1656, Organization of American States, 2002, available at: http://www.cicad.oas.org/LavadoActivos/eng/MODEL_REGUALTIONS.htm.

72. For an informative overview of the programs of each of these institutions, see Kathleen A. Lacey and Barbara Crutchfield George, "Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms," 23 *NW. J. Int'l L. & Bus.* 263 (2003).

73. The FATF's Forty Recommendations (2003) are available at: http://www1.oecd.org/fatf/40Recs_en.htm.

74. Alison S. Bachus, "Note: From Drugs to Terrorism: The Focus Shifts in the International Fight against Money Laundering after September 11, 2001," 21 *Ariz. J. Int'l & Comp. Law* 835 (2004), 849.

75. 31 U.S.C. §§ 5311-5326 (2002). As defined in the Bank Secrecy Act, the term "financial institution" includes a number of entities such as banks, mutual funds, insurance companies and "persons involved in real estate closings and settlements."

76. See 18 U.S.C. 1956(c)(7)(B) (2002) and 18 U.S.C. 1960 (2002).

77. 18 U.S.C. 1956(b)(2).

78. See, for example, FATF's "annual review of non-cooperative countries or territories," available at: http://www.fatf-gafi.org.

79. Justice Initiative interviews with Arvind Ganesan and Ian Gary. See Silverstein, "Oil Boom Enriches African Ruler."

80. U.S. Senate Report, 37.

81. U.S. Senate Report, 3, 7, 37-55, 96-106.

82. Marcy Gordon, "SEC Eyes Oil Payments to Equatorial Guinea," *Associated Press*, August 11, 2004. The bank had also failed to report suspicious transactions in accounts controlled by Saudi diplomats in Washington.

83. Gordon, "SEC Eyes Oil Payments to Equatorial Guinea."

84. Terence O'Hara, "Judge Backs Riggs's $16 Million Plea Deal" *Washington Post*, March 30, 2005, E02. See also U.S. Department of Justice (DOJ) Press Release, "Riggs Bank Enters Guilty Plea and Will Pay $16 Million Fine for Criminal Failure to Report Numerous Suspicious Transactions", January 27, 2005 and DOJ Press Release, "Riggs Bank sentenced to pay $16 million fine for criminal violation of the Bank Secrecy Act," March 29, 2005.

85. Experts consulted by the Justice Initiative in researching the present report.

86. Coalition for International Justice, *Following the Money 101: A Primer on Money-Trail Investigations*, Washington, D.C.: Coalition for International Justice (February 2004), 3, available at: http://www.cij.org/pdf/Following_the_Money.pdf.

87. In many civil law countries, private parties may also join a civil complaint to an ongoing criminal investigation.

88. See Terence O'Hara, "Allbrittons, Riggs to Pay Victims of Pinochet," *The Washington Post,* February 26, 2005, A01.

89. PNC Financial Services Group, Inc., Amendment No. 2 to Registration Statement under the Securities Act of 1933 on Form S-4, filed with the Securities and Exchange Commission on March 30, 2005. See Al Goodman, "Pinochet: U.S. Urged to Charge Bank," *CNN.com*, September 16, 2004.

90. Spanish Penal Code, Art. 301.2.

91. Spanish Penal Code, Art. 301.4.

92. U.S. Senate Report, 54.

93. U.S. Senate Report, 6.

94. For example, the Bank of Credit and Commerce International (BCCI), at the center of one of the world's worst banking scandals, was incorporated in Luxembourg. See *Bank of Credit and Commerce International (BCCI) Investigation Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong. 69 (1991); See also, Robert T. Kudrle and Lorraine Eden, "The Campaign Against Tax Havens: Will It Last? Will It Work?" 9 *Stan. J.L. Bus. & Fin.* 37 (2003).

95. Luxembourg Criminal Code, Art. 506-1.

96. OECD Working Group, *Luxembourg–Phase 2*, 23.

97. See the Eastern and Southern Africa Anti-Money Laundering Group website: http://www.esaamlg.org. As of this writing, the website carries no information on evaluations.

98. Charles Goredema, *Money Laundering in Southern Africa: Incidence, Magnitude and Prospects for its Control*, Occasional Paper 92, Institute for Security Studies (October 2004).

99. Experts consulted by the Justice Initiative in researching the present report. See generally, FATF *Annual Report 2002–2003* (June 2003), 11–14, available at: http://www1.oecd.org/fatf/pdf/AR2003_en.pdf.

100. For provisions referred to here, see Chapter 1 of the Prevention of Organised Crime Act of 1998, available at: http://www.acts.co.za/prev_org_crime/index.htm.

101. The FATF reports that South Africa has had only two money laundering convictions since 1996. FATF *Annual Report*, 11.

102. The Financial Intelligence Centre, established by the Financial Intelligence Centre Act, section 29, entered into force February 2003. Prior to the FICA, these reports were made to the South African Police Service (SAPS). FATF, *Annual Report*, 12.

103. FATF *Annual Report*, 11.

104. Federal Office of Justice (FOJ), Switzerland, "Abacha Funds to Be Handed over to Nigeria; Majority of Assets Obviously of Criminal Origin" Press Release (August 18, 2004), available at:

http://www.ofj.admin.ch/themen/presscom/2004/20040818-1-e.htm. Other sources for the information in this section include: "Abacha Loot: Switzerland Gives Condition for Return," *This Day*, May 27, 2005, available at: http://allafrica.com/stories/200505270764.html; "Nigeria: Switzerland Hands Back Nearly $500 million of Abacha's Loot," *IRIN News*, August 19, 2004, available at: http://www.irinnews.org/report.asp?ReportID=42764. "Switzerland to Give Back Abacha Millions," *BBC News*, April 17, 2002, available at: http://news.bbc.co.uk/1/hi/world/africa/1935646.stm; "Luxembourg Freezes Abacha Accounts," *BBC News*, May 9, 2000, available at: http://news.bbc.co.uk/1/hi/world/africa/741506.stm; "Nigeria: Swiss Slow to Return Money," *CNN*, May 29, 2005, available at: http://edition.cnn.com/2005/WORLD/africa/05/29/nigeria.switz.ap. See also Robin Hodess, "Introduction: What is Political Corruption" in *Global Corruption Report 2004* (Berlin: Transparency International, 2004): 13.

105. For an overview of the Abacha family's activities and legal troubles since the death of Sani Abacha, see "Living in Limbo" in *This Day*, April 22, 2005. For an informative summary of Nigeria's efforts, see the congressional testimony of Jack A. Blum, partner in the Washington, D.C. law firm of Lobel, Novins, and Lamont, "Recovering Dictators' Plunder: House Subcommittee on Financial Institutions and Consumer Credit, Committee on Financial Services," U.S. House of Representatives, May 9, 2002.

106. Swiss Anti-Money Laundering Act of 1997, RS 955.0, Art. 9. See FOJ, "Abacha Funds to Be Handed over to Nigeria."

107. FOJ, "Abacha Funds to Be Handed over to Nigeria." Also "Vorzeitige Herausgabe der Abacha-Gelder durch Rekurs blockiert," in *Associated Press Worldstream* (German), September 21, 2004, and Oliver Bilger, "Schweizer Organisationen misstrauen Rueckzahlung," *Spiegel Online*, August 25, 2004.

108. Margaret Studer, "Swiss Regulators Cite Credit Suisse for Nigerian Ties-Bank Accepted Millions from Late Military Leader," *Wall Street Journal Europe*, September 5, 2000.

109. See Jersey's *Attorney General's Review 2003*, (2004) 5–6, available at: http://www.lawofficers.gov.je/content/pdf/Annual_Review_2003.pdf; see also Jersey Financial Services Commission, "Abacha Investigation News Release" (March 1, 2004), available at: http://www.jerseyfsc.org/generalinfo/releas134.html.

110. See also the UN Office on Drugs and Crime's *Anti-Corruption Tool Kit*, Chapter 8, "International Legal Cooperation," available at: http://www.unodc.org/unodc/en/corruption_toolkit.html.

111. Jack A. Blum, "Recovering Dictators' Plunder."

112. See Linda J. Candler, "Tracing and Recovering Proceeds of Crime in Fraud Cases: A Comparison of U.S. and U.K. Legislation," 31 *Int'l Law* 3 (1997).

113. Jack A. Blum, "Recovering Dictators' Plunder."

114. FOJ, "Abacha Funds to Be Handed over to Nigeria."

115. "Abacha-Gelder Nigerianische NGO: Kein Regierungsmonopol fuer Abacha-Gelder," *Schweizerische Depeschenagentur*, October 28, 2004 and Africa Network for Environment and Economic Justice, *Report of a Two-Day International NGO Conference on Stolen Wealth from Nigeria*, Abuja, Nigeria, October 25–26, 2004, available through http://www.aneej.org.

III. Civil Causes of Action

1. 28 U.S.C. § 1350. The ATCA, adopted by Congress in 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." A plaintiff must affirmatively plead jurisdiction pursuant to U.S. law and the principles of *forum non conveniens* apply, among other potential legal obstacles. For summaries of recent and ongoing ATCA cases, see the International Labor Rights Fund website (http://www.laborrights.org, under "Current Projects"); the EarthRights website (http://www.earthrights.org/resources.shtml); and the Center for Constitutional Rights website (http://www.ccr-ny.org/v2/legal/corporate_accountability).

2. Cases involving spoliation-related claims include *Doe I. v. Unocal Corp.*, 963 F. Supp. 880 (C.D.Cal. 1997); dismissed by *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) remanded by *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. Cal. 2002) vacated, rehearing, en banc, granted by *Doe v. Unocal Corp.*, 395 F.3d 978, 2003 (9th Cir. 2003) affirmed by *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. Cal. 2001) related proceeding *National Coalition Gov't of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003); *Aguinda v. Texaco*, 303 F. 3d 470, (2d Cir. 2002); *Galvis et al. v. Occidental Petroleum et al.* No. CV03-2860-WJR (C.D. Cal.) [pending]; *Bowoto v. Chevron*, No. No. C99-2506 (N.D.Cal.) [pending]; *John Doe v. Exxon Mobil Corp.*, No. 01-CV-1357 (D.D.C.) [pending].

3. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy*; *Doe v. Unocal*.

4. 124 S.Ct. 2739 (2004). Under the ATCA after *Sosa*, a common law cause of action under the "law of nations" must "rest on a norm of international character accepted by the civilized world and defined with a specificity" comparable to the well-accepted international law claims known to Congress when it enacted the ATCA in 1789.

5. Sandra Coliver, Jennie Green, and Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts*, Center for Justice and Accountability (2004). Available on the CJA website: http://www.cja.org/legalResources/AccountabilityColiverGreenHoffman.pdf.

6. Paul Chavez, "Tentative Unocal Deal Could Alter Behavior of Multinationals," *Associated Press*, December 19, 2004.

7. Chavez, "Tentative Unocal Deal Could Alter Behavior of Multinationals."

8. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2005 WL 1060353 (S.D.N.Y. May 6, 2005).

9. *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65 (2d Cir.2003).

10. Richard Meeran, "The Long Arm of Liability" *Financial Times*, November 11, 2002. Meeran, a partner at Leigh Day & Co, acted for the plaintiffs in *Lubbe & Ors v Cape Plc* (2000) 1 WLR 1545; 2 Lloyd's L. Rep 383.

11. For more on these cases, see Halina Ward, "Governing Multinationals: the Role of Foreign Direct Liability," Briefing Paper for The Royal Institute of International Affairs, New Series No. 18 (February 2001).

12. *Ngcobo and Others v. Thor Chemicals Holdings Ltd.*, TLR (10/11/95). See generally Ward, "Governing Multinationals."

13. See, for example, *Connelly (AP) v. RTZ Corporation plc.*, (1997) 4 All ER 335, 3 WLR 373.

14. *Lubbe & Ors v. Cape Plc* (2000) 1 WLR 1545; 2 Lloyd's L. Rep 383.

15. Cal. Bus & Prof Code §17200.

16. See *John Doe I et al. v. Unocal Corp. et al.* 6/7/02 BC 237 980 (County of LA Sup. Ct.).

17. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901a, 84 Stat. 922, 941 [codified as amended at 18 U.S.C. §§ 1961–1968 (1988)].

18. 18 U.S.C. § 1961.

19. 18 U.S.C. § 1962(a). See, for example, Stephen Warneck, "Note, A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations," 78 *B.U. L. Rev.* 177 (1998), 197–205.

20. Justice Initiative interview with ATCA litigator Judith Brown Chomsky.

21. See, for example, Randy D. Gordon, "Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. § 1962(c)," 39 *U.S.F.L. Rev.* 319 (2005).

22. Justice Initiative interview with Judith Brown Chomsky.

23. These include *John Doe I. v. Unocal* (plaintiff's RICO suit dismissed for lack of extraterritorial subject matter jurisdiction); and *Wiwa v. Royal Dutch Petroleum Co., et al.* (the RICO suit is still going ahead).

24. *Bowoto v. Chevron* C99-2506 (N.D.Cal. 2002). The complaint is available online at: http://www.earthrights.org/chevron/4thamendedcomplaint.doc.

25. *Bowoto v. ChevronTexaco Corporation* 312 F. Supp. 2d 1229 (N.D. Cal. 2004). The company was known as ChevronTexaco from 2001 to 2005; it reverted back to the Chevron Corporation in early 2005.

26. See Rick Jurgens, "Nigerian Lawsuit Steps Up A Notch," *Contra Costa Times*, March 26, 2004.

27. For example, see Ariz. Rev. Stat. Ann. § 13-2312 (1978 & Supp. 1983); Cal. Penal Code § 186 (West Supp. 1984); Colo. Rev. Stat. § 18-17-101 (Supp. 1983); Conn. Gen. Stat. Ann. § 53-393 (West. Supp. 1984); Fla. Stat. Ann. § 895-1 (West Supp. 1983); Ga. Code Ann. § 16-4-1 (1981); Hawaii Rev. Stat. § 842-1 (1976); Idaho Code § 18-7801 (Supp. 1984); Ill. Rev. Stat. Ch. 56, § 1652 (Smith-West Supp. 1968–1985) (Limited To Narcotics); Ind. Code Ann. § 35-45-6-1 (Burns Supp. 1984–85); La. Rev. Stat. Ann. § 15:1351-56 (West Supp. 1985) (Limited To Narcotics); Miss. Code Ann. § 97-43-1 (Supp. 1984); Nev. Rev. Stat. § 207.350 (1983); N.J. Stat. Ann. § 2c:41 (West 1983); N.M. Stat. Ann. § 30-42-1 (Supp. 1980); N.D. Cent. Code § 12.1-06.1 (Supp. 1983); Or. Rev. Stat. § 166.715 (1983); 18 Pa. Cons. Stat. § 911 (1983); R.I. Gen. Laws § 7-15-1 (Supp. 1984); Utah Code Ann. § 76-10-1601 (Supp. 1983); Wash. Rev. Code Ann. § 9a.83 (Supp. 1985); Wis. Stat. Ann. § 946.80 (West Supp. 1984–85).

28. Michael P. Sullivan, "Civil Action for Damages under State Racketeer Influenced and Corrupt Organizations Acts (Rico) for Losses from Racketeering Activity," 62 *A.L.R.*4th 654 (1988).

29. Civil Law Convention on Corruption, CETS No. 174, Strasbourg, Nov. 4, 1999, available at: http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm.

30. Civil Law Convention on Corruption, Art. 1.

31. Civil Law Convention on Corruption, Art. 13.

32. Civil Law Convention on Corruption, Art. 14.

33. Council of Europe, *Explanatory Report to the Civil Law Convention on Corruption*, Section 87. The Justice Initiative is grateful to Sonja Starr for her research on this section.

34. Sixteen countries have signed but not ratified the Convention. Finland, Greece, and Sweden are the only pre-2004 EU members to have ratified to date.

35. Op Atty Gen: § 11 of the Securities Act (15 USCA § 77k).

36. Op Atty Gen: § 20A of the Exchange Act (15 USCA § 78t-1).

37. Riggs National Corp, Quarterly Report on Form 10Q for the period ended June 30, 2004 and filed on August 9, 2004.

38. Moreover, reform organizations might generate fees for their services, absent any obvious conflicts of interest or appearances of conflicts of interest.

39. See, for example, Terrence Guay, Jonathan P. Doh and Graham Sinclair "Non-governmental Organizations, Shareholder Activism, and Socially Responsible Investments: Ethical, Strategic, and Governance Implications," *Journal of Business Ethics* (June 1, 2004).

40. The Liberian NGOs are: The Association of Environmental Lawyers (Green Advocates), The Liberia Democracy Watch (LDW), The Foundation of International Dignity (FIND), The National Human Rights Center of Liberia (NHRCL), The Foundation for Human Rights (FOHRD), and The Center for Democratic Empowerment (CEDE). Sources for this case are: "Supreme Court Halts Iron Ore Shipment," *All Africa*, August 30, 2004; "Assembly Orders Probe into Iron Ore Sale, Report Expected in Two Weeks," *The News* (Nigeria), September 1, 2004; "Bryant Visits Buchanan Amidst Controversies over Iron Ore Deal, Local Authority :Post," *The News* (Nigeria), September 3, 2004; "Make Iron Ore Deal Public," *The News* (Nigeria), September 3, 2004; "Iron Ore Deal Controversy Reaches Full Bench at the Supreme Court," *The News* (Nigeria), September 6, 2004; "Checks and Balances: Will the Supreme Court Flex Its Muscles?" *All Africa*, September 7, 2004; Steve Swindells, "Hands Off Our Ore," *Metal Bulletin*, September 13, 2004; "Supreme Court Order Violated Again?" *All Africa*, September 14, 2004; "Bizarre Account of Iron Ore Deal," *All Africa*, September 15, 2004; George Bardue, "Iron Ore Saga Deepens as NTGL Comes Under Fire," *The News* (Nigeria), October 8, 2004; "The Bill is a Sham," *All Africa*, October 19, 2004.

41. The "Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties" was signed in August 2003 under UN auspices. It was entered into by the parties to Liberia's civil war following the departure of former President Charles Taylor, and establishes a National Transitional Government of Liberia for an interim period until a new government is elected. Elections are due in October 2005.

42. Comprehensive Accra Peace Agreement, Art. 17. See "Checks and Balances: Will the Supreme Court Flex Its Muscles?" *All Africa*, September 6, 2004.

43. "Interest Group Wants Sanction On NTGL," *All Africa*, October 8, 2004.

44. "Interest Group Wants Sanction On NTGL," *All Africa*, October 8, 2004.

45. Transparency International, "Russian, Chinese, Taiwanese and S. Korean companies widely seen using bribes in developing countries," Press Release for the Bribe Payers Index 2002, May 14, 2002.

46. African Charter on Human and Peoples' Rights, Art. 21, according to which people "shall freely dispose of their wealth and natural resources," "dispossessed people have a right to recovery of the property and compensation," and states have the obligation to avoid "foreign economic exploitation" that would prevent its people from "fully benefit[ing] from the advantages derived from their national resources."

47. Decision Regarding Communication No. 155/96, African Comm. Hum. & Peoples' Rights, Done at the 30th Ordinary Session, Held in Banjul, Gambia from 13–27 October 2001, para. 1. Available at: http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

48. Communication No. 155/96.

49. See Human Rights Watch, *The Niger Delta: No Democratic Dividend*, Human Rights Watch (October 2002), at: http://www.hrw.org/reports/2002/nigeria3.

50. Equatorial Guinea ratified the African Charter on Human and Peoples' Rights on April 7, 1986.

51. U.S. Senate Report, 3, 7, and 96-106.

52. African Charter on Human and Peoples' Rights, Art. 56(5).

53. Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on October 6, 1995, Rule 118(2), Doc. ACHPR/RPT/XIX, available at: http://www1.umn.edu/humanrts/africa/rules.htm.

54. *Jawara v. The Gambia*, Comm Nos. 147/95, 149/96, para. 31, 1999-2000 Afr. Ann. Act. Rep., Annex V.

55. Justice Initiative interviews with Bern Johnson, Executive Director of E-LAW US and Jen Gleason, E-LAW US Staff Attorney.

IV. Access to Information and Transparency Mechanisms

1. The Open Society Justice Initiative recently developed a monitoring tool and conducted a survey of five countries to assess whether existing national laws meet international standards and whether they are implemented in conformity with these standards, available at: http://www.justiceinitiative.org/activities/foifoe/foi. Helen Darbishire, Justice Initiative senior program manager, freedom of information and expression, contributed significantly to the following section.

2. Richard Calland and Catherine Musuva, *Measuring Transparency in the Oil and Gas Sectors—Home Government Indicators: Access to Information*, Draft Report Prepared by the Institute for Democracy in South Africa on Behalf of Save the Children UK (February 2005), 3, on file with the Justice Initiative. See also Save the Children's final report, *Beyond the Rhetoric—Measuring Revenue Transparency: Home Government Requirements for Disclosure in the Oil and Gas Industries* Annex II, Save the Children UK (March 2005).

3. Recently, for example, the *Financial Times* obtained information relating to the alleged bribery by a subsidiary of Halliburton in the Nigerian consortium case (see page 23), through a request for information from the government credit agency, the Export Credit Guarantee Department (ECGD).

The papers showed that the ECGD had made little attempt to investigate the allegations and revealed "an unusual degree of coordination between ECGD and Halliburton in their response to the bribery allegations." Michael Peel and Thomas Catan, "UK Agency Failed to Tackle Nigeria Bribes Claim," *Financial Times*, June 22, 2005, 9.

4. UK Freedom of Information Act 2000 (entered into force January 1, 2005), Section 43.

5. Information Commissioner, "Freedom of Information Act Awareness Guidance No 5," available on the Commissioner's website: http://www.informationcommissioner.gov.uk.

6. In Ireland, for example, the Information Commissioner ruled in January 2003 that once a contract has been awarded, "the successful tender information lost confidentiality with respect to the fee rates and other details necessary to understand the nature of the services contracted for." See Office of the Information Commissioner, Case 99183–McKeever Rowan Solicitors and the Department of Finance (decision of January 21, 2003), available at: http://www.oic.gov.ie/24c2_3c2.htm.

7. See Save the Children, *Beyond the Rhetoric*. The countries are: Australia, Canada, France, Italy, the Netherlands, Norway, Russia, South Africa, the UK, and the United States.

8. See South Africa's Promotion of Access to Information Act, Section 50 on the Right of Access to Records of Private Bodies, online at: http://www.acts.co.za/prom_of_access_to_info/index.htm. A second phase of the Save the Children survey will focus on access to information laws in natural resource-rich host countries.

9. For a list of global freedom of information laws, including relevant constitutional provisions, visit the Justice Initiative website: http://www.justiceinitiative.org/activities/foifoe/foi.

10. See, for example, Mexican Federal Electoral Tribunal, case SUP-JDC-117/2001 of 30 January 2002, brought by Partido Verde Ecologista de México (Green Party of Environmentalists of Mexico).

11. The people's right to public information has been upheld routinely by the Supreme Court of the Philippines, for example, in 1976: "(T)here can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decisionmaking if they are denied access to information of general interest." See *Baldoza v. Dimaano*, Adm. Matter No. 1120-MJ, 5 May 1976. Section 7 of the Bill of Rights of the Constitution of the Philippines reads: "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to limitations as may be provided by law."

12. Constitution of the Republic of Liberia, Article 15(a) and (c).

13. See Extractive Industries Review, *Striking a Better Balance, Volume I: The World Bank Group and Extractive Industries–The Final Report of the Extractive Industries Review*, Washington, D.C.

(December 2003), and *Striking a Better Balance—The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review. World Bank Management Response,* (September 17, 2004), both available on the World Bank Group Oil, Gas, Mining, and Chemicals website: http://www.worldbank.org/ogmc.

14. See Heike Mainhardt-Gibbs, *Revenue Transparency in the Extractive Industries: The Role of International Financial Institutions,* Washington, D.C.: Bank Information Center (November 2004).

15. Catholic Relief Services and the Bank Information Center, *Chad's Oil: Miracle or Mirage? Following the Money in Africa's Newest Petro-State* (February 2005), 3, available at: http://advocacy.crs.org/oil. According to the report: "While some information on Chad's oil revenues is made public, details regarding the calculation of revenues and many key agreements between the oil companies and the government remain secret. Furthermore, legal safeguards contain notable loopholes. For example, all indirect revenues—including income taxes on the oil companies—will go directly into general government coffers. These indirect revenues may amount to more than $3 billion over the next 25 years. In addition, the revenue management law does not cover any revenues from oil produced outside the three original ... fields. These and other weakness mean that it is difficult for citizens to verify the accuracy of revenue information disclosed and that much oil revenue will fall outside of the jurisdiction of the law and the control of the [monitoring] Collège."

16. Petroleum Revenues Base Law (Law No. 8/2004 of December 30, 2004). See the Earth Institute website: http://www.earthinstitute.columbia.edu/cgsd/STP.

17. See the EITI website: http://www.eitransparency.org.

18. In September 2004, in a letter addressed to the World Bank, the Government of Equatorial Guinea stated its commitment to implementing EITI and requested the technical assistance of the Bank. See the EITI web page on Equatorial Guinea, available at: http://www.eitransparency.org/countryupdates/equatorialguineacountryupdate.htm.

19. The EITI may be seen as problematic both because it is voluntary and because it effectively holds countries to lower transparency standards than do international financial institutions like the IMF. Arvind Ganesan, Human Rights Watch, Panel Discussion at Fordham University Law School, "The Crude Reality: Africa's Oil Boom and the Poor," New York City, September 27, 2004. See also Arvind Ganesan and Alex Vines, "Engine of War: Resources, Greed and the Predatory State" in Human Rights Watch, *World Report 2004*, available at: http://hrw.org/wr2k4/download/14.pdf.

20. Adhering countries are the 30 OECD members plus nine nonmember countries: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania, and Slovenia. The OECD Guidelines for Multinational Enterprises are available at: http://www.oecd.org/about/0,2337,en_2649_34889_1_1_1_1_1,00.html.

21. In 2000, the UN Security Council authorized the creation of the Panel of Experts to undertake this investigation. Final report of the UN Panel of Experts Investigating the Illegal Exploitation of the Natural Resources and Other Forms of Wealth of the Democratic Republic of the

Congo (DRC), S/2002/1146, Annex III: “Business enterprises considered by the Panel to be in violation of the OECD Guidelines for Multinational Enterprises,” available at: http://www.un.dk/doc/S20021146.pdf. The report was vilified by the corporations named.

22. OECD Policy Brief on the Guidelines for Multinational Enterprises, June 2003, available at: http://www.oecd.org/dataoecd/52/38/2958609.pdf.

23. See the Publish What You Pay website: http://www.publishwhatyoupay.org. In addition, Revenue Watch, an Open Society Institute initiative, generates and publicizes research, information, and advocacy on the investment and disbursal of revenues, and how governments and extraction companies are responding to demands for accountability in Iraq and the Caspian basin: http://www.revenuewatch.org.

24. The campaign’s background information is available on its website at: http://www.publishwhatyoupay.org/english/background.shtml.

V. Conclusion

1. Nancy Birdsall, Dani Rodrik, and Arvind Subraiman, “How to Help Poor Countries,” *Foreign Affairs*, July/August 2005, 136.

2. This suggestion was made by Jack Blum in his testimony before the U.S. Congress. Jack A. Blum, “Recovering Dictators’ Plunder.”

Open Society Justice Initiative

The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.

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The Open Society Institute, a private operating and grantmaking foundation, aims to shape public policy to promote democratic governance, human rights, and economic, legal, and social reform. On a local level, OSI implements a range of initiatives to support the rule of law, education, public health, and independent media. At the same time, OSI works to build alliances across borders and continents on issues such as combating corruption and rights abuses. OSI was created in 1993 by investor and philanthropist George Soros to support his foundations in Central and Eastern Europe and the former Soviet Union. Those foundations were established, starting in 1984, to help countries make the transition from communism. OSI has expanded the activities of the Soros foundations network to other areas of the world where the transition to democracy is of particular concern. The Soros foundations network encompasses more than 60 countries, including the United States.

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WHEN RESOURCE EXTRACTION companies can obtain oil, diamonds, gold, coltan, timber, and other natural resources through covert contacts with unaccountable government officials, the losers are the people in the communities where the wealth originates. The power of corrupt governments frequently derives from monopoly access to natural wealth, bolstered by foreign government and industry allies. Local populations suffer the effects of the "resource curse," including the destruction of their immediate environment and the social and economic devastation that follows: arbitrary eviction and dispossession, unlawful arrest or harassment, and neglect of health care, housing, and education.

This report reviews some of the main legal instruments used to date to combat natural resource corruption—as well as new, untested legal remedies that appear promising. Focusing on resource spoliation in Africa, it provides case studies to demonstrate what has and has not worked. The report treats the "home countries" of resource extraction companies separately from the "host countries" where they operate. It looks at both criminal and civil means of redress. Although corruption in transnational resource extraction is generally subject to inadequate legal safeguards, the report identifies opportunities for civil society action.

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