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Property Rights and the Resource Curse

Because of a major flaw in the system of international trade, consumers buy stolen goods every day. Consumers may buy stolen goods when they buy gasoline and magazines, clothing and cosmetics, cell phones and laptops, perfume and jewelry. The raw materials used to make many of these goods have been taken—sometimes by stealth, sometimes by force—from some of the poorest people in the world. These goods flow through the system of global commerce under cover of a rule that is little more than a cloak for larceny.

The plainest criticism of global commerce today is not that it violates some abstract distributive standard, but that it violates property rights. The international commercial system breaks the first rule of capitalism in transporting stolen goods, and does so on an enormous scale. The priority in reforming global commerce is not to replace “free trade” with “fair trade.” The priority is to create trade where now there is theft.

Ending the global traffic in stolen goods will require no new theories or novel international agencies. The principles of lawful trade are well understood, and global commerce has already created powerful institutions to enforce property rights. What is required is to use these institutions to bring all international resource sales into the system of enforced market rules. This article sets out a framework for doing this.

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I. THE RESOURCE CURSE

To understand how stolen goods reach consumers, we can trace their raw materials back to the countries where the thefts take place. Economists have noticed a peculiar phenomenon in some less developed countries, which is a symptom of the violation of property rights that concerns us. They have named this the *resource curse*. Economists have found that many countries rich with natural resources are full of very poor people. For many less developed countries, natural resources have become an obstacle to prosperity instead of its foundation.

The resource curse afflicts many countries that derive a large portion of their national income from exporting high-value extractive resources such as oil, natural gas, and diamonds. Less developed countries that gain a large portion of their national incomes from these extractive resources are subject to three overlapping “curses.” They are more prone to authoritarian governments, they are at a higher risk for civil conflict, and they exhibit lower rates of growth. Several causal pathways explain these surprising correlations between natural resources and national misery.

First, resources correlate with authoritarianism.¹ Authoritarian regimes can greatly increase their power by exploiting natural resources. Oil, gas, and minerals fetch high bounties: whoever controls their sale often receives billions of dollars per year. A strongman or junta that seizes this revenue stream can use the money to pay for extra security forces, spies, and weapons to put down domestic challenges to their rule.² The money from resource sales can also free authoritarians from raising revenues through taxation, and so release them from financial accountability to the citizenry.³ Authoritarians flush with resource

1. Wantchekon surveyed 141 countries over a forty-year period and found that a 1 percent increase in natural resource dependence can increase the likelihood of authoritarian government by nearly 8 percent. Leonard Wantchekon, “Why Do Resource Dependent Countries Have Authoritarian Governments?” *Journal of African Finance and Economic Development* 5.2 (2002): 57–77.

2. For example, the repressive Burmese regime remains in power partly by selling the country’s natural gas to Thailand and using these revenues to buy weapons from India. The regime is being protected from UN sanctions by China in exchange for access to Burma’s large energy reserves.

3. Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley, Calif.: University of California Press, 1997), pp. 58–64.

money can also use these funds as sources of patronage, bribing local leaders and buying off nascent resistance movements.⁴

The second resource curse is civil conflict: civil war and coup attempts.⁵ Many rebel groups have sustained their expensive armies by seizing some territory and selling off its resources. Other military leaders have sold off rights to future exploitation of territory they hope to capture.⁶ The presence of oil, gas, and minerals in a country increases the risk of civil war, and these resources have played a major role in sustaining some of the longest-running and most ferocious conflicts in recent history.⁷ As for coup attempts, they become more likely in countries that contain one major revenue source (like offshore oil) that will enrich whoever controls the national government.⁸ The contribution of extractable resources to civil conflict has been affirmed by academics, nongovernmental organizations, and UN Security Council resolutions.⁹

4. See the literature cited in Michael L. Ross, "Does Oil Hinder Democracy?" *World Politics* 53.3 (2001): 325–61, at pp. 333–34. See also Nathan Jensen and Leonard Wantchekon, "Resource Wealth and Political Regimes in Africa," *Comparative Political Studies* 37 (2004): 816–41; Daron Acemoglu, James Robinson, and Thierry Verdier, "Kleptocracy and Divide-and-Rule: A Model of Personal Rule," MIT Department of Economics Working Paper No. 03-39.

5. On resources and civil conflict see Paul Collier and Anke Hoeffler, "On Economic Causes of Civil War," *Oxford Economic Papers* 50 (1998): 563–73, and "Greed and Grievance in Civil War," *Oxford Economic Papers* 56 (2004): 563–95; Michael L. Ross, "A Closer Look at Oil, Diamonds, and Civil War," *Annual Review of Political Science* 9 (2006): 265–300.

6. For example, Pol Pot supported the Khmer Rouge army by capturing a strip of Cambodian territory rich in rubies and sapphires; and Sassou of Congo-Brazzaville sold future drilling rights to a French oil company to support his private militia. See Michael L. Ross, "The Natural Resource Curse: How Wealth Can Make You Poor," in *Natural Resources and Violent Conflict: Options and Actions*, ed. Ian Bannon and Paul Collier (World Bank, 2003), pp. 1–37; and Ross, "Booty Futures," working paper (2005).

7. For example, the conflict in the Democratic Republic of Congo, 1998 to 2002, which caused approximately 3.3 million deaths.

8. Philippe Le Billon, "The Political Ecology of War: Natural Resources and Armed Conflicts," *Political Geography* 20 (2001): 561–84; Paul Collier and Anke Hoeffler, "Coup Traps: Why Does Africa Have So Many Coups d'Etat?" (Centre for the Study of African Economies, 2005).

9. See, for example, Oxfam, "Africa at the Crossroads," Oxfam Briefing Paper 19; Global Witness, *The Sinews of War: Eliminating the Trade in Conflict Resources* (London: Global Witness, 2006); UN Security Council Resolutions 1625 (2005) and 1653 (2006).

Civil conflict is one reason that resource-rich countries are subject to the third resource curse: lower rates of growth.¹⁰ Collier and Hoeffler estimate that it takes twenty-one years for a country to catch up to the GDP it would have had without a civil war.¹¹ Even without civil conflict, resource-dependent economies are more vulnerable to growth-retarding economic shocks, adverse exchange-rate effects, and corruption.¹² The fact that these resources can be extracted either by small groups of foreign experts (e.g., with oil) or unskilled domestic laborers (e.g., with alluvial diamonds) gives the regimes that control the resource revenues little incentive to invest in the health or education of the people. The more a country relies on exporting minerals, the worse its standard of living tends to be.¹³ Resource dependence is correlated, for example, with higher rates of child malnutrition, lower healthcare and education budgets, higher illiteracy rates, higher poverty rates, and lower life expectancy.¹⁴

Abundant resources are neither necessary nor sufficient for authoritarian repression, civil conflict, or low growth. For example, Eritrea has a repressive government but few easily saleable resources, while oil-rich Norway is decent and stable. Social scientists are still debating how to predict exactly where the resource curse will strike.¹⁵ What is so dramatic about the resource curse is how, when it hits, the wealth of a country bypasses its citizens and in fact contributes to their suffering.

One example is Nigeria. From 1970 to 2000 the Nigerian government received very large revenues (around \$300 billion) from oil sales. Yet during this period the percentage of Nigerians living in extreme poverty

10. On resources and growth, see Jeffrey Sachs and Andrew Warner, "Natural Resource Abundance and Economic Growth," NBER Working Paper no. 5398 (1995); Sachs and Warner, "The Curse of Natural Resources," *European Economic Review* 45 (2001): 827–38; Richard Auty, "Introduction and Overview," in *Resource Abundance and Economic Development*, ed. Richard Auty (Oxford: Oxford University Press, 2001), pp. 3–16.

11. Paul Collier and Anke Hoeffler, "Civil War," working paper (2005), p. 24.

12. Macartan Humphreys, Jeffrey Sachs, Joseph Stiglitz, "Introduction" to their edited volume *Escaping the Resource Curse* (New York: Columbia University Press, 2007): 1–20.

13. Michael L. Ross, *Extractive Sectors and the Poor* (New York: Oxfam America, 2001), p. 8.

14. Ross, *Extractive Sectors and the Poor*; Thorvaldur Gylfason, "Natural Resources, Education, and Economic Development," *European Economic Review* 45.6 (2001): 847–59.

15. Andrew Rosser, "The Political Economy of the Resource Curse: A Literature Survey," IDS Working Paper 268 (2006).

(\$1 per day) increased from 36 percent to almost 70 percent.¹⁶ Meanwhile inequality skyrocketed, and corruption was everywhere evident in the Nigerian government.¹⁷ A second example is Sierra Leone and its “blood diamonds.” In the 1990s insurgents recruited child soldiers to scare much of the population away from the country’s rich diamond fields with a brutal campaign of shootings and machete amputations. The rebels enslaved many of the remaining locals to work the fields, selling the diamonds to international corporations like De Beers and spending the proceeds on weapons with which they nearly toppled the government. A third example is the Democratic Republic of Congo. Right now more than a thousand people die every day in the chaos caused by militias fighting over the minerals used to make chips for cell phones and laptops. These militiamen are raping women with bayonets and clubs as a tactic of war.¹⁸

Equatorial Guinea deserves special attention, as it is such a pure case of a country stricken by the resource curse. Equatorial Guinea is a central African country, ruled since 1979 by the strongman Theodoro Obiang. Obiang is the kind of ruler who has not shied from having himself proclaimed “the country’s God” on state-controlled radio, or from having his guards slice the ears of political prisoners and smear their bodies with grease to attract stinging ants.¹⁹ In the 1990s large deposits of oil were discovered in the Bay of Guinea; Equatorial Guinea quickly became the third-largest oil exporter in Africa. Because of the huge influx of oil money, Equatorial Guinea now has the fourth-highest average income in the world: 15 percent higher than the per capita income of the United States.²⁰ Yet almost all the income is at the top. *Forbes* recently ranked Obiang as richer than Queen Elizabeth II, with an estimated personal wealth of \$600 million. Obiang sells two-thirds of Equatorial Guinea’s oil

16. Xavier Sala-i-Martin and Arvind Subramanian, “Addressing the Natural Resource Curse: An Illustration from Nigeria,” IMF Working Paper WP/03/139 (2003). The \$1 per day figure is the World Bank 1993 PPP standard for extreme poverty.

17. In just four years in power Sani Abacha and his family embezzled around \$3 billion from the state. Transparency International, “National Integrity Systems Country Study Report Nigeria” (2004), p. 13.

18. “Rape Epidemic Raises Trauma of Congo War,” *New York Times*, October 7, 2007 (<http://www.nytimes.com/2007/10/07/world/Africa/07congo.html?r=1&oref=slogin>).

19. “Equatorial Guinea’s ‘God’,” BBC News, 26 July 2003; U.S. State Department, “Equatorial Guinea Country Report on Human Rights Practices (1998).”

20. CIA, *World Factbook 2007*, “Rank Order – GDP – per capita (PPP).”

to U.S. corporations like ExxonMobil and Hess, and has recently spent 55 million of these petro-dollars adding a sixth private jet to his fleet. Meanwhile raw sewage runs through the streets of the country's capital, three-quarters of the country's people are malnourished, and the majority of its citizens survive on less than what one could buy in the United States with \$1 a day.²¹

Obiang has used his country's remarkable oil windfall to consolidate his personal power. In Equatorial Guinea government security forces suppress dissent with impunity, there is no independent judiciary, the government controls telephone and internet provision, newspapers are banned without explanation, nongovernmental organizations are prohibited from promoting human rights, opposition activists languish and die in jail, and there is no prospect of a credible election.²² President Obiang's tempestuous playboy son and likely heir, Teodorín, is by all accounts at least as determined as his father to control the country's oil revenues for his personal use.²³ Given their situation, the people of Equatorial Guinea may well feel cursed by their country's resource wealth.

II. OUR CONTRIBUTION TO THE RESOURCE CURSE

The repression of the citizens of Equatorial Guinea, and the denial to them of the revenues from the country's oil deposits, may strike outsiders as a cause for sympathy. The situation in Equatorial Guinea appears truly miserable, the oppression of the people seems unjust, and something should be done about it. One might think of an aid program to help the Equatorial Guineans, or of asking Western leaders to put pressure on Obiang to share more of the oil revenues with his people. These kinds of proposals may not spark much optimism: repressive governments often

21. "The Fortunes of Kings, Queens, and Dictators," *Forbes*, May 5, 2006; "With Friends Like These . . .," *Washington Post*, April 18, 2006, A18; Global Witness, "New U.S. Envoy to Equatorial Guinea Must Hold Government Accountable for Corruption and Human Rights Abuses," press release, March 8, 2006.

22. Freedom House, *Freedom in the World*, "Equatorial Guinea" (2006); U.S. State Department, "Equatorial Guinea Country Report on Human Rights Practices (2006)."

23. "Playboy Waits for His African Throne," *Sunday Times*, September 3, 2006 (<http://www.timesonline.co.uk/tol/news/world/article626511.ece>).

capture aid money, and rich dictators can resist a good deal of political pressure. However, the sense remains that something should be done to help these Africans in their dire conditions.

This natural course of thinking about the situation in Equatorial Guinea overlooks a morally significant fact. Outsiders to Equatorial Guinea are already doing a great deal with regard to its citizens: outsiders are making their plight worse. The resource curse is only half about resources. The dictator Obiang could not, after all, subdue his political opponents by dousing them in crude oil. The other half of the equation is the foreign money that flows into the dictator's bank accounts when he transfers the country's oil abroad. It is this money that increases Obiang's ability to buy weapons, to control the channels of patronage, and to disrupt possible challenges to his rule. The money that outsiders pay for the resources of Equatorial Guinea ends up being used against the people of that country.

The contribution of external funds to internal repression is clear enough when pointed out, and reflecting on it may cause more discomfort. We do not like to think of ourselves as contributing to severe political repression and poverty, even if only indirectly. The thought that what we pay to fuel our cars might end up being spent on Obiang's torture chambers or personal jets is not at all welcome. Yet, one might think, this is the way it often is in our contemporary world. In a globalized market economy we pay for all sorts of goods. We typically do not know—indeed we often cannot know—where these goods originate or where the money we use to purchase them goes. Some of the money we pay at the pump may go to support tyrants, but that seems just a part of modern life.

This way of looking at the contribution that outsiders make to the situation in Equatorial Guinea again fails to connect the facts. Indeed it is particularly inadequate from a market perspective. The resource curse is not a curse that falls on poor countries because they have abundant resources. Natural resources are by definition valuable. The "curse" results from a defect in the rules that allocate control over these resources. The fault is not in nature, but in human institutions, here specifically markets.

The misdirection of attention from the institutional to the natural is a familiar one in human history. It is a cousin of the error that was made, for instance, in the days when it was said that dark skin dooms men to be

lazy, or that women are cursed by their weak minds. The tension within the phrase “resource curse” should alert us that the misdirection of attention from the institutional to the natural is happening here. Only human practices can turn what should be a national asset into a collective liability.

III. THE OWNERSHIP OF NATURAL RESOURCES

The resource curse results from a failure of institutions: specifically, a failure to enforce property rights. This defect in the system of global commerce allows authoritarians and insurgents to capture for themselves the money that consumers around the world spend on everyday goods. The authoritarians and insurgents have no right to this money. The natural resources of a country belong, after all, to its people. The blessing of resources turns into a curse when tyrants and insurgents are allowed to sell off a country’s resources while crushing popular resistance, and to use the proceeds in ways that make the people worse off.

The principle that the resources of a country belong to the people of that country is widely accepted and embedded deep within international law. For example, Article 1 of the historic human rights treaty on civil and political rights begins with these words:²⁴

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources . . .

Similarly, Article 21 of the African Charter on Human and Peoples’ Rights states:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

24. International Covenant on Civil and Political Rights, Article 1. The first article of the International Covenant on Economic, Social, and Cultural Rights is identical. Of the 192 UN member states, 151 (including the United States and all of the other G8 countries) have ratified one or both of these treaties. The nonratifiers are mostly small countries like Palau. In international law “a people” refers to all of the citizens of a country.

The principle of ownership by the people is also enshrined in many national constitutions. For example, the (American-approved) Iraqi constitution of 2005 proclaims that “Oil and gas are the property of the Iraqi people in all the regions and provinces.”²⁵ Further examples from national constitutions as well as UN declarations and resolutions are easily multiplied.²⁶

The idea that the natural resources of a country belong to the people of that country is so intuitive that most will need no more proof than its statement. America’s resources belong to the American people, Canada’s resources belong to the Canadian people, France’s resources belong to the French people, and so on. The oil, for example, off of the U.S. Gulf Coast belongs to the American people. If it were found that Cuba had drilled a long diagonal pipeline through the Gulf of Mexico and was now siphoning American oil, the American people would immediately (and perhaps literally) be up in arms. The oil within the territory of the United States is American oil, and foreigners must not take it without permission.

Similarly, national ownership explains our rejection of private usurpation of a country’s resources. In the years leading up to the Reagan administration, companies such as Shell discovered large oil deposits off the coasts of Louisiana and Florida. One can imagine the response had President Reagan secretly sold this oil to Shell, then put the profits from these sales into his private bank account and ordered the FBI to detect and squash any dissent. America’s natural resources must not be disposed of in ways that wholly bypass the assent of the American people.

25. *The Constitution of Iraq*, Article 108. George W. Bush agrees with the Iraqi constitution on this point: “The oil belongs to the Iraqi people. It’s their asset” (“President’s Statement to the Press,” June 12, 2006). Indeed world leaders from across the political spectrum have made analogous assertions: Hugo Chavez has stated that the Venezuelan people own Venezuela’s oil (<http://www.energybulletin.net/4656.html>), and Ayatollah Ali Khamenei has said that the Iranian people own Iran’s oil (<http://www.globalsecurity.org/wmd/library/news/iran/2002/12-080402.html>). (In this article “American” will be used to refer to the United States, with apologies to other North and South Americans.)

26. See, e.g., Angolan Law N. 13/78 (1989): “All deposits of liquid and gaseous hydrocarbons which exist underground or on the continental shelf within the national territory . . . belong to the Angolan People”; UN General Assembly Resolution 1803 (XVII) (1962) “Permanent Sovereignty over Natural Resources”; and the “Declaration on the Right to Development” adopted by the United Nations in 1986.

Yet selling resources while bypassing the people's assent is just what Obiang is doing today.²⁷

As one would expect of a legal principle that has been ratified by many nations, the principle of national ownership accommodates different economic systems. For example, the principle is compatible with a national oil company controlling all of a country's oil (as in Kuwait), and also with widespread private ownership of oil (as in the United States). Widespread private ownership of resources is possible through the operation of validly enacted laws that transfer resources from national to private control. For instance, legal private ownership of oil might come about through a law that vests permanent title to subsoil oil in whoever legally acquires the land above that oil. Or private ownership might come about through the rather different law dominant in the United States, which is that extracted oil belongs to whoever can first reduce it to physical possession (this is "grabbers-keepers": one may extract all the oil in a deposit that stretches under both one's own and another's land). Laws such as these can result in most or even all of a nation's resources coming to be privately held.

Moreover, the principle of national ownership is permissive in that citizens need not be involved in, or even aware of, the management of natural resources that remain publicly controlled. Like shareholders of a corporation, most citizens will not be interested in tracking the administration of their assets. National ownership only requires that citizens be able to find out what those in power are doing with the country's resources, and that citizens be able to influence these decisions collectively if they so choose. To take the analogy: there is nothing unusual about shareholders who *do not* know about or try to influence how the company's assets are managed. There would be something seriously wrong, however, if shareholders *could not* find out about or influence how the company's assets are managed.

The principle of national ownership, that "peoples may, for their own ends, freely dispose of their natural wealth and resources," is a flexible

27. What the Reagan administration actually did in 1982 was to institute a series of public auctions for drilling leases in American coastal waters, putting the revenues from these auctions into the public purse. The wisdom of Reagan's auction policy was fiercely debated in Congress, but all sides of this debate assumed that whatever policy was adopted for the oil would have to be open to public scrutiny and discussion.

and permissive standard that forbids only flagrant injustice. The principle features prominently in treaties fundamental to modern international law, and therefore carries decisive legal authority. Yet this principle of national ownership is now violated daily, under an archaic provision in the international system that invites the seizure of natural resources by violence and threat.²⁸

IV. THE RIGHT TO SELL NATURAL RESOURCES

The natural resources of a country belong to the citizens of that country, and no one may sell off this property without some sort of authorization. A thief who steals your watch from your nightstand cannot legally sell your watch to anyone else, for neither you nor anything else in the law has empowered the thief to sell your watch. The thief may have taken *possession* of your watch and then transferred possession to someone else, but no valid transfer of the title to your watch has taken place. The watch is still your property, and the thief and his transferee have merely handled stolen goods.

Who besides the people then has this “resource right”: the right legitimately to sell off the resources of the territory so that they are permanently beyond the people’s control? Here we uncover the customary rule in the system of international trade that certainly gets the answer wrong. In current international practice all that is necessary for a group to acquire the legal right to sell off a territory’s resources is the power to inflict violence on the territory’s people. Whoever can maintain coercive control over a country’s population (or in the case of civil warriors, over part of a population) is recognized internationally as legally authorized to sell off that country’s resources. According to this customary rule,

28. Although it carries no contemporary legal authority, some philosophers may hold to the idea that the earth in some way belongs to all humans equally. There are deeper theoretical issues here that we cannot take up, but simply as a practical matter global egalitarians have good reason to support the approach set out in this article. For global egalitarians will certainly condemn dictators and civil warriors seizing natural resources by force in underdeveloped countries. The approach here will push the highly unequal pattern of control over resources toward greater equality among individuals around the world, and so will make progress toward the global egalitarian ideal.

might makes right: specifically, might vests the legal right to transfer property. This rule violates the most basic principle of the market:²⁹

A group that overpowers the guards and takes control of a warehouse may be able to give some of the merchandise to others, accepting money in exchange. But the fence who pays them becomes merely the possessor, not the owner, of the loot. Contrast this with a group that overpowers an elected government and takes control of a country. Such a group, too, can give away some of the country's natural resources, accepting money in exchange. In this case, however, the purchaser acquires not merely possession, but all the rights and liberties of ownership, which are supposed to be—and actually *are*—protected and enforced by all other states' courts and police forces.

The practice that equates the capacity for violence with the right to sell others' property makes nonsense of ownership. Might cannot vest property rights. This customary rule also engenders the resource curse. As we have seen, the legal right to sell the resources of a territory can be extremely valuable. The rule that recognizes this right in whoever can prevail through force of arms generates systematic incentives toward the curses of tyranny, violence, and poverty. Authoritarians who gain the resource right will use the money from resource sales to free themselves from public accountability through repression and bribery. Coup plotters will look for ways to grab the resource right from the current regime and then become authoritarians in their turn. Rebels who can seize control of resource-rich territory will gain the funds they need to start or escalate a civil war. And the people, whose resources are being sold off, will become not the beneficiaries of this wealth but the victims of those who use their own wealth to repress them.

The persistence of this antimarket “might makes right” rule, which has such disastrous consequences in many countries, calls for explanation. Some have noticed that the convention is convenient for rich countries, which get stable access to natural resources regardless of

29. Thomas Pogge, “Recognized and Violated by International Law: The Human Rights of the Global Poor,” *Leiden Journal of International Law* 18.4 (2005): 717–45, at p. 737. Pogge uses the term “resource privilege,” but as he notes this is actually a Hohfeldian power. Here I use the term “resource right.”

who takes power in poor countries.³⁰ While this seems plausible, it is also plausible to see this aspect of international practice as a holdover from an earlier era of expansive sovereignty and colonial rule. In this Westphalian era whatever group of individuals could maintain coercive control over a territory thereby gained international recognition of the legitimacy of almost any actions they took within that territory. For hundreds of years, the rule in international relations was that might did make right within a territory's borders. Whoever maintained coercive control over a population was recognized as having nearly total discretion over the territory's "internal affairs." Under these old rules any sufficiently brutal group could use its power to arrogate to itself the right to sell off the territory's resources.³¹ Yet the old rules can play no role in justifying current international practice. For the old Westphalian rules are no longer valid, having been decisively rejected in international law and public opinion.

The human rights revolution that began with the *Universal Declaration of Human Rights* in 1948 has displaced the idea of expansive sovereignty in international law. The thrust of human rights doctrine is to insist that there are certain things that rulers must not do to citizens (e.g., kill or arrest them arbitrarily, enforce their enslavement), and other things that rulers must do for them (protect their property, provide them with fair trials). No one claiming authority in a territory can now assert that their abuse or neglect of the people is only a matter of "internal affairs." Human rights qualify the authority of those who hold power, and securing human rights is now a condition for legitimate rule.³² Every nation on earth has ratified a major human rights treaty, signaling the legal death of the old Westphalian settlement.

The customary "might makes right" rule that results in the resource curse is a remnant of the premodern Westphalian world. The contrast between this anachronism and the modern understanding of legitimacy

30. Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), pp. 4–6.

31. The Westphalian system recognized the resource right not only in sovereign states, but also in invading armies and joint-stock companies that controlled significant territory within a state.

32. See Jack Donnelly, *International Human Rights* (Boulder, Colo.: Westview Press, 1998), pp. 26–28; Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2003), pp. 233–88.

is vivid. It makes just as little sense that a capacity for violent domination should give a regime legitimate authority over citizens' resources than that a capacity for violent domination should give a regime legitimate authority over citizens' persons. Once the old idea of overriding sovereignty is undermined, both ideas fall together. Indeed there need not be a "resource rights" revolution to follow the human rights revolution, because as we have seen, the fact that a people owns its resources is already affirmed in the fundamental human rights treaties. A people's right to its resources *is* a human right. Like a people's right to self-determination or a people's right against genocide, this is a human right proclaimed in primary documents of international law.

The most salient reform of international commerce must be to remove the "might makes right" rule that vests the right to sell resources in whoever can control a population by force. Unlike the national ownership of resources, this "might makes right" rule has no treaty basis in modern international law. It persists by custom because powerful global actors have strong interests in maintaining the status quo. Removing the "might makes right" rule from international practice is essential for bringing all trade in natural resources within the scope of enforced market rules.

We can be sure that the mere seizure of power should not vest any regime with an internationally recognized resource right. What then is necessary for a regime legitimately to claim this right to sell a territory's resources?³³ In answering this question we will focus exclusively on the resource right. We will not be concerned here with the separate questions of whether some regime has or lacks authority to perform other state functions: to issue currency, to keep public order, to defend the territory from invasion, and so on. This is the point of the end of the old Westphalian settlement: sovereignty no longer comes all in a piece. We are concerned specifically with what is needed for some group that has coercive control over a territory legitimately to sell the resources of that territory to foreigners. Whatever else is true about a regime, if it asserts an entitlement to sell off a country's oil, gas, or diamonds it must appeal to some credible rationale to validate this right.

33. In this article the term "regime" refers to groups within a territory that have coercive power over a significant proportion of that territory's population. The term applies both to officeholders of national governments and to leaders of rebellions during a civil war.

V. THE PRINCIPLES OF OWNERSHIP AND SALE

Oil is big business; in fact, oil is the biggest business. Five of the ten largest corporations in the world are oil companies, and oil accounts for about half the value of all global commodity transactions: over one and a half trillion dollars a year.³⁴ Any action to deny the resource right to regimes in resource-cursed countries will disrupt some of the current flow of oil, and so will have to be grounded in deep principles that cannot be dismissed or defined away. These principles will need natural political allies who will come to their defense when their enforcement comes under attack by oil corporations and the rich governments that support them. When one adds that these principles must also be enforced for international sales of other extractable resources, such as natural gas and diamonds, the demand that they be resilient only intensifies.

Such principles already exist, and in fact are the principles of the global market system. They are the principles of ownership and sale. Large corporations and Western governments can hardly disavow the principles of ownership and sale. Corporations depend on these principles for their existence as both buyers and sellers; and the governments of the United States and other rich countries have championed the spread of market principles across the globe. Yet international resource corporations defy these basic market principles in a substantial portion of their dealings. We can show this first with a commonsense argument, and then also in some detail within legal doctrine.

The natural resources of a country belong to the people of that country. The property rights of a people are violated, as any owner's rights would be, whenever someone gains control of this property through theft, deception, force, or extreme manipulation. The oppressed citizens of Equatorial Guinea could not possibly be authorizing the dictator Obiang to sell off their oil. These citizens cannot find out what deals Obiang is making, and are either unable to protest his sales or are too fearful to try. In no case can the citizens of Equatorial Guinea be said to be acquiescing to Obiang's deals. The capacity to threaten a people does

34. Oil industry global revenues in 2005 were \$1.62 trillion, 81 percent of which went to the five "super-major" integrated oil companies. Congressional Research Service, "Oil Industry Profit Review 2005," RL33373 (2006), p. 5. For comparison, the U.S. GDP in 2005 was \$12.46 trillion. The percentage of trade figure is from WTO, *International Trade Statistics 2006*, p. 119.

not confer the right to sell off their resources, nor does the capacity to deceive or overbear. Obiang cannot rightly sell the country's oil, so the corporations that sign contracts with him do not have title to what they steam away in the holds of their ships. These international resource corporations are trading in stolen goods.

The force of this argument flows directly from the principles of ownership and sale. To make the argument part of a realistic proposal for reform of international commerce it must be made legally precise. There are likely many ways to do this.³⁵ In the next sections I show that there is a feasible legal framework built around the most resilient principles in all of commercial law, which can be used to bring actions against international resource corporations for trading in stolen goods.

VI. PASSING TITLE: THE LAW OF PROPERTY AND CONTRACT

The principles of property and contract define the legal structure of the market. These principles have statutory codification in domestic laws (e.g., the United States Uniform Commercial Code, made law in all fifty states) and treaty basis in international law (e.g., the Convention on Contracts for the International Sales of Goods). These principles determine the legality of the bulk of commodity transfers both within and across national borders. No principles are more basic to the system of global trade.

A fundamental principle governing the sale of property states is that in order to complete a valid sale a vendor must have the right to sell. The thief has no title to the watch he has stolen from your nightstand, and so cannot pass title to the watch to any buyer, however willing. This principle is expressed in the ancient Roman maxim *nemo dat quod non habet* (no one can give what they do not have). Commercial law in general follows the intuitive rule that to make a valid sale a vendor must either be the owner or have the owner's authorization.

A thief, who gains possession by stealth, can never pass good title. In legal parlance a thief's title is "void," and therefore the title of anyone

35. See, for example, the parallel legal framework based on the Alien Tort Claims Act in the case against UNOCAL for abetting human rights violations in Burma (*Doe v. Unocal*, 2003 WL 359787 [9th Cir.]). See also the private law strategies developed to limit the damage of borrowing by corrupt regimes in Lee C. Buchheit, G. Mitu Gulati, and Robert B. Thompson, "The Dilemma of Odious Debts," *Duke Law Journal* 56.5 (2007): 1201–61.

who receives property from a thief is also void. However, commercial law allows certain exceptions to the *nemo dat* rule, and in building a legal framework we must track these exceptions.³⁶ The law treats differently vendors who gain possession of a good not through stealth, but rather through deception, duress, or undue influence. Such a vendor's title is not "void" but "voidable." The owner may repossess the good by voiding the vendor's claim to it before the good is sold. Yet a vendor may pass good title to a third party if he does so before his voidable title is voided.³⁷ When the goods of an innocent owner have reached the hands of an innocent purchaser, and the money from the sale cannot be extracted from the culpable vendor, then either the owner or the purchaser will have to lose out. The commercial rules separating void and voidable title divide up the situations in which innocent owners and innocent purchasers will prevail.

However, in order for an innocent purchaser to gain valid title through any transaction he must actually *be* innocent. Only a *good faith* ("*bona fide*") *purchaser* can gain title from a vendor with voidable title. A good faith purchaser is one who buys without notice of circumstances that would make a person of ordinary prudence inquire whether the vendor's title to the goods being sold was valid. An executive who buys a Rolex from the sales counter at Saks Fifth Avenue is a good faith purchaser. He gains good title to the watch, even if somehow it turns out that Saks received the watch from the Rolex Corporation through deception, duress, or undue influence. But an executive who buys a Rolex on the street from an unshaven man carrying several watches inside his coat cannot be a good faith purchaser. This executive should suspect that the unshaven man may not have good title to the watch. This executive is a *bad faith* ("*mala fide*") *purchaser*, and the law will not favor him. If the true owner of the Rolex appears, a court will order the executive to hand over the watch (or its market value) to that owner.

In order for a purchaser to act in good faith, it must be reasonable for him to believe that he is dealing with a genuine vendor: to believe either

36. Here I summarize the U.S. Uniform Commercial Code, which is (because of the position of the United States in global trade) one dominant model. Commercial law in other developed countries has slightly different patterns, but not in ways that will affect the outcome of the argument here.

37. The vendor may be vulnerable to any number of civil and criminal penalties, including penalties for fraud or robbery.

that the vendor is the owner of the good, or that the owner has authorized the vendor while free from deception, duress, or undue influence. A purchaser who buys in bad faith cannot gain valid title to the good, and the owner may recover the good (or its value) through a lawsuit. A bad faith purchaser may also be criminally prosecuted.

VII. THE LAW APPLIED TO INTERNATIONAL TRANSFERS OF NATURAL RESOURCES

The law described governs the sale of all goods within the United States, and is commonly used for trade across international borders as well. The challenge is to bring these rules to bear on the resource curse so that the result is robust. A dictator like Obiang will insist that the people have consented to his selling off the nation's resources. The oil companies will portray themselves as good faith purchasers who could not reasonably be expected to know of deceptive or coercive relations between Obiang's regime and the people. For our legal framework to stand up to such vigorous and well-funded challenges, its application to cases like this must be solid.

There are several ways to apply the rules of commercial law to trade with resource-cursed countries. To establish feasibility I will set out one. Here I will argue that even under empirical assumptions favorable to the international resource corporations, and even on a quite permissive interpretation of the legal rules, it can be shown that these corporations are handling billions of dollars worth of stolen resources every year.

To prove this we will need theory on two levels. First, we will need an account of the absolutely *minimal conditions* that must obtain in a country for it to be possible for the people to authorize resource sales. Second, we will need an account of *authoritative notice* that indicates when these minimal conditions do not obtain.

This section sets out theory on the first level: that of minimal conditions. What we require is an account of conditions that must exist in a country for it to be possible for a people to authorize a regime to sell off its resources. When these conditions are not met, regimes that claim to be selling resources with the people's authorization cannot be doing so.

The account of minimal conditions is simple to derive, since it follows directly from the concept of valid consent. To gain the authorization to

sell, a regime must claim some sort of valid consent from the people. A regime may claim that the people *asked* the regime to sell off its resources, or that the people *agreed* that the regime should do so. At last resort a regime may assert that the people signaled their *acquiescence* to the sale of the country's resources by remaining silent as the sales occurred. This final assertion—that the people tacitly consented to resource sales by remaining silent—is the claim that authoritarians and civil warriors are most likely to make.

However, for it to be possible for a people to perform any act of authorization, including the act of authorizing by remaining silent, three minimal conditions must obtain. For an owner to be able to authorize sales, the owner must at least:

- (1) be able to find out about the sales;
- (2) be able to stop the sales without incurring severe costs; and
- (3) not be subject to extreme manipulation by the seller.

If these minimal conditions do not obtain, an owner cannot authorize any sale of property.

Since we are looking to build the sturdiest legal framework, we will apply permissive interpretations of these conditions to our case of a people and its resources. That is, we will interpret these conditions so that they are quite favorable to the authoritarians, the civil warriors, and the resource corporations:

- (1) An owner who cannot know about sales or their terms cannot authorize those sales. Citizens who cannot find out about resource sales cannot approve these sales even tacitly. At the very least, citizens should be able to obtain reliable general information about which resources the regime is selling for how much, and who is getting the proceeds.
- (2) In order to acquiesce to resource sales an owner must have the ability and opportunity to stop these sales without incurring severe costs.³⁸ Any regime claiming that it has the authority of the

38. An analogy from Simmons: a chairman could not claim even tacit consent from his board members if he finished his proposal by saying: "Anyone with an objection to my proposal will kindly so indicate by lopping off their arm at the elbow." A. John Simmons, *Moral Principles and Political Obligations* (Princeton, N.J.: Princeton University Press, 1979), p. 81.

people to sell must put some effective mechanisms in place through which it acknowledges that the people can dissent to the sales. Citizens must also be able peacefully to express their dissent inside or outside of these formal mechanisms without fearing exile, imprisonment, torture, or death.

- (3) To be authorizing, the acquiescence of an owner must be to some minimal extent independent of the will of the seller. Owners who are hypnotized, brainwashed, or subject to extraordinary psychological manipulation do not validate the sale of their resources even if they remain silent as their resources are sold. North Korea has some oil, but the comprehensively dominated people of North Korea could not now give tacit assent to the current regime selling their oil abroad, even if the regime were inclined to do this.

In concrete political terms these three conditions require that citizens have at least minimal civil liberties and bare-bones political rights. There must be at least some absolutely minimal press freedom if citizens are to have access to information about what the regime is doing. The regime must not be so deeply corrupt that it is nearly impossible for the people to find out what happens to the revenues from resource sales. Citizens must be able to pass information about the regime to each other without fear of surveillance and arrest. The regime must put some effective political mechanisms in place through which the people can express their unhappiness about resource sales: at least a nonelected consultative legislature that advises the regime, or at the very least occasions on which individuals or civic groups can present petitions. There must also be a minimally adequate rule of law, ensuring that citizens who wish to protest resource sales publicly and peacefully may do so without fear of cruel judicial punishment, disappearance, serious injury, or death.

If these minimal conditions do not obtain in a country, then the silence of the people when a regime sells its resources cannot signal the people's consent. Absent these conditions, the people's silence is just silence. A regime in a country like Equatorial Guinea where these conditions are not met cannot claim authorization to sell the country's natural resources. Outsiders who are on notice that these conditions do not obtain within a country cannot purchase resources from any regime

in that country in good faith.³⁹ What could put outsiders on notice that these conditions do not obtain within some country is the subject to which we now turn.

VIII. AUTHORITATIVE STANDARDS

To rule against an international resource corporation for receiving stolen goods, courts in affluent countries will need authoritative standards that establish that the minimal conditions in some country do not obtain. The U.S. government has provided just such standards. The U.S. government has authorized for official use an independent report that provides bright-line ratings of the relevant political conditions in every country in the world. These standards have sufficient standing to ground secure judgments in American courts.

In 2002 the Bush administration established the Millennium Challenge Account (MCA) as a mechanism for distributing development aid to poor countries. President Bush required that the MCA choose countries to receive aid based on “a set of clear and concrete and objective criteria” on governance that would be applied “rigorously and fairly.”⁴⁰ For the governance criteria concerning civil liberties and political rights, the U.S. government selected the ratings of Freedom House.

39. Barring exceptional circumstances, a regime may not argue that, although it lacks the people’s consent, it is selling the country’s resources in the people’s interests. An appeal to the owner’s interests is no defense to the charge of selling the owner’s property without the owner’s permission (as any everyday example will show). The only possible exception concerns incompetent owners, whose property may be managed by an authorized agent. What if some regime then attempted to declare itself to be the selling agent of an incompetent principal, claiming that the country’s citizens were too simple-minded, or too divided by ethnic antagonisms, or too exhausted by the demands of daily survival to come to a collective decision about the territory’s resources? For such claims to ground a credible declaration of agency, this regime could not itself be responsible for the people’s incompetence: for keeping the population uneducated or divided or impoverished. Moreover, even if the regime’s declaration were credible, this regime would be jumping out of the frying pan of property law into the fire of the law of agency (see American Law Institute, *Restatement [Second] of Agency* [1958], §39: 130; §165: 389–92; *Restatement [Third] of Agency* [2006], §2.03d). Agents of incompetent principals are bound by the most stringent duties in all of equity. These strict-liability duties leave no room whatsoever for the diversion of revenues that is typical of regimes in resource-rich countries. A president who is receiving hundreds of millions of dollars from oil sales while most of his people live on a dollar a day cannot be a credible agent of an incompetent principal. No corporation that should suspect that a regime lacks legitimate agency can sign contracts with it in good faith.

40. Speech of George W. Bush, March 14, 2002.

Freedom House is an independent NGO established in 1941 by Eleanor Roosevelt and Wendell Wilkie. Its Board of Trustees is filled with business leaders (e.g., Malcolm Forbes Jr.), former senior government officials (Kenneth Adelman), scholars (Henry Louis Gates Jr.), and journalists (P. J. O'Rourke): well-known figures of the American establishment. Since 1972 the organization has published *Freedom in the World*, an annual evaluation of political conditions in countries around the world. The survey uses indicators drawn from the *Universal Declaration of Human Rights* to rate each country in two broad categories: civil liberties and political rights. The Freedom House ratings are widely cited by journalists, academics, and nongovernmental agencies; "most scholars of comparative politics consider the Freedom House index to be the best measure available."⁴¹ The U.S. government uses the Freedom House ratings not only for the MCA, but also, for example, for setting official targets for the performance of the State Department.⁴²

The Freedom House report assigns each country a rating from 1 (best) to 7 (worst) on civil liberties and on political rights. The index on civil liberties measures to what degree citizens are free from arbitrary political coercion, violence, or manipulation. The report describes countries with the worst two scores on civil liberties in this way:⁴³

Rating of 6: People in countries and territories with a rating of 6 experience severely restricted rights of expression and association, and there are almost always political prisoners and other manifestations of political terror. These countries may be characterized by a

41. Cynthia McClintock and James Lebovic, "Correlates of Levels of Democracy in Latin America During the 1990s," *Latin American Politics & Society* 48.2 (2006): 29–59, at p. 31.

42. Department of State and U.S. Agency for International Development, "FY 2007 Joint Performance Summary, Strategic Goal 7: Democracy and Human Rights" (2007). The use of the Freedom House ratings by the U.S. government gives these ratings as much standing as they could have (short of being incorporated into legislation), and is sufficient to ground judgments in U.S. courts. Although U.S. courts are not strictly bound to use these ratings, any court that requests supporting evidence can also be furnished with ratings from related indices such as the World Bank's Worldwide Governance Indicators, the Bertelsmann Transformations Index, Transparency International's Corruption Perceptions Index, and so on. These indices reinforce each other's results, which also means that compelling evidence can be presented to courts even in countries where no index is in official use. The legal framework set out here could thus be translated, for example, into European courts as well.

43. Freedom House, *Freedom in the World 2008*.

few partial rights, such as some religious and social freedoms, some highly restricted private business activity, and relatively free private discussion.

Rating of 7: States and territories with a rating of 7 have virtually no freedom. An overwhelming and justified fear of repression characterizes these societies.

Among the countries rated '6' on civil liberties in the 2008 Freedom House report are Iran, Syria, and Zimbabwe. Among the countries with a rating of '7' are Burma, North Korea, Somalia, and Sudan.

The Freedom House index of political rights measures how much the people's informed and unforced choices control what those with power in the country do. The descriptions of countries that receive the worst scores on political rights are as follows:

Rating of 6: Countries and territories with political rights rated 6 have systems ruled by military juntas, one-party dictatorships, religious hierarchies, or autocrats. These regimes may allow only a minimal manifestation of political rights, such as some degree of representation or autonomy for minorities. A few states are traditional monarchies that mitigate their relative lack of political rights through the use of consultation with their subjects, tolerance of political discussion, and acceptance of public petitions.

Rating of 7: For countries and territories with a rating of 7, political rights are absent or virtually nonexistent as a result of the extremely oppressive nature of the regime or severe oppression in combination with civil war. States and territories in this group may also be marked by extreme violence or warlord rule that dominates political power in the absence of an authoritative, functioning central government.

Among the countries rated '6' on political rights in the 2008 report are Angola, Iran, and Rwanda. Among the countries rated '7' are Burma, Equatorial Guinea, North Korea, Sudan, Syria, and Zimbabwe.

In order to build the strongest legal framework we will make the least controversial assumptions, focusing only on the countries where it is certain that the minimal conditions for authorization are not met. We can say with confidence that a Freedom House rating of '7' on either civil liberties or political rights should be conclusive for establishing that

the citizens of that country cannot have sufficient information about resource sales, or sufficient opportunity to dissent from those sales, or sufficient freedom from political manipulation. A Freedom House rating of '7' should therefore be a decisive indication that no regime can legitimately sell resources from that country.⁴⁴ A rating of '7' should thus put all potential buyers within American jurisdictions on notice that regimes within that country must lack valid title to the resources they offer to sell. This is a secure minimal criterion, and it is a criterion based on a scale that the U.S. government has declared as an official, objective, and reliable standard.

Using this criterion, calculations show that international corporations illicitly transport into the United States over 600 million barrels of oil each year. This is 12.7 percent of U.S. oil imports: more than one barrel in eight. Most of this petroleum is refined into gasoline and diesel; the rest is used in making a vast range of consumer products from clothing, cosmetics, and medicines to toys, asphalt, and ink. Even under empirical assumptions that are favorable to the international resource corporations, and even within a very permissive construal of the legal rules, it is beyond doubt that there is a massive flow of stolen goods into the United States every year.

IX. NATIONAL ENFORCEMENT: APPLYING THE LEGAL FRAMEWORK

The U.S. government has declared that the citizens of each country own the resources of their country. The U.S. government has also stated that the citizens of some countries could not possibly be authorizing the sale of their resources. Therefore, by the U.S. government's own standards, American corporations are buying resources from regimes that could not possibly have the right to sell them. Any consistent pro-market government must allow legal action against these resource corporations to proceed.

The framework set out above is robust enough to support several different strategies in litigation. For example, actions against resource

44. The Freedom House ratings indicate the level and not the cause of a lack of basic freedoms within a country, so they register civil conflict and failed states as well as repression by a national government. This can be seen from the low ratings of countries like Sudan and Congo. In these places the ratings show that there is no political actor (government or rebel) that can claim to be representing the whole people of that country.

corporations could be taken within civil law (for a tort to property) or criminal law (for the crime of receiving stolen goods) or both.⁴⁵ Which strategies will be most effective will depend on the details of specific statutes and transactions. It is true that strong cases may require lawyers to overcome the resistance of the “might makes right” rule that still lingers in transnational law.⁴⁶ The prospects are good, however, that strong civil or criminal cases can be brought.⁴⁷ Winning the first case would change every corporation’s incentives for dealing with the worst regimes. Cases requiring the United States to follow its own principles in enforcing property rights are waiting to be made.

X. INTERNATIONAL ENFORCEMENT: ENFORCING PROPERTY RIGHTS THROUGH TRADE POLICY

So far this article has argued that governments should block corporations within their jurisdictions from purchasing natural resources from severely repressive regimes. The U.S. government has already shown that it agrees with this argument to some extent. For example, since 1997 the U.S. government has barred American energy companies from

45. Citizens from a resource-cursed country can have the standing to bring civil suits in U.S. courts: a government in exile would be ideal; an opposition movement or even a group of concerned citizens could also be granted standing. Upon finding for the plaintiffs in a civil case, a court should place the money reclaimed into a Clean Hands Trust for the people of the country, as described below.

46. For example, the Westphalian “act of state” doctrine requires courts not to review acts of a foreign government. The status of this doctrine has declined in U.S. law, especially in property cases; Anne-Marie Burley [Slaughter], “Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine,” *Columbia Law Review* 97 (1992): 1907–96, at pp. 1928–41.

47. For example, in civil law, in addition to the UNOCAL case cited above, a New York court has recently upheld a plaintiff’s right to bring action under the Alien Tort Claims Act regarding Shell’s activities in Nigeria (*WIWA v. Royal Dutch Petroleum Co. & Shell Transport and Trading Co.*, WL 319887 [S.D.N.Y. 2002]). See also the opinion in *Kensington v. BNP Paribas*, 05 Civ. 5101 (LAP) (S.D.N.Y. 2005), alleging conspiracy under the civil RICO statute by corrupt officials of the Republic of Congo to misappropriate resources, including oil, from the country.

In the criminal law, the National Stolen Property Act (18 USC 2314) criminalizes importation of goods when the defendant acts “knowing the same to have been stolen, converted, or taken by fraud” (see *United States v. Schultz*, 178 F. Supp. 2d 445, 449 [S.D.N.Y. 2002]); and the Federal statute concerning receipt of stolen goods (18 USC 662) has explicit extraterritorial jurisdiction (see Congressional Research Service, “Extraterritorial Application of American Criminal Law,” 94–166 A [2006]).

trading with the Sudanese regime in Khartoum, in part because of this regime's grim record on human rights. The property-based approach here would only add that American energy companies should be barred from trading with the Sudanese government specifically because this regime is violating the human rights that are property rights.

However, imagine that this property-based approach were widely adopted. Imagine that the United States, the United Kingdom, France, and all other major Western governments were to stop their corporations from buying resources from repressive governments and civil warriors. Would not other countries that are less fussy about the niceties of rights just step in and purchase these resources instead? Say that both U.S. and European oil companies were barred from signing contracts for Sudanese oil. Wouldn't the Chinese just buy the oil from the Khartoum regime anyway? Would the proposal here really make any difference to the resource curse?⁴⁸

Moreover, after the Chinese-Sudanese sale inevitably went through, could Western consumers keep themselves from being tainted with this stolen Sudanese oil while their countries maintained trade relations with China? This Sudanese oil would, after all, percolate through the Chinese economy, and so become a factor in producing many of the goods (it will be hard to know which ones) that Western consumers end up purchasing. Even if American oil companies stop receiving stolen goods, won't American shoppers still end up dirtying their hands when they buy Chinese imports?

This is an important challenge. Here I set out one feasible response, which again turns on enforcing property rights. Western governments can set up mechanisms that will both secure the rights of resource-cursed peoples and keep their own citizens from receiving stolen goods secondhand. Moreover, these mechanisms can attract support from powerful domestic interests as well as from politically engaged citizens across the ideological spectrum.

48. Sudan's civil conflict, which has flared up repeatedly since the 1980s, pits the Muslim Arab regime in Khartoum against the Christian and animist African tribes. Since the beginning of serious oil production in 1999 the regime has received about \$500 million a year from petroleum sales, and has spent much of this money on arms that human rights groups say have been used to attack civilians in the south and the west (Darfur). China is a major investor in the Sudanese oil industry, and China currently meets 7 percent of its total energy demand with oil from Sudan. "Hu's Trip to Sudan Tests China-Africa Ties," *Christian Science Monitor*, February 2, 2007.

Sudan rates a Freedom House ‘7’ on both civil liberties and political rights. So let us imagine that American oil companies continue to be barred from buying Sudanese oil. Say that China now buys \$3 billion worth of oil from the regime in Khartoum. The correct response on a property rights approach is for the U.S. government immediately to announce a Clean Hands Trust for the People of Sudan. This trust is a bank account that the government will fill until it contains \$3 billion. The money to fill the trust will be raised from tariffs on Chinese imports as they enter the United States. The money in this Clean Hands Trust will be held for the people of Sudan until the minimal conditions in that country are met. At that point, the money in the trust will be turned over to the Sudanese people.

The Clean Hands Trust will protect the American people from becoming tainted with the oil that China buys illegally from the regime in Khartoum. The tariffs extract from Chinese imports the value of the oil taken from Sudan, and the trust holds this money in reserve until it can be given back to the Sudanese people. With the tariffs in place American consumers can buy Chinese goods with clean hands, because the tariffs subtract the value of that element of the goods’ manufacture that comes from the oil sold illegitimately by the Khartoum regime.⁴⁹

The trust-and-tariff mechanism protects property rights by retaining the value of the stolen property for the owners of that property: the citizens of Sudan. The tariffs here are different from other tariffs: they are “antitheft tariffs” designed to enforce property rights. The trust-and-tariff mechanism corrects a flaw in the market order by pushing a significant portion of the global circulation of resources into the domain of trade, so that it is no longer merely a massive shifting of stolen goods. The trust-and-tariff mechanism is no more a restraint on free trade than a court order to return stolen property, and no more a restraint on free

49. Trade economics says that the tariffs may have to collect total revenues greater than \$3 billion in order to ensure that it is the Chinese (and not American consumers) who end up contributing \$3 billion to the trust. Still, when the antitheft tariffs are in place, shoppers in the United States will have to pay slightly higher prices for some Chinese imports. Yet this is the cost of engaging in legitimate trade: consumers must always pay higher prices when they buy legal merchandise. Shoppers will always have to pay more, for example, to buy a watch from a department store than they would to buy the same watch from a black market dealer on the street.

trade than a prison term for a thief.⁵⁰ China, having violated market rules by passing stolen goods, has no standing to complain when these violations are rectified.⁵¹

This trust-and-tariff mechanism will generate strong incentives for a variety of domestic economic interests to support the property-based approach. The instant that China contracts for the Sudanese oil, American manufacturers will lobby the U.S. government to set up a Clean Hands Trust. Many American companies (in apparel, electronics, machinery) will want these tariffs to protect them against Chinese competition in their sector. The American banking industry will also support the Clean Hands Trust, as American banks will hold the tariff proceeds in trust until these are returned to the Sudanese.⁵² Both the manufacturing and banking industries will also welcome the opportunity publicly to support measures aimed at helping poor people overseas.

The Chinese, for their part, will have much less of an incentive to buy more oil from Sudan, knowing that if they buy \$2 billion worth of oil then the United States will impose tariffs worth \$2 billion more on their goods. Further, the Sudanese people will know that there is a great deal of money waiting to be turned over to them if they can replace the regime that is looting their resources with a minimally decent, unified government. The trust gives the Sudanese people an extra incentive to unite in installing a government that will represent the people, while drying up the revenues that support and arm the current regime in Khartoum.

50. The trust-and-tariff policy can be seen as an enforcement mechanism for Nozick's third basic principle for the legitimacy of capitalist holdings: the principle of rectification of injustice. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 152–53.

51. Chinese export of commodities produced with Sudanese oil would not be trade, but rather to that extent the passing of stolen goods. Since the antitheft tariffs are aimed at the illegal component of these exports, these tariffs are not restrictions on trade, but mechanisms to enforce property rights. Therefore the World Trade Organization should not allow China to impose trade restrictions in retaliation for the antitheft tariffs. The Chinese could no more protest these antitheft tariffs in the WTO than they could protest sanctions were they to occupy Sudan militarily and sell off its oil (or, more realistically, were they to invade Taiwan and export its iron). The antitheft tariffs should be at least as nonretaliable under WTO rules as would have been the 1986 U.S. import bans against the apartheid South African regime, or the 1990 UN Security Council sanctions against Iraq after its invasion of Kuwait.

52. American banks must transfer the funds from the trust to the Sudanese, plus interest. They may claim a reasonable fee for their trusteeship.

With one modification the trust-and-tariff policy can be implemented in any country. Any government that prohibits its corporations from receiving Sudanese oil may set up a Clean Hands Trust once the Chinese contract with the Khartoum regime. Each government that sets up such a trust must then continually update its public report of how much money it is holding in its trust, and all governments must stop filling their trusts once the combined global total in all of the trusts equals the amount of the Chinese contract (\$3 billion). This gives the “clean” countries a competitive incentive to announce and fill their trusts as quickly as possible, while limiting the amount the Chinese will be penalized to the amount of the original property rights violation.

The biggest difference between the current proposal and previous international sanctions is that this proposal creates a better alignment of incentives and so is more likely to work. The problem with previous sanctions has been that the sanctions have not been universally observed. Oppressive regimes have sold their countries’ resources to their traditional patrons and to other repressive regimes, thereby escaping some of the pressure that the sanctions were meant to apply. By contrast, on the property-based approach all buyers who purchase from repressive regimes (e.g., China from Sudan) will face exactly proportionate trade penalties. Unlike traditional sanctions, trade penalties here *track* the looted resources, so no one receiving these resources will remain unpenalized.

The trust-and-tariff proposal should also attract popular support in developed countries across the political spectrum. Free market advocates will support the trusts and tariffs because these mechanisms strengthen the global market order by enforcing property rights. Protectionists will back the tariffs because they protect domestic manufacturing and so keep jobs from going overseas. Those who prioritize national security will see in the proposal an opportunity to strengthen failed states where terrorism can incubate, and also to lessen the power of potentially hostile “petrocrats.” Environmentalists should also support the property-based approach, as its implementation will at least temporarily raise the price (and so lower the consumption) of petroleum, leading to lower global carbon emissions. Finally, humanitarians will rightly see the proposal as bettering the opportunities of some of the most impoverished and oppressed people in the world. The policy is not

only incentive-compatible for many powerful interests, but it should also be broadly appealing across the political spectrum from right to left.

XI. THE PROPERTY-BASED APPROACH TO THE RESOURCE CURSE

When a country is badly enough off to be disqualified by the criteria above, resource revenues are the curse of the common people. In resource-cursed countries these revenues strengthen authoritarian rulers, incentivize coups, and heighten the dangers of civil war. Further, this money does not tend to improve poor people's standard of living. When the resource curse strikes, the money that flows into the country from resource transfers does not benefit ordinary citizens but rather makes their situation more desperate.

Life was bad enough for people in Equatorial Guinea in the 1980s when they were poor and oppressed by a megalomaniacal despot. Now that Obiang can sell off their oil, the people are poor and oppressed by a megalomaniacal despot who has hundreds of millions more dollars to cement his personal hold on power. Sudan is similar. The most impoverished Sudanese used to have a hard enough time resisting the Khartoum regime's military offensives. After oil money began to flow into the country, these poorest Sudanese became much worse off, as the regime began to use its new millions to pay for more soldiers and the latest weaponry to kill them and chase them off their traditional lands.

The property-based approach here will stop this harmful foreign money from coming into the country. It will deprive authoritarian rulers and civil warriors of funds that they would use to inflict further misery on the country's people. Moreover, the Clean Hands Trusts will give citizens extra incentives to replace their tyrants and warlords with minimally decent, unified governments. Implementing the approach will also discourage future dictators, coup plotters, and civil warriors from attempting to gain power by stealing resources. Even if in the short run some poor people may lose out when they can no longer catch, as it were, the scraps that fall from a dictator's table, in the long run the great majority of poor people will be better off when their entitlements to their resources are enforced. That is perhaps the most we can ask of any realistic proposal.

There is one last point in favor of the property-based approach. If the only way for ExxonMobil or China legally to get oil out of Equatorial

Guinea is for there to be minimally decent governance in Equatorial Guinea, then there will be minimally decent governance in Equatorial Guinea, at least if there is any way at all for outsiders to help achieve this. The property-based approach reverses the incentives of resource corporations and governments so that these powerful actors will be strongly motivated to secure the basic rights of citizens in poor countries, instead of being strongly motivated to remain complicit in the violation of those rights.

XII. CONCLUSION

Because of a major flaw in global markets, consumers today send their money to tyrants and brutal rebels when they make their daily purchases. This article has suggested that this damaging flow of money can be stopped by enforcing property rules against the middlemen who channel consumer spending into resource-cursed countries: against the international resource corporations, and against the foreign governments that deal with the worst regimes. The citizens of affluent countries can abolish the disastrous “might makes right” rule by using their own institutions to enforce the basic principles of legal trade.

Peoples have rights, and there are things no person or group may do to them (without violating their rights).⁵³ Trafficking in a country’s valuable natural resources without the people’s consent certainly crosses that line. The priority in reforming global trade must be to enforce the rights that define the modern international order. The first step in improving the prospects of poor people is to enforce the rights they already have.

53. See Nozick, *Anarchy, State, and Utopia*, p. ix.