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Patrimonicide: The International Economic Crime of Indigenous Spoliation

Ndiva Kofele-Kale

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Patrimonicide: The International Economic Crime of Indigenous Spoliation

*Ndiva Kofele-Kale**

ABSTRACT

In the past two decades, the organized and systematic theft of a state's wealth and resources by its leaders has reached unprecedented levels in developing and less-developed states. Unlike previous acts of embezzlement by political leaders, this new wave of corruption—referred to as indigenous spoliation—involves billions of dollars and causes widespread social and economic devastation. This Article defines indigenous spoliation and presents some examples of this practice. The author describes the inadequacy of domestic law in dealing with the problem and suggests that international law should provide a remedy. Next, the author proposes a framework for holding persons involved in acts of spoliation individually liable. The author then contends that the international community, through a multilateral treaty, could enforce a prohibition against spoliation by imposing enforcement obligations on individual states. Additionally, the availability of foreign aid and commercial bank credits for developing states could be conditioned on these states proscribing acts of spoliation. The author encourages victim states to change their domestic laws to address spoliation and asserts that indigenous spoliation should be treated as a violation of human rights.

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I. INTRODUCTION

Presidential graft and high-level official corruption have become a permanent factor in the political life of many states. Their lethal effects on the world economy are so evident that it is surprising that the international community of scholars and policymakers have not done more to bring these activities under international discipline. The slow response to the problem of indigenous spoliation¹ contrasts sharply with the international preoccupation with efforts aimed at protecting and preserving

1. In this Article, indigenous spoliation has been defined as an illegal act of depredation committed for private ends by constitutionally responsible rulers, public officials, or private individuals. See discussion *infra* pt. II.A.

endangered species,² the rain forest, and stolen art.³ Indeed, international condemnation of the trafficking of stolen cultural property⁴ and the steps taken by the community of states to stem this illicit trade represent the kinds of responses one would have expected for a problem such as indigenous spoliation.⁵ Attempts

2. See, e.g., Endangered Species Act, § 7(a)(2), 16 U.S.C.S. § 1536(a)(2) (1984) (requiring each federal agency to consult with the United States Secretary of the Interior to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species); see also Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1 (1990); Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991).

3. The importance of animal preservation is not being downplayed except to suggest that such efforts must be placed in perspective. The author is a Cameroonian national whose ethnic group, the Bakweri, live on the slopes of Mt. Cameroon, the highest mountain in West Africa. The Bakweri are traditionally hunters and farmers. Fako, as they call their mountain, is where they have their farms and have done all of their hunting since time immemorial. Fako is also the home of a variety of wildlife ranging from the lowly porcupine to the majestic African elephant. Following the traditions of their ancestors, the Bakweri have hunted and continue to hunt and trap these animals. Recent efforts by the Cameroon government to use grants from foreign groups to turn the mountain into a wildlife reserve have met with bewilderment and resistance from the Bakweri. They cannot understand how the source of their livelihood, their very existence, could be taken away from them in the name of wildlife preservation.

The point of this narrative is to underscore the fact that definitions of human rights are culture-bound, and conflicts in values arise when one tries to impose one culture's definition of human rights on that of another culture. The inevitable clash between the Bakweri and the Cameroon government stems from the attempt to juxtapose the so-called universal human right to a quality environment with the right of peoples to pursue their traditional practices without outside interference. Preserving all the elephants in Mt. Cameroon will not change the quality of life of the vast majority of the Cameroonian population if at the same time its rulers are emptying the national treasury and carting the money to banks in Europe and the United States. The author can speak with authority for the Bakweri of Cameroon who are resisting government efforts to turn their hunting ground into a wildlife preservation. The Bakweri see such attempts as an infringement on some of their basic human rights. Whose values and judgment should prevail: the universalist who states the case for all mankind or the communalist who retorts that the universalist cannot speak for the people? For an examination of how these issues have dramatically played out in a court of law, see for example, *Mabo v. Queensland* (No. 2) 175 C.L.R. 1 (1992) (Austl.). In *Mabo*, the High Court of Australia held that Australia was not *terra nullius* when first occupied and that significant pre-settlement indigenous land rights continued to exist under the common law of Australia. See G.P.J. McGinley, *Natural Resource Companies and Aboriginal Title to Land: The Australian Experience-Mabo and its Aftermath*, 28 INT'L L. LAW. 695 (1994).

4. See, e.g., The Pennsylvania Declaration Decision of Curators of the University Museum, University of Pennsylvania (April 1, 1970); The Harvard Report (November 29, 1971).

5. See Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627 (1992); Report on

have even been made to criminalize the illicit taking and movement of cultural property⁶ and to define it as an international crime in the Draft International Criminal Code.⁷ Restrictions on the export and import of stolen cultural objects—usually from culturally rich but economically poor states to comparatively art-poor but economically wealthy market states⁸—have taken the form of multilateral⁹ and bilateral treaties,¹⁰ as well as domestic legislation.¹¹ If the plunder of cultural assets can prompt international concern, then the organized and systematic theft of a state's economic wealth and resources by its leaders deserves no less. Why then has the discussion of this problem been ceded to

National Legal Control of Illicit Traffic in Cultural Property, Lyndel V. Prott & P.J. O'Keefe, UNESCO, 38th Sess., U.N. Doc. CLT-83/WS/16 (1983); and Halina Niéc, *Legislative Models of Protection of Cultural Property*, 27 HASTINGS L.J. 1089 (1976).

6. See James A.R. Nafziger, *International Penal Aspects of Crimes against Cultural Property and the Protection of Cultural Property*, in 1 INTERNATIONAL CRIMINAL LAW 525 (M. Cherif Bassiouni ed. 1986).

7. See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT CRIMINAL CODE 98-99 (1980).

8. See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

9. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, UNESCO, 10 I.L.M. 289 (1971) (the first global agreement regarding international trade in illicit cultural objects); Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, 15 I.L.M. 1350 (1976); European Cultural Convention, December 19, 1954, art. 5, 218 U.N.T.S. 139; European Convention on the Protection of the Archaeological Heritage, May 6, 1969, 788 U.N.T.S. 227, 8 I.L.M. 736 (1969); European Convention on Offenses Relating to Cultural Property, June 23, 1985, 25 I.L.M. 44.

10. See Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059; Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, Dec. 9, 1987, U.S.-Mex., S. TREATY DOC. No. 100-13, 100th Cong., 2d Sess., 27 I.L.M. 443 (1988).

11. For the United States, see Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals, 19 U.S.C. §§ 2091-2095 (Supp. II, 1972); Convention on Cultural Property, 19 U.S.C. § 2601 *et. seq.* (1983); National Stolen Property Act, 18 U.S.C. §§ 2314-15 (1990) (prohibiting transportation or receipt, in interstate or foreign commerce, of any goods knowingly stolen and worth \$5,000 or more); Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470ll (1985) (declaring as national property objects located above and below ground on either public or Indian lands). For Mexico, see *Ley Sobre Proteccion y Conservacion de Monumentos y Bellezas Naturales*, art. 1, 58 D. O. 7, (1930) (Mex.); *Ley Sobre Proteccion y Conservacion de Monumentos Arqueologicos e Historicos, Poblaciones Tipicas y Lugares de Belleza Natural*, 82 D. O. 152 (1934) (Mex.); *Ley Federal del Patrimonio Cultural de la Nacion*, 303 D. O. 8 (1970) (Mex.); *Ley Federal Sobre Monumentos y Zonas Arqueologicos, Artisticos, e Historicos*, 312 D. O. 16 (1972) (Mex.).

newspaper columnists, editorial writers, and lawyers representing successor governments trying to sue in foreign courts to get back some of the spoliated funds?¹²

The apparent neglect of this important subject matter reflects the nature of the scholarship in this area. Discussions of the consequences of high-level political corruption in the last two decades have been shaped by what Laurence Whitehead terms a *realpolitik*, or functionalist, stance.¹³ This paradigm, which has dominated the writings of U.S. political scientists, avoids any outright condemnation of political corruption, preferring instead a "balance sheet" approach, which strains to break down the social costs and benefits of political corruption. Adherents of the *realpolitik* school do not regard corruption as a grave concern

12. See Lauren Weiner, *Recovering Wealth from Dictators Is Not Easy*, THE WASH. TIMES, Sept. 24, 1990, at A7; Bob Drogin, *Corruption; Manila Under Fire for Its Deals on Marcos Assets*, L.A. TIMES, Nov. 24, 1990, at A3; Rone Tempest, *Ex-Despots Can't Bank on the Swiss*, L.A. TIMES, Jan. 31, 1990, at 1; Barbara Hetzer, *The Pals & Pariahs; The Wealth That Leaves No Tracks*, FORTUNE, Oct. 12, 1987, at 189; Louis Kraar, *Where Do You Hide \$10 Billion? Aquino Wants to Know*, FORTUNE, Sept. 14, 1987, at 97 (Marcos' "declared net income over 22 years [in office] was just \$224,750"); *Frontline: In Search of the Marcos Millions* (PBS television broadcast, May 26, 1987).

At its eighty-first Annual Meeting in 1987, the American Society of International Law broke new ground when it devoted an entire panel to address the problem of indigenous spoliation. See Abram Chayes, *Pursuing the Assets of Former Dictators*, in PROCEEDINGS OF THE 81ST ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 394 (1987) (Michael P. Malloy ed., 1990) [hereinafter ASIL PROCEEDINGS]. A couple of years later, the remarkable humanist, Michael Reisman, attempted to draw attention once again to this scourge. In a brief commentary, Reisman decried the preoccupation of traditional scholarship with the exploitation of the natural wealth of developing states by giant multinational corporations while ignoring internal forms of wealth exploitation. As he argued, "[t]he ritual of condemnation of foreign corporations' spoliations of the resources of developing [states] and their elevation to the level of international concern have obscured the problem of spoliations by national officials of the wealth of the states of which they are temporary custodians. . . . [The effects of this neglect have been much] confusion and paralysis about the status of national funds spoliated by high government officials and cached abroad." See W. Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AM. J. INT'L L. 56-57 (1989). It was time, Reisman reasoned, to harness international law to restrain and recapture spoliated wealth. *Id.* at 56.

13. See Laurence Whitehead, *On presidential graft: the Latin American evidence*, in CORRUPTION: CAUSES, CONSEQUENCES AND CONTROL 146, 154 (Michael Clarke ed., 1983). Whitehead's *realpolitik* school is also referred to as the functionalist paradigm by other political scientists. See Edward van Roy, *On the Theory of Corruption*, 19 ECON. DEV. & CULTURAL CHANGE 87 (1970); Arnold J. Heidenheimer, *Introduction, Corruption and Modernization*, in POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS 479 (Arnold J. Heidenheimer ed., 1970); SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 69 (1968).

because of its purported functional or utilitarian role in any political system, especially those of developing Third World states.¹⁴ Therefore, the *realpolitik* school tends to view corruption as a lesser of two evils,¹⁵ touting its contribution to the non-violent resolution of social conflicts as one of its beneficial consequences.¹⁶

Accordingly, functionalists posit an inverse relationship between corruption and political instability by arguing that the average costs of political corruption are likely to diminish over the life of a regime as it becomes more secure. Thus, a state would benefit from retaining a corrupt person as president for an extended period rather than changing presidents fairly frequently in order to minimize the cost of presidential fortunes.¹⁷ However, in a system where presidential graft is a way of life, as is the case in much of the Third World, each change in leadership sets in motion a wave of corruption because presidents will try to amass their own fortunes in the shortest possible time.

Others have argued instead that, in embracing this socially beneficial formulation of corruption, academics have unwittingly conferred the stamp of respectability on political corruption in general and presidential graft in particular¹⁸—an imprimatur that may very well explain why international policymakers have been slow to condemn the practice. Yet, to the victims of presidential graft, there is nothing academic about this pestilence. Soon after

14. See J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967). Nye argues that corruption is a necessary element in the development of emerging Third World states because, in the early stages of development, these societies lack the essential infrastructures that make things work. The system becomes dysfunctional only when a middle class or student population emerges because those groups, more than anyone else, believe in morality and law. *But see* Sinnathamby Rajaratnam, *Bureaucracy versus Kleptocracy*, in *POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS* 546 (ARNOLD J. HEIDENHEIMER ed., 1989) (arguing that kleptocracy has led to economic anarchy, political instability, and the eventual replacement of democracy by civilian or military autocracies in many Third World states). At the time that he wrote his article, Rajaratnam was the Minister of Foreign Affairs and Labor of Singapore. As a result, he knew of the destructive effects of high level corruption.

15. See Whitehead, *supra* note 13, at 156.

16. *Id.* at 156.

17. An unidentified supporter of a South American dictator is quoted in 1956 as stating: "It is cheaper for the country that he should be president for life, because he has made his fortune and is satisfied. When we changed presidents every few years, the cost of presidential fortunes used to ruin us." *Towards a Grammar of Graft*, *ECONOMIST*, June 15, 1957, at 959.

18. See Whitehead, *supra* note 13, at 159.

becoming Prime Minister of Ghana in 1969, Dr. Kofi Busia—an Oxford-educated sociologist who himself went down in ignominy a few years later under the weight of corruption charges leveled against him¹⁹—acknowledged that high-level official corruption was the biggest threat to the national economy.²⁰ For Ghana, as well as numerous other states, longevity in office has never been known to dampen a president's acquisitive tendencies. Even after thirty-one years as President of the Dominican Republic Rafael Trujillo's "acquisitiveness was never dimmed by satiation."²¹ Other dictators who rule or have ruled their states for years without any sign of slowing down their pace of personal aggrandizement include: Mobutu Sese Seko of Zaire, Ferdinand Marcos of the Philippines, Alfredo Stroessner of Paraguay, and François ("Papa Doc") Duvalier and Jean-Claude ("Baby Doc") Duvalier of Haiti.

To suggest to the citizens of these states that high-level official corruption has some broad redeeming social value invites their criticism and risks being dismissed as unhinged, for these human flotsam and jetsam are the immediate casualties of indigent spoliation.²² What would one think of a doctor who devotes

19. Busia was the target of the Taylor Assets Committee set up by the National Redemption Council. For a fuller discussion on commissions of inquiry, see *infra* notes 29, 255-64, and accompanying text.

20. See Herbert H. Werlin, *The Roots of Corruption—the Ghanaian Enquiry*, 10 J. MOD. AFR. STUD. 247, 251 (1972) (hereinafter *Roots of Corruption*).

21. See Whitehead, *supra* note 13, at 157.

22. Beginning in December 1993, government employees in Cameroon went on strike to protest deep salary cuts (between 50% and 70%), unpaid arrears, and other related grievances. See Memorandum submitted by Public Service Employees of the South West Province through the Prime Minister, Head of Government to His Excellency the Head of State, President of the Republic, in Reaction to the Recent Salary Cuts, Dec. 29, 1993 (on file with author). Much of the public school system was closed down because striking teachers refused to teach; the judiciary in some provinces stopped administering justice; and government hospitals continued their long tradition of abandoning the sick. The government complained of not having money to pay state employees or to service its internal debts, and the international community has refused to come to its rescue, citing among other reasons gross mismanagement, excessive corruption in high places, and persistent human rights abuses. See *Democracy in West Africa: Moins ça change . . .*, ECONOMIST, January 22, 1994, at 45-46. In the thirty years since independence, an estimated 1,610 billion CFA francs (CFAF), roughly \$5.31 billion, have been embezzled by public officials and safely stashed away in European banks. See P. J. TEDGA, ENTERPRISES PUBLIQUES, ETAT ET CRISE AU CAMEROUN: FAILLITE D'UN SYSTEME 246-56 (1990). Of this amount, 650 billion CFAF, or \$2.145 billion, left the state during a four year period, 1986-1990. *Id.*

Putting these figures in some perspective, private Cameroonian wealth abroad essentially is enough to wipe out the state's external debt. The public outrage stirred by these revelations of this systematic looting has been understandably harsh. Much of this huge fortune was diverted into the pockets of the ruling elite,

the better part of his examination of a patient with a high fever to doing a cost-benefit analysis of the disease? Surely, one would expect the physician to attempt to lower the patient's body temperature and to do everything medically possible to discover the underlying infection responsible for causing the fever with a view toward eliminating it.²³ The conventional wisdom of treating the problem of spoliation as an exercise in "balance sheet balancing" leaves Third World scholars uncomfortable.

Moreover, the apparent reluctance by publicists to confront the problem of indigenous spoliation and to elevate it to the level of international concern raises some very troubling questions about the priorities and objectives of Western scholarship. For instance, a recently published collection of articles and debates on the enduring as well as the controversial issues of international law²⁴ fails to include a single essay on the problem of indigenous spoliation.²⁵ Apparently, the persistent and systematic assaults on the economic rights of Third World peoples by their leaders do not rank high enough on the scale of normativity²⁶ as a subject that can test the foundations of international law. Could the failure to provide space for just one essay on indigenous spoliation be explained on the ground that, because Euro-American interests are not directly or are only remotely affected by these obscene acts of depredations, little is served in deploying intellectual resources to resolve someone

with the Biya family allegedly heading the pack of plunderers. See, e.g. Gerard Mpressa Moulongo, *Chroniqué d' un pillage annonce*, JEUNE AFRIQUE ECONOMIE, no. 151, janvier 1992, 175-83 (presents a who's who of prominent Cameroonians, public servants as well as private businessmen, who have mulcted the national treasury).

23. Werlin, discussing corruption in Ghana, employs the metaphor but in a slightly different form. See *Roots of Corruption*, *supra* note 20, at 250.

24. See INTERNATIONAL LAW ANTHOLOGY 1 (Anthony D'Amato ed., 1994).

25. *Id.* at xv. The editor of the anthology, Professor Anthony D'Amato, proudly describes the essays as "writings that grapple with the deep issues and fascinating underpinnings of international law, writings that test the foundations of the discipline in light of today's and tomorrow's problems and issues." *Id.* Professor D'Amato predicts that the volume will "last for years and years." *Id.*

26. A trend has been observed in the development of international law "towards the replacement of the monolithically conceived normativity of the past by graduated normativity." The result is the emergence of a new scale of normativity in which norms are not merely distinguished from non-norms, as was the case in the past, but among the norms themselves. The "super-norms" are carefully segregated from the "ordinary" ones. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 421 (1983). Clearly, a new normativity is at work that allows one group of international law scholars to decide for the rest which issues test the very foundations of international law.

else's problem? If so, could this omission be a subtle reminder that international law is still the preserve of the developed states of Europe and North America whose "vital interests" it continues to reflect?

Might an international legal community in which Third World scholars set the intellectual and publishing agenda have produced an international law anthology on the enduring problems of our world without as much as including a single essay on indigenous spoliation? And, might a global community of states dominated by Third World members have approached the problem of indigenous spoliation differently? If so, what questions would they have asked; which issues would have been stressed; and what solutions would they have proposed? In a nutshell, this Article addresses the challenges raised by these questions. It is time once again to draw international attention to the persistent problem of economic plunder in general and high-level official graft in particular—the problem of indigenous spoliation. Perhaps if more is written about indigenous spoliation, the world community of scholars and policymakers may finally take note and address the problem.

Accordingly, this Article advances and attempts to confirm the thesis that acts of indigenous spoliation by high-ranking government officials violate the law of states and that responsibility for these acts attaches to the individuals committing them. These acts violate (1) treaty-based obligations imposing duties upon parties to promote individual economic rights within their domestic spheres; (2) treaty-based obligations imposing duties on parties to promote and protect fundamental human rights and freedoms; and (3) customary international law.

Part II of this Article offers a definition of indigenous spoliation and presents several concrete descriptions of important instances of this practice, as well as its macroeconomic consequences on both the national and international spheres. This analysis refutes the view advanced by some U.S. scholars that these acts of economic piracy possess some socially beneficial value. Part III briefly describes the current state of municipal law on, and its inadequacy as a vehicle for, the recovery and repatriation of spoliated funds and the pressing need for international law to provide a remedy. Part IV confirms the thesis that indigenous spoliation violates the law of states by showing how a fundamental, internationally protected human right—the right of a people to exercise permanent sovereignty over their wealth and natural resources—is implicated. Part V proposes a framework for holding persons involved in acts of spoliation individually liable. Finally, Part VI builds on the discussion of extraterritorial effects of indigenous spoliation and advances

several options that the world community can pursue to bring it under international discipline.

II. THE PROBLEM AND ITS CONSEQUENCES

A. A Definition of Indigenous Spoliation

Indigenous spoliation is an illegal act of depredation committed for private ends by *constitutionally responsible rulers, public officials, or private individuals*.²⁷ Such terms as "embezzlement," "misappropriation," "corruption," and "graft" have been, and continue to be, used to describe the widespread practice of office-holders confusing the public treasury with their private accounts.²⁸ However, these concepts do not adequately

27. The definition of corruption is much narrower. The focus of indigenous spoliation is on the illegitimate use of power for private ends by a particular group of people who hold public trust: heads of states and governments and other high-ranking constitutionally elected and appointed leaders. The circle of persons liable for acts of indigenous spoliation parallels the list of possible offenders in the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IV, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. There was much discussion during the drafting of the Genocide Convention on the circle of persons liable for persecution under the Convention. In the end, the final version of the Convention put to rest many of these concerns. Article IV stipulates that persons committing acts punishable under the Convention shall be punishable regardless of whether they are "public officials or private individuals." *Id.* Some concern was raised whether this definition was not only limiting but imprecise as well in that there are persons who act on behalf of the state, such as Members of Parliament, who do not qualify as officials *strictu sensu*. The comment to Article IV of the draft Convention prepared by the UN Secretary-General ("[T]hose committing genocide shall be punished, be they rulers, public officials or private individuals") sought to clarify this point: "[t]he perpetration of genocide can indeed be the act of statesmen, officials or individuals. The heaviest responsibility is that of statesmen or rulers in the broad sense of the word. . . ." Draft Convention on the Crime of Genocide, 4 U.N. Stat. ESCOR, at 35, U.N. Doc. E/447 (1947) [hereinafter Draft Convention on Genocide].

In the final version of Article IV that was adopted by the UN General Assembly, the words "constitutionally responsible" were added to qualify "rulers." The inclusion of "constitutionally responsible rulers" among the circle of persons liable for persecution under the Convention explicitly excludes the plea of acts of state. See ROBINSON NEHEMIAH, *THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION* 22 (1949).

28. Kleptocracy has been offered as a substitute. See, e.g., STANISLAV L. ANDRESKI, *THE AFRICAN PREDICAMENT: A STUDY IN THE PATHOLOGY OF MODERNISATION* 93-109 (1968). "The essence of kleptocracy is that the functioning of the organs

convey the full force of the relatively new phenomenon of indigenous spoliation.²⁹ Over the last two decades, several dictators have executed coordinated plans with the effect, if not the objective, of destroying the essential foundations of the economic life of a society. Their activity warrants a new name, because—as Raphael Lemkin³⁰ argued some four decades ago

of authority is determined by the mechanisms of supply and demand rather than the laws and regulation. *Id.* at 109. The ordinary meaning associated with the term “kleptocracy” is a ruling body or order of thieves.” 8 OXFORD ENGLISH DICTIONARY 477 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Again, like the other terms, kleptocracy only succeeds in describing the act of thieving but fails to convey its effects on the society. *Id.* Other scholars have referred to these countries as “vampire states.” See generally JONATHAN H. FRIMPONG-ANSAH, *THE VAMPIRE STATE IN AFRICA: THE POLITICAL ECONOMY OF DECLINE IN GHANA* (1992).

29. Consider, for example, some of the startling disclosures that were made in three Commissions of Inquiry set up by the military government that overthrew a civilian government in Sierra Leone in 1991—the Beccles-Davies Commission of Inquiry. One of the first witnesses to appear before the Beccles-Davies Commission was the former Inspector-General of Police, Mr. James Bambay Kamara, who disclosed that he had substantial money in several local and overseas bank accounts, he owned over 30 pieces of property in the state, and occasionally kept between Le 10,000 and Le 20,000 in his office which he used to help people. At the time of the coup, Mr. Kamara’s monthly salary including allowances was Le 18,042.

Another example of phantom contracts that was brought to the attention of the Lynton Nylander Commission of Inquiry was the award of a \$20 million contract to Siemens for the rehabilitation of the Sierra Leone Broadcasting Service. The contract was never performed though the contractors were paid Le 66 million on the instructions of the former Minister of Information and Broadcasting. Fake contracts, kickbacks, assets out of step with salaries, and outright conversion of public funds were the order of the day in Sierra Leone. Take the case of Mr. Michael Abdulai, the former Minister of Transport and Communication, who also appeared before the Beccles-Davies Commission. His cabinet portfolio gave him jurisdiction over the state’s sea and inland waters ports. In 1987, Abdulai executed a Memorandum of Understanding and Consultancy Agreement with the managers of the Sierra Leone Ports Authority (SLPA), which provided that Abdulai would be secretly paid a lump sum of \$100,000 each year plus a 10% commission on all purchases made overseas by the SLPA.

A former diplomat and government minister, Aiah M’bayo, told the Beccles-Davies Commission that the Algerian government had donated four million dollars, five hundred tons of fuel, and a shipload of provisions as Algeria’s own contribution to the hosting of the OAU summit in Sierra Leone. However, contrary to the intentions of the Algerian government, the money was distributed among some of Sierra Leone’s ambassadors. This kind of graft contributed in no small measure to the classification of Sierra Leone as the poorest of the poor. This is not ordinary, run-of-the-mill corruption. This type of activity is graft of a different order: the kind that can literally bankrupt a state’s economy, arrest its development, and condemn its people to a life of poverty and misery.

30. Professor Raphael Lemkin was one of three experts—the other two were Professor Henri Donnedieu de Vabres of the University of Paris and Professor Vespasian V. Pella, President of the International Association of Penal Law—who assisted Professor John P. Humphrey, Director of the Division of

when he introduced the word "genocide" into the lexicon of political discourse—a new crime deserves a new name.³¹ The word "patrimonicide" seems appropriate for this new international economic crime. The word comes from combining the Latin words "patrimonium," meaning "[t]he estate or property belonging by ancient right to an institution, corporation, or class; especially the ancient estate or endowment of a church or religious body,"³² and "cide," meaning killing. This term is fitting because indigenous spoliation is the destruction of the sum total of a state's endowment, the laying waste of the wealth and resources belonging by right to her citizens, and the denial of their heritage.

Although political leaders have historically misappropriated the wealth of their peoples, three things distinguish this new generation of "economic crimes of former dictators."³³ The first feature is that, unlike past depredations where the wealth remained in the territory for recycling, the modern context is characterized by "great mobility of wealth and the capacity to hide and disguise it."³⁴ A Filipino senior executive of a multinational oil company operating in the Philippines accurately summarized the situation: "If only these people kept their money here and

Human Rights at the United Nations, in preparing a Draft Convention on Genocide. See Draft Convention on Genocide, *supra* note 27, at 15.

31. Raphael Lemkin, *Genocide—A Modern Crime*, 9 FREE WORLD, APRIL 1945, at 39. The depredations discussed in this Article pale in comparison to the horrors for which Lemkin's term "genocide" has been reserved. Nonetheless, recognition that spoliation by indigenous rulers is offensive is a step forward in the evolution of international law, as it pertains to respect for the rights and obligations of individuals. Spoliation is an activity with immediate effects, such as capital flight, that have immediate macro- and micro-economic consequences, especially when the amounts involved are substantial. The victims are easily identifiable: unemployed and underemployed college and university graduates that the economy simply cannot absorb; ordinary citizens who cannot count on services from any of the social agencies and who suffer hardships such as undernourishment and high infant mortality rates.

32. See 11 OXFORD ENGLISH DICTIONARY 349 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., 1989); see also OXFORD LATIN DICTIONARY 1310 (P.G.W. Glare ed., 1983) (defining patrimonium as the property of a *paterfamilias*, private or personal possessions, estate, fortune.).

33. See ASIL PROCEEDINGS, *supra* note 12, at 395 (remarks by Professor Chayes). Presidential corruption is an old problem. HUGH THOMAS, CUBA: THE PURSUIT OF FREEDOM (documenting presidential corruption in Cuba dating back to the turn of the century during the administration of President Gomez and ending with Fulgencio Batista's second tenure as President of Cuba). Edwin Lieuwen also documents gross presidential graft in Venezuela covering a span of five decades. See EDWIN LIEUWEN, VENEZUELA (1961).

34. See ASIL PROCEEDINGS, *supra* note 12, at 395; see also Hetzer, *supra* note 12, at 189; Kraar, *supra* note 12, at 97.

reinvested it in productive enterprises, our problems would be a lot more manageable."³⁵ This statement undermines the argument that patrimonicide has a socially beneficial side.

A second feature of the modern version of indigenous spoliation is the amount of wealth involved—usually billions of dollars. So stupendous are the amounts of wealth involved that one commentator described these depredations as going “beyond shame and almost beyond imagination.”³⁶ Indeed, the private buildup of assets abroad is usually so large in relation to the total external debts of the states from which these funds were spoliated that in some cases it even exceeds these states’ total foreign debt.³⁷

A third new aspect of contemporary indigenous spoliation is the social and economic devastation that follows when capital of the magnitude described above is allowed to leave any state, particularly a capital-poor developing state. The ultimate losers and victims are the ordinary citizens.³⁸ The economies suffer because the accumulation of these substantial assets abroad has the effect of draining resources, both domestic and external, that might otherwise have been used for domestic investment.³⁹ As resources are funneled into private accounts abroad, governments, state enterprises, central banks, and private-sector companies are forced to borrow from foreign lenders.⁴⁰ These

35. Pete Carey et. al., *Marcos Top Associates Stash Personal Fortunes Overseas*, SAN JOSE MERCURY NEWS, in 131 CONG. REC. S. 15, 124 (Nov. 4, 1985).

36. DARRELL DELAMAIDE, DEBT SHOCK: THE FULL STORY OF THE WORLD CREDIT CRISIS 60 (1984); see also C. BRAECKMAN, LE DINOSAURE (1990).

37. See Rimmer de Vries, *LDC debt: debt relief or market solutions?*, 1986 WORLD FIN. MARKETS 1, 6.

38. Commenting on the real estate buying spree of the Marcoses in the United States, Congressman Stephen Solarz noted that such actions cheat the Philippines in two ways: First, “[t]he corrupt practices [President Marcos] has engaged in and encouraged have made him one of the world’s richest men while impoverishing millions of people in his own country and greatly accentuating the prospects for progress on the part of the Communist-dominated New People’s Army. Second, the hundreds of millions if not billions of dollars he has acquired represent resources that would otherwise be available to meet the basic needs of the Filipino people. . . .” *Investigation of the Philippine Investments in the United States, Hearings Before the Subcommittee on Asian and Pacific Affairs of the Committee on Foreign Affairs*, 99th Cong., 1st & 2nd Sess., 263 (1985 & 1986) (statement of Stephen Solarz, Chairman of the Subcommittee) (hereinafter *Philippine Hearings*).

39. *Id.*

40. *Id.* According to the *Economist*, Africa’s debt in 1993 had more than tripled since 1980 as a result of new borrowings. More importantly, because of the build-up of unpaid interest, Africa has been able to meet only half of its debt-servicing obligations. See *African debt: Borrowed time*, *ECONOMIST*, May 22, 1993, at 52 (hereinafter *African debt*).

external borrowings create new liabilities, which must be paid off by governments whose economies are already overburdened with debt.⁴¹ The price of these outflows of foreign exchange to the industrial world is "billions of dollars-worth of unsurfaced roads, unpurified water and untreated illnesses."⁴²

The focus of this Article is not on ordinary corruption, but rather on the illegitimate use of power for private ends by a particular group of people who hold public trust: heads of states and governments and other high-ranking, constitutionally elected and appointed leaders. Focusing on this group is justified for several reasons. First, large-scale expropriation of a state's resources typically requires the consent of the president or head of state. In Latin America, the chief executive presides over the plunder of the state's resources: limited corruption can always escape presidential scrutiny, "but on a large-scale systematic basis it normally must require at least his tacit acquiescence and, more likely, his personal supervision."⁴³ This view is consistent with what other observers have remarked with regard to the presidential regimes in Africa.⁴⁴ Second, current efforts to curb corruption are aimed primarily at low-level government officials. Graft at the presidential level is merely mirrored, on a smaller scale, by officials at all levels of government. Thus, chief executives are the appropriate target for corruption inquiries.

However, given the intimate involvement of high-level executives in the organized plunder of national resources, it is not surprising that such inquiries, as well as laws prohibiting corruption, almost always target low-level officials, rarely looking into "the politically dangerous areas of the Presidency, the party, and

41. In order to maintain payments on their debts, many Third World governments use up scarce foreign exchange. "Uganda spends two-thirds of all the foreign currency it earns from exports servicing its debts." It has been estimated that "[t]he average share spent servicing debt in sub-Saharan Africa is about one-fifth." See *African debt*, *supra* note 40, at 82.

42. *Id.*

43. See Whitehead, *supra* note 13, at 148.

44. These observers include the Apaloo Commission of Inquiry, several other commissions appointed to investigate high-level corruption in Ghana during Kwame Nkrumah's administration, and Stephen Riley who studied corruption in Sierra Leone. See VICTOR T. LE VINE, *POLITICAL CORRUPTION: THE GHANA CASE* 29 (1975); see also SAMUEL IKOKU, *LE GHANA DE KWAME NKUMAH* 111 (1971). See Stephen Riley, *The land of waving palms': political economy, corruption inquiries and politics in Sierra Leone*, in *CORRUPTION: CAUSES, CONSEQUENCES AND CONTROL* 190, 202 (Michael Clarke ed., 1983).

the activities of the country's ministerial oligarchs."⁴⁵ Targeting low-level officials is useful only:

as evidence in areas of low-level, incidental and systematic corruption; they are not, however, and indeed cannot for political reasons be used as evidence in cases of high-level systemic corruption. It is unlikely that a corrupt regime will investigate itself; it is only possible when there is a change of regime, and then the exercise is politically suspect (as an apologia for the current regime).⁴⁶

Finally, in light of the prevailing Western academic view that corruption is socially beneficial, a reminder of how the vast amounts of state funds routinely stolen by heads of state continue to exact a heavy financial toll on state economies might result in a reassessment of this thesis. Of five Latin American presidents ousted between 1952 and 1961, their reported fortunes, obtained mostly through graft, have been estimated at \$1.8 to \$2.6 billion⁴⁷ against a total foreign debt of about \$2 billion for the five states.⁴⁸ A similar picture emerges in Africa. In the early 1960s, for example, Maurice Yameogo, first president of Upper Volta (now Burkina Faso) was prosecuted for embezzling £1,212,000 during his tenure in office.⁴⁹

45. LE VINE, *supra* note 44, at 23.

46. See Riley, *supra* note 44, at 195. Le Vine offers an identical explanation for Ghana. See LE VINE, *supra* note 44, at 80. The Ghanaian novelist, Ayi Kwei Armah, is even more forthright in his dismissal of post-coup corruption inquiries in his country as no better than "a net to catch only the small, dispensable fellows, trying in their anguished blindness to leap and to attain the gleam and the comfort the only way these things can be done. And the big ones floated free, like all the slogans." See AYI KWEI ARMAH, *THE BEAUTIFUL ONES ARE NOT YET BORN* 180 (1989); see also *Roots of Corruption*, *supra* note 20, at 248. When corruption became so widespread and common in the Philippines, President Ferdinand Marcos appointed a commission in 1984 to investigate persistent allegations that high-ranking officials close to the First Family were exporting huge amounts of illegally obtained state funds to safe havens abroad. Few Filipinos had any confidence in the commission: "[it] was appointed by the president, and it will concentrate only on small operators. To expect otherwise would be silly self-deception," said a consultant to a leading Philippine bank. See 131 CONG. REC. 15,124, *supra* note 35.

47. These fortunes include: Miguel Aleman of Mexico, \$500-\$800 million; Juan Peron of Argentina, \$500-\$700 million; Marcos Perez Jimenez of Venezuela, over \$250 million; Cuba's Fulgencio Batista, \$100-\$300 million; and Rafael Trujillo of the Dominican Republic, \$500 million. See Whitehead, *supra* note 13, at 146, 150.

48. *Id.*

49. See RUTH FIRST, *POWER IN AFRICA* 103 (1970).

B. *The International Dimension of Indigenous Spoliation*

Although the conduct of indigenous spoliation and its immediate victims appear to be confined to developing states, the problem does have worldwide significance.⁵⁰ The founders of the United Nations clearly saw a direct link between economic well-being and international peace. The UN Charter states, in its Preamble and Article 1, that the United Nations was established, *inter alia*, to promote better quality of life, the economic and social advancement of all peoples, human rights, and fundamental freedoms.⁵¹ The right of a people to the benefits from, and the sovereignty over, their resources is a fundamental human right.⁵² This right is denied when a state's wealth is diverted for the personal use of its political leaders. By the express terms of Article 55 of the Charter, members of the United Nations have a duty to discourage this form of economic exploitation of a state's wealth.⁵³

1. Stress and Strain on Interstate Relations

Economic crimes by a ruling oligarchy have not only a local character but also extraterritorial effects. They affect relations between states, unleashing a range of reactions that threaten international peace. Demonstrations by an outraged public, often violent, have usually occurred in states willing to provide sanctuary for fleeing dictators who have looted the economies of

50. In the congressional hearings on Philippine investments in the United States, several members of the House of Representatives' Subcommittee on Asian and Pacific Affairs were insightful enough to see clearly the transnational implications of what at first blush could be mistaken for a purely intra-national problem. In particular, the chairman of the subcommittee, Congressman Solarz, repeatedly drew his colleagues' attention to the profound and serious questions for U.S. foreign policy that the Marcoses' vast investments in the United States raised. See *Philippine Hearings*, *supra* note 38, at 252. This view was echoed by Congressman Leach who also argued that there were significant policy implications for the United States "when it becomes apparent that a country to which we give aid is run by a family which allocates the resources of the land to its own personal use and which, in effect, loots the capacity of that country to achieve responsible economic growth and advance the welfare of its people." See *id.* at 264.

51. See U.N. CHARTER pmbi., art. 1.

52. See discussion *infra* pt. IV.

53. U.N. CHARTER art. 55.

their home states. The refusal of asylum states to surrender fugitives to the requesting states to stand trial for their crimes frequently invites diplomatic protests from the requesting state or an outright rupture in diplomatic relations. England's refusal to extradite Umaru Dikko—a former Nigerian politician under the civilian administration of President Shehu Shagari, which was overthrown by a military coup in 1983—severely strained Anglo-Nigerian relations for several years.⁵⁴ In short, economic crimes of the sort typified by indigenous spoliation are not only directed against the domestic public order, but also violate the international public order. Perpetrators of such acts, therefore, constitute a danger to the public order of other states, and it is in the mutual interest of states to apprehend and to punish them.

2. Failed Efforts to Contain Cross-Border Refugee Flows

As already pointed out, capital flight almost always leads to grave economic problems for developing states, the resolution of which hinges on the assistance and generosity of the international community.⁵⁵ Economies in distress traditionally look to the rich, industrialized states and international financial institutions for financial aid. However, the rich, industrialized states do more than provide economic assistance to strengthen collapsing economies. They also must contend with the influx of economic

54. Dikko was among a number of civilian politicians who fled Nigeria to England shortly after a military coup on December 31, 1983. Others who fled included: Chief Adisa Akinloye, Mallam Ali Makele, Emmanuel Osamor, the former Finance Minister, Dr. Sunday Essang, and Dikko, brother-in-law of the former President and his Minister of Transport. Chief Adisa Akinloye and Mallam Ali Makele were alleged to have conspired with others to receive kickbacks of 29.1 million *naira* (then worth \$18.2 million). In addition, Chief Akinloye is alleged to have received 1.5 million *naira* in cash for himself and an additional 375,000 *naira* paid in dollars on his demand to a Swiss bank account. The Nigerian government alleged that Dikko had corruptly amassed a \$3.5 billion fortune during his four years in office as Minister of Transport. See Nigeria's Fresh Start, *TIMES* (London), May 9, 1989, at 17; Richard Dowden, *Nigerian kidnap man seeks asylum*, *TIMES* (London), Dec. 21, 1984, at 28.

55. Periodically, debts have been forgiven or rescheduled. A succession of rescheduling arrangements has been attempted in the last several years. The "Trinidad terms," the first of many, proposed in 1990 by then Chancellor of the Exchequer, John Major, has as its goal writing off two-thirds of a poor state's debt incurred before a certain date, and rescheduling the rest over twenty-five years. Alternatively, the so-called "enhanced Toronto terms" proposes to cancel only half a poor state's debts contracted before a certain debt and then to reschedule the remaining half over a protracted term. These efforts have all been a drop in the bucket, barely denting the servicing problem. See *African debt*, *supra* note 40, at 52-53.

refugees forced to flee their home states for the more salubrious economic shores of Western Europe and the United States.

Governments in these industrialized states have reacted to the threat of asylum-seekers flooding their shores in several ways. Some governments have been forced to take a closer look at the activities of their protégés around the world in order to ascertain what additional support can be provided. For instance, the increasing number of refugees who fled Haiti for United States shores⁵⁶ in the late 1970s played a major role in the decision made by the United States and several international development agencies to intervene more forcefully in Haiti's internal affairs in 1980. By mid-1981 the number of Haitian immigrants had risen to 45,000,⁵⁷ roughly half of whom had applied for political asylum in the United States.⁵⁸ Interestingly, the U.S. government has taken to referring to these boat people as "economic migrants"⁵⁹

56. JOSH DEWIND & DAVID H. KINLEY III, *AIDING MIGRATION: THE IMPACT OF INTERNATIONAL DEVELOPMENT ASSISTANCE ON HAITI* xiv (1988). A 1980 estimate puts the number of Haitians living outside their homeland at 680,000—roughly 12% of the population of Haiti. See James Allman, *Haitian Immigration: 30 Years Assessed*, 10 *MIGRATION TODAY* 7,11 (1982) cited with approval in DEWIND & KINLEY, *supra* at 6-7.

57. See DE WIND & KINLEY, *supra* note 56, at 1.

58. Statistics on immigration compiled annually by the United States Immigration and Naturalization Service show that the overwhelming majority of Haitian immigrants to the United States between 1962 and 1978 came from the rural poor. See SUSAN BUCHANAN, *HAITIAN EMIGRATION: THE PERSPECTIVE FROM SOUTH FLORIDA AND HAITI* 203 (1981). This statistic tends to support the United States government's position that the root cause of migration is economic, and not political.

59. This description has been endorsed by successive United States presidents from Richard M. Nixon to George H.W. Bush. See DEWIND & KINLEY, *supra* note 56, at 1-2. See also FAGEN, *Applying for Political Asylum in New York: Law, Policy and Administrative Practice*, in N.Y.U. CENTER FOR LATIN AMERICAN AND CARIBBEAN STUDIES, at 23 (1984); G.D. LOESCHER & J. SCANLON, *U.S. Foreign Policy and Its Impact on the U.S. Refugee Flow From Haiti*, N.Y.U. CENTER FOR LATIN AMERICAN AND CARIBBEAN STUDIES, 24-25 (1984). To be sure, supporters of the Haitian boat people have countered on two levels. First, they have argued that the vast majority of the immigrants are fleeing political persecution and are therefore entitled to asylum under United States law and international law. See *Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442, 462 (S.D. Fla. 1980); see also Thomas Powers, *The Scandal of U.S. Immigration: The Haitian Example*, MS. MAGAZINE, Feb. 1976, at 62-66, 81-83. Second, they argue that the separation of political and economic causes of Haitian migration is artificial and misleading. See DEWIND & KINLEY, *supra* note 56, at 5. It is unrealistic to talk of one without the other because they are so intertwined. See ALEX DUPUY, *HAITI IN THE WORLD ECONOMY: CLASS, RACE, AND UNDERDEVELOPMENT SINCE 1700*, 185 (1988); A. STEPICK, *Haitians Released From Krome: Their Prospects for Adaptation and*

who are fleeing poverty rather than persecution.⁶⁰ Consistent with the view that Haitian emigration is economically rather than politically motivated, the United States and other Western governments responded by expanding and increasing their economic assistance programs. Between 1973 and 1981, these governments provided close to \$500 million of development assistance to the Haitian economy.

But this massive international effort to transfer huge sums of money to Haiti still failed to staunch the flow of emigration. Judge King in *Haitian Refugee Center v. Civiletti*⁶¹ may unwittingly have provided an explanation for this state of affairs. "The Haitians' economic situation," the judge stated, "is a political condition," and "much of Haiti's poverty is the result of Duvalier's efforts to maintain power."⁶² DeWind and Kinley argue:

From an analysis of the structure, policies, and socio-economic impacts of past aid programs, it appears that internationally sponsored development initiatives were in large part subverted by the Haitian government through a combination of bureaucratic mismanagement and corruption, which systematically diverted aid resources away from the genuinely needy.⁶³

In a similar vein, a Canadian assessment of foreign aid programs in Haiti concluded that:

[L]ittle progress has been made in reducing the notorious misuse of public revenues for private purposes. Huge sums are still diverted in countless different ways. . . . The man on the top of the hierarchy is hardly about to put a stop to this integral part of Haitian life for he is undoubtedly its greatest beneficiary.⁶⁴

The international dimensions of this problem are clear. Such fiscal diversions inevitably create large-scale poverty, which in turn forces the economically deprived to seek a better life outside Haiti and similarly situated states. The threat of a flood of

Integration in South Florida, FLORIDA INTERNATIONAL UNIVERSITY LATIN AMERICAN AND CARIBBEAN STUDIES CENTER 347 (1984).

60. For international legal definitions of "refugee," see Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 150, as modified by Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 19 U.S.T. 6259, 189 U.N.T.S. 150. See also Declaration on Territorial Asylum, G.A. Res. 2313, 22 U.N. GAOR, 22nd Sess., Supp. No. 10, at 81; U.N. Doc. A/6912 (1967); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

61. 503 F. Supp. 442 (S.D. Fla. 1980).

62. *Civiletti*, 503 F. Supp. at 509; see also WORLD BANK, COUNTRY PROGRAM PAPER, HAITI 21-22 (1983); P.E. ENGLISH, CANADIAN DEVELOPMENT ASSISTANCE TO HAITI 24-26 (1984).

63. See DEWIND & KINLEY, *supra* note 56, at 39-40, 44.

64. See ENGLISH, *supra* note 62, at 28-30.

unwanted, unskilled, and illiterate refugees trying to enter Western industrialized states has caused these states to scramble to develop additional aid packages to induce these prospective refugees not to leave their home states.

3. The Consequences of Cross-Border Refugee Flows: Compassion Fatigue and Violent Backlash Against Foreigners

Foreign aid directed at halting the flow of "economic refugees" rarely reaches its intended beneficiaries. As a result, "economic refugees" from Haiti and other states have continued to flood the shores of the United States and Western Europe.⁶⁵ Their presence has in turn provoked a backlash from the governments and citizenry of the receiving states.⁶⁶ Increasingly, the governments of Europe are losing their tolerance and have begun erecting legal⁶⁷ and psychological walls to keep out economic migrants.⁶⁸ Refugees compete with citizens of their host states for scarce resources—land, water, housing, food, and medical services.⁶⁹ "As a result, the economics and services of the coun-

65. The explosion of so-called "poverty refugees" fleeing the destitution of their home states far exceeds the number of "traditional refugees" fleeing persecution and armed conflict. See T. Stoltenberg, *UNHCR Refugees a problem for all*, HINDUSTANI TIMES, Oct. 29, 1990 cited in Shamsul Bari, *The Right to Development and Refugee Protection*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 181 (S. R. Chowdury, et al. ed., 1992). The United States is currently confronting what experts now call the "fourth wave" of immigration. Between 1970 and 1993, 25 million immigrants and refugees have entered the United States; this figure represents an annual rate of acceptance far in excess of that of the rest of the world combined. See *Immigration: We must manage this flood of newcomers better*, DALLAS MORNING NEWS, Oct. 3, 1993, at 2J (hereinafter *Immigration*).

66. A nationwide survey of opinions toward immigration revealed that 65% of Americans have reached their threshold of tolerance and now want limits on the massive influx of refugees into the United States. See *Immigration*, *supra* note 64, at 2J; see also Bruce W. Nelan, *Europe Slams the Door*, TIME, July 19, 1993, at 38-40; David A. Martin, *Interdiction, Intervention, and the New Frontiers of Refugee Law and Policy*, 33 VA. J. INT'L L. 473 (1993).

67. Most recently, the Constitution of the Federal Republic of Germany has been changed to stop the flow of refugees. See generally Michael W. Devine, Note, *German Asylum Law Reform and the European Community: Crisis in Europe*, 7 GEO. IMMIGR. L.J. 795 (1993).

68. See Shamsul Bari, *The Right to Development and Refugee Protection*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 167, 173 (S.R. Chowdhury et al., eds., 1992) (hereinafter *Refugee Protection*); see also Nelan, *supra* note 66.

69. Opposition to the United States so-called open-door policy to immigrants has focused on the high costs of maintaining such a system. Indeed, the annual cost of illegal immigration to taxpayers in California—one of the six

tries of asylum are often under severe pressure, and their own people are seriously deprived.⁷⁰ This sense of deprivation is at the root of so-called "compassion fatigue," a growing feeling among Western Europeans that their generosity in providing a safe harbor for "poverty refugees" has reached its breaking point.⁷¹ The negative public perception of refugees that such feelings engender may explain partly the rise in racism in France and neo-Nazism in Germany,⁷² as well as the treatment of Haitian refugees in the United States.

The negative perception of immigrants, particularly illegal immigrants, is also reinforced by the popular view of them as economic parasites and inveterate lawbreakers. In a 1993 editorial, the *Dallas Morning News* drew attention to the economic costs of illegal immigration to the United States.⁷³ The editorial cited one estimate that placed the nationwide cost of illegal immigrants in 1990 at approximately \$5.5 billion.⁷⁴

There is growing evidence that as the number of immigrants increases in the United States, a sizeable proportion of these newcomers are attracted to criminal, rather than entrepreneurial, activities. The attack on the World Trade Center in New York City on February 26, 1993, which resulted in six deaths, over 1,000 injuries, and \$1 billion in damage, was allegedly the work of immigrants.⁷⁵ Other studies have demonstrated a link between immigration and crime.⁷⁶ Overall, immigrants overpopulate both state and federal correctional systems at staggering costs to taxpayers.⁷⁷

Cross-border refugee flows pose a real threat to regional, if not global, stability. Therefore, the community of states has an

states where the bulk of immigrants settle—has been estimated at \$2.3 billion. See *Immigration*, *supra* note 65, at 2J; see also *Immigration: Swell of newcomers distorts the workplace*, DALLAS MORNING NEWS, Oct. 4, 1993, at 14A.

70. J.N. Saxena, *Uprooted People and Development*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 179, 182 (S.R. Chowdury, et. al., eds., 1992) (citing *Refugees in the Developing World: A Challenge to the International Community*, U.N. GAOR Executive Committee of the High Commissioner's Programme, 34th Sess., Annex III, at 6-7); U.N. Doc. A/AC 96/627 (1983).

71. Saxena, *supra* note 70, at 182.

72. See, e.g., Report on the Committee of Inquiry on Racism and Xenophobia, A3-195/90, rec. 31 1990 O.J. [hereinafter Report of Committee on Racism and Xenophobia].

73. *Immigration: Newcomers are burdening U.S. taxpayers*, DALLAS MORNING NEWS, Oct. 17, 1993, at 2J.

74. *Id.*

75. *Immigration: Congress must confront criminal impact*, DALLAS MORNING NEWS, Oct. 10, 1993, at 2J (hereinafter *Immigration and Crime*).

76. *Id.*

77. *Id.*

interest in addressing the root causes of the economic refugee problem. One way to contain this flood of migration is to ensure that the wealth of the developing states is put to use for the populations of these states and not diverted to the private accounts of ruling oligarchies.

III. THE CURRENT STATE OF THE LAW ON INDIGENOUS SPOILIATION

A. *The Case Law*

1. The Defense of Forum Non Conveniens

The doctrine of forum non conveniens allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute. Under *Piper Aircraft Co. v. Hartzell Propeller, Inc.*⁷⁸ a suit may be dismissed under this theory after taking into account: (1) any alternative forum for plaintiff's action; (2) the private interest factors affecting the interests of the litigants; and (3) the public interest factors affecting the convenience of the present forum. Although the first and third elements of the three-pronged analysis are relatively simple in their application, the second element—the private interest concerns—requires a more in-depth analysis. In the case of *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*,⁷⁹ a federal district court subsequently subdivided this second factor into two elements: (1) sources of proof and (2) access to witnesses.

The defense of forum non conveniens has been used successfully to foreclose litigation in a foreign jurisdiction to recover allegedly spoliated funds. In *Islamic Republic of Iran v. Pahlavi*,⁸⁰ Iran alleged that defendants "accepted bribes and misappropriated, embezzled or converted 35 billion dollars in Iranian funds. . . ." The Court of Appeals of New York upheld the dismissal of the suit based on forum non conveniens, despite the fact that Iran did not have a suitable alternate forum.⁸¹ Thus, under the common law

78. 454 U.S. 235 (1981).

79. 634 F. Supp. 842, 853, 859 (S.D.N.Y. 1986).

80. 62 N.Y.2d 474, 477 (1984), *cert. denied*, 469 U.S. 1108 (1985).

81. *Id.* at 478.

doctrine of forum non conveniens, a court may exercise its discretion in weighing the *Piper* and *Bhopal* factors.

2. The Act of State Doctrine

The act of state doctrine was first articulated by the United States Supreme Court in *Underhill v. Hernandez*,⁸² in which the Court held that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”⁸³ The act of state doctrine is a “prudential doctrine designed to avoid judicial action in sensitive areas.”⁸⁴ A successful assertion of the act of state doctrine precludes a litigant from bringing action against a foreign state, regardless of the litigant’s jurisdictional arguments.

While the act of state doctrine has remained essentially the same since *Underhill*, an exception to the doctrine (the *Bernstein* exception) has been created. In *Bernstein v. N.V. Nederlandsche-Amerikansche Stoomvaart-Maatschappij*,⁸⁵ the Second Circuit Court of Appeals reviewed a case involving the confiscation of property in Germany by the Nazi government. After the U.S. State Department informed the court that United States foreign relations did not demand judicial abstention in cases involving Nazi confiscations, the court proceeded to determine the validity of the acts of the German state.

In *Banco Nacional de Cuba v. Sabbatino*,⁸⁶ the U.S. Supreme Court held that “[w]hile historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence” and that the doctrine had “constitutional underpinnings” requiring the judiciary to refrain from interfering with the executive branch’s conduct of foreign relations. *Sabbatino* involved the use of the act of state doctrine by the Supreme Court to refuse to adjudicate the validity of an uncompensated confiscation of United States-owned property in Cuba by the Cuban government. Because the United States government had already taken a position on the Cuban taking,

82. 168 U.S. 250, 252 (1897).

83. *Id.* The case involved a Venezuelan general who was accused of assaulting a U.S. citizen in Venezuela. The Supreme Court refused to uphold *Underhill*’s claim that he was unlawfully detained by the Venezuelan government and dismissed the suit.

84. See *Int’l Assoc. of Machinists & Aerospace Workers v. Organization of the Petroleum Exporting Countries*, 649 F.2d 1353, 1359 (9th Cir. 1981).

85. 210 F.2d 375 (2d Cir. 1954).

86. 376 U.S. 398, 421 (1964).

the Court ruled that further adjudication would risk embarrassment to the executive branch.

In the more recent decision of *Alfred Dunhill of London, Inc. v. Republic of Cuba*,⁸⁷ the Supreme Court again faced the issue of the act of state doctrine. In *Dunhill*, former owners of several expropriated Cuban cigar companies brought an action against Cuba to recover payments made by Dunhill for cigar shipments made before and after the property was confiscated by the Cuban government. The Court held that the proprietary acts of the government of Cuba did not warrant the application of the act of state doctrine. As a consequence, an essential element of the application of the act of state doctrine is the characterization of the action as a public, as opposed to private or commercial, act of a sovereign. The burden of establishing an act of state defense lies with the defendant foreign state.⁸⁸

B. *The Act of State Doctrine as a Defense in Spoliation Cases*

The act of state doctrine was the centerpiece of the Marcoses' defense during their legal skirmishes with the Aquino government that succeeded Ferdinand Marcos. In two noteworthy cases, two United States Courts of Appeals were asked to consider whether the doctrine prevented U.S. courts from adjudicating the claims of the Aquino government because they involved acts of a former foreign sovereign. The question the Second and Ninth Circuits had to answer was whether the Marcoses' actions would be considered acts of the sovereign state or private acts for personal gain.

In *Republic of Philippines v. Marcos*,⁸⁹ the Second Circuit found a number of weaknesses in the defendant's act of state defense. The U.S. Justice Department, with the concurrence of the U.S. State Department's Office of the Legal Advisor, argued that "the burden is on the party asserting the applicability of the doctrine, and [. . . the] defendants [Marcoses] have to date not discharged their burden of proving acts of state. . . ."⁹⁰ Applying *Dunhill*, the court found that the defendants had failed to show that their acts were public acts protected under the doctrine, but

87. 425 U.S. 682 (1976).

88. See *id.* at 694.

89. *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) [hereinafter *Marcos*].

90. *Id.* at 356-57.

the court also questioned whether the act of state doctrine was applicable.⁹¹

When this same defense was raised in another case involving the Philippine government and Ferdinand and Imelda Marcos, the outcome was different. In *Republic of Philippines v. Marcos*,⁹² the Ninth Circuit Court of Appeals applied the act of state defense in upholding a district court preliminary injunction that barred the Marcoses from transferring their assets, allegedly purchased with money stolen from the Philippine government. The court of appeals found that the Marcoses' activities were public actions; therefore, the act of state doctrine precluded judicial review. The court rejected the view that the Marcoses' activities were private and asserted that governmental actions fall under the act of state doctrine even if illegal and regardless of whether the ruling power is lawful and recognized.⁹³ The court also concluded that Ferdinand Marcos could invoke the act of state doctrine as a defense because a United States pronouncement of the legality of his actions could interfere with foreign relations with the Philippines.⁹⁴

Unlike the Second Circuit action, the Ninth Circuit suit did not seek the recovery of specific property, but rather of all wealth allegedly obtained by the Marcoses through theft, fraud, expropriation, and an enterprise engaged in a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).⁹⁵ Although the district court granted plaintiffs' request for a preliminary injunction to freeze the property, this decision was quickly overruled by the Ninth Circuit on the ground that the act of state doctrine precluded the plaintiffs' claim.⁹⁶

The Ninth Circuit opinion was widely criticized by reviewers, many of whom maintained that the two cases were virtually indistinguishable.⁹⁷ Some commentators have even suggested

91. *Id.* at 359.

92. *Republic of Philippines v. Marcos*, 818 F.2d 1473 (9th Cir. 1987) (hereinafter *Marcos II*).

93. *Id.* at 1483 (citing *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 444 (2d Cir. 1940)).

94. *See* 818 F.2d at 1485.

95. *Id.* at 1475-77.

96. *Id.* at 1490.

97. *See* Tacie A. Sundack, Note, *Republic of Philippines v. Marcos: The Ninth Circuit Allows a Former Ruler to Invoke the Act of State Doctrine Against a Resisting Sovereign*, 38 AM. U. L. REV. 225, 247 (1988); William J. Ritter, Case Comment, *International Relations-Act of State Doctrine-Marcos' Assets as Act of Philippine State*, 11 SUFFOLK TRANS. NAT'L L.J. 501 (1988); Douglas J. Chu, Note, *Marcos Mania: The Crusade to Return Marcos' Billions to the Philippines Through the*

that the Ninth Circuit's application of the act of state doctrine was indicative of its confused view of the issue.⁹⁸ This confusion is apparent in the following statement by the court:

We cannot shut our eyes to the political realities that give rise to this litigation, nor to the potential effects of its conduct and resolution. Mr. Marcos and President Aquino represent only two of the competing political factions engaged in a struggle for control of the Philippines. While the struggle seems to be resolving itself in favor of President Aquino, this may not be the end of the matter. . . . While we are in no position to judge these things, we cannot rule out the possibility that the pendulum will swing again, or that some third force will prevail. What we can say with some certainty is that a pronouncement by our courts along the lines suggested by plaintiff would have a substantial effect on what may be a delicate political balance, as would a contrary pronouncement exonerating Mr. Marcos.⁹⁹

The Ninth Circuit appears to have overlooked the fact that President Aquino had already been recognized by the United States as the head of state and government of the Philippines.¹⁰⁰ The majority chose to overlook the extant relationship between the Philippines and the United States, speculating instead on future Philippine political conditions.

These criticisms aside, the Ninth Circuit's opinion is also contrary to the basic policies underlying the act of state doctrine. First, the Ninth Circuit erroneously concluded that Marcos' illegal governmental activities were public and therefore beyond United States jurisdiction.¹⁰¹ However, United States courts have long recognized the distinction between a foreign official's public and private acts and ruled that the act of state doctrine only protects official public actions.¹⁰² For example, the Fifth Circuit in *Jimenez v. Aristeguieta* held that former Venezuelan President Jimenez's crimes were acts committed for his private financial benefit and, therefore, were not sovereign acts shielded by the act of state doctrine.¹⁰³ The court implicitly articulated a benefit test by emphasizing that acts done for "private financial benefit" are not immunized from judicial review by the act of state doctrine.¹⁰⁴

Federal Courts, 18 RUTGERS L.J. 217 (1986). Cf. A.C. Robitaille, Note, *The Marcos Cases: A Consideration of the Act of State Doctrine and the Pursuit of the Assets of Deposed Dictators*, 9 B.C. THIRD WORLD L.J. 81, 85 (1989).

98. Robitaille, *supra* note 97.

99. *Marcos II*, 818 F.2d at 1486.

100. Robitaille, *supra* note 97, at 99.

101. See Sundack, *supra* note 97, at 247.

102. *Id.* at 248 (citing *Marcos I*, 806 F.2d at 359).

103. *Jimenez v. Aristeguieta*, 311 F.2d 547, 557-58 (5th Cir. 1962).

104. *Id.*; see also Robitaille, *supra* note 97, at 92.

Furthermore, a sovereign's illegal activities are not public actions simply because they are related to governmental activities. Under the reasoning of *Jimenez*, Marcos had acted in furtherance of his own private interests¹⁰⁵ and, therefore, was not entitled to the protection of the act of state defense.

Second, even if the Ninth Circuit were correct in holding that Marcos' crimes were public acts, the act of state doctrine still would have been inapplicable because Marcos' activities were not fully executed in the Philippines.¹⁰⁶ Marcos, for instance, attempted to hide the money he spoliated from the Philippines by purchasing real estate in the United States under an assumed name, in violation of U.S. law. Clearly, these illegal activities were reviewable by the Ninth Circuit. By refusing to adjudicate the legality of Marcos' activities, the court of appeals unwittingly validated his illegal actions.

Finally, the Ninth Circuit's statement that it allowed Marcos to invoke the act of state doctrine in order to prevent embarrassment to the United States executive branch and to alleviate tension between the Philippines and the United States that may result from adjudication is a *non sequitur*. First, the Philippines government brought the action against Marcos.¹⁰⁷ Second, the court's insistence on applying the act of state doctrine to protect Marcos was likely to offend the Philippine government. The court would not have gone wrong if it ruled that the adjudication of the validity of Marcos' illegal practices was permissible.¹⁰⁸

The activities of a sitting or former sovereign that qualify as public acts are protected under the act of state doctrine, regardless of their legality under the law of the state, and, therefore, beyond the reach of United States courts. However, if the activities are considered private acts for personal gain, the act of state doctrine is no longer available as a defense. A review of case law alleging spoliation of state wealth by high-ranking government officials reveals a very fine line between public and private activities. To make acts of spoliation adjudicable and redressable in domestic courts would require treating them as a violation of the law of nations. If treated as internationally prohibited conduct, states will be under a duty to lend assistance in the recovery of spoliated funds anywhere in the world.

105. Sundack, *supra* note 97, at 249.

106. *Id.* at 250 (citing *Marcos II*, 818 F.2d at 1476).

107. *Marcos II*, 818 F.2d at 1485-86.

108. See Judson J. Wambold, Note, *Prohibiting Foreign Bribes: Criminal Sanctions For Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 238 (1977).

IV. THE DOCTRINE OF PERMANENT SOVEREIGNTY: ITS ORIGINS, CONTENT, AND RELATION TO INDIGENOUS SPOILIATION

International law comes into being in one of three ways: through international treaties, international custom (as evidence of a general practice accepted as law), or general principles of law recognized by the world's major legal systems.¹⁰⁹ Acts of indigenous spoliation by high-ranking government officials should be viewed as a violation of the law of nations. These acts violate (1) treaty-based obligations that impose on states parties a duty to promote individual economic rights within their domestic spheres¹¹⁰ and (2) treaty-based obligations that impose a duty on states parties to promote and protect fundamental human rights and freedoms.

In the last half of the twentieth century, international law has shifted dramatically away from the historical preoccupation with sovereign-state rights to a concern for the well-being of the citizens of these states.¹¹¹ This concern has led to the recognition and subsequent elaboration of a corpus of rights that pertain to individuals *qua* individuals. Among the many rights that have been recognized are certain fundamental human rights and the right to minimum economic standards. Not all of the newly-minted rights have risen to the level of international law.¹¹²

109. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1), June 26, 1945, 59 Stat. 1055 (1945), T.S. No. 993; see also MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 35-38 (1988).

110. See International Covenant on Economic, Social and Cultural Rights, art. 2, para. 1, reprinted in THE INTERNATIONAL BILL OF HUMAN RIGHTS 13 (Paul Williams ed., 1981); African, Caribbean, and Pacific States-European Economic Community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lome, Dec. 15, 1989, art. 5, reprinted in 29 I.L.M. 783 (1990).

111. See C. WILFORD JENKS, THE COMMON LAW OF MANKIND 17 (1958); Wolfgang Friedmann, *Human Welfare and International Law—A Reordering of Priorities*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 113 (Wolfgang Friedmann et. al., eds, 1972).

112. See Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982); Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3 (1988); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?* in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 501 (Richard Falk et. al. eds., 1985); Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982); K. Vasak, *For the Third Generation of Human Rights: The Rights of Solidarity*, Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, given in Strasbourg, France, July 2-27, 1979 (manuscript on file with the author).

Among these rights is the right of peoples to dispose freely of their national wealth and natural resources. However, this right is among the inalienable rights of all human beings, as part of the doctrine of permanent sovereignty. This section traces the evolution of this doctrine.

A. *Permanent Sovereignty and Self-Determination*

1. The Draft Covenants on Human Rights

The concept of permanent sovereignty over natural resources had its genesis in the Eighth Session of the Human Rights Commission of the United Nations.¹¹³ The concepts of permanent sovereignty and self-determination were again linked together in the General Assembly of the United Nations. In a 1952 resolution, the General Assembly recognized "that the under-developed countries have the right to determine freely the use of their natural resources . . . in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests"¹¹⁴ In the Sixth Session of the General Assembly, the Assembly recognized "the right of peoples and nations to self-determination as a fundamental right."¹¹⁵ Further, the General Assembly decided "to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination"¹¹⁶ Later that same year, the General Assembly passed a resolution dealing with the right to exploit freely natural wealth and resources.¹¹⁷

a. Second Committee Debates: 1952

Also in 1952, the Second Committee of the United Nations General Assembly discussed the concept of permanent

113. Somendu Kumar Banerjee, *The Concept of Permanent Sovereignty Over Natural Resources—An Analysis*, 8 INDIAN J. INT'L L. 515, 517 (1968). The concept of permanent sovereignty over natural resources was adopted as paragraph three of Article One of the Covenant. *Id.* at 517-18.

114. G.A. Res. 523, 6th Sess., 360th plen. mtg. (1952), *reprinted in* 3 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 186 (Dusan J. Djonovich ed., 1972).

115. G.A. Res. 545, 6th Sess., 375th plen. mtg. (1952) (citing G.A. Res. 421D, 5th Sess. (1950)), *reprinted in* 3 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 201 (Dusan J. Djonovich ed., 1972).

116. *Id.*

117. G.A. Res. 626, 7th Sess., 411th plen. mtg. (1952), *reprinted in* 4 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 106 (Dusan J. Djonovich ed., 1972).

sovereignty.¹¹⁸ The representative from Uruguay submitted a draft resolution affirming the principle that "[t]he ideal for an under-developed country was to attain economic independence, [and] to dispose freely of its own resources"¹¹⁹ The Uruguayan representative noted that the purpose of the draft resolution "was to affirm the need for protecting the population of under-developed countries and [to justify] their governments' desire to nationalize their natural resources."¹²⁰ The Uruguayan delegate strongly urged that "if the economic and political liberation of peoples was sought, measures would have to be taken to enable them to exploit their natural resources themselves and for their own benefit."¹²¹ Thus, the Uruguayan delegate emphasized the link between economic independence, self-determination, and permanent sovereignty over natural resources. The Haitian representative said that "the adoption of a draft resolution like the one being considered by the Committee would weaken the right of sovereign States to nationalize and exploit their natural wealth."¹²² Thus, once again, the notion of permanent sovereignty over natural resources was linked to self-determination and economic independence.

The Iranian representative clearly warned that "[c]ertain industrialized countries would have to realize that in the modern world a policy of exploiting the resources of another country against the interests of that country's inhabitants could not be justified," and that "[a] State's right to nationalize its natural resources was the guarantee of its economic independence."¹²³ However, the capital-exporting states resisted the notion of permanent sovereignty, while the capital-importing states insisted that permanent sovereignty over natural resources lay at the heart of economic independence.¹²⁴

b. The Ninth Session of the General Assembly Debates: 1954

The controversy between capital-importing and capital-exporting states continued in 1954 during the Ninth

118. U.N. GAOR 2nd Comm., 231st mtg., at 251-53, U.N. Doc. A/C.2/S.R. (1952) [hereinafter Second Committee Meeting].

119. *Id.* at 253.

120. *Id.* at 254.

121. *Id.*

122. *Id.* at 255.

123. *Id.* at 256.

124. See *infra* text accompanying note 125.

Session of the General Assembly.¹²⁵ During this Session the General Assembly considered the Draft International Covenant on Human Rights (Covenant).¹²⁶ The capital-exporting states raised objections to the inclusion of the term "permanent sovereignty" in the discussion of self-determination contained in paragraph three of Article One of the Covenant.¹²⁷ The capital-importing states, on the other hand, insisted that the concept of self-determination necessarily included the concept that states or peoples should have control over their own natural resources.¹²⁸

This debate in the Ninth Session culminated in a compromise resolution intended to encourage a stable investment climate and to recognize some of the demands of the capital-importing states with respect to permanent sovereignty.¹²⁹ However, the resolution did not directly tackle the concept of permanent sovereignty over natural resources. Nonetheless, the General Assembly did tackle the issue of permanent sovereignty over natural resources in the Ninth Session when it adopted a resolution proposed by the representative from Afghanistan.¹³⁰

c. The Human Rights Commission Debates: 1955

Subsequently, the Human Rights Commission considered the General Assembly's Resolution in 1955.¹³¹ The Human Rights Commission ultimately adopted a draft resolution recommending that "in the conduct of the full survey . . . due regard would be paid to the rights and duties of States under international law and to the importance of encouraging international cooperation in the economic development of under-developed countries."¹³²

125. Banerjee, *supra* note 113, at 520.

126. *Id.*

127. *Id.*

128. *Id.*

129. See G.A. Res. 824, 9th Sess., 510th plen. mtg. (1954), reprinted in 5 UNITED NATIONS RESOLUTIONS 128 (Dusan J. Djonovich ed., 1973).

130. Banerjee, *supra* note 113, at 520. India was one of the delegations to amend the Afghan representative's proposed resolution. *Id.* at 520-21.

131. *Id.* at 521.

132. *Id.*

d. The Third Committee Debates: 1955

In 1955, the Third Committee of the General Assembly conducted in-depth discussions on the concepts of economic independence, self-determination, and permanent sovereignty. During the Third Committee's debate, the issues of self-determination and permanent sovereignty deeply fractured the Committee.

The Brazilian representative proposed that Article One be deleted entirely or that the concepts contained therein be moved to the Preamble.¹³³ The Yugoslav delegate insisted that "the right of peoples to self-determination was of fundamental importance, and . . . it should continue to appear in the operative part of the Covenants."¹³⁴ The Greek delegation felt that "right, upon which all the others were dependent, would not be safeguarded if it were only made the subject of a declaration of principle in the preamble to the covenants."¹³⁵ The Danish representative favored deletion of the Article altogether.¹³⁶

A Working Party was established by the Third Committee. Within the Working Party, the delegates were clearly divided, with the United States, Great Britain, and the Netherlands opposing the inclusion of any article on self-determination and the Asian, African, and Arab groups favoring such an article.¹³⁷ The Working Party proposed a new Article One. In it, the Working Party had switched paragraph three with paragraph two, and had redrafted paragraph three to contain no express reference to permanent sovereignty over natural wealth and resources.¹³⁸

Ultimately, the Third Committee adopted the draft text proposed by the Working Party by a vote of thirty-three in favor, twelve against, and thirteen abstentions.¹³⁹ The votes in favor were largely attributable to the under-developed states and the

133. U.N. GAOR, 3d Comm., 10th Sess., 638th Mtg. at 70, U.N. Doc. A/C.3/SR. 638, (1955) (Afghan representative discussing Brazilian proposals) [hereinafter 638th Meeting].

134. *Id.* at 69.

135. *Id.*

136. U.N. GAOR, 3rd Comm., 644th mtg. at 99, U.N. Doc. A/C.3/SR.644 (1955) [hereinafter 644th Meeting].

137. Banerjee, *supra* note 113, at 522.

138. U.N. GAOR, 3rd Comm., 668th mtg. at 221, U.N. Doc. A/C.3/SR.668 (1955). The Working Party's draft provoked a lengthy debate among the members of the Third Committee.

139. James N. Hyde, *Permanent Sovereignty Over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854, 857 (1956).

Communist bloc.¹⁴⁰ The deletion of any express reference to permanent sovereignty in conjunction with self-determination was clearly designed as a compromise measure, intended to eliminate as much opposition as possible. However, the language that the Third Committee ultimately adopted as paragraph two did implicitly refer to the concept of permanent sovereignty over natural resources. During the debate on the Working Party's Report, many delegations continued to interpret paragraph two as dealing with the concept.

Thus, despite the fact that the concept of permanent sovereignty was not mentioned expressly in the Third Committee's Draft Covenant, the concept was implicitly embodied within paragraph two of Article One. Clearly, numerous delegates continued to interpret the language of paragraph two as including permanent sovereignty over natural resources—the right of peoples to exploit their own natural wealth.

2. The Economic and Social Council Debate on Implementation: 1955

In 1955, the Economic and Social Council of the United Nations (ECOSOC) also debated the concept of permanent sovereignty.¹⁴¹ When the ECOSOC convened it had before it an important draft resolution, submitted by the Human Rights Commission, urging the establishment of a commission to survey the status of the right to permanent sovereignty over natural wealth and resources.¹⁴² The United States representative introduced an "alternative" proposal,¹⁴³ which the Human Rights Commission had already rejected.¹⁴⁴ The ECOSOC ultimately agreed to transmit both the United States proposal and the draft resolution of the Human Rights Commission to the General Assembly.¹⁴⁵ Vocal opposition to the United States proposal

140. Banerjee, *supra* note 113, at 522.

141. *Id.* at 524.

142. *Id.*

143. *Id.* The ad hoc commission was to contain five members appointed by the Secretary-General. *Id.*

144. Hyde, *supra* note 139, at 860. The U.S. proposal was opposed by the Arab-Asian states, the Soviet Union, Czechoslovakia, and Yugoslavia. Banerjee, *supra* note 109, at 525. The Afro-Asian states argued that such an ad hoc commission would afford no practical or immediate value. *Id.* In emphasizing the utmost importance of the concept of permanent sovereignty, these states continued to maintain that the proposed survey was not intended to oppose private foreign investment. *Id.*

145. Hyde, *supra* note 139, at 860.

stressed the importance of the concept of permanent sovereignty of peoples and states over their natural resources.¹⁴⁶

3. The Commission on Permanent Sovereignty Over Natural Resources: 1959-61

A three-year moratorium on discussions of permanent sovereignty ended in 1958 at the Thirteenth Session of the General Assembly.¹⁴⁷ Upon the resumption of the debate, the majority of the Members agreed that the inclusion of the concept of permanent sovereignty in the Draft Covenants was necessary.¹⁴⁸ Ultimately, the General Assembly adopted Resolution 1314 (XIII) on December 12, 1958.¹⁴⁹ The Resolution noted that "the right of peoples and nations to self-determination as affirmed in the two Draft Covenants completed by the Commission on Human Rights¹⁵⁰ includes "permanent sovereignty over their natural wealth and resources."¹⁵¹ Thus, Resolution 1314 (XIII) gave birth to the Commission on Permanent Sovereignty (Commission). The monumental task facing the Commission consisted of determining the nature of the right of permanent sovereignty over natural resources; the manner in which that right should be exercised; and what measures should be taken into account according to international law.¹⁵²

At its first meeting in May 1959, the Commission directed the Secretariat of the United Nations to prepare a study on the status of permanent sovereignty over natural wealth and resources.¹⁵³ Because of the perception that the report was incomplete, the Commission adopted a resolution requesting the Secretariat to revise the study and to submit such revision to the Commission by March 15, 1961.¹⁵⁴

146. *Id.* at 861.

147. Banerjee, *supra* note 113, at 525.

148. *Id.*

149. G.A. Res. 1314, U.N. GAOR, 13th Sess., 788th plen. mtg. (1958), reprinted in 7 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 121 (Duson J. Djonovich ed., 1973).

150. *Id.* See also U.N. SCOR, 18th Sess., Supp. No. 7, annex I, UN Doc. E/2573 (1955) (two draft Covenants completed by Commission on Human Rights).

151. G.A. Res. 1314, *supra* note 149.

152. *Id.*

153. *Id.*

154. *Id.*

Several delegations still opposed the Secretariat's revised study.¹⁵⁵ During this debate, Chile and the Soviet Union submitted draft resolutions.¹⁵⁶ The controversy over these two alternative resolutions focused on the issue of whether the right of permanent sovereignty over natural resources was an absolute right or whether it was a right limited by obligations and responsibilities imposed by international law.¹⁵⁷ During 1960, while the Commission on Permanent Sovereignty struggled to define the scope of permanent sovereignty, the General Assembly again emphasized its concern with the concept in a Resolution entitled "Concerted Action for Economic Development of Economically Less Developed Countries."¹⁵⁸

In 1961, the General Assembly had before it the Secretariat's report and the Commission on Permanent Sovereignty's report, transmitted without consideration by the ECOSOC.¹⁵⁹ In Resolution 1720 (XVI), the General Assembly thanked the Secretariat for its report, requested that both reports be printed, and decided to continue its work at the Second Committee's next session.¹⁶⁰

4. Debates Preceding Resolution 1803

Debate ensued in the Commission on Permanent Sovereignty and in the Second Committee, culminating in the General Assembly's adoption of Resolution 1803, which dealt expressly with permanent sovereignty over natural resources.¹⁶¹ The United States, previously opposed to any resolution on permanent sovereignty, espoused the capital-exporting states' position that, in the event of nationalization, prompt, adequate, and effective compensation should be paid. The issue of compensation was resolved with a majority of the Commission and the Committee members insisting that states had a duty to pay compensation for takings as a general principle of international law.¹⁶² However,

155. Banerjee, *supra* note 113, at 526.

156. *Id.*

157. *Id.* at 526-27.

158. G.A. Res. 1515, U.N. GAOR, 15th Sess., 948th plen. mtg. (1960), reprinted in 8 UNITED NATIONS RESOLUTIONS 134 (Dusan J. Djonovich ed., 1974).

159. Banerjee, *supra* note 113, at 527.

160. G.A. Res. 1720, U.N. GAOR, 16th Sess., 198th plen. mtg. 91961), reprinted in 8 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 256 (Dusan J. Djonovich ed., 1974).

161. Banerjee, *supra* note 113, at 528.

162. *Id.* at 530.

views differed with regard to the conditions that require states to pay such compensation.¹⁶³

5. Resolution 1803

Resolution 1803,¹⁶⁴ entitled "Permanent Sovereignty Over Natural Resources," constitutes the broadest, most explicit declaration from the United Nations on the subject.¹⁶⁵ The Resolution again links the concepts of permanent sovereignty, economic independence, and self-determination.¹⁶⁶ While authorizing nationalization, expropriation, and requisitioning, Resolution 1803 emphasizes "mutual respect of States based on their sovereign equality."¹⁶⁷

In evaluating Resolution 1803, an important inconsistency must be noted: the Resolution fails to clarify who possesses the right of permanent sovereignty. Because of this inconsistency, several scholars have argued that the concept of permanent sovereignty over natural resources is invalid as a legal principle.¹⁶⁸ In any event, the concept of permanent sovereignty embodied in Resolution 1803 paves the way for the establishment of the so-called new international economic order.

163. *Id.* at 531.

164. G.A. Res. 1803, U.N. GAOR, 17th Sess., 1194th plen. mtg. (1962), reprinted in 9 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 103 (Dusan J. Djonovich ed., 1972).

165. See *supra* text accompanying notes 114, 116, 150-52, 160 (discussing the resolutions cited in the preamble of General Assembly Resolution 1803).

166. G.A. Res. 1803, *supra* note 164.

167. *Id.* (quoting para. 4 of G.A. Res. 1803). The issues of nationalization and compensation, while highly controversial and of great import, are beyond the scope of this Article. For in-depth discussions of these issues, see Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L. Q. 398, 420-35 (1964). See also P.J. O'Keefe, *The United Nations and Permanent Sovereignty Over Natural Resources*, 8 J. WORLD TRADE L. 239, 251-75 (1974) (discussing nationalization and compensation historically and in the context of Resolution 1803).

168. See O'Keefe, *supra* note 167, at 243-46; Gess, *supra* note 165, at 414 (noting that Japan and others expressed the view that the concept of permanent sovereignty over natural resources lacks legal validity).

6. Other Developments: 1963-66

a. Secretary-General's Report: 1963

The last portion of Resolution 1803 requested the Secretary-General of the United Nations to continue the study on permanent sovereignty over natural resources and to report to the ECOSOC and to the General Assembly at its Eighteenth Session, if possible.¹⁶⁹ Pursuant to this request, the Secretariat issued its report in November 1963.¹⁷⁰ Among other things, the report examined national measures affecting ownership and the use of natural resources by foreigners, with emphasis on the developing states.¹⁷¹ The report also discussed state succession, as well as arbitration and conciliation measures being employed.¹⁷²

b. The ECOSOC Session: 1964

The ECOSOC considered the Secretary-General's Report at its Thirty-seventh Session in Geneva, in July and August of 1964.¹⁷³ The ECOSOC failed to adopt a resolution dealing with the concept of permanent sovereignty, but it submitted the Report and some general comments to the General Assembly.¹⁷⁴

c. The Second Committee's Session: 1965

The Second Committee briefly considered the issue of permanent sovereignty at its Twentieth Session in 1965.¹⁷⁵ Because of the sharp differences raised by the United States and others,¹⁷⁶ the Second Committee postponed further discussion on permanent sovereignty until the next session of the General Assembly.¹⁷⁷

169. G.A. Res. 1803, *supra* note 164 (quoting part III).

170. Banerjee, *supra* note 113, at 535.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 536.

176. The United States submitted an amendment to the Algeria, Poland, et al. draft joint resolution. *Id.* at 537. In the amendment, the United States emphasized the sharp division in opinion between capital-importing states and capital-exporting states.

177. *Id.*

d. Special Committee Debate: 1966

In 1966, the concept of permanent sovereignty was discussed by the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States (Special Committee).¹⁷⁸ The Special Committee, established by resolution 1966 (XVIII) of the General Assembly,¹⁷⁹ debated the issue of whether or not permanent sovereignty over natural resources constituted a fundamental element of the sovereign equality of states.¹⁸⁰ However, the Special Committee failed to reach an agreement as to whether this right was qualified by obligations and duties arising from international law.¹⁸¹

e. The Second Committee's Session: 1966

In October and November of 1966, the Second Committee continued its discussions on permanent sovereignty, considering the Secretary-General's report and the relevant records of the ECOSOC.¹⁸² The draft resolution ultimately adopted by the Second Committee largely was the product of the less-developed states' efforts during the debate.¹⁸³ The Committee ultimately adopted a draft resolution, after numerous amendments, by a vote of one hundred and four to zero, with six abstentions.¹⁸⁴

7. Resolution 2158

Following the recommendation of the Second Committee,¹⁸⁵ the General Assembly adopted Resolution 2158 (XXI), entitled "Permanent sovereignty over natural resources."¹⁸⁶ The primary focus of the Resolution is accelerated economic and technological

178. *Id.*

179. *Id.* at 535.

180. *Id.* at 537.

181. *Id.* at 538.

182. *Id.*

183. *Id.* at 540.

184. *Id.*

185. See *supra* notes 182-84 and accompanying text (discussing Second Committee's debate and recommendation).

186. G.A. Res. 2158, U.N. GAOR, 21st Sess., 1478th plen. mtg., U.N. Doc. A/6518 91966), reprinted in 11 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 145 (Dusan J. Djonovich ed., 1975). The General Assembly adopted the Resolution by a vote of 104 in favor, none against, with six abstentions. Banerjee, *supra* note 113, at 540.

growth for the developing states in the area of natural resources exploitation.¹⁸⁷ Thus, Resolution 2158 represents a strong statement against concession agreements of the past, and affirms the new concept of permanent sovereignty as a method of increasing the economic and technological development of less-developed states and ensuring their right to freely exploit their own natural resources. Although the resolution recognizes the need for foreign capital in exploiting natural resources,¹⁸⁸ the Resolution clearly contemplates the movement away from this type of exploitation of natural resources toward having the less-developed states develop their own resources.¹⁸⁹

B. *Permanent Sovereignty and the Creation
of a New Economic Order*

The less-developed states' success in establishing the principle of permanent sovereignty evolved into a push for a new world order. The United Nations seemed to adopt this goal as an extension of the concept of permanent sovereignty. For example, the Preamble to Resolution 2626, adopted in 1970, emphasized that "[e]very country has the right and duty to develop its human and natural resources, but the full benefit of its efforts can be realized only with concomitant and effective international action."¹⁹⁰ Thus, the Resolution called for a progression from an old world order to a new economic world order.

The new international order was foreshadowed by the passage of Resolution 3171 in 1973, which strongly affirmed the inalienable right of states to permanent sovereignty over natural resources.¹⁹¹ This Resolution expressly supported developing states "in their struggle to regain control over their natural resources."¹⁹²

187. G.A. Res. 2158, *supra* note 186.

188. *Id.*

189. See *id.* (calling upon developed states to assist developing states' internal development efforts).

190. G.A. Res. 2626, U.N. GAOR, 25th Sess., at para. 10, U.N. Doc. A/8124 (1970), *reprinted in* 13 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 255, 256 (Dusan J. Djonovich ed., 1976).

191. G.A. Res. 3171, U.N. GAOR, 28th Sess., U.N. Doc. A/9400 (1973), *reprinted in* 14 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 422 (Dusan J. Djonovich ed., 1978).

192. *Id.*

1. Special Session of the General Assembly: 1974

In preparation for a Special Session of the General Assembly in 1974, the Group of Seventy-Seven, which represents the developing states, drafted two documents to present to the General Assembly: a Declaration on the Establishment of a New International Economic Order and a Programme of Action.¹⁹³ The issue of permanent sovereignty over natural resources was one of the major topics.¹⁹⁴ The states of the European Economic Community (EEC), the United States, Japan, and Australia insisted upon linking the concept of permanent sovereignty with other rules of international law.¹⁹⁵ Debate ensued over whether the concepts should be linked in the draft documents. This debate underscores the increasing vocalization by developing states of the need for a new international economic order.

2. The New International Economic Order

The vocalizations culminated in the Declaration on the Establishment of a New International Economic Order (Declaration)¹⁹⁶ and the Programme of Action on the Establishment of a New International Economic Order (Programme).¹⁹⁷ The General Assembly adopted the Declaration without a vote.¹⁹⁸ The Declaration called for the establishment of a new international economic order¹⁹⁹ and contains twenty principles on which the new international order should be founded. For instance, the promotion of foreign investment, *inter alia*, is recommended in order to finance the development of less-developed states.²⁰⁰

193. JUHA KUUSI, *THE HOST STATE AND THE TRANSNATIONAL CORPORATION* 129 (1979). See also *Study of the Problems of Raw Materials and Development*, U.N. GAOR, ad hoc comm., 6th Spec. Sess., Annexes, Agenda Item 7, U.N. Doc. A/9556 (1974).

194. *Id.*

195. *Id.*

196. G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. 1, 2229th pln. mtg., at 3, U.N. Doc. A/9559 (1974), reprinted in 14 UNITED NATIONS RESOLUTIONS 527 (Dusan J. Djonovich ed., 1978).

197. G.A. Res. 3202, U.N. GAOR, 6th Spec. Sess., Supp. 1, 2229th pln. mtg., at 6, U.N. Doc. A/9559 (1974), reprinted in 14 UNITED NATIONS RESOLUTIONS 529 (Dujan J. Djonovich ed., 1978).

198. G.A. Res. 3201, *supra* note 196.

199. *Id.*

200. *Id.* art. II.

More significantly, the Programme establishes new guidelines for dealing with foreign investors, calling for "an international code of conduct for the transfer of technology corresponding to needs and conditions prevalent in developing countries"²⁰¹ and "an international code of conduct for transnational corporations . . ."²⁰² Both the Declaration and the Programme attempt to establish a major structural change in, and to prescribe standards for, state behavior in the international economy.²⁰³ The documents purport to cover the whole arena of international economic relations.

3. The Charter of Economic Rights and Duties of States

The General Assembly also adopted the Charter of Economic Rights and Duties of States (Charter)²⁰⁴ in order "to establish or improve norms of universal application for the development of international economic relations on a just and equitable basis."²⁰⁵ The Charter lists fifteen principles which, *inter alia*, "shall" govern international economic relations.²⁰⁶ Article 2 of the Charter expressly addresses the concept of permanent sovereignty over natural resources and the regulation of transnational corporations.²⁰⁷ Article 17 also touches on the concept of permanent sovereignty, stressing the need to accelerate the economic development of developing states while respecting their sovereign equality.²⁰⁸

While some scholars have criticized the Charter for its dichotomous nature,²⁰⁹ they uniformly recognize the change in international economic relations which this document—combined with the Declaration and the Programme—attempts to effect.²¹⁰

201. G.A. Res. 3202, *supra* note 197, art. IV(a).

202. *Id.* art. V.

203. Jonathan Dubitzky, *The General Assembly's International Economics*, 16 HARV. INT'L L.J. 670, 670 (1975).

204. G.A. Res. 3281, U.N. GAOR, 29th Sess., 2315th plen. mtg., U.N. Doc. A/9946 (1974), *reprinted in* 15 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 300 (Dusan J. Djonovich ed., 1984).

205. G.A. Res. 3082, U.N. GAOR, 29th Sess., Supp. 30, 2192nd plen. mtg., at 40, U.N. Doc. A/9379 (1974), *reprinted in* 14 UNITED NATIONS RESOLUTIONS: GENERAL ASSEMBLY 400 (Dusan J. Djonovich ed., 1978).

206. G.A. Res. 3281, *supra* note 204, at ch. I. The Working Group rejected a proposal utilizing the term "should" instead of the mandatory term "shall." Dubitzky, *supra* note 203, at 672.

207. G.A. Res. 3281, *supra* note 204, at ch. II, art. 2.

208. *Id.* ch. II, art. 17.

209. *See, e.g.*, Dubitzky, *supra* note 203, at 672.

210. *See, e.g.*, KUUSI, *supra* note 193, at 44; Dubitzky, *supra* note 203, at 670.

V. TOWARD A FRAMEWORK FOR HOLDING CONSTITUTIONALLY
RESPONSIBLE RULERS INDIVIDUALLY LIABLE FOR
ACTS OF INDIGENOUS SPOILIATION

A. *The Doctrine of Individual Responsibility*

Holding high-ranking public officials individually responsible for their acts while in office is no longer the novel idea that it was five decades ago. The War Crimes Tribunals played a central role in affirming the principle of individual culpability. The Nuremberg Tribunals established that individuals can be held responsible as individuals for conduct that breaches international law.²¹¹ The Nuremberg Principles were bolstered when they were affirmed by the United Nations General Assembly on December 11, 1946.²¹² In 1991 the International Law Committee (ILC) brought this process of formulation, codification, and progressive development of international law to a close when it adopted a Draft Code of Crimes Against the Peace and Security of Mankind (Draft Code).²¹³

Article 3(1) of the 1991 Draft Code states that "[a]ny individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment."²¹⁴ This Article reflects the first paragraph of Article 6 of the Nuremberg Charter, which contains the most important provisions on individual culpability for particular offenses under

211. See NAZI CONSPIRACY AND AGGRESSION 66 (1940) (hereinafter Judgment at Nuremberg); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

212. See Affirmation of the Principles of International Law Recognized by the Charter of Nürnberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. A/236 (1946), reprinted in 1 UNITED NATIONS RESOLUTIONS 175 (Dusan J. Djonovich ed., 1972).

213. *Draft Code of Crimes Against the Peace and Security of Mankind*, [1954], 2 Y.B. INT'L L. COMM'N 150, U.N. Doc. A/2693; see also *Fifth Report on the Draft Code of Offenses Against the Peace and Security of Mankind*, [1987] 1 Y.B. INT'L L. COMM'N 4, U.N. Doc. ACN.4/404; *Draft Articles of the Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. Doc. A/43/539 (1988); *Seventh Report on the Draft Code of Crimes* (1988); *Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, [1989] 2 Y.B. INT'L L. COMM'N 81, U.N. Doc. A/CN.4/419 [hereinafter Draft Code of Crimes]; *Draft Codes of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. INT'L L. COMM'N 79, U.N. Doc. A/CM4/.435 [hereinafter 1991 Draft Code of Crimes].

214. See 1991 Draft Code of Crimes, *supra* note 213.

international law.²¹⁵ Article 3 of the Draft Code reaffirms the position taken by the International Military Tribunal that international law imposes human duties directly on both public and private authors of an international crime. The position was again reinforced in the judgment in the *Flick Trial*, which again was based on the provisions of law formulated in the Nuremberg Charter.²¹⁶

The noose for individual responsibility is tied so tightly that even heads of states are not spared. Article 13 of the Draft Code provides that individuals' official positions do not relieve them of personal responsibility for committing crimes against the peace and security of mankind. Article 13 singles out chief executives, making it clear that the "fact that [an individual] acts as head of state or Government, does not relieve him of criminal responsibility."²¹⁷

The Draft Code deliberately limits criminal responsibility and the resulting punishment to the individual alone; states are excluded from punishment. Nevertheless, the doctrine of state responsibility is retained.²¹⁸ Nuremberg also established conclusively that international law forms the bases for personal culpability; reliance on provisions of national law is not necessary. Individual responsibility attaches when: (1) the wrongful conduct does not constitute a crime under municipal law, and/or (2) the act constitutes an international crime but its commission was compelled under municipal law.²¹⁹ Article 2 of the Draft Code reaffirms this doctrine of the supremacy of international law over municipal law.²²⁰ Article 2 tracks the language of Article 6(c) of the Nuremberg Charter in defining crimes against humanity as certain acts committed "whether or not in violation of domestic law of the country where perpetrated."²²¹

Although the principle of personal accountability for international crimes is now widely accepted, there is still no definitive list of acts that would qualify as international crimes to which individual responsibility can be ascribed. The Nuremberg Charter

215. See Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis Powers, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, entered into force, Aug. 8, 1945 [hereinafter Agreement on Prosecution of Criminals]. The United States entered the agreement on September 10, 1945. *Id.*

216. See UNITED NATIONS WAR COMMISSION, 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 121 (1949).

217. 1991 Draft Code of Crimes, *supra* note 213, at art. 13.

218. *Id.* art. 3 (commentary).

219. PETER DROST, 2 THE CRIME OF STATE: GENOCIDE 152 (1959).

220. See Draft Code of Crimes, *supra* note 213; see also 1991 Draft Code of Crimes, *supra* note 213, at art. II.

221. 1991 Draft Code of Crimes, *supra* note 213, art. 2.

listed three crimes for which individual responsibility attaches: crimes against peace, war crimes, and crimes against humanity.²²² Later, the crimes of genocide,²²³ apartheid,²²⁴ and torture would be added.²²⁵ The Draft Code includes, *inter alia*, all of these crimes among those that incur individual responsibility.²²⁶ Pre- and post-Nuremberg practice suggests that such conduct, by the nature of its seriousness, undermines the very foundations of human society, such that its proscription is properly addressed by the community of states.

Article 1 of the Draft Code and the accompanying commentary offer some useful guidelines in making the determination of whether particular conduct has risen to the level of an international crime. Article 1 provides that "[t]he crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind."²²⁷ In deciding what defines these crimes, the ILC was torn between a conceptual definition that would establish the essential elements of such a crime and an enumerative definition incorporating a list of individual crimes defined a priori in the Draft Code.²²⁸ The ILC

222. See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279 [hereinafter NUREMBERG CHARTER], art. 6; see also Draft Code of Crimes, *supra* note 210, at princ. VI.

223. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

224. See International Convention on the Suppression and Punishment of the Crime of "Apartheid," opened for signature Nov. 30, 1973, art. III, entered into force, July 18, 1976. The United Nations General Assembly later adopted the Convention. See G.A. Res. 3068, U.N. GAOR, 29th Sess., 285th plen. mtg., Supp. No. 30, 75, U.N. Doc. A/RES/3068 (1974), reprinted in 13 I.L.M. 50 (1974).

225. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted, Dec. 10, 1984. U.N.G.A. Res. 39/46 Annex, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. E/CN.4/1984/72, Annex (1984), (entered into force, June 26, 1987), reprinted in 23 I.L.M. 1027 (1984).

226. The 1991 Draft Code of Crimes lists as crimes against the peace and security of mankind: aggression (art. 15); threats of aggression (art. 16); intervention (art. 17); colonial domination and other forms of alien domination (art. 18); systematic or mass violations of human rights, for example murder, torture, and slavery (art. 21); exceptionally serious war crimes (art. 22); recruitment, use, financing, and training of mercenaries (art. 23); international terrorism (art. 24); illicit traffic in narcotic drugs (art. 25); and willful and severe damage to the environment (art. 26). 1991 Draft Code of Crimes, *supra* note 213, at 95-97.

227. 1991 Draft Code of Crimes, *supra* note 213, at 94.

228. Draft Code of Offenses against the Peace and Security of Mankind, [1987] 2 Y.B. INT'L L. COMM'N 1324, U.N. Doc. A/CN.4/404 (discussing the commentary to article 1).

ultimately opted for definition by enumeration. While eschewing a broad conceptual definition, the Commission nevertheless identified "seriousness" as the essential element of a crime against the peace and security of mankind.²²⁹ Recognizing that seriousness can be established on the basis of subjective and objective factors, the ILC set forth three tests for establishing the subjective content of the seriousness of an offense: (1) the nature of the act; (2) the extent of its effects; and (3) the motive of the perpetrator.²³⁰ Alongside these criteria, the ILC also identified some of the objective factors that go into the definition of seriousness—essentially violations of rights, physical persons, or property.²³¹ In short, a serious offense that rises to the level of an international crime is one that is directed against persons or property.

The Special Rapporteur on the Draft Code,²³² Doudou Thiam, provided additional clarification on the criteria for establishing the seriousness of an offense in his Third Report to the General Assembly.²³³ Significantly, however, the Special Rapporteur placed the right to self-determination in the pantheon of serious violations of international law.²³⁴ This right, as previously indicated, subsumes the right of a people to dispose freely of their wealth and natural resources.²³⁵ Therefore, a breach of one is tantamount to a violation of the other. Thus, on this basis alone, indigenous spoliation would qualify as an offense against the peace and security of mankind. However, if this avenue is foreclosed, the "effects" test articulated in the Commentary to Article 1 of the Draft Code provides another basis for treating indigenous spoliation as an individual international crime. This test defines a crime against peace and security in terms of the extent of its effects—more particularly, whether it involves a large number of victims.

229. *Id.* para. 1.

230. *Id.*

231. *Id.*

232. Thiam was appointed Special Rapporteur by the Commission at its Thirty-fourth Session in 1982. See 1991 Draft Code of Crimes, *supra* note 213, at 79, 94. Report of the International Law Commission, [1985], 2 Y.B. INT'L L. COMM'N 63, 70-71 U.N. Doc. A/CN.4/387.

233. As the Special Rapporteur noted in his Report, article 19 (3) (a-d) of the Draft Articles on State Responsibility lists these breaches as examples of the most serious violations of international law. See *Draft Articles on State Responsibility*, [1976] 2 Y.B. INT'L L. COMM'N 53-55, U.N. Doc. A/CN.4/Ser.A/1976/Add.1 (Commentary to article 19).

234. Report of the International Law Commission, [1985], 2 Y.B. INT'L L. COMM'N 63, 70-71 U.N. Doc. A/CN.4/387.

235. See discussion *supra* part IV.

The 1991 ILC Draft Code of Crimes reflects the expectations of the international community with respect to the most serious international offenses committed by individuals: these crimes undermine the foundations of human society, and the perpetrators should be held individually responsible. However, the Draft Code was never intended to be viewed as an exhaustive list.²³⁶ The Draft Code makes it clear that the enumerated crimes "could be supplemented at any time by new instruments of the same legal nature."²³⁷ Wanton acts of depredation carried out by high-ranking public officials, which have led to the financial and economic ruin of numerous states, belong to this category of offenses that "attack the very foundations of human existence, injure the vital interests of the international community and were regarded as criminal by that community as a whole."²³⁸ The victims—individuals and groups—representing states from the major regions of the world have uniformly reacted with horror and outrage at the systematic destruction of their common patrimony. The challenge facing the international community is to begin to reflect these individual and societal forms of moral judgment in their state practice.

1. The Link Between Permanent Sovereignty and Indigenous Spoliation

In the debates and discussions leading to the inclusion of the principle of permanent sovereignty in a number of international human rights documents,²³⁹ the focus was on two related rights: the right of states to exercise control over their natural wealth and resources, and the right of all peoples freely to use, exploit, and dispose of their natural wealth and resources. The doctrine of permanent sovereignty arose in the context of relations between host states and transnational enterprises engaged in the exploitation of natural resources. As a result, the right of the state to legislate for the public good with respect to the natural resources and economic activities in its territory has become the most common construction given to the doctrine of permanent sovereignty. However, this focus is misplaced. First of all, Article

236. See Summary Records of the Meetings of the Thirty-Ninth Session, U.N. Doc. A/CN.4/403, p. 12, para. 37 (Remarks by Mr. Tomuschat).

237. *Id.* para. 4.

238. *Summary Records of the Meetings of the 1993d Meeting*, [1987] 2 Y.B. INT'L L. COMM'N 12, para. 37, U.N. Doc. A/CN.4/403 (Remarks by Mr. Barsegov).

239. See discussion *supra* part IV.

21(5) of the African Charter requires states "to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies."²⁴⁰ Thus, the African Charter singles out foreign multinationals from all the possible exploiters, including state governments. A second problem with this interpretation of permanent sovereignty is that it pins all the responsibility on foreigners, thus permitting the exploitation of finite Third World natural wealth and resources to continue unabated by indigenous exploiters.

The right of all *peoples* freely to use, exploit, and dispose of their natural wealth and resources is usually given short shrift in scholarly commentaries.²⁴¹ This neglect is unfortunate because a review of the *travaux préparatoires* on the Civil and Political Rights Covenant as well as the Economic, Social and Cultural Rights Covenant reveals that representatives consistently spoke of the rights of peoples and states over their wealth and natural resources.²⁴² These and other instruments have incorporated specific provisions on the right of peoples.²⁴³ Furthermore, all these provisions appear in instruments dealing with human

240. African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 I.L.M. 59 (1982).

241. *See, e.g.* Kamal Hossain, *Introduction in* PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW ix (Kamal Hossain & Subrata Roy Chowdhury eds. 1984) (noting that the principle of permanent sovereignty must be understood in the context of the efforts of developing states to restructure inequitable and onerous concession-type arrangements erected during the colonial period); INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE, MONTREAL, 1982, at 197 (noting that the principle underlines the domestic jurisdiction of states with regard to the natural resources within their national boundaries); OSCAR SCHACHTER, SHARING THE WORLD'S RESOURCES 172 (1977) (noting that the "principle of permanent sovereignty has become the focal normative conception used by States to justify their right to exercise control over production and distribution arrangements without being hampered by the international law of State responsibility as it had been traditionally interpreted by the capital-exporting countries . . ."). *But see* Subrata Roy Chowdhury, *Permanent Sovereignty and its Impact on Stabilization Clauses, Standards of Compensation and Patterns of Development Co-operation in* PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW, *supra*, at 42 (noting that the right of all peoples to use, exploit, and dispose of their natural wealth and resources is an important component of the principle of permanent sovereignty).

242. International Covenant on Civil and Political Rights, *opened for signature*, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976); MARK J. BOSSUYT, GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1987); Covenant on the Economic, Social and Cultural Rights, *opened for signature*, Dec. 16, 1966, 993 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360 (1967) (*entered into force* Jan. 3, 1976).

243. *See* Vienna Convention on Succession of States in Respect of Treaties, *opened for signature*, Aug. 23, 1978, art. 13, 17 I.L.M. 1488, 1495.

rights, thus suggesting that the rights mentioned attach to people *qua* human beings and not only to the states parties.²⁴⁴

Although these instruments incorporate "peoples" rights, they are deliberately silent on the meaning of "peoples" or "nations." However, the definition of "peoples" is critical to appreciating the full import of, for example, Article 2(2) of the Civil and Political Rights Covenant. Article 21(4) of the African Charter, however, suggests that "peoples" refers to the state.²⁴⁵ Equating peoples with states makes sense inasmuch as people act through states and state-sponsored agencies. However, "peoples" could also mean all persons within the state: in that case the power of the state to dispose freely of natural wealth and resources would be subject to the consent of all persons within the state. This meaning of "peoples" reflects the democratic ideal. In this situation, the citizenry would exercise their collective right against the state to benefit from the state's wealth and natural resources.

2. Permanent Sovereignty and the Public Trust Doctrine

Whether the state exercises the right of free disposal alone or subject to the consent of the people, two issues still must be addressed. First, what rules will guide the disposal? Second, who constitutes the "state"? Article 21(3) of the African Charter and Article 1(2) in both the Civil and Political Rights Covenant and the Economic and Social Rights Covenant define the parameters within which natural resources may be exploited: "[a]ll peoples may . . . freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit, and international law."²⁴⁶ These instruments also contain specific rules that states are required to follow in their dealings with foreigners on matters pertaining to the

244. See Louis Henkin, *International Human Rights As "Rights"*, 1 CARDOZO L. REV. 425, 438-42 (1979).

245. G.A. Res. 3281, *supra* note 204, at art. (2)(1). The argument has been made that Article 2(1) of the Charter transforms the peoples' right into a duty of states. See Paul Peters et al., *Permanent Sovereignty, Foreign Investment and State Practice*, in PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW, *supra* note 241, at 88, 95-96.

246. International Covenant on Civil and Political Rights, *supra* note 242, art. 1(2); Covenant on Economic, Social and Cultural Rights, *supra* note 242, art. 1(2).

exploitation of natural wealth and resources.²⁴⁷ However, with respect to the relations between the states and the peoples, there are very few concrete guidelines on how this exploitation can be accomplished.

After determining who may dispose of natural wealth and resources, a clarification of how natural wealth and resources may be disposed is still needed. In short, is the state accountable and, if so, to whom? The answer to this question lies in how one conceptualizes the state. Rather than determining "what," we should be determining "who," is the state. For example, if one were to suggest to a Zairean subsistence farmer that it is the state's responsibility to ensure that Zaire's vast mineral wealth is put to use for his best interest, that suggestion is likely to elicit a stare suggesting disbelief. To him, the state is President Mobutu, the tax collector, or the principal in the local public elementary school. In order for the statement—that the state exercises the right of free disposal—to make sense to this farmer and the millions of similarly situated compatriots, the focus ought to be on these human faces. Therefore, one should ask what rules, if any, limit government officials' power to dispose? More particularly, can these men and women be made accountable to the people?

The military junta in Nigeria must have wrestled with this question when it seized power in 1984. As part of a national campaign to stamp out official corruption, the Federal Military Government headed by General Badamosi Babangida arrested, detained, investigated, and punished many prominent office-holders from previous civilian and military administrations.²⁴⁸ The Nigerian government was expressing a view about the proper relationship between leaders and followers. The notion that public office-holders are servants of the people and that government owes its citizens special duties of care or stewardship is at the heart of democratic governance. More specifically, that citizens have an indefeasible public interest in their national wealth and resources placed under the guardianship of their government is a rarely contested proposition. If this concept is what the military junta had in mind, then it was merely restating

247. See, e.g., G.A. Res. 1803, *supra* note 164 ("Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign."); see also G.A. Res. 3281, *supra* note 204, at art. 2(2)(c).

248. See Decree No. 3 1984 (1986), The Recovery of Public Property (Special Military Tribunals) para. 3(c) (codified in XXI LAWS OF THE FEDERATION OF NIGERIA (REVISED) ch. 389 (1990)).

the public trust doctrine. This doctrine, in turn, provides a context within which one can construct a framework for holding the guardians of the peoples' wealth accountable for their stewardship.

Basic to the public trust doctrine is the deceptively simple idea that the state owes its citizens special duties of care, or stewardship, with respect to certain "common property" public resources that comprise the wealth of the state.²⁴⁹ A number of subjects can be included among "common property" public resources. Thus, the "wealth" referred to in the various international covenants—even if viewed as meaning all the property in existence at any given time that has a money value, exchange value, or economic utility—would be included in an

249. In the United States, this doctrine has held sway for at least a century. See Gregory F. Cook, *The Public Trust Doctrine in Alaska*, 8 J. ENVTL. & LITIG. 1, 4 n.7 1993. It has been held to include, *inter alia*, protection of navigational and commercial fishing rights over tidelands (*Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842)); recreational fishing, boating, swimming, water skiing, and other related purposes (*Wilbour v. Gallagher*, 462 P.2d 232 (Wash. 1969), *cert. denied*, 400 U.S. 878 (1970); Act of June 3, 1985 Relating to the Navigable or Public Waters of the State, ch. 82, § 1(c), *codified in* 1985 ALASKA TEMPORARY & SPECIAL ACTS); protection of the public's right to hunt (*Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); Opinion of Justices to the Senate, 424 N.E.2d 1092 (Mass. 1981); *Delmarva Power & Light Co. v. Eberhard*, 230 A.2d 644 (Md. 1967); *Hartford v. Gilmanton*, 146 A.2d 851 (N.H. 1958); *Swan Island Club Inc. v. White*, 114 F.Supp. 95 (E.D.N.C. 1953), *aff'd sub nom. Swan Island Club, Inc. v. Yarborough*, 209 F.2d 698 (4th Cir. 1954)); protection of fish and wildlife habitat (*Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983); *Smithtown v. Poveromo*, 336 N.Y.S. 2d 764 (1972), *rev'd on other grounds*, 359 N.Y.S. 2d (1973); *Just v. Marienette County*, 201 N.W.2d 761 (Wis. 1972)); recreational access to the ocean (*County of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974)); sunbathing, swimming, other shore activities, and access to and use of shorelands and upland dry sand beaches (*Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J.), *cert. denied*, 469 U.S. 821 (1984)); enjoyment of scenic beauty (*City of Madison v. Wisconsin*, 83 N.W. 2d 674, 678 (Wis. 1957); *Obrecht v. Nat'l Gypsum Co.*, 105 N.W. 2d 143, 149-51 (Mich. 1960)); conservation of fishery resources (*Gilbert v. Alaska Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 398-99 (Alaska 1990); *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989); *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488, 492-96 (Alaska 1988); *Nathanson v. Alaska*, 554 P.2d 456, 458 n.9 (Alaska 1976); *Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961), *aff'd*, 369 U.S. 45 (1962)); conservation of wildlife resources (*Herscher v. Alaska Dep't of Commerce*, 568 P.2d 996, 1005 (Alaska 1977); *Owsichek*, 763 P.2d at 492-96; *McDowell*, 785 P.2d at 12-18; *Gilbert*, 803 P.2d at 398-399; *Matthews*, 471 A.2d at 361); water and minerals (*Herscher*, 568 P.2d at 1003); and existing and future recreational uses (Act of June 3, 1985, *supra*).

expanded list of "common property" public resources governed by the public trust doctrine.

If the doctrine of permanent sovereignty is taken to mean (1) the people's right to dispose freely of their wealth and natural resources, and (2) the exercise of this right in their exclusive interest, then it can only be explained in the context of the public trust doctrine. First, the wealth and natural resources referred to would constitute "common property" public resources representing the entire wealth of the state. Second, this wealth is held in constructive trust for the people by their constitutionally elected and appointed leaders. Finally, these leaders, in their roles as trustees, are expected to act as the representatives for the benefit of all the people in common.

B. *The Fiduciary Relationship and the Public Trust Doctrine*

What is a fiduciary relationship as envisaged by the public trust doctrine? Historically, courts, in the exercise of their equitable jurisdiction, have defined the scope and extent of equitable rights and duties appurtenant to the public trust doctrine.²⁵⁰ Accordingly, among the many duties a trustee owes to the beneficiaries of the trust are a duty of loyalty—the duty not to engage in self-dealing—and a duty to preserve trust property.

1. The Duty of Loyalty

A trustee is under a duty to the beneficiary "to administer the trust solely in the interest of the beneficiary."²⁵¹ In this context, an important distinction can be drawn between leaders holding public office and the citizens they serve. Political leaders hold greater power and, therefore, bear far greater moral responsibility than ordinary citizens.²⁵² A state's wealth and resources are passed down to the citizens and political leaders as the natural legacy from previous generations. Accordingly, a state's wealth and resources are to be held in trust for the present generation of citizens and for those not yet born.

250. See, e.g., *Clews v. Jamieson*, 182 U.S. 461, 479 (1901).

251. RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).

252. Smith, *Moral Reasoning and Moral Responsibility in International Affairs* in ETHICS AND INTERNATIONAL RELATIONS 33 (Kenneth Thompson ed., 1985) [hereinafter *Moral Reasoning*].

2. The Duty to Preserve the Trust Property

In addition to the duty of loyalty, the trustee is also under a duty to the beneficiary to "use reasonable care and skill to preserve the trust property."²⁵³ Thus, a certain obligation is placed upon each generation of political leadership to ensure the access to this wealth on an equitable basis to all the members of the present generation. Implicit in this trust is the expectation that the political leadership will not divert the national wealth they hold in trust for their personal use. By the same token, there will be some limits on the extent to which citizens can consume the fruits of their legacy.

3. Application of These Duties in Spoliation Situations

The aforementioned duties have been breached in a number of instances. These examples come from the findings of fact made by properly constituted commissions of inquiry appointed to investigate two former Presidents of Sierra Leone—Siaka Stevens and Joseph Momoh²⁵⁴—and other high-ranking cabinet ministers who served under them.²⁵⁵ The inquiries focused on their performances while in office, in particular how well they discharged their duties as guardians of the state's wealth and resources. These commissions have sat as courts of law, applied the rules of evidence, and ensured that all persons accused had a

253. RESTATEMENT (SECOND) OF TRUSTS § 176 (1959).

254. Shortly after overthrowing the civilian government of President Joseph Momoh in April 1992, the National Provisional Ruling Council (NRCP) set as one of its principal objectives eradicating corruption, mismanagement, and indiscipline in the affairs of government. It followed through on its promise when, by Public Notice No. 172 in the Extraordinary issue of the Sierra Leone Gazette dated Wednesday, June 13, 1992, it instituted the Justice Beccles-Davies Commission of Inquiry. See SIERRA LEONE, WHITE PAPER ON THE REPORT OF THE JUSTICE BECCLES-DAVIES COMMISSION OF INQUIRY INTO THE ASSETS AND OTHER MATTERS OF ALL PERSONS WHO WERE PRESIDENTS, VICE-PRESIDENTS, MINISTERS, MINISTERS OF STATE AND DEPUTY MINISTERS WITHIN THE PERIOD FROM THE 1ST DAY OF JUNE, 1986, TO THE 22ND DAY OF SEPTEMBER, 1991, AND TO INQUIRE INTO AND INVESTIGATE WHETHER SUCH ASSETS WERE ACQUIRED LAWFULLY OR UNLAWFULLY (1993) [hereinafter SIERRA LEONE WHITE PAPER ON JUSTICE BECCLES-DAVIES COMMISSION OF INQUIRY].

255. See SIERRA LEONE, WHITE PAPER ON THE REPORT OF THE MRS. JUSTICE LAURA MARCUS-JONES COMMISSION OF INQUIRY INTO THE ASSETS, ACTIVITIES AND OTHER RELATED MATTERS OF PUBLIC OFFICERS, MEMBERS OF THE BOARD AND EMPLOYEES OF PARASTATALS, EX-MINISTERS OF STATES, PARAMOUNT CHIEFS AND ON CONTRACTORS—WITHIN THE PERIOD 1ST DAY OF JUNE, 1986 TO THE 22ND DAY OF SEPTEMBER, 1991 (1993).

right to be represented by counsel, regardless of whether they chose to exercise that right.²⁵⁶ Thus, the findings of fact made by these tribunals are entitled to the same respect traditionally accorded such conclusions when reached by courts in the United States and other legal systems.

The stewardship of Siaka Stevens and Joseph Momoh was meticulously dissected by the Marcus-Beccles Commission. The Commission found that Stevens and Momoh, in the discharge of their high office as guardian of the state's wealth and resources, put their personal interests above those of the people of Sierra Leone and failed to exercise the care and skill necessary to preserve the common public property of all Sierra Leoneans.

In the case of Siaka Stevens, the Commission found that, during his tenure of office,²⁵⁷ his total income from the state was Le 271,975.²⁵⁸ Yet during this period, Stevens was able to acquire an extensive real estate portfolio consisting of sixteen houses, including Kabassa Lodge, which is currently valued at \$5,850,000.²⁵⁹ In the investigation of Joseph Momoh, who was President from November 1985 to April 1992, the Commission uncovered evidence that paints a picture of a head of state who became a millionaire several times over in the relatively short period he was in office. During this seven year period, he acquired a "sizeable collection of real property,"²⁶⁰ including homes and farms, a fleet of twenty-three expensive vehicles, Le 12,950,000 in Treasury Bills, cash deposits in various banks in Sierra Leone totalling Le 45,613,870.22, cash deposits in various banks abroad totalling Le 128,478.73 and \$30,000, 110,000 shares in a local insurance company, and much more.²⁶¹

Testifying before the Beccles-Davies Commission, Momoh's own Finance Minister, Hassan Gbassay Kanu, described Momoh's conduct throughout his term as President of Sierra Leone as one that "inflicted the severest mismanagement of the affairs of the

256. See REPUBLIC OF GHANA, REPORT OF THE GHANA JIAGGE COMMISSION, para. 2 (1967). The Jiagge Commission and over seventy other commissions of inquiry that were appointed to probe high level official corruption in Ghana were all appointed under the provisions of the Commissions of Enquiry Act, 1964 (Act 250), N.L.C. Decree No. 72, August, 18, 1966, as amended N.L.C. Decrees No. 101, November 1, 1966 and N.L.C. Decree No. 129, January 24, 1967.

257. Stevens served first as Prime Minister, 1968-80, then as President, 1980-88.

258. SIERRA LEONE WHITE PAPER ON JUSTICE BECCLES-DAVIES COMMISSION OF INQUIRY, *supra* note 254, at para. 5.

259. *Id.*

260. *Id.* para. 2.

261. *Id.*

people of this country."²⁶² For its part, the Commission reached the following conclusions:

- i. Dr. Momoh was in control of pecuniary resources and property disproportionate to his past official emoluments;
- ii. Evidence of corruption, dishonesty, and abuse of his office for private benefit by him and in collaboration with other persons has been established; and
- iii. Dr. Momoh acted wilfully and corruptly in a manner which resulted in loss and damage to Government.²⁶³

These two case studies exemplify how some heads of states have treated their states like cash cows, exploiting their resources and using them as conduits to channel funds to their private accounts. They also demonstrate how the ruthless pursuit of self-interest can steadily impoverish the very people whom these leaders were elected to serve and protect.

C. *The Fiduciary Relationship in the International Sphere*

The fiduciary relationship concept has been applied in the international sphere as well. The origins of an international fiduciary duty can be traced to the United Nations Trusteeship System.²⁶⁴ Chapter XII of the UN Charter and the various trusteeship agreements that grew out of the Charter provide the legal framework for analyzing this principle.²⁶⁵ By selecting the term "trusteeship" to describe the relationship between an administered territory and the administering authority, the drafters of the UN Charter intended to make the administering power accountable for its actions in the non-self-governing territories. In theory, if not necessarily in practice, the trustee states assumed fiduciary obligations to act in the best interests of the non-self-governing territories.²⁶⁶

A trusteeship arrangement suggests a trust, a trustee, and a beneficiary. Presumably the architects of the UN Trusteeship System knew what a trusteeship arrangement entailed and selected the term fully aware of its common usage.²⁶⁷ National

262. *Id.* para. 7.

263. *Id.* para. 4

264. U.N. CHARTER ch. XII.

265. *Id.*

266. See Comment, *International Fiduciary Duty: Australia's Trusteeship Over Nauru*, 8 B. U. INT'L L.J. 397, 405-406, n.74 (1990) (hereinafter *International Fiduciary Duty*).

267. Several writers and jurists who have commented on the Mandate System, the predecessor to the Trusteeship System, have taken the position that

and international courts have reinforced the view that trusteeship agreements were intended to give rise to a fiduciary relationship creating substantive rights and duties between the peoples of the non-self-governing territory and their administering authority. The few cases involving the International Trusteeship System that have been argued before the International Court of Justice have provided the court with an opportunity to make some general comments about the nature of the trustee's obligations.²⁶⁸ In the *South West Africa Case*, for example, the court reaffirmed part of an earlier opinion of the Permanent Court of International Justice that dealt with the Mandate System.²⁶⁹ Accordingly, the court stated that the Mandate System "was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization."²⁷⁰ The court then noted that "[t]he acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character."²⁷¹ Moreover, "as a corollary of the trust, 'securities for [its] performance' were instituted in the form of legal accountability for its discharge and fulfillment. . . ."²⁷²

The rights and duties arising under a trusteeship system have also been addressed by United States courts. In the case of *People of Saipan v. United States Department of Interior*,²⁷³ the Ninth Circuit ruled that trusteeship agreements give rise to substantive rights and duties. At issue was whether the Trusteeship Agreement created for the citizens of the Trust

there was explicit reliance on three private law terms: tutelage, mandate, and trust. See generally J.L. Briery, *Trusts and Mandates*, 1929 BRIT. Y.B. INT'L L. 217; QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 376 (1930); International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128 (separate opinion of Judge Arnold McNair); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), I.C.J. 16, 198-99, June 21 (separate opinion of Judge F. De Castro); I.C.J. Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 99 (oral statement of Mr. Elias); see also *International Fiduciary Duty*, *supra* note 266.

268. See, e.g., *Southwest African Case*, *supra*; Case Concerning the Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15 (preliminary objections).

269. The League of Nations' Mandate System was the predecessor of the UN Trusteeship System. With the demise of the League of Nations, the newly established United Nations absorbed the former mandated territories under its jurisdiction. See U.N. CHARTER art. 77, ¶1(a).

270. *Southwest Africa Case*, *supra* note 267, at 29.

271. *Id.*

272. *Id.*

273. *Saipan v. United States Dep't of Interior*, 502 F.2d. 90 (9th Cir. 1974), *cert. denied* 420 U.S. 1003 (1975).

Territory any substantive rights that are judicially enforceable. The court ruled that it did.²⁷⁴ Noting that the substantive rights guaranteed through the Trusteeship Agreement are not "precisely defined,"²⁷⁵ the court stated that "[h]owever, we do not believe that the agreement is too vague for judicial enforcement. Its language is no more general than such terms as 'due process,' 'seaworthiness,' 'equal protection of the law,' 'good faith,' or 'restraint of trade,' which courts interpret every day."²⁷⁶

VI. THE NEED FOR AN INTERNATIONAL RESPONSE

A. *International Complicity*

Although acts of spoliation are carried out by indigenous elites, success depends on the assistance, direct or indirect, they receive from the international community. The destruction of national economies that necessarily follows can therefore be attributed not only to the leaders who treat their national treasuries as their personal accounts, but also to their foreign backers and aid donors who overlook their excesses for one reason or another. In hearings conducted by a subcommittee of the United States House of Representatives on the investments by the Marcoses in the United States, Congressman Robert Torricelli of New Jersey addressed the problem of Western complicity. After reviewing the Marcoses' assets in the United States, Torricelli concluded that ". . . one day America will be held accountable, accountable to whether we were complicitous, whether we stood silent while the Philippine people went further into debt, while Mr. Marcos and his family feathered their American nest in preparation for their eventual departure."²⁷⁷

1. The Conspiracy of Silence

As Congressman Torricelli's remarks reveal, Western complicity has been in the form of a studied silence in the face of spoliation by ruling elites around the world—a silence that has

274. *Id.* at 96-97.

275. *Id.* at 99.

276. *Id.*

277. *Philippines Hearings, supra* note 38, at 264.

been maintained even when these elites have used force to get their way. It is no secret that repression has been one of the favorite and most effective tools employed by dictators to plunder their economies. François Duvalier, for instance, set out early in his presidency to establish his own praetorian guard—the dreaded and infamous *Tontons Macoutes*.²⁷⁸ Duvalier's *Macoutes* operated as a paramilitary and mercenary force with arbitrary powers that were used “widely and wantonly to terrorize the population, deprive them of their most elementary civil rights, and engage in all sorts of extortionary and corrupt practices.”²⁷⁹ François Duvalier skillfully manipulated and exploited the United States fear of Communism and Haiti's proximity to Cuba to wring badly-needed aid from the United States.²⁸⁰ Throughout the long relationship between Haiti and the United States, the United States “assumed the responsibility for financing the Haitian government through foreign aid, despite the knowledge of widespread fraudulent practices and misappropriation of public and aid monies by government officials.”²⁸¹ Misappropriations were possible because the Duvaliers enjoyed absolute control over the state apparatuses and repressive forces. Ministerial appointments were made with an eye toward pleasing Washington, though it was generally understood that ministers were not to take their responsibilities seriously lest they jeopardize or expose government corruption.²⁸²

Haiti was not the only state in which the instruments and weapons of repression financed by Western friends were pressed into service by ruling elites to assist in the pillage of the economy. In the twenty years Ferdinand Marcos was President of the Philippines, his state was tied to the United States by a web of treaty arrangements dating back to the 1940s.²⁸³ Under Marcos, the

278. See DEWIND & KINLEY, *supra* note 56, at 16-17; DUPUY, *supra* note 59, at 160.

279. See DUPUY, *supra* note 59, at 160-161; DEWIND & KINLEY, *supra* note 56, at 17. When Jean-Claude Duvalier succeeded his father in 1972, he too quickly created his own elite military force, the Leopards, “equipped and trained by the United States in counterinsurgency tactics.” DUPUY, *supra* note 59, at 170.

280. DUPUY, *supra* note 59, at 166.

281. *Id.* at 169.

282. *Id.* at 171.

283. Agreement Concerning Military Bases, March 14, 1947, U.S.-Phil., 61 Stat. 4019 (*entered into force* March 26, 1947); Agreement on Military Assistance to the Philippines, March 21, 1947, U.S.-Phil., 61 Stat. 3282; Mutual Defense Treaty, August 30, 1951, U.S.-Phil., 3 U.S.T. 3948; Southeast Asia Collective Defense Treaty (Manila Pact), September 8, 1954, 6 U.S.T. 81, T.I.A.S. 3170; see also Paul M. Kattenburg, *The Case For Ending the Special Relationship and Leaving the United States Bases in the Philippines*, in REBUILDING A NATION: PHILIPPINE CHALLENGES AND AMERICAN POLICY 547, 549 (Carl H. Landés ed., 1987).

Philippines was viewed as a longstanding treaty ally and a special friend of the United States.²⁸⁴ Marcos used this "special friendship" to milk the United States for funds to combat insurgencies—communist and otherwise—that plagued his administration. United States military aid went to the equipment and training of Philippine counter-insurgency forces.²⁸⁵ In addition to this overt official military assistance, an estimated \$500 million was pumped annually into the Philippines economy in the form of wages and other expenses related to the operation of United States naval and air force bases.²⁸⁶ Much of the aid was misused or stolen,²⁸⁷ while the insurgencies grew because the insurgencies were "stimulated by economic hardship, exacerbated by tyrannies of the Marcos government" ²⁸⁸

2. Privileged Treatment for Heads of State Guilty of Spoliation

Western complicity in these acts of depredation is also evidenced in the treatment deposed dictators receive from their allies in the West. When the end finally came for Duvalier and Marcos, for instance, both were flown out of their respective states on U.S. Air Force planes with their family members, close associates, and in the case of Jean-Claude Duvalier, bodyguards.²⁸⁹ Neither man was forced to endure a Ulyssean odyssey in search of a safe harbor to take refuge. Contrast this reception with the treatment routinely meted out to the Haitian boat people heading for United States shores or Filipino "economic refugees" in Kuwait. The latter, fleeing the wrenching poverty and hardship that Marcos had inflicted on them, have eagerly accepted the most menial jobs; meanwhile, they stoically

284. See William M. Wise, *The Philippine Military After Marcos*, in REBUILDING A NATION, *supra* note 283, at 435, 447.

285. See L. Stull, *Moments of Truth in Philippine-American Relations: The Carter Years*, in REBUILDING A NATION, *supra* note 283, at 517, 520; see also Alva M. Bowen, Jr., *The Philippine-American Defense Partnership*, in REBUILDING A NATION, *supra* note 283, at 449, 453.

286. *Id.*

287. *Id.* at 524.

288. Bowen, *supra* note 285, at 453; see also Lela G. Noble, *Muslim Grievances and the Muslim Rebellion*, in REBUILDING A NATION, *supra* note 283, at 417.

289. See DEWIND & KINLEY, *supra* note 56, at 150; see also John Bresnan, *Preface in CRISIS IN THE PHILIPPINES: THE MARCOS ERA AND BEYOND* xi (John Bresnan ed., 1986).

endure physical and psychological abuse at the hands of their hosts.

B. *The Need for a Concerted International Response to the Problem*

1. The Inability of International Law to Deter the Perpetrators

A concerted international response to this situation is necessary. Individuals who engage in indigenous spoliation tend to flee their states to seek refuge in other states, placing them well beyond the jurisdictional reach of their national courts. As long as these fugitives are on the run, extradition or abduction remains the only available avenue for repatriating them so they can stand trial. However, both methods have proved difficult to accomplish in the past.²⁹⁰ Several factors account for the inadequacy of these two methods: (1) the absence of an extradition treaty between victim-state and asylum-state; (2) even if an extradition treaty exists, the crime of indigenous spoliation is most likely not one of the enumerated extraditable offenses;²⁹¹ and (3) the international doctrines of sovereign immunity and act of state continue to provide a convenient wall behind which chief executives involved in indigenous spoliation may hide.

If these stolen funds stand any chance of being recaptured and repatriated, some basis must be found for piercing the veil of the sovereign immunity and act of state doctrines. In this regard, traditional notions of sovereignty²⁹² must give way when human

290. States harboring these fugitives have been very reluctant to extradite them and have routinely refused such requests from other governments. See *Brazilian High Court Rejects Paraguay Extradition Request*, CHI. TRIB., Nov. 1, 1990, at 4; GUARDIAN, June 9, 1966, July 27, 1966, July 28, 1966; TIMES (London), April 29, 1966. For more on the Dikko affair, see Martin Wainwright, Stephen Cook & Michael Smith, *Mercenary team held for Dikko abduction*, GUARDIAN, July 7, 1984, p. 1; Patrick Smith, *Nigerians amused by kidnapping attempt*, GUARDIAN, July 7, 1984, at 2; Editorial, *To Lagos by special delivery*, GUARDIAN, July 7, 1984, at 12; David Pallister & Ad'Obe, *Twenty-one reasons why Nigeria wants Dikko*, GUARDIAN, Saturday July 7, 1984, 17.

291. Under the requirement of "double criminality," spoliation must be characterized as an offense punishable under the law of both states. See generally, *Draft Convention on Extradition*, 29 AM. J. INT'L L. 81-86 (1935); OPPENHEIM'S INTERNATIONAL LAW: A TREATISE 958 (HERSCH LAUTERPACHT, ed., 1955).

292. There is a pressing need for a reassessment of the concept of sovereignty in a world that has increasingly become a global village. In an implicit recognition that we are all "thy brother's keeper," states have implicitly waived or surrendered part of their sovereignty to others: the vast majority of states in Africa, Asia, the Caribbean, Latin America, and now Central and Eastern Europe

lives are at stake, as they are in cases of patrimonicide, or indigenous spoliation. The consequences of indigenous spoliation are so dire that national sensitivities must not be allowed to stand in the way of efforts to capture and punish those guilty of such acts. Generally, the sovereign immunity and act of state doctrines should be entitled to some deference. However, in compelling circumstances, courts should treat them as flimsy veils and not as impenetrable barriers.²⁹³ These doctrines could not have been intended to exculpate the nefarious activities associated with patrimonicide.

Clearly, a redefinition is required. Such an exercise is already under way as courts now make an exception for sovereign activities deemed commercial.²⁹⁴ Evidence culled from reports of commissions of inquiry worldwide paints a picture of some heads of states and other high-ranking officials as nothing more than politicians-turned-businessmen.²⁹⁵ In Latin America, just as in Africa, heads of states have routinely used state resources to build an economic base and to operate in the marketplace as entrepreneurs. President Trujillo of the Dominican Republic²⁹⁶ took over the state's only shoe factory and then proceeded to issue a decree forbidding anyone in the capital from going barefoot.²⁹⁷ Moreover, Cuba's onetime President Gomez²⁹⁸ is

can hardly survive without economic handouts from the major economic powers (United States, European Community, and Japan) and loans from the leading multilateral lending agencies (World Bank, International Monetary Fund, etc.). Donor states and lending agencies are increasingly using their enormous financial leverage in the receiving states to legislate in areas previously regarded as the exclusive domain of the sovereign, even to the point of rewriting their constitutions. See, e.g., Jonathan Cahn, *Challenging the New Imperial Authority: The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159 (1993).

293. See Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990). Indigenous spoliation touches on the fundamental right of a people to exercise sovereignty over their natural resources and economic output and their right to be the principal beneficiaries of their national wealth. When these fundamental human rights are trampled, legal formalisms must not be used to deny the victims an opportunity to seek redress. In this vein, when the doctrine of sovereign immunity is placed in its proper historical perspective, it turns out to be a doctrine of expediency promoted by a court to protect some very definite state interests. See W. Michael Reisman, *Incidents in INTERNATIONAL LAW ANTHOLOGY* 53, 57 (Anthony D'Amato ed., 1994).

294. See *supra* part III.A.2.

295. See FIRST, *supra* note 49, at 96.

296. Trujillo served as president from 1930 to 1961.

297. See Whitehead, *supra* note 13, at 148. The shoe business also attracted Chief Festus Okotie-Eboh, Finance Minister in Nigeria's First Republic

reputed to have run his state as "the private preserve of his own family and the army."²⁹⁹

Therefore, to the extent that heads of state and other high-ranking officials involved in indigenous spoliation use the stolen wealth in running commercial ventures, they should be treated as politicians-turned-businessmen. Thus, they should not be eligible for protection under the various sovereign immunity doctrines.

2. Spoliated Capital Invested in Western Economies

Much of the spoliated wealth is banked or invested in states that have been all too willing to grant asylum to the perpetrators of these acts. These states are just as much a part of the problem because their gain is the loss of the victim-states.³⁰⁰ However, viewed from a broader perspective, the gains from the investments of the stolen wealth are short-term. Taxpayers in the asylum states ultimately pay far more to bail out states than do the victims of indigenous spoliation. Furthermore, the benefits resulting from investing spoliated funds in the host economy—employment generation, infrastructure development, and provision of social services—are also short-term. As capital flees the developing states, it leaves behind impoverished consumers who cannot afford to buy the goods produced in the industrialized states. Without markets for their products, it is only a matter of time before these developing economies begin to feel the full impact of what was originally viewed as an external problem.

3. The Absence of Autonomous Judiciaries in Victim States

Finally, international action is the only remedy because no court in a victim-state would want to risk adjudicating a claim of indigenous spoliation as long as the defendants are still in office wielding enormous power. Finding an impartial court and equally impartial judge who would agree to judge a sitting president or his

(1960-1966), who also opened a shoe factory "but not before he had legislated tax relief for local industry and a tax on imported shoes." See FIRST, *supra* note 49, at 103.

298. President Gomez was in power from 1910 to 1935.

299. See EDWIN LIEUWEN, *VENEZUELA* 49 (1961).

300. See SUSAN GEORGE, *A FATE WORSE THAN DEBT* 19-20 (1990); see also James S. Henry, *Third World Debt Hoax: Where the Money Went*, THE NEW REPUBLIC, April 14, 1986, at 19.

closest associates would be difficult.³⁰¹ The attitude of Haitian courts with respect to the *ancien regime* is typical. While legal actions were proceeding in France and the United States against members of the Duvalier regime, the Haitian judiciary did everything within its power to protect the remnants of a discredited *ancien regime*.³⁰² An African participant at the Thirteenth Session of the African Commission on Human and People's Rights reacted with some incredulity to the naive suggestion that victims of human rights violations must first exhaust all local remedies before bringing suit in an international forum: "You taking (sic) an African head of state to court in your country and you would be signing your death warrant."³⁰³ Thus, the only way to combat the problem of spoliation by chief executives and high-ranking officials is concerted international action.

C. Some Possible Solutions

1. The Multilateral Treaty Approach

The international legal community can address the problem of indigenous spoliation through a convention or treaty. In this vein, Professor Reisman has proposed the drafting of an international declaration that would (1) characterize acts of spoliation by national officials as a breach of national trust and international law; (2) impose on other governments an obligation of supplying information and cooperation; and (3) characterize the failure of other governments to prevent such funds from being cached in their jurisdiction and to aid in their recapture as complicity, after the fact, and as an international delict.³⁰⁴ Treaties representing the express consent of state parties to be bound by their under-

301. The issue of an appropriate tribunal to try crimes involving heads of states and their close collaborators was also raised in the debates leading to the adoption of the Genocide Convention. See *Continuation of the Discussion on the Draft Convention on Genocide*; U.N. ESCOR, 6th Comm., 195th plen. mtg., at 810, U.N. Doc. A/760 (1948), revised by U.N. Doc. A/760/Corr. 2 (1948) (remarks by Mr. Rafat). It is safe to presume that national tribunals will be powerless or too tolerant to punish powerful friends of a sitting president proved to have spoliated national funds.

302. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS 27 (1990).

303. See K. Gyan-Apenteng, *Defining the Terrain in Banjul*, in WEST AFRICA, April 19-25, 1993, at 634, 635.

304. See Reisman, *supra* note 12.

takings³⁰⁵ would occupy the highest rung in the hierarchy of international legal authorities.³⁰⁶

Notwithstanding the fact that the primacy of international conventions is settled, there are still some problems with this approach, including the process of treaty-making itself. In the absence of a world legislative body, international lawmaking operates through multilateral diplomacy, a very tortuous and drawn-out process. The history of postwar multilateral treaty negotiation would suggest that reaching consensus in a timely manner on a spoliation convention is highly unlikely.³⁰⁷ Moreover, several factors may militate against the early signing of a convention. Indigenous spoliation is a crime which benefits some of the very members of the international community who will be expected to draft a declaration proscribing such conduct. Additionally, it would appear that some states are more injured than others, and it may not be easy to convince everyone to share the same sense of outrage as the victim states.

Even if an international declaration is feasible, the very idea of a declaration leaves many questions unanswered. Is a declaration, as envisaged by its proponents, the same thing as a treaty or convention to which the signatories are bound? Will it come in the form of a General Assembly resolution?³⁰⁸ And will it take the form of an aspirational or hortatory declaration with no binding force? On the other hand, assuming such a resolution serves to set forth principles for a future treaty, who would be included among the persons subject to its proscriptions?

305. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 333.

306. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060.

307. It has taken the International Law Commission over three decades to put together a Draft Code of Crimes Against the Peace and Security of Mankind. See *supra* notes 213-16 and accompanying text.

308. Publicists are divided on this issue with some arguing that such declarations are legally binding on member states, while others see it differently. The debate has generated an extensive literature. See Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, PROCEEDINGS OF THE 72ND ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 301; Anthony D'Amato (Chair), *Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms*, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, 1979, 300; JORGE CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (Alba Amoia trans., 1969); H. BOKER-SZEGO, THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION (1978); OBED Y. ASA-MOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966); Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Cf. Guradze, *Are Human Rights Resolutions of the United Nations General Assembly Law Making?* 4 HUM. RTS. J. 456 (1971).

2. Proscribing Indigenous Spoliation as a Condition for Foreign Aid and Commercial Bank Credits

Major aid donors have increasingly included democratic reforms and observance of human rights as conditions for extending aid and credits to authoritarian and totalitarian governments.³⁰⁹ These donors should also condition financial assistance on a proscription of indigenous spoliation and leadership incorruptibility. This goal can be accomplished in one of three ways:

1. By requiring extradition treaties between victim states and states where spoliated wealth is banked or invested include indigenous spoliation as an extraditable crime.
2. Given the importance developing states attach to private foreign investment, treaties of friendship, commerce, and navigation, as well as bilateral investment treaties between investment-starved developing states and capital-rich industrial states,—should be drafted to include a provision to assist a government that has been the victim of indigenous spoliation in recovering and repatriating funds.
3. Including in bilateral and multilateral Mutual Legal Assistance on Criminal Matters Treaties a provision for the recovery and return of spoliated wealth.

3. Getting Victim States Involved in the Prevention and Punishment of Indigenous Spoliation

Indigenous spoliation will continue unabated unless the victim states are involved in the solution. Towards this end, victim states should be encouraged to pass and enforce national legislation for the prevention and punishment of persons guilty of acts of indigenous spoliation. In this regard, Professor Ann-Marie Burley has called for an international convention which, among other things, would assist fragile democratic successor governments to restore “the legitimacy and effectiveness of their own judicial and political systems.”³¹⁰ For such a convention to be effective, it must include an obligation upon victim states to incorporate in their national laws a provision imposing severe penalties on persons guilty of acts of indigenous spoliation.

309. See, e.g., 22 U.S.C. § 2151n (1988) (prohibiting foreign assistance to gross violators of human rights); 22 U.S.C. § 2304 (1988) (prohibiting security assistance to gross violators of human rights).

310. See *Pursuing the Assets of Former Dictators*, in ASIL PROCEEDINGS, *supra* note 12, 394, 402 (comments by Anne-Marie Burley) [hereinafter *Pursuing the Assets of Former Dictators*].

Additionally, the convention should also establish national legal guarantees that (1) judgments against high-ranking officials—including former heads of state—will be enforced, and (2) the courts will not permit a deposed dictator to invoke sovereign immunity or act of state defenses when the new government requests such immunity to be revoked. Many African states have taken the position that economic rights for individuals and peoples take precedence over civil and political rights. For these states, there can be no better barometer for measuring their professed commitment to this principle than their willingness to pass and enforce strict laws on leadership misconduct.³¹¹

For many of these suggested solutions, Article 2(7) of the UN Charter, prohibiting any meddling in the internal affairs of member states, may present a problem. The argument has been made that even discussion of a state's human rights violations is prohibited by Article 2(7). This doctrine, which posits that only states and not individuals are the proper subjects of international law, has been blamed for the position taken by the American Bar Association—that the United States could not ratify the Genocide Convention³¹² because it dealt with matters within the domestic jurisdiction of the United States.³¹³

The steady erosion of this view has already been noted.³¹⁴ This change in perspective has been forced on the community of states by several factors.³¹⁵ First, the persistent violation of human rights in some states has forced the victims of these violations to appeal directly to the international community to intervene in their states to put an end to their misery.³¹⁶ Second, there has been recognition of an emerging right to democracy: the international community, in turn, is under an obligation to protect this right by intervening in other states, if necessary, to

311. See Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), U.N. ESCOR, 43rd Sess., at 1, U.N. Doc. E/Cn.4/1987/7, reprinted in 9 HUMAN RTS. Q. 128, 143 (1987); WORLD COMMISSION ON ENVIRONMENT & DEVELOPMENT, OUR COMMON FUTURE (1987); *On Human and People's Rights in Africa*, OAU Document AHG/Dec. 115 (XVI) (emphasis added).

312. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

313. See MALVINA HALBERSTAM & ELIZABETH F. DEFELS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS, AN ALTERNATIVE TO ERA? 50-52 (1987).

314. See *supra* note 111 and accompanying text.

315. See generally Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order*, 9 AM. U. J. INT'L L. & POL'Y 1 (1993).

316. Such interventions have been viewed favorably by some international law scholars. See Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516 (1990).

prevent the overthrow of democratically elected governments. This emerging right has undermined the notion of the impregnability of sovereignty.³¹⁷ Finally, the shifting role of the major multilateral agencies—the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (IMF)—from a merely lending role to an increasingly law-making institution, able and willing to dictate fundamental institutional change in the borrowing states through their lending policies.³¹⁸

The World Bank's principal tool in nudging borrowing members towards prescribed social objectives is "conditionality."³¹⁹ Bank loans impose conditions requiring legislative and policy changes by borrowing governments.³²⁰ The World Bank has taken the position that its governance concerns include: broad macroeconomic policy, the proper structure and role of government institutions that administer the economy, environmental impacts, and even military spending.³²¹

Indigenous spoliation is injurious to the economic well-being of a state because it drains the state of scarce but vital resources needed for economic development. This activity clearly falls within the World Bank's governance role. Therefore, the Bank should include in its loan agreements specific requirements for the repatriation of spoliated wealth in foreign accounts held by high-ranking officials of the borrowing governments.

317. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); *The Situation of Democracy and Human Rights in Haiti*, U.N. GAOR 46th Sess., Agenda Item 145, U.N. Doc. A/46/L8/Rev.1 (1991) (demanding the return of Jean-Bertrand Aristide to Haiti following his overthrow by a military coup in Sept. 1991); *Support to the Democratic Government of Haiti*, OEA/Ser.F/V.1/MRE/RES.1/91, corr. 1, paras. 5,6 (1991).

318. In a recent article, Dr. David N. Plank meticulously examines the impact of World Bank and IMF programs of structural adjustment and sectoral policy reform on Mozambique. David N. Plank, *Aid, Debt, and the End of Sovereignty: Mozambique and Its Donors*, 31 J. MOD. AFR. STUD. 407 (1993).

319. For the origins of the concept of conditionality, see JOSEPH GOLD, *CONDITIONALITY* (1979); MANUEL GUTIAN, *FUND CONDITIONALITY: EVOLUTION OF PRINCIPLES AND PRACTICE* (1981); John Williamson, *Introduction*, in IMF *CONDITIONALITY* xiii (John Williamson ed., 1983).

320. See PAUL MOSLEY, JANE HARRIGAN & JOHN TOYE, 1 AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING: ANALYSIS AND POLICY PROPOSALS 66-77 (1979).

321. WORLD BANK, *GOVERNANCE AND DEVELOPMENT* 46 (1992); see also WORLD BANK, *SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH* 60-61 (1989) (the issue of borrowing members' governance raised for the first time whereupon Bank publicly called upon African governments to become accountable to their citizens).

4. Treating Indigenous Spoliation as More Than a Property Dispute

The preceding solutions treat indigenous spoliation essentially as a property dispute.³²² But it is much more. Such acts arguably belong in the category of human rights violations. When the wealth and natural resources of a state are diverted by its leadership, the citizens are deprived of their right to full use and enjoyment of the resources. The right of a people not to be dispossessed of their wealth and natural resources is not just any ordinary human right, but *the* fundamental human right. This right transcends all the other rights and gives some semblance of form and shape to—and in a very real sense qualifies—the other rights. In this sense, other human rights are not on the same plane.

Acts of indigenous spoliation violate fundamental human rights. A people's enjoyment of the other rights within the pantheon of human rights is dependent on their access to national wealth. One cannot talk realistically of a fundamental right to life when this life can barely be sustained because it is cut off from the most basic necessities of food, shelter, and medical care. The right of access to national wealth must be protected because it guarantees the enjoyment of the other rights of life, liberty, and the pursuit of happiness. Those who seek to promote and protect fundamental human rights can do no better than to ensure that the national wealth is not spoliated by public officials. After all, the quality of life—whether it will be a dignified one or not—hangs precariously on the availability of a state's resources and the people's right of access to them.

In this vein, acts of indigenous spoliation should be viewed as an extension of the *Filartiga* principle,³²³ which applies international law to violations of human rights in domestic courts.³²⁴ However, even in the egregious case of the Marcoses, lawyers for the Philippine government had a difficult time establishing that the law of nations is violated when a head of state steals virtually all his state's wealth. However, elevating

322. This view was expressed by Peter Weiss, one of the lawyers who represented the Philippines Government in the *Marcos* cases. He thought that those cases were not property disputes but rather human rights cases. See *Pursuing the Assets of Former Dictators*, *supra* note 310, at 394, 396-98 (remarks by Peter Weiss).

323. *Id.* at 397.

324. This principle provides that certain human rights principles have ripened into customary law and therefore constitute part of the law of the United States. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888-89 (2d Cir. 1980).

indigenous spoliation to the level of a human rights violation³²⁵ transforms it into an obligation *erga omnes*, which entitles any state to bring an action before its courts against high-ranking officials who engage in acts of spoliation under the color of the law.³²⁶

The following developments support the view that the community of states has an affirmative duty to intervene to prevent acts of indigenous spoliation in states where these have occurred or are occurring: the willingness of victims of human rights violations to invite foreign governments to intervene in their states to stop such violations;³²⁷ the widespread recognition by the world community of an emerging right to democracy and the duty that it imposes on the international community to enforce this right; and the increasing interventionist policy of the major multilateral funding agencies .

VII. CONCLUSION

In *The Warriors*, J. Glenn Gray's sensitive memoir of World War II, Gray proposes a principle for fixing responsibility for collective acts by suggesting that: "[t]he greater the possibility of free action in the communal sphere, the greater the degree of guilt

325. Indigenous spoliation can be included among the list of crimes against the peace and security of mankind enumerated in Part II of the 1991 ILC Draft Code of Crimes, *supra* note 213.

326. In the *Barcelona Traction* case, the International Court of Justice elaborated on the concept of obligations *erga omnes* when it said:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the . . . rules concerning the basic rights of the human person. .

Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 4, 33.

327. See U.N. SCOR, 46th Sess., 2982nd mtg. at 1, U.N. Doc. S/RES/688 (1991); see generally Michael Stopford, *Humanitarian Assistance in the Wake of the Persian Gulf War*, 33 VA. J. INT'L L. 491 (1993).

for evil deeds done in the name of everyone."³²⁸ It would appear that what the philosopher has in mind is moral, not merely legal, responsibility. Furthermore, his overriding concern, according to Michael Joseph Smith, is with conscience, not strict liability.³²⁹ For Gray and Smith, the conception of moral responsibility extends well beyond the provisions of the legal code. What determines one's responsibility in the moral sense is the degree of freedom to act—or "free action"—that one enjoys in a given sphere.³³⁰ Responsibility must be fixed within the limits of one's freedom to act.

If Gray's notion of freedom to alter things is central to the fixing of moral responsibility, then an important distinction can be made between leaders and citizens. Regardless of how free citizens should act in the communal sphere, the acts of their leaders carry far greater consequences. Because leaders *qua* leaders assume far greater power, they also bear far greater moral responsibility.³³¹ Thus, a second proposition that flows logically from Gray's principle of free action is that political leaders act not as personal agents, but as trustees for their states. Since they act on behalf of the collective, it is incumbent on them to consider the consequences of their actions not simply from the perspective of their narrow self-interest but, perhaps more importantly from the view of the state and its collective interests.³³² This view is consistent with Max Weber's injunction that true leaders must adopt an ethic of consequence and responsibility.³³³

This Article set out to call attention to a serious problem worthy of elevation to the level of international concern. A state's wealth is whittled down to a fraction of its former size as a result of planned, organized, systematic, and deliberate diversions by its public officials and their close associates. This problem is not limited to the celebrated Marcos cases that attracted so much international press coverage; it is widespread in contemporary societies. As Professor Tignor, a leading Africanist, points out: "the frequent regime changes which have occurred in Africa in the

328. J. GLENN GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE* 199 (1959).

329. See *Moral Reasoning*, *supra* note 252, at 33.

330. See GRAY, *supra* note 328, at 199.

331. *Moral Reasoning*, *supra* note 252, at 33.

332. GRAY, *supra* note 328, at 34. Gray also makes the point that a leader's moral responsibility is dictated by the context of uncertainty wherein the leader operates. Although leaders seek and hold greater power and greater responsibility than the citizens they rule, nevertheless "they operate under circumstances that make purely ethical action quite difficult." *Id.* at 35.

333. *Id.*; see also Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 77, 122 (H. Gerth & C. Wright Mills eds. and trans., 1946).

last several decades have been accompanied by charges of gross administrative malfeasance and promises to introduce honest government."³³⁴ In states that have been victims of looting on a massive scale, indigenous spoliation has become the single most important obstacle to economic development.³³⁵ In each of the states mentioned in this Article, the confusion of public finance with private financial interests of office-holders has had fatal consequences for the vast majority of the population. This tradition of plundering the national treasury has brought about human suffering on a tragic scale, rolled back the little gains in economic advancement, and given ground to those who advocate a return to the age of paternalistic colonial rule.³³⁶

What has taken place in the last three decades is planned, organized, and deliberate looting on a massive scale, as never before seen in history. All who have commented on this phenomenon tend to use the same vocabulary in describing this unprecedented movement of national wealth from states that can least afford such extensive financial hemorrhage into private accounts in capital-rich states for safekeeping. There seems to be general agreement that while corruption is nothing new in these societies, contemporary graft by high-ranking officials is so unique that our usual vocabulary cannot adequately describe it.

"Patrimonicide" and "indigenous spoliation" have been offered as substitutes. They are intended to call to mind pillage or plunder that is systematic and organized—accomplished often by forcible, questionable, and dishonest means. Usually such acts of looting are committed by an enemy. However, this genre of spoliation differs in that it is practiced by people indigenous to the states. Even worse is the fact that those responsible are the men and women who eagerly sought and obtained public office or had it thrust upon them; these are not marauding hordes of armed bandits bent on sacking and destroying property belonging to the enemy. Furthermore, the looting is directed at all the wealth-generating sectors of the economy. As a result, the consequences on society as a whole are long-lasting.

334. Robert L. Tignor, *Political Corruption in Nigeria Before Independence*, 31 J. MOD. AFR. STUD. 175-76 (1993).

335. *Id.*; see also Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, in POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS 564 (Arnold J. Heidenheimer ed., 1989); ROBERT WILLIAMS, *POLITICAL CORRUPTION IN AFRICA* (1987).

336. See Paul Johnson, *Colonialism's Back-and Not a Moment Too Soon*, N.Y. TIMES MAG., Apr. 18, 1993, at 22, 43-44.

Constitutionally responsible rulers should be held individually accountable before the law of nations for their acts of spoliation. Achieving this goal will require adopting the approach of the Genocide Convention and the Nuremberg war crimes prosecutions. This development would open the door for individual criminal liability to attach to those who engage in the proscribed acts. In addition, following the Nuremberg strategy, courts in the place where these activities occur, as well as the courts of any state where spoliated funds are found or an accused is given sanctuary, would have jurisdiction. This approach was adopted by the drafters of the Convention on Apartheid. The decision to criminalize apartheid had as its objective, viewed from the perspective of criminal theory, to capture "both the symbolic and the deterrent aspects of criminal law."³³⁷ The emphasis on the criminal nature of the deed was intended to symbolize "the heinous nature" of the conduct in the view of the international community.³³⁸ The international community ought to take the same position with respect to acts of indigenous spoliation. The spoliator, like the pirate³³⁹ and slave trader before him, should be regarded as *hostis humani generis*, an enemy of mankind.³⁴⁰

337. See Roger S. Clark, *The Crime of Apartheid*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 299, 301 (M. Cherif Bassiouni ed., 1986).

338. *Id.*

339. The story is often told of a famous pirate named Dionides who was caught and brought before Alexander the Great. Asked by Alexander why he had arrogated to himself the empire of the seas, Dionides replied with a question: "Why do yourself sack the earth?" "I am king," said Alexander, "while you are only a pirate." Dionides then shot back: "What matters is the name. The business is the same for both of us. Dionides ravages the ships and Alexander the empire. If the Gods had made me Alexander and had made you Dionides, perhaps I would be a better prince than you would be a good pirate." See N.N. SESTIER, *LA PIRATERIE DANS L'ANTIQUITE* 268 (1900), quoted in Jacob W.F. Sundberg, *The Crime of Piracy in INTERNATIONAL CRIMINAL LAW: CRIMES* 441 (M. Cherif Bassiouni ed., 1986). The story reveals the razor-thin edge that separates the ancient behavior of pirates from contemporary acts of indigenous spoliation. Both crimes are equally odious and deservedly targets of international conventional regulation.

340. In the *Lotus Case* Judge Moore stated in his dissent that:

[I]n the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come

Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humanis generis*—whom any nation may in the interest of all capture and punish.

The S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A), No. 9, at 70. The principle of universal jurisdiction articulated by Judge Moore applies to crimes that are committed typically in *res communis*. However, it also applies to conduct that is "recognized to constitute such a grave affront to the international community that any State having custody over the author has a right to prosecute *regardless* of the *locus delicti* or the nationality of the offender." LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 103 (1992). It is in this sense that universal jurisdiction can be invoked to try and punish leaders who commit acts of indigenous spoliation.