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The Challenges of State Building in Resource Rich Nations

Matthew L. Norman*

I. INTRODUCTION

¶1 Nations rich in primary commodities, whether minerals, timber, or fossil fuels, have experienced sharply divergent outcomes: where strong state institutions developed prior to large-scale resource exploitation, resource wealth has generally been beneficial; where, however, resource exploitation preceded the formation of a functional state, the results have been negative on average, and in some cases disastrous. The combination of a weak state and primary commodity exports has been shown to reduce economic growth, erode governance, and increase the risk of civil war—a stylized fact that has come to be known as the "resource curse."[1]

¶2 The resource curse represents a major obstacle to the universal protection of human rights. Resource revenues represent a means of survival for ineffective and repressive regimes. By mitigating the need to tax citizens and giving the resource-importing advanced nations an interest in supporting the government for the sake of stability,[2] resource exports sever the government from the two forces capable of incentivizing reform—internal and external pressure.[3] One result of this is that control of resources has been at the center of many of the worst humanitarian crises

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[1] Seminal works in the identification and description of the resource curse include: ALAN H. GELB, OIL WINDFALLS: BLESSING OR CURSE? (1988) (finding that the oil boom of the 1970s had a negative impact on many oil exporting nations); THE RENTIER STATE: NATION, STATE AND THE INTEGRATION OF THE ARAB WORLD 77 (Hazem Beblawi & Giacomo Luciani eds., 1987); TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES (1997); WILLIAM RENO, WARLORD POLITICS IN AFRICAN STATES (1998) (describing the use of illicit international trading networks by African leaders as a means to support patrimonialism while avoiding the creation of state bureaucracy); MICHAEL L. ROSS, *Extractive Sectors and the Poor*, OXFAM AMERICA (2001), *available at* http://www.sscnet.ucla.edu/polisci/faclutry/ross/oxfam.pdf (arguing that resource dependent states "tend to suffer from unusually high rates of: corruption; authoritarian government; government ineffectiveness; military spending; civil war."); Hussein Mahdavy, *The Patterns and Problems of Economic Development in Rentier States: The Case of Iran*, *in* STUDIES IN THE ECONOMIC HISTORY OF THE MIDDLE EAST (M. Cook, ed.1970) (introducing the concept of the "rentier state", in which political patronage funded by resource revenues serves to stifle political reform); Jeffrey Sachs & Andrew Warner, *Natural Resource Abundance and Economic Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1995) (finding, through cross-country regression, that resource wealth reduces economic growth); Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil Wars*, 56 OXFORD ECON. PAPERS 563 (2004) (showing that resource wealth is empirically associated with a greater risk of civil war) Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POLITICS 297 (1999) (reviewing political economic theories of the resource curse).

[2] *See* CHRISTOPHER S. CLAPHAM, AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL (2002) (describing international support for regimes in resource rich African nations such as Nigeria, Democratic Republic of Congo and Equatorial Guinea).

[3] *See, e.g.*, Terry Lynn Karl, *Ensuring Fairness: The Case for a Transparent Fiscal Social Contract*, *in* ESCAPING THE RESOURCE CURSE 256, 256 (Macartan Humphreys, Jeffrey Sachs & Joseph Stiglitz eds., 2007)("[P]etro-states are even *less subject to the types of internal countervailing pressures* that helped to produce bureaucratically efficacious…states elsewhere *precisely because they are relieved of the burden of having to tax their own subjects*." (emphasis in original)).

in recent history, including those in Sudan[4] and the Democratic Republic of Congo.[5] Another is that resource exports have been implicated in the survival of oppressive or corrupt regimes in dozens of nations, from Burma[6] to Saudi Arabia.[7] For a government that is able to support itself on resource royalties, the public is at best irrelevant and at worst a potential threat to be preemptively repressed. Meanwhile, foreign resource extraction firms provide the income necessary to political survival, meaning that political, economic, and environmental rights are frequently ignored for the convenience of extractive industries.[8] In general, a thoroughgoing atrophy of the rule of law and a spiraling privatization, criminalization, and militarization of politics make weak, resource rich states some of the most dangerous places on earth.

¶3 In recent years, the international community has begun to search for ways to address the resource curse. Spurred to action by the role of diamonds in financing the brutal conflicts in Angola, Liberia and Sierra Leone, NGO-led initiatives like the Kimberley Process Certification System (KPCS)[9] and Extractive Industries Transparency Initiative (EITI)[10] have sought to make both corporations and governments more accountable for their use of resource wealth. Complementing these efforts has been the broadened reach of international criminal law and the increased international application of domestic laws. U.S. laws such as the Foreign Corrupt Practices Act[11] and Alien Torts Statute[12] carry potential liability for individuals and corporations found complicit in corruption or human rights abuse abroad.

¶4 Unfortunately, each of these means of combating the resource curse suffers from fundamental limitations. Both the KPCS and EITI are dependent on implementation within

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[4] *See* HUMAN RIGHTS WATCH, SUDAN, OIL AND HUMAN RIGHTS (2003); Nicholas D. Kristof, Op-Ed., *China and Sudan, Blood and Oil*, N.Y. TIMES, Apr. 23, 2006, at WK10.

[5] U.N. Secretary-General, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, U.N. Doc. S/2003/1027 (Oct. 28, 2003) [hereinafter 2003 DRC Report](documenting connections between military forces, illicit trade networks and government officials from DRC, Rwanda and Uganda that persisted throughout the later years of the regional war centered on the Eastern DRC); HUMAN RIGHTS WATCH, THE CURSE OF GOLD (2005).

[6] Michael L. Ross, Op-Ed., *Myanmar: The Latest Petro-bully*, L.A. TIMES, Oct. 26, 2007, *available at* http://articles.latimes.com/2007/oct/26/opinion/oe-ross26.

[7] Michael L. Ross, *Oil, Islam and Women*, 102 AM. POL. SCI. REV. 107, 107-16 (2008) ("The failure of women to join the nonagricultural labor force … leaves oil-producing states with atypically strong patriarchal cultures and political institutions … states that are richest in oil (Saudi Arabia, Qatar, United Arab Emirates, and Oman) have the fewest women in their nonagricultural workforce…").

[8] Illustrative incidents abound. *See, e.g.,* Amy Apollo, Note, *Mujica v. Occidental Petroleum Corporation: A Case Study of the Role of the Executive Branch in International Human Rights Litigation*, 37 RUTGERS L.J. 855 (2005) (describing Mujica v. Occidental Petrol. Co., 381 F.Supp.2d 1164 (C.D. Cal. 2005) (dismissing claim alleging illegal killings by private security forces protecting oil pipelines as barred by political questions doctrine)); DENISE LEITH, THE POLITICS OF POWER: FREEPORT IN SUHARTO'S INDONESIA (2003); HUMAN RIGHTS WATCH, PAPUA NEW GUINEA: SERIOUS ABUSES AT BARRICK GOLD MINE (2011), http://www.hrw.org/en/news/2011/02/01/papua-new-guinea-serious-abuses-barrick-gold-mine (documenting gang rape and other human rights abuse at a Canadian owned gold mine). See also other incidents litigated in U.S. courts, described in Section III (b) *infra*.

[9] THE KIMBERLEY PROCESS CERTIFICATION SCHEME, *available at* http://www.state.gov/e/eeb/diamonds/c19974.htm; *See also*, GLOBAL WITNESS, THE KIMBERLEY PROCESS, http://www.globalwitness.org/campaigns/conflict/conflict-diamonds/kimberley-process.

[10] EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org (last visited Feb. 21, 2012); *See also Extractive Industries Transparency Initiative*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/en/activities/advocacy/extractive-industries-transparency-initiative (last visited Feb. 21, 2012).

[11] 15 U.S.C. § 78dd-1 (2010).

[12] 28 U.S.C. § 1350 (2010); a case currently before the Supreme Court may eliminate corporate liability under the ATS; see *infra*, fn.77-86.

exporting countries in order to be effective.[13] This is a serious weakness given that a defining feature of resource cursed states is the inability to regulate and manage resource wealth. Absent increased state capacity, voluntary initiatives run the risk of serving as whitewash for extractive corporations and states. Giving failed states a means to proclaim their own transparency through compliance with voluntary, and thus largely cosmetic, requirements, may help them mask the persistence of deeper problems. Similarly, international criminal law remains a poor substitute for effective domestic law when it comes to deterring human rights abuse.[14] Meanwhile, the primary effect of expanded liability for American firms operating abroad has been that leaders of poor, resource-rich nations increasingly prefer to deal with firms less encumbered by human rights considerations.[15]

¶5 The limited impact of these initiatives has made it clear that there is no simple solution to the resource curse. The most promising progress in ameliorating the resource curse has come as the result of coordinated and sustained international interventions with an underlying focus on building state stability and capacity. In Liberia and Sierra Leone, where the international community has demonstrated a commitment to helping each country achieve long-term stability,[16] the potential of such an approach is apparent. The stability imposed by international forces has decreased the political risk multinationals face in the country and, by making the government less dependent on patrimonial use of resource rents to survive, has improved the country's bargaining position in dealing with multinationals. In Liberia, these impacts have already made possible the favorable renegotiation of several major resource concessions.[17] Just

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[13] *See* Ian Smillie, *The Kimberley Process Certification Scheme for Rough Diamonds* 3, *in* ODI Comparative Case Study 1 (2004), *available at* http://www.pacweb.org/Documents/diamonds_KP/kimberley-process.pdf ("Each participant . . . undertakes to maintain internal controls over rough diamonds. For producers this means establishing an audit trail between mines and the point of export.").

[14] *See, e.g.,* Renee Doplick, *Bassiouni "Quite Doubtful" International Criminal Court Will Succeed: The Failures, Challenges and Future of International Criminal Law*, INSIDE JUSTICE (Mar. 31, 2010), http://insidejustice.com/law/index.php/intl/2010/03/31/cherif_bassiouni_international_criminal ("[W]e likely will see a shift from supranational criminal courts to national courts, which he said will be more successful in prosecuting the guilty."); Susan Aaronson, *Ruggie Tells States to Mind Their Own Business*, POLICY INNOVATIONS, (Mar. 5, 2007), http://www.policyinnovations.org/ideas/commentary/data/ruggie (interpreting the 2007 Ruggie Report—the first of a series of annual reports on the human rights impacts of international business prepared for the U.N. by a team led by professor John Ruggie—as a call for greater state oversight of multinational corporations); *see* John Ruggie, Special Representative of the U.N. Secretary General (SRSG), *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007).

[15] GIOVANNI ARRIGHI, ADAM SMITH IN BEIJING: LINEAGES OF THE TWENTY-FIRST CENTURY (2009) (chronicling rapidly increasing Chinese support of regimes like those in Sudan, Chad and Zimbabwe in exchange for access to resources); Padraig Carmody & Francis Y. Owusu, *Competing Hegemons? Chinese Versus American Geo-Economic Strategies in Africa*, 26 POLIT. GEO. 504 (2007); Richard Behar, *China Surpasses U.S. as Leader in Sub-Sahara*, FAST COMPANY, June 1, 2008, at 37; Carlos Hoyos, *Sudan: China and India Fill the Void Left by Rights Campaigners*, FIN. TIMES, Feb. 28, 2006 (describing entrance of Chinese and Indian firms to Sudanese oil and gas sector after pressure from civil society forced Canadian firm Talisman Oil to leave the country).

[16] For Liberia this is best evidenced by the ongoing presence of a substantial UN peacekeeping force almost a decade after the close of the country's civil war. *See* United Nations Mission in Liberia, Facts and Figures (2012), http://www.un.org/en/peacekeeping/missions/unmil/facts.shtml (reporting 9,233 uniformed personnel as of Jan. 31, 2012 and an approved budget of $525,612,730 from July 2011 through June 2012.); also significant have been large-scale US-led efforts to reform the nation's security sector; *see* International Crisis Group, Liberia: Uneven Progress in Security Sector Reform, Africa Report No. 148, Jan. 13, 2009, http://www.crisisgroup.org/~/media/Files/africa/west-africa/liberia/Liberia%20Uneven%20Progress%20in%20Security%20Sector%20Reform.pdf. Sierra Leone's stability owes largely to the United Kingdom's "over the horizon" guarantee to back the government. *See* Paul Collier, *Editorial: Rethinking Assistance for Africa*, 26 ECON. AFFAIRS 2, 2 (2006).

[17] *See* RAJA KAUL, ANTOINE HEUTY & ALVIRA NORMAN, GETTING A BETTER DEAL FROM THE EXTRACTIVE SECTOR:

as importantly, this window of stability has allowed Liberia and Sierra Leone to begin the process of building state institutions constrained by the rule of law in their use of revenue rents. What these experiences suggest is that only a better understanding of the particular institutional pathologies underlying the resource curse can make it possible to address the problem at its source. In this article, I will attempt to provide the outline of such an understanding and support it with a case study of the Democratic Republic of Congo (DRC).

¶6 Section II describes the general understanding of the resource curse that has emerged from the empirical literature. Section III outlines and critiques various initiatives seeking to address the resource curse. Section IV reviews theories of the resource curse and argues for a narrative that is, in many ways, a synthesis of these theories. This explanation is supported by a brief case study of the DRC. The conclusion explores the implications of this explanation, suggesting means by which the emerging international will to combat the resource curse can be effectively applied.

II. What Is the Resource Curse? Reviewing the Evidence

¶7 While the exact outlines of the resource curse remain contested in the empirical literature, certain basic elements have emerged. Perhaps most significantly, it has become apparent that the existence of a resource curse in any given country is conditioned on the quality and strength of that country's institutions.[18] Stable countries with representative governments and institutionalized bureaucracies that limit opportunities for corruption can gain a great deal from resource wealth. Vast reserves of resources like iron and oil were central in fueling various stages of industrialization in Australia, Canada, and the United States.[19] More recently, Norway has become the world's most developed nation, by at least one measure, since the discovery of North Sea oil,[20] and the diamond mines of Botswana helped make it the world's fastest growing economy from 1965 to 1998.[21]

¶8 However, for weak states—those characterized by corruption, autocracy, or fledgling democracy, and generally ineffective state institutions—resource wealth has had a wide range of negative impacts. For one, resource dependence, in which a large proportion of a nation's GDP comes from the export of primary commodities, leads to reduced economic growth, even relative to other nations with similarly weak state institutions.[22] Resource dependence is also associated

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CONCESSION NEGOTIATION IN LIBERIA 2006-2008 (2009) (documenting Liberia's renegotiation of major concession contracts with ArcelorMittal and Firestone, both resulting in substantially improved terms for the Liberian state);

[18] Paul Collier & Anke Hoeffler, *Testing the Neocon Agenda: Democracy in Resource-Rich Societies*, 53 EURO. ECON. REV. 293, 303-05 (2009) (finding that resource wealth has tended to reduce economic growth in both autocracies and fledgling democracies but that strong, functional checks and balances offset this effect); THAD DUNNING, CRUDE DEMOCRACY: NATURAL RESOURCE WEALTH AND POLITICAL REGIMES 5-22 (2008) (arguing that where elites gain their status from the private sector, resource rents will reduce elite opposition to democracy by decreasing popular demand for redistribution).

[19] HAROLD INNIS, ESSAYS IN CANADIAN ECONOMIC HISTORY (1956); Gavin Wright & Jesse Czelusta, *Resource Based Growth Past and Present*, *in* NATURAL RESOURCES: NEITHER CURSE NOR DESTINY (Daniel Lederman & William Maloney eds., 2006).

[20] UN DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2010 143 (2010), *available at* http://hdr.undp.org/en/media/HDR_2010_EN_Contents_reprint.pdf (finding Norway to have the highest Human Development Index among measured nations); Leonard Wantchekon, *Why Do Resource Dependent Countries Have Authoritarian Governments?*, 5 J. AFRICAN FIN. & ECON. DEV. 57 (2002).

[21] Daron Acemoglu, Simon Johnson & James Robinson, *An African Success Story: Botswana*, *in* IN SEARCH OF PROSPERITY: ANALYTICAL NARRATIVES ON ECONOMIC GROWTH 81, 82 (Dani Rodrik, ed., 2003), *available at* http://www.colby.edu/economics/faculty/jmlong/ec479/AJR.pdf.

[22] Paul Collier & Benedikt Goderis, *Commodity Prices, Growth and the Natural Resource Curse: Reconciling a*

with nearly every manifestation of political stagnation or decay; democratization is impeded, autocracy is entrenched,[23] state provision of public goods is eroded,[24] and corruption is increased.[25] It is no surprise, then, that resource dependent nations are disproportionately represented in discussions of nearly every facet of human rights abuse.[26]

¶9 The single most devastating element of the resource curse is the increased likelihood of civil war in resource-dependent nations. While the general causal dynamics of the relationship between resource wealth and civil war are the subject of ongoing debate,[27] empirical tests suggest that resource dependence, when combined with a weak state, is a strong predictor of intrastate conflict.[28] Certainly a striking number of current and recent conflicts, particularly those in Africa, involve nations with a high degree of resource dependence.

¶10 Like all violent conflicts, resource conflicts have collateral human rights impacts that go far beyond their death tolls. Rebels funded by resource smuggling routinely target civilians, recruiting displaced children to join their cause.[29] Meanwhile, opportunistic multinationals use private security forces to violently carve out pockets of order within nations at war.[30] Indeed, these multinationals and their security forces sometimes represent the most important allies for embattled rulers.[31] As with the relationship between resources and the existence of intrastate conflict, it is not clear that resources have a consistent impact on the nature and duration of conflict.[32] Still, the connection between resources and combat strategies based on inflicting horror is difficult to ignore, and has been central in bringing the resource curse into the public eye.

Conundrum, Center for the Study of African Economies Working Paper Series (2007), *available at* http://economics.ouls.ox.ac.uk/13218/1/2007-15text.pdf; Jeffrey Sachs & Andrew Warner, *The Curse of Natural Resources,* 45 EURO. ECON. REV. 827 (2001).

[23] Michael Ross, *Does Oil Hinder Democracy?*, 53 WORLD POLITICS 326 (2001); Wantchekon, *supra* note 20.

[24] Ross, *Extractive Sectors and the Poor*, *supra* note 1.

[25] H. Mehlum, K. Moene & R. Torvik, *Institutions and the Resource Curse*, 116 ECON. J. 1 (2006).

[26] *See, e.g.,* Ross, *Oil, Islam and Women*, *supra* note 7, at 107 (arguing that the prominence of oil in many economies in the Middle East has perpetuated gender inequality by causing women to be underrepresented in the labor force.); Australian Council for Overseas Aid, *Trouble at Freeport: Eyewitness Accounts of West Papuan Resistance to the Freeport-McMoRan Mine in Irian Jaya Indonesia, and Indonesian Military Repression, June 1994-February 1995*, 1995, http://www.utwatch.org/corporations/freeportfiles/acfoa.html (documenting executions and torture perpetrated by the Indonesian military, using Freeport facilities); *see also supra* note 8.

[27] Conflicts in which resources play a part have taken many different forms. In Angola, Nigeria, Sudan, Indonesia, DRC, Burma and Morocco, separatist movements have been motivated at least in part by resources. In Colombia, DRC, Congo-Brazzaville, Angola, Liberia, Sierra Leone and Ivory Coast, resources have motivated and/or funded general rebellions, often with support from outside nations. In all of these conflicts, factors besides resources – from Great Power rivalries to legitimate grievances with predatory states – have also played an important role. *See, e.g.*, Michael L. Ross, *How Do Natural Resources Influence Civil War: Evidence from 13 Case Studies*, 58 INT'L ORG. 37 (2004).

[28] See the discussion in Section III below. *See also* ROBERT BATES, WHEN THINGS FELL APART: STATE FAILURE IN LATE-CENTURY AFRICA (2010); James Fearon, *Primary Commodities Exports and Civil War*, 49 J. CONFLICT RESOLUTION 483 (2005); Ross, *supra* note 27; William Reno, *Foreign Firms, Natural Resources and Violent Political Economies* (Univ. of Leipzig Papers on Econ. No. 46, 2001).

[29] *See* DANIEL BERGNER, IN THE LAND OF MAGIC SOLDIERS (2003); STEPHEN ELLIS, THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR (2001).

[30] RENO, *supra* note 1 at 135-37.

[31] *Id*.

[32] Ross, *Oil, Islam and Women*, *supra* note 7.

III. THE INTERNATIONAL RESPONSE

¶11 The resource curse has entered common parlance thanks to international civil society. Both environmental and human rights activists have contributed to creating broad popular awareness of the problems associated with extractive industries. Due to the resulting pressure, implicated governments and multinational firms have cooperated in creating new standards meant to introduce accountability and transparency to extractive sectors, most notably the Kimberley Process Certification System and the Extractive Industries Transparency Initiative. Thus far, however, these new standards have failed to have any discernible impact on the resource curse. These standards, which necessarily rely on self-enforcement by governments and corporations, pose the threat of creating the illusion of transparency and progress—thus alleviating pressure on corrupt governments—while leaving the underlying mechanisms of the resource curse unaddressed.

A. The Kimberley Process

¶12 The multitude of current international initiatives aimed at eliminating the resource curse can be traced to the pioneering efforts of a handful of environmental NGOs, and in particular, the UK-based Global Witness (GW). GW formed in 1994 as a response to the illegal timber trade that was helping to prolong Cambodia's civil war and causing rapid rainforest deforestation.[33] The organization's founders went undercover at Thailand's border with Cambodia and documented Thai firms making millions of dollars of timber purchases from Cambodia's Khmer Rouge rebels.[34] After GW went public with its findings, the border was closed to timber trade and the Khmer Rouge, cut off from its financing, splintered.[35]

¶13 In 1998, GW reported that *União Nacional para a Independência Total de Angola* (UNITA), the rebel group then occupying a substantial portion of Angola, was funding itself through the sale of diamonds.[36] Similar reports from other NGOs followed, chronicling the use of diamond sales to finance civil war in Liberia and Sierra Leone.[37] As a result, the diamond industry, working together with the U.N. and diamond-importing nations, committed itself to self-enforced certification requirements intended to reduce the number of diamonds originating in conflict nations.[38] The end result was the Kimberley Process Certification System.[39]

¶14 The KPCS aims to endow every diamond with a "continuous chain-of-warranty" from mine to retailer.[40] Member nations can only trade in rough diamonds with other member nations, and each shipment of rough diamonds from a member nation must be accompanied by a

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[33] Center for Global Development, Q&A with Patrick Alley, Co-founder of Global Witness (Dec. 17, 2007), http://www.cgdev.org/content/article/detail/1423608/.
[34] *Id*.
[35] *Id*.
[36] GLOBAL WITNESS, A ROUGH TRADE (1998), *available at* http://www.globalwitness.org/library/rough-trade.
[37] I. SMILLIE, L. GBERIE & R. HAZLETON, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS AND HUMAN SECURITY (2000), *available at* http://www.pacweb.org/pub-conflict-diamonds-kimberley-process-e.php.
[38] For an excellent account of the genesis of the Kimberley Process, including background on the diamond industry and previous U.N. efforts to curb trading in conflict diamonds, see Wolf-Christian Paes, "Conflict Diamonds" to "Clean Diamonds": The Development of the Kimberley Process Certification Scheme, in RESOURCE POLITICS IN SUB-SAHARAN AFRICA 305 (Matthias Basedou & Andreas Mehler eds., 2007).
[39] *Id.*; Smillie, *supra* note 13.
[40] Paes, *supra* note 38 (explaining that the KPCS governs only rough (uncut) diamonds; however, it seeks to assure that only diamonds from certified KPCS shipments are cut).

certification that the diamonds are from licensed miners and traders.[41] Non-compliant member nations can be expelled, rendering it nearly impossible, in theory, to sell diamonds originating in that nation.[42]

¶15 While it has been rightly hailed as an innovation in civil society's pursuit of human rights,[43] the KPCS has thus far failed to have a major impact on the use of diamonds in conflict. In the years since the KPCS became effective, diamonds have funded conflict in the Ivory Coast and DRC, in each of which rebel groups continue to mine and sell diamonds.[44]

¶16 The fundamental weakness in the KPCS is that it ultimately relies on national governments for the implementation and enforcement of Process requirements.[45] Few of the nations likely to be affected by such conflict have the bureaucratic capacity to enforce these requirements. Indeed, if they did, the Kimberley Process would become largely redundant, as governments would surely need no encouragement to prevent the sale of diamonds by rebels.[46]

¶17 The KPCS does have a mechanism meant to enforce effective internal control by member nations: expulsion from the Process.[47] Each nation's internal controls are to be inspected by a review mission once every three years, and failing nations can no longer certify diamonds for export. The 2004 expulsion of the Republic of Congo, which had been exporting many times more diamonds than it was capable of producing, gave some promise that external monitoring might prove effective.[48] This promise has not been realized. As public concern for conflict diamonds has waned,[49] the World Diamond Council and KPCS member nations have failed to take action even in the face of evidence that the KPCS is being subverted.[50] The significance of the KPCS's shortcoming has become increasingly clear to the civil society groups behind the KPCS, who now represent its most formidable critics.[51] This was illustrated most dramatically

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[41] The Kimberley Process Certification Scheme, Section III, Undertakings in Respect of the International Trade in Rough Diamonds, *available at* http://www.kimberleyprocess.com/home/index_en.html. In the U.S., the KPCS is implemented through the Rough Diamond Control Regulations, 31 C.F.R. § 592.301(2004).

[42] Paes, *supra* note 38, at 316-38.

[43] There have also been skeptical voices. *See, e.g.,* Holly Burkhalter, *Between the Lines: A Diamond Agreement in the Rough*, 135 FOREIGN POL'Y 72 (Mar. 1, 2003) ("[W]ith no powers to compel compliance by either the diamond industry or governments, the entire operation can still be considered a 'faith-based initiative.'"); Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717 (2010); Jack Jolis, *Naomi Campbell and the Blood Diamond Hoax*, Wall Street Journal, Aug. 10, 2010 at A8; *Rapaport Puts Nail in Kimberley Coffin*, MINING J., Nov. 25, 2009, *available at* http://www.mining-journal.com/production-and-markets/rapaport-puts-nail-in-kimberley-coffin.

[44] PARTNERSHIP AFRICA CANADA, DIAMONDS AND HUMAN SECURITY: ANNUAL REVIEW 2009, *available* at http://www.pacweb.org/Documents/annual-reviews-diamonds/AR_diamonds_2009_eng.pdf.

[45] *See* Paes, *supra* note 38 ("The complete chain of warranties from the mine to the retailer can only be maintained if the requirements of KPCS are matched by similar certification mechanisms on the national level.").

[46] Another potential weakness in the KPCS is the fact that some rebel groups finance themselves through what Michael Ross has dubbed "booty futures"—funds advanced in expectation of resource concessions once the rebel group gains power. *See* Michael Ross, *Booty Futures*, UCLA Department of Political Science Working Paper, May 6, 2005, http://www.sscnet.ucla.edu/polisci/faculty/ross/bootyfutures.pdf.

[47] Paes, *supra* note 38.

[48] *Id.*

[49] The Kimberley Agreement was preceded by a voluntary initiative by the World Diamond Council, consisting of major diamond traders and retailers, to cease trading in conflict diamonds. The agreement was signed in the wake of widespread coverage of brutalities in Sierra Leone and Liberia, which had prompted headlines such as "This little girl had her hand cut off so you can wear a diamond ring." Paes, *supra* note 38, at 314. Subsequent conflicts and human rights incidents in which diamonds played a part, though no less brutal, failed to elicit the same degree of public attention.

[50] *See, e.g.*, Global Witness, *Loopholes in the Kimberley Process*, October 2007, *available at* http://www.globalwitness.org/sites/default/files/import/loopholes_in_the_kimberley_process.pdf.

[51] PARTNERSHIP AFRICA CANADA, *supra* note 44, at 1 ("By all indications, and from the evidence gathered for this

by the 2009 resignation of Ian Smillie, one of the driving forces behind the formation and development of the KPCS. Smillie explained he could "no longer in good faith contribute to a pretense that failure is success."[52] In May 2011, Global Witness withdrew from the KPCS, stating that the Process's failure "has proved beyond doubt that voluntary schemes are not going to cut it in a multi-polar world where companies and countries compete for mineral resources."[53]

¶18 Ultimately, the fundamental factor preventing the KPCS from realizing its potential is the same factor that made diamond-fueled conflict in Africa possible in the first place—weak states incapable of preserving internal order. Liberia and Sierra Leone have made some progress in building effective, credible states with the help of the international community. It is this state-building process that represents the best chance for other diamond-rich nations like the DRC and Ivory Coast to avoid future resource wars.

B. The Extractive Industries Transparency Initiative

¶19 In spite of the Kimberley Process's shortcomings, many current initiatives aimed at addressing the resource curse are modeled on the Kimberley Process approach. The foremost example is the Extractive Industries Transparency Initiative, spearheaded by Revenue Watch Institute and supported by Global Witness and George Soros's Open Society Institute, among other groups.[54] The EITI aims to impose accountability on governments and corporations involved in resource extraction by pushing both parties to report all revenue streams.[55] The effort has succeeded in gaining a number of signatories, including both corporations and national governments, many of which have been certified as compliant.[56] Ultimately, however, it can be expected to face the same challenges as the Kimberley Process as it attempts to trace the previously untraceable, while avoiding a role as window dressing for the industries and governments it means to police.[57]

¶20 The EITI has served as the model for a new U.S. law aimed at the resource curse. The Energy Security Through Transparency Act (ESTTA),[58] passed as Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[59] amends Section 13 of the Exchange Act of 1934 and compels the Securities Exchange Commission (SEC) to make rules requiring that all "resource extraction issuers"[60] disclose payments to foreign governments for oil, natural gas, or minerals.[61]

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year's Diamonds and Human Security Annual Review, the Kimberley Process (KP), designed to halt and prevent the return of 'conflict diamonds,' is failing.").

[52] IRIN Global, *Credibility of Kimberley Process on the Line Say NGOs*, June 22, 2009, http://www.irinnews.org/Report.aspx?ReportId=84949.

[53] Charmian [sic] Gooch, *Why We Are Leaving the Kimberley Process*, Press Release, Dec. 5, 2011, http://www.globalwitness.org/library/why-we-are-leaving-kimberley-process-message-global-witness-founding-director-charmian-gooch.

[54] EITI SUPPORTERS, http://eiti.org/supporters/civilsociety (last visited Apr. 9, 2012).

[55] Jonas Moberg, *EITI Reporting Coming of Age*, EITI Blog, Aug. 28, 2010, http://eiti.org/blog/eiti-reports.

[56] EITI MEMBER COUNTRIES, http://eiti.org/countries (last visited Feb. 21, 2012).

[57] *See* Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L. L. 1043 (2010).

[58] H.R. 4173 (2010) § 1504 (to be codified as 15 U.S.C. § 78m(q)).

[59] Dodd-Frank, signed into law in July 2010, introduces a number of significant changes to financial regulation in the U.S.

[60] H.R. 4173 (2010) § 1502 (to be codified at 15 U.S.C. § 78m(p)). The provision would apply only to companies subject to the 1934 Act's reporting requirements and which engage in "the commercial development of oil, gas or minerals." *Id.*

[61] Firger, *supra* note 57, at 1084 (noting that the provision would apply only to companies subject to the 1934 Act's

¶21 Another provision of Dodd-Frank, the Congo Conflict Minerals Act (CCMA),[62] requires due diligence investigation and disclosure of "chain-of-custody information related to the extraction and processing of…coltan, cassiterite…wolframite," and gold sourced from the DRC and neighboring countries.[63] It also requires that the State Department provide guidelines for avoiding conflict resources and that the United States Agency for International Development (USAID) investigate and describe potential punitive measures against "individuals or entities whose commercial activities are supporting illegal armed groups and human rights violations in Eastern [DRC]."[64]

¶22 As of January 2012, both rules are still undergoing comment. Industry groups, such as the American Petroleum Institute, have argued that the SEC must minimize the ESTTA's impacts on "efficiency, competition and capital formation,"[65] pointing out that many of the world's largest oil companies (including Gazprom and Chinese National Petroleum Company) will not have to comply with the rules and may gain a competitive advantage over companies listed in the U.S.

¶23 The CCMA has been equally controversial, with some arguing that the law has created a "de facto embargo"[66] on minerals from the Kivu Provinces of Eastern DRC, hurting artisanal miners while benefitting the military officers and militias that smuggle minerals.[67] The U.N. Security Counsel's Group of Experts on the DRC has confirmed these impacts, adding that the effective boycott of minerals from the DRC's Kivu provinces has starved the governments of these provinces of revenues.[68] In a comment to the SEC, the Group of Experts suggests that the CCMA regulations adopt a "mitigation" approach based on due diligence guidelines currently being created by the OECD and the Group of Experts.[69]

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reporting requirements).

[62] H.R. 4173 (2010) § 1502, *supra* note 60.

[63] *Id.* The movement that led to the CCMA borrowed tactics from the NGO's behind the Kimberley Process, drawing public attention to connections between the gold, tin and coltan used in consumer electronics and ongoing violence in DRC. *See* John Prendergast, *Can You Hear Congo Now?: Cell Phones, Conflict Minerals and the Worst Sexual Violence in the World*, ENOUGH PROJECT (Apr. 1, 2009), http://www.enoughproject.org/files/Can%20Your%20Hear%20Congo%20Now.pdf ("The time has come to expose a sinister reality: Our insatiable demand for electronics products such as cell phones and laptops is helping fuel waves of sexual violence in a place that most of us will never go, affecting people most of us will never meet.").

[64] Firger, *supra* note 57, at 1088.

[65] American Petroleum Institute, SEC Comment Letter, Release No. 34-63549 (Jan. 19, 2012), http://www.sec.gov/comments/s7-42-10/s74210-121.pdf.

[66] David Aronson, Op. Ed., How Congress Devastated Congo, N.Y. TIMES, Aug. 7, 2011, http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html.

[67] *Id*. Aronson contends that the law has had "unintended and devastating consequences." *See also* Representatives of Axel Mutia, North Kivu Artisanal Mining Cooperatives, SEC Comment Letter regarding Dodd Frank sections on Conflict Minerals (Mar. 11, 2011). Though regulations implementing the law have yet to be passed, manufacturers have begun preemptively shifting their supply chain away from Africa en masse.

[68] U.N. Group of Experts on the Democratic Republic of the Congo, Final Report, transmitted by letter dated Nov. 29, 2011 from the Chair of the Security Council Comm. established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council ¶¶ 368-73, U.N. Doc. S/2011/738 (Nov. 29, 2011). *See also* Jonny Hogg & Graham Holiday, *Conflict Minerals Crackdown Backfiring in Congo – UN,* REUTERS, Dec. 30, 2011, *available at* http://af.reuters.com/article/drcNews/idAFL6E7NU25720111230?pageNumber=1&virtualBrandChannel=0.

[69] U.N. Group of Experts on the Democratic Republic of the Congo, Comment, transmitted by letter dated Oct. 21, 2011 from the Coordinator of the Group of Experts established pursuant to resolution 1952 (2010) concerning the Democratic Republic of the Congo addressed to the Chairman of the Securities and Exchange Comm., U.N. Doc S/AC.43/2011/GE/OC.86 (Oct. 21, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-346.pdf. The proposed rule essentially defers to voluntary initiatives like the OECD guidelines in defining the due diligence requirements of the CCMA.

¶24 Whether CCMA can eventually succeed in its aims will depend on the extent to which the traceability of minerals up the supply chain can be achieved.[70] As long as it remains impossible to determine with any confidence that a mineral sourced from the DRC (or a neighboring country) did not come from a rebel-controlled mine, CCMA is likely to remain an overly blunt instrument. Alternatively, this lack of certainty may deter SEC enforcement, making compliance with CCMA cosmetic. With the resources and enforcement power of the SEC behind it, the CCMA has the potential to be effective, but only if the challenge of achieving traceability is met.

C. International Criminal Law

¶25 Another avenue through which the resource curse might be mitigated is international criminal law. A number of individuals indicted thus far by the International Criminal Court and the mixed tribunals are linked to conflicts in resource-rich nations.[71] However, these courts will need to be developed far more before they can realistically be expected to deter individuals involved in resource wars. The Special Court for Sierra Leone, for instance, has imprisoned only three members of the Revolutionary United Front,[72] a group that waged a war of terror against the nation's civilians.[73] Even for those in command of armies or militias, the remote risk of prosecution under international criminal law is unlikely to figure prominently in decision-making. Meanwhile, limits on the reach of these courts, combined with ineffective legal systems in victim nations, means that the bulk of those profiting from resource wars continue to have impunity.

¶26 What these approaches to attacking the resource curse have in common is that each fails to address the underlying source of the problem: the state weakness associated with resource wealth. Even if every other element of the KPCS, EITI, and ESSTA were to be implemented without flaw, this gap in their reach would render each of little effect. This is most evident with the KPCS. States rich in diamonds have every incentive to prevent those diamonds from funding rebels, but lack the capacity to regulate the movement of what are, after all, no more than pebbles. The EITI and ESSTA might eventually succeed in preventing extractive multinationals from making clandestine payments to governments, but they have no means of affecting the use of resource rents legitimately paid to those governments.[74] The most basic reason for this is simply that many resource dependent states lack the capacity to transform resource revenues into public services. In such states, there is no question of whether the revenues will be swallowed by the state—the only question is by which state actor. And while international criminal law, and the ICC in particular, offer the promise of deterring the fourth generation warfare tactics common in resource wars, they will never provide a complete substitute for functioning domestic law.

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[70] Laura E. Seay*, What's Wrong With Dodd-Frank 1502?: Conflict Minerals, Civilian Livelihoods and the Unintended Consequences of Western Advocacy* (Center for Global Development, Working Paper No. 284, 2012), *available at* http://www.cgdev.org/files/1425843_file_Seay_Dodd_Frank_FINAL.pdf.

[71] This includes all those indicted by the Special Court for Sierra Leone as well as several indicted by the ICC in connection with crimes in the DRC and Sudan.

[72] Press Release, *Sierra Leone: Special Court Renders Final Judgment in RUF Case*, AMNESTY INT'L (Oct. 26, 2009), *available at* http://www.amnesty.org/en/for-media/press-releases/sierra-leone-special-court-renders-final-judgment-ruf-case-20091026.

[73] Human Rights Watch, Sowing Terror: Atrocities Against Civilians in Sierra Leone (1998), *available at* http://www.hrw.org/legacy/reports/reports98/sierra.

[74] *But see* Paul Collier, *Laws and Codes for the Resource Curse*, 11 YALE HUM. RIGHTS DEV. J. 9 (2008) (arguing that the KPCS and EITI should serve as the foundations for a web of interlocking international voluntary initiatives that together will establish influential norms for resource management).

D. Domestic Laws

¶27 In recent years a different strand of challenge to the resource curse has arisen. Led by NGOs like the Center for Constitutional Rights,[75] this strategy attempts to use existing legal means to hold multinational corporations accountable for complicity in human rights abuse.

¶28 The most promising of these means have been Alien Torts Statute[76] and Foreign Corrupt Practices Act[77] prosecutions in U.S. courts. The Alien Torts Statute was first successfully used in a resource curse context in the case of *Doe v. Unocal*.[78] The suit was brought by 13 Burmese villagers who claimed to have been forced by American-based Unocal, acting through Myanmar's ruling Junta, to labor without pay on the construction of a natural gas pipeline.[79] The plaintiffs also alleged Unocal's complicity in rape and murder. In 2002, the 9th Circuit dismissed Unocal's Motion for Summary Judgment;[80] that same year, a California state court did the same. In March 2005, with an en banc review of the 9th Circuit decision pending and a jury trial on the state claim scheduled for June, Unocal settled for an undisclosed amount.[81]

¶29 Equally successful, if also equally arduous, was *Wiwa v. Shell*, in which the family of Nigerian writer and civil rights leader Ken Saro-Wiwa sued Shell for complicity in the torture and murder of Saro-Wiwa and other dissidents in the Niger Delta. A 2002 2nd Circuit decision,[82] finding that Shell's New York office was enough to give the court jurisdiction over the case, was followed by seven years of discovery.[83] Finally, in 2009, Shell settled for $15.5 million.[84]

¶30 The survival of the ATS as a means of holding extractive corporations liable is currently an issue before the Supreme Court. In 2012, the Court will decide *Kiobel v. Royal Dutch Petroleum*,[85] settling a circuit split created by the Second Circuit's holding that "corporate liability is not a discernable [sic]—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS."[86] Even if the Court finds that the ATS confers jurisdiction over corporations, uncertainty is likely to remain over the appropriate level of culpability for corporate accessorial liability.[87]

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[75] CCR has helped pioneer the use of the ATS, beginning with Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) and continuing through Bowoto v. Chevron, 621 F.3d 1116 (9th Cir. 2010) (alleging Chevron's complicity with Nigerian troops who killed two protestors at an oil rig).

[76] 28 U.S.C. § 1350.

[77] 15 U.S.C. §§ 78dd-1, et seq.

[78] Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002).

[79] *Id.* at 938.

[80] *Id.* at 939.

[81] Doe v. Unocal Corp., No. BC-237-980, 2002 WL 33944505 (Cal. App. Dep't Super. Ct. June 7, 2002); *Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers,* EARTH RIGHTS INTERNATIONAL (Apr. 2, 2005), http://www.earthrights.org/print/1363.

[82] Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88 (2d Cir. 2000).

[83] Wiwa v. Royal Dutch Petrol. Co., 626 F.Supp.2d 377 (S.D.N.Y 2009).

[84] Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 9, 2009, at B1.

[85] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), reh'g denied, 642 F.3d 268 (2d Cir. 2011), cert. granted, 132 S. Ct. 472 (2011).

[86] *Id.* at 148; *See also* APOLLO, *supra* note 8 (describing political complications encountered in ATS and FCPA suits).

[87] *See* Angela Walker, *The Hidden Flaw in Kiobel: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting is Knowledge,* 10 NW. U. J. INT'L HUM. RTS. 119 (2011); Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304 (2008); Harold Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263 (2004); Julian Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2010).

¶31 The FCPA may offer a more promising means of policing extractive corporations with U.S. connections. While it relies on SEC and DOJ initiative, FCPA enforcement has been increasing rapidly in recent years. In 2010, companies paid a total of $1.8 billion in FCPA fines, interest and disgorgement, while as recently as 2003 that number had been zero.[88] As of December 2011, 78 companies were under investigation on FCPA charges.[89] Extractive corporations have been among the largest targets of FCPA actions, including a $560 million settlement against Halliburton for bribery used to gain oil and gas infrastructure contracts in several nations worldwide.[90]

¶32 Still, both the FCPA and ATS suffer the same major problem: both are only effective against corporations, or individuals, over which U.S. courts can exercise jurisdiction. The effect of this is to advantage corporations with no ties to the United States. In particular, this has meant that Chinese firms, increasingly aggressive in their quest to secure natural resources, have become prominent in the extractive sector throughout much of the developing world.[91]

¶33 Successes in fighting the resource curse have thus been rare. This is in large part because such efforts have not been informed by a full understanding of the dynamics that produce the resource curse. The remainder of this article will attempt to provide the beginnings of such an understanding and explore its implications for international initiatives aimed at remedying the resource curse.

IV. THEORIES OF THE RESOURCE CURSE

¶34 Theories of the resource curse can be categorized as either economic or political. For some time the two literatures proceeded independently, with little mutual awareness. In recent years, however, the two strands of theory have been integrated, and a consensus has built that political and institutional factors drive the economic problems associated with the resource curse.

A. Economic Explanations

¶35 The most widely accepted economic explanation for the resource curse is known as the Dutch Disease.[92] In this account, resource exports provide a capital infusion to the economy, but have the side effect of inflating the national currency. This damages the global competitiveness of other export sectors in the economy.[93] As discussed further below, this is especially damaging to developing countries, where manufacturing exports are the primary source of the "learning by doing" essential to human-capital based economic growth.

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[88] Richard Cassin, *Enforcement at the Century's Dawn*, THE FCPA BLOG (Jan. 5, 2012, 8:08 AM), http://www.fcpablog.com/blog/2012/1/5/enforcement-at-the-centurys-dawn.html.

[89] Richard Cassin, *The Corporate Investigations List (January 2012)*, THE FCPA BLOG (Jan. 4, 2012, 6:28 AM), http://www.fcpablog.com/blog/2012/1/4/the-corporate-investigations-list-january-2012.html.

[90] Dan Slater, *Halliburton Breaks FCPA Settlement Record for U.S. Companies*, WALL STREET JOURNAL LAW BLOG, (Jan. 26, 2009, 5:37 PM), http://blogs.wsj.com/law/2009/01/26/halliburton-breaks-fcpa-settlement-record-for-us-companies/.

[91] Behar, *supra* note 15.

[92] The phrase was originally coined to describe the poor performance of the manufacturing sector in the Netherlands following the commencement of natural gas exports in 1959. *See* W. Max Corden & J. Peter Neary, *Booming Sector and De-industrialization in a Small Open Economy*, 92 ECON. J. 825 (1982).

[93] Paul Krugman, *The Narrow Moving Band, the Dutch Disease and the Competitive Consequences of Mrs. Thatcher*, 27 J. DEVELOPMENT ECON. 41 (1987); Sachs & Warner, *supra* note 1.

¶36 A second explanation blames the volatility of primary commodity markets for the resource curse.[94] During resource booms, exporting nations are flush with capital and undertake large (often ill-advised) investments with the mistaken assumption that the windfall profits will continue. It is common for resource exporters to finance large projects using debt with future resource revenues as collateral. When the inevitable bust comes, the exporting nation faces a debt crisis.[95]

¶37 Another strand of economic explanations focuses on the secondary effects of extractive industries relative to other sectors, in particular manufacturing.[96] Modern resource extraction requires a great deal of skilled labor. However, when multinational corporations are in charge of extraction, skilled labor is sourced from around the world. Mines and oil rigs in the developing world often exist as enclaves, highly secured compounds populated by well-paid expatriates almost entirely cut off from the life of the country around them.[97] Resource exports thus tend to lack the positive externalities and linkages associated with manufactured exports. Manufacturing produces work at a variety of skill levels, and also endogenously produces human capital through the process of learning-by-doing.[98] Over time, this positive externality leads to increases in productivity. This, in turn, leads manufacturers to shift production to higher margin items that require greater technical skill, thereby further increasing the demand for human capital.[99]

¶38 Manufacturing can also create a domestic market for the inputs to the manufacturing process, meaning that the export income from manufacturing moves throughout the domestic economy.[100] Resource extraction will have no such backward linkages when technical inputs for the extraction process are imported.[101] If resource income is to be redistributed through the economy, it will have to be done by the government.

¶39 These economic explanations are not mutually exclusive. In fact, taken together they provide a powerful narrative of the process by which resource wealth, while bringing in tremendous amounts of revenue, can wither the export manufacturing sector, eliminating the important positive secondary effects associated with that sector.

¶40 The shortcoming of purely economic explanations is the simple fact that all of these negative impacts can be mitigated by a minimally competent government. Currency appreciation can be headed off, human capital production can be encouraged, and investment undertaken carefully.[102] This is how many resource-rich nations, even some that faced challenges like internal conflict, were able to translate resource-wealth into development.

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[94] RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS (1993).

[95] Jeffrey Sachs, *How to Handle the Macroeconomics of Oil Wealth*, *in* ESCAPING THE RESOURCE CURSE 173 (Columbia Univ. Press, 2007).

[96] ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1958).

[97] JOHN GHAZVINIAN, UNTAPPED: THE SCRAMBLE FOR AFRICA'S OIL 14, 122 (2002) (observing that foreign oil field workers do, at least, tend to create a boom for nightclubs and sex workers in nearby communities.); *see also* AUTY, *supra* note 94, at 3. *But see* Raphael Kaplinsky, *Commodities for Industrial Development: Making Linkages Work* (UNIDO Working Paper No. 01/2011), *available at* http://www.unido.org/fileadmin/media/documents/pdf/Publications/110905/WP012011_Ebook.pdf (arguing that modern supply chain practices, which increasingly value near-sourcing, offer new opportunities for the creation of linkages between resource exports and domestic economies).

[98] PHILIPPE AGHION & PETER HOWITT, ENDOGENOUS GROWTH THEORY (1998).

[99] NANCY BIRDSALL ET AL., PATHWAYS TO GROWTH: COMPARING EAST ASIA TO LATIN AMERICA (1997).

[100] ROSS, *Extractive Sectors and the Poor*, *supra* note 1, at 10-13.

[101] Augustin Kwasi Fosu, *Primary Exports and Economic Growth in Developing Countries*, 19 WORLD ECON. 465 (1996); meanwhile, without domestic production of inputs for the export sector, forward linkages making use of those inputs are also unlikely to develop.

[102] MACARTAN HUMPHREYS ET AL., *What is the Problem with Natural Resource Wealth?*, *in* HUMPHREYS ET AL.,

¶41 The question left unanswered, then, is why so many resource-rich nations fail to follow a policy path that has proven successful for similar nations. Political explanations help to answer this.

B. Political Explanations

¶42 Political explanations seek to account for both the negative growth effect and the negative institutional effects of resource dependence. Increasingly it is understood that the two are inextricably intertwined, as state weakness distorts the incentives facing leaders, making optimal economic policies not only undesirable but impossible to implement. Indeed, it appears that in some instances, a shrewd leader of a resource-rich nation will deliberately seek to shrink every other sector of the economy in order to prevent economic change and the social forces and competitors for power economic change tends to produce.[103]

¶43 The central element of political explanations of the resource curse is the insight that governments flush with revenues from resource export have no need to tax their constituencies.[104] This is essential because theories of state formation suggest that building the capacity to tax citizens has been a fundamental process driving the development of modern states.[105] Gaining tax revenues requires the state to conquer its own citizens, centralizing the capability for force and displacing local patron-client networks with state bureaucracy.[106] It also generally requires that the state make compromises, finding ways to credibly commit itself to limits on its predation in exchange for taxes and loans. Thus the state incrementally commits itself to providing representation, first to landholding aristocrats, then to traders, and finally to the middle class.[107] When the state is introduced to resource wealth before it has completed this process, the process is arrested, and potentially reversed.[108]

¶44 A closely related account draws attention to the role played by the state in protecting private property rights.[109] Economic growth depends largely on the effectiveness of property rights, which in turn are only made possible by effective legal institutions.[110] Only when the state impartially protects both parties to time-dependent contracts can the credible commitments necessary to large investments be made. Historically, states have created the complex institutions needed to protect property rights as part of the process of taking over local economies from large landholders and other localized monopolists of force.[111] When resource rents make this difficult process unnecessary for the state, property rights enforcement may decay or remain ineffective. This slows economic growth and, as a result, many of the political and social forces unleashed by

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supra note 3.

103 RENO, *supra* note 1; ELLIS, *supra* note 29.

104 BEBLAWI & LUCIANI, *supra* note 1; Mahdavy, *supra* note 1.

105 Charles Tilly, *Reflections on the History of European State-making*, *in* THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE (Charles Tilly & Gabriel Ardant eds., 1975); MARGARET LEVI, OF RULE AND REVENUE (1988).

106 Tilly, *supra* note 105; Charles Tilly, *Warmaking and Statemaking as Organized Crime*, *in* BRINGING THE STATE BACK IN (P. Evans, T. Skocpol, & D. Rueschemeyer eds., 1984); Y. Cohen, B. Brown & A.F.K. Organski, *The Paradoxical Nature of State-Making: The Violent Creation of Order*, 75 AMER. POL. SCI. REV. 901 (1981).

107 JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783 (1990); BARRINGTON MOORE, JR., THE SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD (1966).

108 KARL, *supra* note 1.

109 Ross, *Political Economy*, *supra* note 1.

110 *See, e.g.*, DOUGLASS NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1975).

111 CHARLES TILLY, COERCION, CAPITAL AND EUROPEAN STATES: AD 990-1992 (1992).

economic growth never materialize. In particular, economic growth often creates a capitalist class and a growing middle class, both motivated to eliminate arbitrary rule, improve conditions for business and increase the representativeness of government.[112] Indeed, inequality by itself has been shown to significantly deter institutional development and economic growth.[113]

¶45 Some political scientists also focus on the effect resource wealth can have on groups seeking representation.[114] Resource revenues may allow the state to simply pay such groups off, forestalling demands for improved government.[115] Alternately, access to resource rents may make control of the state so valuable, and give winners such complete power to punish losers, that relations between the state and those mobilizing for representation degrade into violence. Rulers must preemptively crush any potential competitors, meaning that any aspiring competitor must be prepared to answer force with force.[116]

¶46 Other narratives focus on the forces external to the resource-rich nation. Throughout modern history, nations with desirable resources have occupied a disadvantaged position in the international system. In areas with valuable resources, the colonial powers established extractive colonies built entirely on exploitation, institutionalizing gross inequality and providing no local autonomy.[117] Much of Africa, due to the difficulty of turning it into a place of habitation, came to be treated as an extractive colony.[118] When the colonial powers were finally forced to depart, they left behind states that had never become states. Their administrative capacities had been directed solely to extraction and export. This made it possible for the colonial powers—along with new powers like America and Japan—to exert continued control, propping up corrupt autocrats in exchange for stable and guaranteed access to strategic resources.[119]

¶47 Being propped up by powerful nations may seem an advantage—and certainly for rulers it is—but it may also further deter the building of state capacity.[120] Today's advanced states developed military and resource-extraction capabilities as a means of surviving in the international system.[121] Today's weak states are freed from this pressure by the implicit support of more powerful nations—and this may be especially true of weak states with resource wealth to offer.

¶48 These same political explanations help account for the relationship between resources and civil war. The growing consensus holds that resources are not the direct cause of war; instead they are a contributor to state failure, which in turn invites war. The implication is that, given the degree of state failure in nations like Sierra Leone and the DRC, war was likely even if

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112 *See, e.g.,* MOORE, *supra* note 107, at 418 ("No bourgeoisie, no democracy."); Stanley Engermann & Kenneth Sokoloff, *Factor Endowments, Inequality and Paths of Development Among New World Economies*, (Nat'l Bureau of Econ. Research, Working Paper No. w9259, 2002).
113 Roland Benabou, *Inequality and Growth*, *in* NAT'L BUREAU ECON. RESEARCH ANNUAL (Ben Bernanke et al. eds., 1996).
114 RENO, *supra* note 1; KARL, *supra* note 1.
115 *Id.*
116 ROBERT BATES, PROSPERITY AND VIOLENCE: THE POLITICAL ECONOMY OF DEVELOPMENT (2001); William Reno, *Clandestine Economies, Violence and States in Africa*, 53 J. INT'L AFFAIRS 433 (2000).
117 Engermann & Sokoloff, *supra* note 112.
118 D. Acemoglu, J. Robinson & S. Johnson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AMER. ECON. REV. 1306 (2001).
119 *See* Clapham, *supra* note 2.
120 ROBERT JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1993); JEAN-FRANÇOIS BAYART, THE STATE IN AFRICA: THE POLITICS OF THE BELLY (Cambridge: Polity Press 2d ed. 2009) (1993).
121 Tilly, *supra* note 105.

there had been no resources to loot.[122] Just as significant as the availability of lootable resources in these conflicts has been the availability of disaffected youths easily recruited to any cause with the potential to bring change, or even just a steady income.[123]

¶49 Also contributing to many resource conflicts has been the volatility of commodity prices; states that achieve stability through patronage are subject to sudden, violent instability when the funds behind that patronage unexpectedly dwindle.[124]

¶50 There are also indications that the combination of resource wealth and a weak state makes a uniquely tempting combination to outsiders with access to arms. The ongoing involvement of Ugandan and Rwandan forces in the DRC,[125] the likely Sudanese support for rebels in Chad and the alleged material support provided by Charles Taylor for the conflicts in Sierra Leone and the Ivory Coast seem likely to have been motivated by the access or potential access to resource wealth more than by realpolitik. The combination of lootable resources and low-priced soldiers makes war a profitable venture for "entrepreneurs of violence" like Taylor.

¶51 Like the economic accounts, the political accounts of the resource curse are not mutually exclusive. The interaction between these elements is perhaps best illustrated through case studies. The next section presents a brief account of the dramatic role that resources have played throughout the modern history of what today is the Democratic Republic of Congo.

C. The Democratic Republic of Congo: A Paradigm of Dysfunction

¶52 The Democratic Republic of the Congo has been called "the stereotype of a collapsed state."[126] Certainly it is the paradigmatic example of a state cursed by its natural wealth. It was this wealth that drove Belgium to run its colony more as an extractive corporation than as a state. Thus, when Belgium formally departed in 1960, it left behind nothing that could be likened to a state apparatus. This was no accident, as the Belgians had every intention of continuing business as usual.[127]

¶53 The DRC's resource wealth, along with its size and location, gave it a central role in the African stage during the Cold War.[128] The U.S. installed the Mobutu Sese-Seko regime and supported it long after it had become clear that Mobutu himself was content in using his position to become one of the world's wealthiest men. The explanation in U.S. policy circles was that it was "Mobuto or chaos." Given that his survival depended on the credibility of this mantra, it was

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[122] BATES, *supra* note 28; Fearon, *supra* note 28; Marina Ottoway, *Dysfunctional States, Dysfunctional Armed Movements, and Lootable Commodities*, *in* BIG AFRICAN STATES: ANGOLA, DRC, ETHIOPIA, NIGERIA, SOUTH AFRICA, SUDAN 187 (Christopher Clapham, Jeffrey Herbst & Greg Mills eds., 2006).

[123] Ottaway, *supra* note 122, at 193; David Keen has argued that strong grievances with the corrupt and failing Sierra Leonan state provided the initial stimulus for rebellion in that country, with diamonds merely an ancillary factor. Keen quotes a student from Sierra Leone: "The feeling seemed to be: 'Let's destabilize everything and look forward to a new order. We might as well participate in the total destruction of the state because people have been destroying it for a long time.'" DAVID KEEN, COMPLEX EMERGENCIES 52 (2008). Although it seems likely that the architects of the rebellions in nations like Sierra Leone and Liberia were driven at least in part by avarice, the general enmity that each state had earned, especially among educated youths with no opportunities, clearly made it easier for these architects to build armies. Just as significantly, in the anarchic conditions these rebellions sought to create, joining one armed group or another may have become a necessity of survival.

[124] William Reno, *African Weak States and Commercial Alliances*, 96 AFRICAN AFFAIRS 165 (1997).

[125] 2003 DRC Report, *supra* note 5.

[126] Claude Kabemba, *The Democratic Republic of Congo*, *in* BIG AFRICAN STATES 97 (Christopher Clapham, et al. eds., 2006).

[127] For an account of Belgium's successful efforts to retain effective control over the Katanga region, see DAVE RENTON, DAVID SEDDON & LEO ZEILIG, THE CONGO: PLUNDER AND RESISTANCE 88-98 (2007).

[128] *Id.* at 95-99.

in Mobutu's interest to ensure that it was true.[129] He did so, in part, by leaving the DRC utterly devoid of state presence except where necessary for extraction.[130] More than any other nation, the DRC was a shell, visible to the outside world as a sovereign state but almost nonexistent within its own borders.

¶54 Things changed rapidly at the close of the Cold War, when Western support suddenly shrank, with further aid becoming conditional on progress being made towards democratization.[131] This coincided with a period of collapsing commodity prices. Suddenly the state could not afford to pay the military, which turned to looting.[132] To maintain control, Mobutu gave his generals control over mining operations, a move that backfired as the military learned to take advantage of clandestine trade networks, freeing it of any reliance on Mobutu.[133] As the chaos in DRC began to spill over into neighboring states, several of these states[134] began combined military operations to topple Mobutu. Whether these states were motivated more by security concerns or by the DRC's wealth is unclear, but the invasions were funded in part by signing anticipatory resource concessions with foreign firms.[135] Mobutu was finally toppled in 1997 by forces led by Laurent-Desire Kabila, a long-time militia leader from Eastern DRC.[136] This, however, did little to restore order, as the coalition that had backed Kabila fractured. Just over a year after Kabila took power, a Rwandan attempt to topple him was stifled by troops from Angola and Zimbabwe.[137] For the next several years, militias supported in varying degrees by neighboring states battled for control of the Congo. One study concludes that the Second Congo War[138] resulted in 3.9 million deaths between 1998 and 2004.[139]

¶55 Though the Second Congo War is over, DRC remains a battleground today.[140] Joseph Kabila, who took power after his father was killed by a bodyguard in 2001, has been accused of styling his rule after Mobutu's.[141] Certainly he has failed, thus far, to build a state capable of creating security for its citizens. Today a multitude of predatory militias support themselves through resource exports.[142] As one resident put it, "Mobutu did not know we existed so we were not afraid of him. Now we have to be afraid of too many people…"[143]

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[129] In fact, Zaire's 1970 presidential ballot offered voters two choices: "hope" and "chaos." *Id.* at 115.
[130] In 1990, 2.1 percent of state expenditures went to health and education—and even this is likely an overstatement, since much of state spending, whatever its designation, was intended to maintain patronage networks. By 1992, as much as 95 percent of the national budget was Mobutu's discretionary spending. RENO, *supra* note 1, at 153.
[131] BATES, *supra* note 28.
[132] *Id.*
[133] RENO, *supra* note 1, at 160-61.
[134] Troops and arms from Rwanda, Angola, Zimbabwe and possibly Uganda supported various strands of the rebellion.
[135] Ross*, Booty Futures, supra* note 46.
[136] RENO, *supra* note 1, at 173-75. It was Kabila who changed the country's name from Zaire to DRC.
[137] John Clark, *Musveni's Adventure in the Congo War: Uganda's Vietnam?*, *in* THE AFRICAN STAKES OF THE CONGO WAR 146, 151 (John Clark ed., 2004).
[138] The First Congo War refers to the rebellion that toppled Mobutu.
[139] Benjamin Coghlan et al., *Mortality in the Democratic Republic of Congo: A Nationwide Survey*, 44 LANCET 367 (2006).
[140] Lydia Polgreen, *Congo's Death Rate Unchanged since War Ended*, N.Y. TIMES, Jan. 23, 2008, at A8, *available at* http://www.nytimes.com/2008/01/23/world/africa/23congo.html?_r=1.
[141] Joe Bavier, *Congo's New Mobutu*, FOREIGN POLICY, June 29, 2010, http://www.foreignpolicy.com/articles/2010/06/29/congo_s_new_mobutu.
[142] *See, e.g.,* U.N. Group of Experts on the Democratic Republic of the Congo, *supra* note 69.
[143] GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS 73 (2004).

V. CONCLUSION

¶56 There are two general lessons that emerge from the analysis of the resource curse and efforts to end it. The first is that ending the resource curse will require ending the cycle of state decay that underlies it. This will mean providing resource-rich states with both the incentive and the means to conduct state-building. The second lesson is that well-intentioned efforts to impose good governance over natural resources on weak states are likely to be of little effect so long as they depend on the capacity and good will of these states. To cause any appreciable shift in the incentives facing leaders of resource-rich nations, it will be necessary to step beyond voluntary initiatives.

¶57 Far more difficult than formulating these general directives, however, is finding realistic ways to apply them. An enormous literature has developed around finding more effective ways for the international community to address the problem of failing states.[144] The crux of these analyses is that, for both humanitarian reasons and reasons of international stability, international institutions and international law must evolve. Perhaps the most vital imperative is to move from an international community that reacts when strategic interests are at risk to one that anticipates crises and works systematically to prevent them from occurring. Better understanding of the resource curse and its fundamentally political origins will be essential to formulating better approaches to failing resource-dependent states.

[144] KREIJEN, *supra* note 143, at 74; FERNANDO TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988); James Fearon & David Laitin, *Neotrusteeship and the Problem of Weak States,* 28 INT'L SECURITY 5 (2004); Gerald Helman & Steven Ratner, *Saving Failed States*, 89 FOREIGN POLICY 3 (1992); Robert Keohane, *Political Authority After Intervention: Gradations in Sovereignty*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS (J. Holzgrefe & Robert Keohane eds., 2003); Stephen Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85 (2004); James Fearon, *Reforming International Institutions to Promote International Security and Peace*, International Task Force on Global Public Goods, Jan. 6, 2005, *available at* http://www.stanford.edu/~jfearon/papers/gpg.pdf.