

COERCION IN CROSS-BORDER PROPERTY RIGHTS

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Abstract: A global market exists only because all states have chosen to converge on rules that coordinate property rights. For property rights over natural resources and products made from them, states converge on the rule of effectiveness, or might makes right. Because of effectiveness, consumers making everyday purchases like electronics, cosmetics and gasoline cannot help but support foreign authoritarians and militias. Effectiveness in the international system puts consumers into business with highly coercive actors abroad. States' choice of effectiveness also leads to their enforcing the injustices of foreign actors within their own borders, with their own justice systems.

Our moral situation is poor. The global market that sustains our lives is harmonized on a bad rule.

A global market exists only because all states have chosen to converge on rules that coordinate property rights. For property rights over natural resources and products made from them, states converge on the rule of effectiveness, or *might makes right*. Because of effectiveness, consumers making everyday purchases like electronics, cosmetics, and gasoline cannot help but support the brutal militias in the eastern Congo, as well as ruthless rulers such as Teodoro Obiang, the dictator of Equatorial Guinea. Effectiveness in the international system puts consumers into business with highly coercive actors abroad.

The path to discovering how foreign coercion creates domestic titles starts in a dim foundation of international trade, which is the law of property that crosses borders. The focal question for this inquiry is this: How do consumers here come to own what they own?¹

I. GUNS MAKE RIGHTS

Consider, for example, a smart phone on sale in a mall in Chicago. How did the molecules that constitute that phone come to be buyable there? We can view the history of this phone in two ways: first, as supply chains that turned raw materials into a finished good, and second as a series of overlaying legal transactions — as sale chains — where titles changed hands as the commodity was created across many countries. The supply

¹ This article draws on Leif Wenar, *Blood Oil: Tyrants, Violence, and the Rules that Run the World* (Oxford: Oxford University Press, 2016), which explores its themes more fully.

chains and the sale chains have the identical shapes: streams combining into unifying flows. What distinguishes the two chains are the laws that govern them.

The supply chains leading to the Chicago mall are movements of molecules, governed by the laws of physics. These supply chains drew chemical elements from many points under the earth's surface and fashioned them into the integral object that a teenager in the mall can hold in her hand. Supply chains are made of physical links and end in possession.

Sale chains are made of legal links and end in property. The sale chains leading to the Chicago mall are movements of property titles that produced a commodity. Tracing the sale chain of one of the components back link by link, we find the brand company's transfer of the phone's title to the retailer in the mall, then a circuit board manufacturer's sale to the brand company, then a component manufacturer's sale to the circuit board manufacturer, a refiner's sale of metal to the component manufacturer, an export company's sale to the refiner, a trader's sale to the export company, and a militia's sale of a bag of coltan, extracted from a mine in eastern Congo, to the trader.² At that anchor of the sale chain we find a group of men keeping watch over locals bringing rocks out of the earth. These men may be part of a Congolese army unit, or they may be rebels officially opposed to the army. What is certain is that the men who make up that group are carrying guns.

We are looking back through the sale chain of one piece of a phone in a store in Chicago. What we see is a long series of transactions transferring title to this piece of the phone, the chain of sales stretching back to a mine in the Congo. At that far end of the sale chain, the mine site, armed men are overseeing extraction of coltan, sending the ore on its way to the next link in the chain. The armed men, it is sure, have no title to the minerals — within American law, Congolese law, or any other law. The guns of these men, however, win them physical possession of the ore. The question is: In what way is the armed theft at the origin of the sale chain reflected in the law at its terminus? How does the crime at one end affect the legal title at the other?

The answer is: not at all. Say the teenage girl buys the smart phone at the mall in Chicago. With her purchase she gains legal title to every atom of the phone under American law, and her title is both presumptive and unassailable. Her title to the smart phone is presumptive: short of a court case, Chicago police will enforce the girl's legal right to the phone against all other claimants. And if there is a court case, her title will be unassailable. Should the owner of the Congolese mine plundered by the militia — whoever that might be — take legal action against the girl in an American

² Coltan is the ore from which tantalum is extracted; tantalum is used to make the capacitors in many kinds of electronics including smart phones.

court, complaining that her phone contains some of the metal stolen from the mine, this suit will fail. American law poses the mine owner with obstacles that a suit cannot overcome. From the perspective of American law, the teenager has perfect title to the smart phone with the stolen Congolese mineral in it. The teenager owns the whole phone free and clear, as she would own a pint of milk with a sale chain going back to a local dairy.³

It may be startling that American courts would so favor the militias responsible for the unspeakable acts, especially against women and girls, that have defined the long-running conflict in the Congo, "the world's worst war."⁴ This may be especially unwelcome since American commercial engagement with those militias not only draws stolen minerals from them to American stores, but also sends some of the money that Americans pay in stores back to the militiamen, helping them to buy more weapons.

This is startling, but correct. We can, if we like, catalog the specific American laws that legitimize the sale chain stretching from Chicago to the Congo. These American laws will use distinctive concepts and bear idiomatic names; they will differ from the specific Egyptian laws that legitimize a sale chain stretching from Cairo to the Congo, and from the specific Japanese laws that legitimize a sale chain stretching from Tokyo to the Congo. What all of these specific national laws have in common is the structure of effectiveness. Every nation's laws will take the input of stolen minerals in the Congo and produce an output of perfect legal title at the point of final purchase. The laws of each country, that is, will turn a militia's might at one end of a sale chain into a pure legal right at the other.

II. MAKING LAW ON HIGH ISLAND

We think of a country's justice system as enforcing the property rights of its persons, within its borders. Yet persons and things also cross borders. Foreigners with possessions penetrate a country's perimeters, and a country's people come into possession of foreign objects. Who defines these legal interfaces between the native and the alien? Let us imagine that we are starting anew.

³ Within American law, the processing of the coltan along the supply chain would, for example, be sufficient to block the owner's suit against the girl. For specialists it may be noted that the "Conflict Minerals" Section 1502 of the U.S. Dodd-Frank Act does not change the conclusions reached here. Greater transparency in supply chains does not affect the law's underlying structure of effectiveness.

⁴ David Smith, "Congo Rape Numbers Rise Dramatically," *The Guardian* 19, October 2012; Jeffrey Gettleman, "The World's Worst War," *New York Times*, December 15, 2012. See Jason K. Stearns, *Dancing in the Glory of Monsters* (New York: Public Affairs, 2011).

Say we establish a new independent nation on a high island in the Pacific. We citizens of this new nation, High Island, have many decisions to make:

- (1) *Each national authority determines the laws for its own persons regarding property within that nation's territory.*

This is straightforward: laws by us and for us here are ours to make. Whether we will establish a common law, civil law, or novel legal code for High Island is up to us. It is also up to us, for example, whether we will manage some of our island's resources collectively, or allow them to be privatized. We must also set our property rules for foreigners that come onto our territory:

- (2) *Each national authority determines its own laws regarding foreign importation into — as well as foreign purchase, sale and use of property within — that nation's territory.*

At this moment, for example, the Colombian government has declared that foreigners have no right to bring used motor vehicles into Colombia. New Zealand has prohibited foreigners from importing pit bull semen. Egyptian law allows foreigners to own only two private residences, of up to four thousand square meters each, while forbidding the sale of such private residences within five years of purchase.⁵ We High Islanders will similarly decide among ourselves what property rules foreigners must follow on our island. Finally, we must decide the rules for our persons coming to own things abroad:

- (3) *Each national authority determines the laws for its own persons regarding property transactions outside that nation's territory.*

Lawyers explain this principle by saying that national authorities have personal jurisdiction in addition to territorial jurisdiction. Persons — both individuals and corporations — are under the authority of the laws of their own country, wherever they are in the world. For instance, most of the G8 countries allow prosecution of their nationals for child sex tourism if the act in question would have been a crime had it occurred domestically, regardless of whether the act is a crime in the country where it took place.⁶ U.S. law condemns treason whether committed “within the

⁵ U.S. Department of Commerce, “Compilation of Foreign Motor Vehicle Import Requirements,” (December 2011), 20; New Zealand, “Dog Control Amendment Act 2003,” 4.17; World Trade Organization, “Trade Policy Review 2005–06: Egypt, (2006), 16–17.

⁶ G8, “G8 Experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes against Children,” (Article prepared for the G8 Justice and Home Affairs Ministerial 2007), April 18, 2007.

United States or elsewhere.”⁷ And one of America’s homeland security laws prohibits overseas drug trafficking by any U.S. person for the benefit of a foreign terrorist organization.⁸

The easiest way to observe personal jurisdiction over property rights is with sanctions. American sanctions on Sudan, for example, were extended in 2006 by Executive Order 13412.⁹

By the authority vested in me as President by the Constitution and the laws of the United States of America . . . I, George W. Bush, President of the United States of America . . . hereby order . . .

Notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all transactions by United States persons relating to the petroleum or petro-chemical industries in Sudan, including, but not limited to, oilfield services and oil and gas pipelines, are prohibited.

This executive order suspends, among other rights, the legal right of all U.S. persons to buy Sudanese oil, no matter where in the world that U.S. person is. That is what these oil sanctions are — a suspension of all American persons’ legal rights. It is likely that a U.S. president will someday restore to U.S. persons the legal right to buy Sudanese oil; that will be the act that lifts these U.S. sanctions.

We High Islanders must decide what legal rights our persons will have with respect to purchasing anything, anywhere in the world. We must settle which of us have what rights to buy what, from whom, on what terms. We could, in theory, require each proposed purchase of foreign property by a High Islander to be approved by a majority of all citizens. Or we might enact laws barring High Islanders from buying foreign products with child labor in their supply chains, or laws blocking High Islanders from buying foreign firearms or great apes. It is up to us.¹⁰

III. ALL PROPERTY IS LOCAL

An Austrian who misplaces his wallet in Australia cannot file a lost property report with the global police. If a Mexican married to a Moroccan

⁷ USC. Title 18, Part I, Chapter 115, §238.

⁸ U.S Patriot Improvement and Reauthorization Act, 21 USC. 960A(b) (2006).

⁹ U.S. Executive Order 13412 (2006), preamble and sec. 2 (the minor exceptions to the prohibition stated have been omitted).

¹⁰ If High Island becomes a member of the UN, and if the UN Security Council imposes mandatory sanctions on some country (as it did on, for example, apartheid South Africa) then our national authority will not have discretion over sanctioning that country. If High Island becomes a member of the World Trade Organization (WTO), then it may or may not (depending on how Article XX of the GATT is interpreted) remain the choice of its authorities to impose a restriction such as the one on the products of child labor described. On WTO law see also note 43 below.

buys a house in Monaco, no global court will decide who owns the house if they divorce. No single legal order exists above national legal systems to adjudicate or enforce property rights. Property law is primarily national and subnational; little property law is supranational.¹¹ A property dispute with an international element that lands in some country's courts will be decided by that country's authorities according to that country's law.

Property law cannot be seen from above; it can only be seen from within. The term "property law" will mislead if it is taken as a common subject studied by law students in different countries. Rather, there are as many systems of property law as there are national authorities. With limited exceptions, each national authority is decisive in setting all of its own *private law* rules: its rules regarding property, marriage, and other relations between legal persons (individuals and corporations). Finnish private law may be structurally similar to Philippine private law; but it also may not be, and where the two systems differ there is no higher law that decides between them. To rise to a global perspective one must shake off all national private legality. What one then sees are many national codes — almost two hundred autonomous systems of private law.

From a moral point of view it matters greatly what commercial transactions a national authority allows its persons to make with foreigners. A foreigner in possession of an object offers that object for sale to one of our nationals. If the foreigner's title is morally as sound as it would be at home, then this transaction will import no injustice. (It makes no moral difference, for instance, whether milk comes from Minnesota or Manitoba.) If the foreign title is morally tainted, though, then it makes all the difference in the world whether our national can legally buy that object or not. This legal transaction is the moment of moral transition: the moment at which foreign injustice may enter the domestic justice system.

For the teenager in Chicago, all of the important laws in the sale chain of the phone in the mall are American laws. Absent American law, the Congolese minerals are to the girl *res nullius*: simply agglomerations of atoms. The presence of American law turns that matter into something she can buy. Unknown to the girl, the Congolese minerals in this phone started their superterranean existence covered in the sweat or even the blood of a villager forced to dig them out. For her, the crucial link in the phone's sale

¹¹ Property law is subnational; for example the several U.S. states have their own systems, which sometimes differ substantially. Also, European efforts to harmonize the private international laws of member states sometimes make it convenient to think of Europe as a single legal entity. We set these details aside. International law does constrain domestic property law in such areas as intellectual property, foreign investment, deep-sea minerals, cultural objects and satellite orbits. Globalization is adding to these constraints: in John G. Sprankling's metaphor, international property law is like a coral reef gradually emerging from the ocean to create a new legal category; see his *International Property Law* (Oxford: Oxford University Press, 2014), vii.

chain is the American law that allowed an American person legally to buy metals that were stolen by soldiers. That is the American law that will turn foreign might into her right, which will call America's police and courts to her defense against all challengers. And that is the law that will ingrain the injustice of those conflict minerals into her daily social life.

The laws that accept armed theft in foreign sale chains are American laws. We know that American law need not turn foreign might into domestic right, because for a few natural resources it blocks such transitions. In 2008, for example, the U.S. Congress passed an amendment to a law called the Lacey Act, with the support of a wide coalition of NGOs concerned with resource governance abroad. As amended, the Lacey Act prohibits importation into the United States of any product made with a plant harvested or exported in violation of the laws of a foreign country. The legislation's main target is timber, sourced from forests in countries such as Indonesia where the government cannot control its territory sufficiently to prevent criminals from logging. With the Lacey amendment the United States chooses against effectiveness: against legitimizing the actions of foreigners who have illegally seized foreign goods. The European Union (EU) now has similar laws for foreign-sourced wood.¹²

These U.S. and EU timber laws attempt to block the legal domestication of thefts in the world's weakly governed regions. The Kimberley Process — embedded in law in the United States and eighty other countries — attempts to do the same for rough diamonds. Nationals of countries within the Kimberley Process are prohibited from importing rough diamonds bought from civil warriors; they may only import stones that have been certified for export by the exporting country's government. Kimberley, like Lacey, shows that countries can stop armed robbery leading to legal property when they choose to do so.¹³

Lacey and Kimberley are rare exceptions. For almost all natural resources and their products, the United States affirms laws that allow might abroad to make right at home. The United States chooses a structure of law that accepts coltan theft in its sale chains, instead of enacting Lacey- or Kimberley-like legislation that would treat stolen minerals in the same way as it treats stolen timber or stolen diamonds. The United States authorizes commercial engagement with the Congolese militiamen by choosing laws that approve American purchase of their pillage, which sends shoppers' dollars back to them. And all other countries do the same. For most natural resources stolen from their countries of origin, the world's nations license might to make right.

¹² Lacey Act, 16 USC 3371–3378; EU Regulation No 995/2010.

¹³ It may be that American property law has a structure that would also wash domestic armed robbery out of entirely domestic sale chains, yet this does not reduce the concern about international trade adding substantially to domestic injustice. Few minerals in the United States, for example, pass into production from the hands of coercively exploitative militiamen.

IV. MIGHT MAKES LAW MAKES RIGHT

Raw materials stolen under the laws of the country of extraction are tainted; most people would be troubled to discover that their private property is made from plunder. Yet raw materials extracted in violation of foreign laws form only a small proportion of world trade. The main means by which might makes right passes not around foreign laws, but straight through them.

Consider Charles Taylor, a Gaddafi-trained warlord who helped to overthrow the government in Liberia and then became its President for six years.¹⁴ Taylor's authoritarian rule was such that the judge sentencing him at a special international tribunal called him, "responsible for aiding and abetting some of the most heinous crimes in human history": war crimes of terrorizing a civilian population, cruel treatment, and other inhumane acts; crimes against humanity including murder, rape, sexual enslavement, and pillage.¹⁵ Taylor's international crimes were committed in support of the extraordinarily brutal Revolutionary United Front (RUF) militias in Sierra Leone. From the RUF Taylor received Sierra Leone's blood diamonds, and Taylor then funneled some of those diamonds to terrorist groups like Al Qaeda.¹⁶

For his international crimes Taylor is serving a fifty-year sentence in a maximum security prison in northern England. During his exceptionally coercive presidency, however, Taylor enjoyed a life of legal privilege. As President, Taylor enjoyed the legal power to sell off Liberia's natural resources, a power that all other nations accepted into their own laws.

President Taylor codified his legal power over Liberia's rich resource endowment by compelling the country's legislators to pass a "Strategic Commodities Act," which stated:¹⁷

The President of the Republic of Liberia is hereby granted the sole power to execute, negotiate, and conclude all commercial contracts or agreements with any Foreign or Domestic Investor for the exploitation

¹⁴ See Helene Cooper, "On Day of Reckoning, Recalling Horror that Swallowed Liberia," *New York Times*, April 26, 2012.

¹⁵ BBC, "Liberia Ex-Leader Charles Taylor Gets 50 Years in Jail," May 30, 2012, <http://www.bbc.co.uk/news/world-africa-18259596>; BBC, "The Charges Against Charles Taylor," February 9, 2011, <http://www.bbc.co.uk/news/world-africa-12391507>.

¹⁶ Douglas Farah, *Blood From Stones: The Secret Financial Network of Terror* (New York: Broadway, 2004).

¹⁷ The Act defined "Strategic Commodities" as "Natural Resources, Minerals, Cultural and Historical items which are of vital importance to the Nation's Economic, Social, Political and Cultural values and the well-being of Liberia." Global Witness, *The Role of Liberia's Logging Industry* (London: Global Witness, 2001), 7. On Liberia's parliament: "This policy illustrated the weakness and lack of autonomy of Liberian state institutions. No viable option existed for parliamentary members but to pass Taylor's initiative, or else fear for their personal safety. It was well-known that even small-scale political opposition to Taylor would be met with harsh measure. [Footnote: Several members of the government] all disappeared or were found dead shortly after criticising Taylor." Patrick Johnston, "Timber Booms, State Busts: The Political Economy of Liberian Timber," in *Conflict and Security in Africa*, ed. Rita Abrahamsen (Rochester, NY: Boydell and Brewer, 2013), 31.

of the Strategic Commodities of the Republic of Liberia. Such commercial agreement shall become effectively binding upon the Republic . . . upon the sole signature and approval of the President of the Republic of Liberia.

This statute confirmed Taylor's personal legal control over all of Liberia's resources. Charles Taylor, and he alone, held the legal right to sell off this entire country's natural assets. A later Liberian president remarked that, "Mr. Taylor ran this country like it was his personal fiefdom. Resources were given to people in a manner that pleased him, and there were no systems or institutions."¹⁸ During Taylor's rule, roundwood deforestation in Liberia reportedly increased by more than 1300 percent. Revenues from these roundwood exports allowed Taylor to buy advanced weaponry from China, Libya, Nigeria, and Serbia.¹⁹

Taylor's Strategic Commodities Act generated only half of the legal rights needed for him to sell Liberia's resources to foreigners. Also needed were foreigners' legal rights to buy those resources from him. The countries (primarily France and China) that imported Liberia's timber during his presidency echoed Taylor's Strategic Commodities Act in their own laws, by authorizing their persons to buy whatever Taylor decided to sell. Only French law, for instance, could endow French persons with the right to buy Liberian resources from Charles Taylor.

This is a consequence of the autonomy of national property systems, illustrated by the High Island example above. It was up to the French to decide whether to endow themselves with the right to deal with Taylor in ways that would generate property rights in France. To do this the French needed to set their own legal system up to link with Taylor's law. And we know that they did so. In order for the timber transactions to happen that did happen, French law needed to be structured in a way that paralleled Taylor's Strategic Commodities Act, effecting the following rule:

French persons are granted the power to execute, negotiate and conclude all commercial contracts or agreements for the Strategic Commodities of the Republic of Liberia only with the President of the Republic of Liberia. Such commercial agreements shall vest title over Liberian resources in French persons only upon the sole signature and approval of the President of the Republic of Liberia.

¹⁸ Ellen Johnson Sirleaf, quoted in Doreen Carvajal, "Hunting for Liberia's Missing Millions," *New York Times*, May 30, 2010, <http://www.nytimes.com/2010/05/31/world/africa/31taylor.html>.

¹⁹ World Rainforest Movement, *Liberia: Unique Forests Threatened by Logging*, 2002, <http://wrm.org.uy/oldsite/bulletin/64/Liberia.html>; Global Witness, *The Usual Suspects: Liberia's Weapons and Mercenaries in Cote d'Ivoire and Sierra Leone* (London: Global Witness, 2003), 20–23. The United Nations banned Liberian diamond exports in 2001 and timber exports in 2003.

Taylor's coercion made Liberian law, France connected its law to Liberia's, Taylor sold timber to French buyers and received French funds in return. For Taylor, might made law made money. For France, might made law made rights. French law was essential to both sequences.

V. THE LAW THAT IS NOT LAW

There is a short-circuit in reasoning that can occlude this conclusion. The short-circuited reasoning runs like this: "The power to pass laws is an attribute of sovereignty — indeed it is the primary attribute of sovereignty. And international law requires all states to recognize other states as sovereign. So international law requires all states to respect the laws of other states within their own laws."²⁰

The protection against this short circuit is an important fact: political recognition does not require commercial engagement. Whoever rules in a foreign country and whatever laws they pass, the international law of recognition does not require any country to align its property laws with the laws of that country.²¹

This distinction is visible on the face of the economic sanctions on Sudan, mentioned earlier, that the United States has maintained in various forms since 1997. The United States has used these sanctions to shape commercial relations with Sudan in exquisite detail. As we have seen, under the sanctions American persons may not legally purchase Sudanese oil from anyone. The sanctions also prohibit American persons from having any commercial dealings with the President of Sudan and with named individuals and firms associated with his regime. Yet the sanctions also, for example, explicitly license U.S. firms to buy Sudanese gum arabic — an ingredient, which Sudan has in abundance, of carbonated drinks like Coca Cola.²² With these sanctions the United States decides exactly the ways it wishes to engage, and not to engage, commercially with the Sudanese. Still, throughout all the years of sanctions, Sudan has never left the State Department's list of independent states. The United States has maintained its embassy in Khartoum during sanctions; White House representatives and Sudanese representatives negotiate in international fora like climate

²⁰ States sometimes announce that they recognize only states, not governments. Even when this distinction is legally meaningful it does not affect the argument here, as the argument works for both sides. See Thomas Grant, *The Recognition of States* (Westport, CT: Praeger, 1999).

²¹ There are qualifications that do not affect the argument: for example, when country A nationalizes a foreign investment from country B, international law requires country B to accept that taking of property provided just compensation is paid. See Nico Schrijver, *Sovereignty over Natural Resources* (Cambridge: Cambridge University Press, 2008), 285–97.

²² U.S. Treasury, "Executive Order 13067" (1997); P.L. 106–476 [H.R. 4868], 114 Stat. 2101, sec. 1464 (2000).

change conferences; a U.S. Treasury official votes on the IMF's Sudan policy, and so on.²³

Even during full political recognition, one state can refuse to align its property laws with those of another by forbidding its persons to buy what the foreign law says can be sold. Indeed this point goes even deeper. In defining its own domain of law, each state has the right to pull the property laws of another state out at the roots. Any state can, that is, inform its own persons that they should regard a statute of a foreign sovereign as having no legal validity whatsoever.

To take one example, Britain's Law Lords once considered how British law should regard an anti-Semitic Nazi statute that purported to strip fleeing German Jews of their property rights by annulling their citizenship. Lord Cross, writing for the court, concluded:²⁴

What we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.

In a later case, the Law Lords contemplated a statute that Iraq passed after its conquest of Kuwait, which declared that all the property of the Kuwaiti national airline, including ten airliners, would thenceforth be Iraqi state property. When the Iraqi government passed this law the Kuwaiti airliners had been flown into Iraq: the Iraqi government was here making property law for objects within its own territory. Nevertheless, the Lords declared that this Iraqi law was too contrary to British principles to be used in British legal reasoning.²⁵

Each sovereign says to the other: 'We will respect your territorial sovereignty. But there can be no offence if we do not recognise your... exorbitant acts.'

In both the Nazi and the Iraqi cases, there was no question that the statute at issue had been approved by the government of a recognized independent state (Germany, and Iraq, respectively). Yet the British court

²³ The United States suspended its embassy operations from 1996–2002 because of the country's links with international terrorist organizations. U.S. State Department, "US Relations with Sudan," May 30, 2014, <http://www.state.gov/r/pa/ei/bgn/5424.htm>.

²⁴ *Oppenheimer v. Cattermole*, 1976 AC 249 at 278.

²⁵ *Kuwait Airways Corporation (KAC) v. Iraqi Airways Company (IAC) and Others*, 2002 UKHL 19 at 317, citing the analysis of Judge Brook from the Court of Appeal.

decided to reject the sovereign acts of those states, so that those acts could have no consequences within British property law. For British persons, these laws are simply not law. This is an even deeper way in which political recognition does not require commercial engagement.

VI. WHY MIGHT MAKES RIGHT

Authoritarians often use their power to shape national laws, even constitutions, for domestic reasons. Yet importing countries give domestic legal effect to authoritarian decisions over natural resources whether embodied in law or not. Pol Pot did not push through a law authorizing the sale of Cambodian rubies to Thai companies in the early 1990s. The Khmer Rouge simply made deals for rubies in the portion of Cambodia that it controlled, and the Cambodian gems entered the stream of international commerce. Anyone buying one of those rubies downstream gained a legal title that originated in Pol Pot's order.²⁶

Someone might object that Pol Pot should not be labeled an "authoritarian" during this period, because at this point the Khmer Rouge was not a governmental entity at all. Though the Khmer Rouge was part of a coalition that held Cambodia's seat at the UN until 1993 this, it might be said, was just Sino-American geostrategy — the Khmer Rouge really had no sovereign law-making powers, but was in fact just an armed group in control of some territory.²⁷ The objection might be correct — we need not decide. We need not decide because what is striking about international trade is how little commercial difference this political difference would make. Whether Pol Pot was an authoritarian ruler or rather a rebel leader, importing states would have validated his effective control over resources within their own laws. A ruby brooch made with a stone supplied by his soldiers would be owned free and clear in every importing country, either way.

French law echoed Charles Taylor's statute that his signature was sufficient for sale of Liberia's timber. American law still allows Congolese militiamen to start a chain of title that ends in domestic ownership of Congolese minerals. What matters most in the laws of importing states is coercive control over natural resources. The legal default of importing states is to authorize their own persons to buy from whichever foreigners can deliver the goods: for natural resources, possession is almost all of their law.

²⁶ Erskine McCullough, "Rubies are Swelling the War Coffers of Cambodia's Feared Khmer Rouge Rebels," *Los Angeles Times*, November 18, 1990. For the history of the Thai-Khmer Rouge resource trade see Puangthong Rungswasdisab, "Thailand's Response to the Cambodian Genocide," Yale University (2010), http://www.yale.edu/cgp/thailand_response.html#kralliance.

²⁷ See Henry Harding, *A Fragile Relationship: The United States and China Since 1972* (Washington, DC: Brookings Institution, 1992), 180–83.

The officials of importing states need not, as we have seen, accept effectiveness as their own law — yet they do, almost by habit. Indeed, effectiveness is so accepted in law as to be nearly automatic. The French did not need to pass an extra law to make their legal code parallel Taylor's Strategic Commodities Act: their legal system was already built to do so. It is only the departures from effectiveness that require special state action, like the Sudan sanctions, the Lacey and Kimberley statutes, and the British court decisions above. Effectiveness is every nation's axiom, built into the structure of its legislation and its arbitration.

Effectiveness for resources imports injustice. Why then do importing states accept it? Why do national leaders allow might abroad to make right at home? One reason is that national leaders inherit effectiveness from their predecessors: this is a holdover from the Westphalian system of international law that was almost entirely effectiveness-based.²⁸ Even more important, national leaders choose effectiveness in response to their citizens' endless demands for natural resources and the products made from them.

Effectiveness sets a test that resource-rich countries can always pass. There will always be someone in the capital of an exporting country who has the most coercive power; effectiveness makes it legal to buy resources from him. If the capital does not control the countryside, there will still always be some group in the countryside that controls the mines and forests; effectiveness drains the countryside's resources out through that group. However good or bad shape a resource-rich country is in — even if it is burdened by an authoritarian, or suffering from a civil war — effectiveness always allows its resources to flow into world markets, where one's nationals can buy those resources under color of law.

Some see effectiveness as a neocolonial policy that allows powerful countries to exploit resource-rich regions without having to bear the costs of governing them.²⁹ However that may be, for every national leader effectiveness will look attractive. For every leader the imperative to secure flows of natural resources and resource-based imports is extremely strong. For energy resources the imperative to secure supplies is categorical: every leader of an advanced economy must keep the lights on and the traffic moving. Consumers' demands for imports are relentless, they stretch into the indefinite future, and the remainder of any politician's agenda will be hostage to these demands being satisfied. So today's national leaders accept effectiveness, as those in office before them also did.

²⁸ As Crawford puts it, during the classic Westphalian period "The law of nations was, in a sense, the codified law of the jungle." James Crawford, "The Right to Self-Determination in International Law: Its Development and Future" in Philip Alston ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001), 12.

²⁹ Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Cambridge: Polity, 2008), 5–6.

VII. INTERNATIONAL LEGAL HOMOLOGARCHY

National leaders favor effectiveness automatically, since the rule channels resources to their people. The most coercive actors in resource-exporting regions, of course, also favor effectiveness, since it channels money from the importing countries to them. Many of the most powerful actors in the world are coordinated on this rule. To understand the implications for the global economy it is just as important to understand the coordination itself as it is to understand the moral quality of the rule.

"In anarchy," wrote the international relations theorist Kenneth Waltz, "there is no automatic harmony."³⁰ For the place we have now reached, Waltz is nearly wrong. In the property rules of the world's many nations there is a harmony that is so nearly automatic that it may seem — if it is noticed at all — a fact of nature instead of a coordination of choices. Indeed, the harmony is so nearly automatic that only the deviations, like sanctions, need codifying. The agreement occurs without extra legislation.

A thing becomes a commodity only when it is illuminated by laws. To play its role on the stage of world commerce, a thing must be lit by the laws of several nations at once. The most basic structure of international markets is sustained by a nearly automatic, yet in a legal sense entirely optional, agreement of governments. This is not "agreement" as in a treaty, where governments make a joint commitment.³¹ This is the agreement of clocks running in sync, where each tells the same time because of the setting of its own internal mechanism. National laws are in almost complete agreement over what will count as a valid international transfer of goods.³²

Those impressed or distressed by "global governance" in our era often cite treaty-based transnational authorities like the WTO, or intergovernmental networks such as the Basel Committee on Banking Supervision, or charities that provide social services across wide regions, or foreign corporations in weak states that claim to regulate themselves. Such global governance may be vital at its level; compared to the global governance of property, it is trivial. Harmonization on property rules is basic for international trade: it is a pre-condition for all cross-border commerce. Agreement on property rights underlies every legal contract regarding goods. It is the infrastructure that supports the most elaborate derived instruments of

³⁰ Kenneth Waltz, *Man, The State and War* (New York: Columbia University Press, 1959), 182.

³¹ Margaret Gilbert, *A Theory of Political Obligation* (Oxford: Oxford University Press, 2006), 134–45.

³² The domestic property laws of weak states, like the Democratic Republic of Congo, do not form part of this consensus — as above, rebels in the eastern Democratic Republic of Congo are violating Congolese law when they seize minerals by force. Yet officials of these weak states are quite unlikely to attempt to break the international consensus on effectiveness by launching international legal actions. This is not only because these states are weak but because officials in these states often benefit directly or indirectly from the illegal resource trade in their jurisdiction.

international finance. It sets a tankerful of oil sailing from port to port, changing ownership dozens of times while at sea. The international harmonization of property laws is the foundation of the global market, and the global market sustains the human population at its current size of over seven billion.

International commercial relations are correctly described as anarchical if the Greek roots are read as *an* + *archos*: the global market has, in fact, no ruler. Yet nations are not in anarchy if the root of the word is taken as *arche*: authority. States' massive mutual agreement on property rules creates a substantial framework of shared authority in the international system. Nations create and enforce the rules of a global market by maintaining symmetric legal structures: they govern by homologarchy. The tally for this homologarchy will turn on the moral quality of the rules by which the global market is created and sustained.

VIII. ENGAGING AN AUTHORITARIAN

The rule that nations have converged on regarding the vending of foreign natural resources is the rule of effectiveness. Effectiveness drives what social scientists call the "resource curses" of authoritarianism and civil conflict. Oil states in the developing world, for example, are 50 percent more likely to be authoritarian than non-oil states.³³ To see the dynamics of the connection between oil and authoritarianism we can study international commercial engagement with the central African oil state of Equatorial Guinea. A former U.S. Ambassador to the country called Equatorial Guinea, "the world's finest example of a country privatized by a kleptomaniac without a scintilla of social consciousness."³⁴ The authoritarian in question is Teodoro Obiang, who has dominated the country since taking over in a coup in 1979.³⁵

Today all nations set their own laws to validate Obiang's decisions about the sale of Equatorial Guinea's oil: all nations tell their own nationals that they must buy Equatorial Guinea's oil only from Obiang's regime. The United States, for example, locates Obiang by the principle of effectiveness: as we have seen, the fact that Obiang is the president of a recognized state does not decide whether the United States will empower its persons to buy Equatorial Guinea's natural resources from him (political recognition

³³ Michael Ross, *The Oil Curse* (Princeton, NJ: Princeton University Press, 2012), 1–2, 145–88. Effectiveness also drives civil conflict by rewarding militias that can seize resource-rich regions with large revenues. Gemstones increase the length and severity of civil conflict, and secessionist conflicts in oil-producing regions are the most severe. See the literature review of the relation between natural resources and the onset, duration, and intensity of civil war in Philippe Le Billon, *Wars of Plunder* (Oxford: Oxford University Press, 2013), 15ff.

³⁴ Peter Maas, *Crude World* (New York: Penguin, 2009), 30.

³⁵ For more on Obiang and his son Teodorín see Ken Silverstein, *The Secret World of Oil* (New York: Verso, 2014), chap. 2.

does not control commercial relations). The United States uses effectiveness to locate Obiang, which is the choice that empowers American oil companies to buy that country's oil with Obiang's approval, and the choice that sends American drivers' dollars back to him.

Once the United States authorizes Americans to buy resources from Obiang, U.S. commercial engagement with Obiang begins. And the American consumer's contribution to authoritarian rule in Equatorial Guinea also begins. The oil of Equatorial Guinea flows into Americans' cars, clothes, and cosmetics. And Americans' money flows back into Obiang's bank accounts. With this money, the authoritarian may choose, as he has, to indulge his last whim for luxury, as the children of his country die at ever higher rates. He may choose, as he has, private jets for himself and solitary confinement for his political opponents.³⁶ While Obiang must worry that predators will seize his effective control, foreign cash itself has so far furnished him the force to repulse those predators.³⁷ Obiang is now Africa's longest-lasting ruler and possibly its richest. United States import engagement with Obiang puts Americans into business with an authoritarian, and drives the resource curse in Equatorial Guinea.

IX. FOREIGN INJUSTICE ON HOME SOIL

Those jaded to foreign affairs may not yet see the implications. The leadership of nations is a club that includes many hard men, they might think, and major changes to the membership of that club cannot be expected. The world is as it is, it might be said; we just do business with who is in charge. The West simply has to deal with dictators.

Perhaps. Nevertheless, countries "deal with" dictators along different dimensions of foreign policy: arms control, counterterrorism, human rights, aid, trade, and so on. A country's handling of any of these areas of foreign policy will produce better or worse outcomes abroad and at home. Yet certain areas of foreign policy have a large moral impact on the home population, which the other areas lack. In many areas of foreign policy countries can treat authoritarian regimes as powerful gangs in charge of localities in the global neighborhood. Yet with trade, and especially with trade in natural resources, it is different. Trade in natural resources imports the injustices of foreign countries, bringing these injustices into the domestic

³⁶ A study in *The Lancet* found that neonatal, post-neonatal and childhood death rates all increased between 1990 and 2010 — that is, since the oil revenues began to accrue. Julie Knoll Rajaratnam et al., "Neonatal, Postneonatal, Childhood, and Under-5 Mortality for 187 Countries, 1970–2010," *The Lancet* 375.9730 (2010): 1988–2008, Table 2. Manfred Nowak, "Report of the Special Rapporteur on Torture, Addendum: Mission to the Republic of Equatorial Guinea," UN Human Rights Council A/HRC/13/39/Add.4 (2010), p. 2.

³⁷ Adam Nossiter, "U.S. Engages with an Iron Leader in Equatorial Guinea," *New York Times*, May 30, 2011.

justice system. This is a way that we now “deal with” dictators that we have special reason to regret.

Contrast U.S. commercial engagement with Obiang to U.S. negotiations with the regime in North Korea. The authoritarians of North Korea are at least as unsavory as Obiang, willing to subject their population to extremes of regimentation, deprivation, and misinformation. The North Korean regime controls nuclear weapons and is trying to get more; the United States deals with the North Korean regime for the sake of its own national security and that of its allies. The United States signs treaties with North Korean officials, presses for them to accept inspections, offers food aid to Pyongyang in exchange for concessions, and more. Yet notice that none of these U.S. dealings impacts U.S. law.

American political recognition of North Korea has almost no domestic legal effects. Should the North Korean regime rejoin the Nuclear Non-Proliferation Treaty, that will be a signal event in foreign relations, but it will not be an event that even the best-trained lawyer working in an American jurisdiction need notice. Similarly, if the North Korean regime decides to build roads, abolish the death penalty, hold elections, or position troops along the border with South Korea, these will be consequential decisions for Koreans and perhaps Americans, but they would have no consequences within American law. American recognition of North Korea has only minor domestic legal effects: for instance, if the North Korean regime were to decide to pull out of the Universal Postal Union, then North Korean postage stamps would no longer be valid for delivery of mail within the United States.

American commercial engagement with Obiang is legally much more intimate. Here the United States uses its control over its own law to designate Obiang as the authoritative decision-maker for resources that will be sold into its jurisdiction. The United States literally makes Obiang's word law: not law for Equatorial Guinea, but law for the United States. Functionally, it is as if the U.S. government has appointed Obiang as the U.S. Secretary for Equatoguinean Petroleum. Because of U.S. import engagement, when Obiang pushes through a new hydrocarbons law (as he did in 2006), U.S. courts will thereafter treat that law as decisive in their own reasoning. When Obiang chooses to sell a million barrels of oil, any American will become legally empowered to buy that oil. For a country whose courts are so reluctant to accept the relevance of foreign laws to their own reasoning, it may seem droll that the United States sets its own legal system automatically to track the decisions of a dictator. This is, however, the current state of affairs. The United States accredits Obiang's decisions to pass title to oil to American persons, and then requires that title to be defended with the full force of the American justice system, including all its police and courts.

This means that any injustice within Obiang's control over Equatorial Guinea's oil will become injustice enforced on American soil. And injustice

there is: Obiang is literally stealing Equatorial Guinea's oil, selling it off without any possible approval by the people whose oil it is.³⁸ The United States chooses not only to allow imports of this stolen oil, but to declare the imports legal because they come from a powerful enough thief.

The American choice of effectiveness leads directly to American officials enforcing foreign injustice on home soil. To see the gravity of this choice, observe that Americans would find such enforcement intolerable in other domains. Not long ago an Iranian official announced that three men, identified only by the initials M. T., T. T., and M. Ch., had been executed for the crime of sodomy. Previous Iranian capital convictions for sodomy came under a charge suggesting an element of coercion or violence in the act. The charges against these three men, however, contained no such suggestion. Their crimes appeared only to be having engaged in consensual adult male sexual conduct.³⁹ Imagine that one of these men (say, T. T.) had somehow escaped being hanged in Iran and fled to the United States, seeking asylum. Consider the U.S. Attorney General saying that he was very sorry, but the Iranian government had condemned T. T. to death. So he is ordering that T. T. be hanged in Indiana.⁴⁰

The escape in that story is fictional, but some escapes are real. In 1989, a seven-year-old boy named Francis Bok was captured in Sudan by a slave-hunting militiaman named Giemma. Giemma forced Bok to live as his slave for ten years, bullwhipping Bok when he tried to escape. Bok finally did escape from slavery, then made his way with much hardship to America. Bok was invited to tell his heroic story to Congress, he published his autobiography, and he now lives in Kansas where he works for an anti-slavery NGO.⁴¹ Imagine the U.S. President at a press conference, saying: "Giemma has traveled from Sudan to Kansas, and is demanding his slave back. We are very sorry, but we must enforce Giemma's property rights over Francis Bok. We must allow Giemma to keep or to sell Bok as a slave in the United States."

It may be that the United States should pressure Iran to stop executing its citizens for sodomy, and that the United States should pressure Sudan to end human bondage. Yet whatever American foreign policy should be in those areas, it would be regrettable for the United States to enforce the

³⁸ "The land of every country," as John Stuart Mill said, "belongs to the people of that country." (*Principles of Political Economy* II.10.4) This aspect of popular sovereignty has been codified in the two main international human rights treaties; 98 percent of humanity is living in a state that is already party to at least one of those treaties. Indeed popular resource sovereignty is declared in the first and the last substantive article of each of the human rights treaties — it is the only human right that each treaty asserts twice. *International Convention on Civil and Political Rights*, Arts. 1, 47; *International Convention on Economic, Social and Cultural Rights*, Arts. 1, 25. See Wenar, "Property Rights and the Resource Curse," *Philosophy and Public Affairs* 36 (2008): 2–32.

³⁹ Jerome Taylor, "Iran Executes Three Men for Sodomy," *The Independent*, September 7, 2011.

⁴⁰ The U.S. federal death row is at the prison in Terre Haute.

⁴¹ Francis Bok, *Escape from Slavery* (New York: St. Martin's, 2003).

Iranian death penalty, or Sudanese slavery, on its own territory. Foreigners may commit or allow injustices in their own countries, but the American justice system becomes tainted when it enforces the results of those injustices within its own borders. Once the U.S. government grants its persons the right to buy oil from Obiang, Obiang's crimes become American law. The oil he steals in Africa becomes legally owned in America, the holdings enforced by the American justice system. The crime of slavery is worse than a theft of a nation's resources, but the wrongness of American enforcement of these injustices on its own soil is at most a matter of degree.

X. THE NATURALIZATION OF RESOURCES

Trade has special potential for transmitting foreign injustice into the domestic legal system. Today this potential is highest for trade in natural resources. One way of describing the international ban on the slave trade is that nations no longer choose *might makes right* for humans: governments no longer give their people the right to buy humans from foreigners who can maintain coercive control over those humans. Yet national authorities still grant the right to buy natural resources from foreigners who can maintain coercive control over resources, and this policy actively draws tainted resources into all importing countries.

Of the two main factor of production — labor and raw materials — the latter is now more likely to be a source of pure injustice imported from abroad. Foreign goods may have been produced under unhealthy or unsafe conditions, and such violations of labor rights may indeed taint the goods that consumers buy at home. These are serious moral issues, and they deserve full treatments of their own.⁴² Yet goods produced with outright theft of labor, with slave labor, are no longer a major portion of international trade flows. And even exploited foreign workers typically have some choice — they can seek another job, or return to the rural poverty from which they usually come.

Raw materials are different. Because the extractive industries are enclaved, local people often have little control over resource extraction. The removal of Equatorial Guinea's oil involves no African labor at all: Obiang's regime approves a contract, foreign firms build platforms offshore and take the country's oil away. The oil is 100 percent stolen when it arrives in the ports of importing states, with no admixture of voluntary labor from Equatorial Guineans and no possibility of their vetoing the exports by downing tools or destroying the machines.

A country's trade policy is not special because it has domestic effects; as above, all foreign policy can have domestic effects. If a government

⁴² For ambitious proposals to improve labor standards see Christian Barry and Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal For Linkage* (New York: Columbia University Press, 2010).

allows trade with a country that exports impure food, then its citizens may be poisoned; similarly, if a government mishandles a war abroad then its citizens may be killed in terrorist attacks. Trade policy is special in having strong domestic *moral* effects. A country that sets its property laws to track the decisions of bad actors abroad is certain to import injustice, and to enforce that injustice with its own domestic laws. Consumers in these countries will own stolen raw materials within their cars and computers, their homes and telephones, their jewelry and cosmetics. Only the morally perverse would enjoy the thought that their government will defend their rights to these stolen goods against all challengers.

Trade policy is a hybrid of foreign and domestic policy. By designating bad actors to make decisions that can vest domestic property rights, states that use effectiveness give these bad actors a functional role in their own legal systems. It is as if the U.S. government had appointed Obiang as one of its officials, empowering Obiang to naturalize Equatorial Guinea's oil as its Department of Homeland Security naturalizes new citizens. This naturalization of stolen resources is the result of America's choice of effectiveness for its trade policy, and it is a significant source of American moral disorder.

Nor is this just an American policy. All states use effectiveness as their default policy, to settle which foreign goods their persons may buy. That default policy synchronizes property rules across borders, and so forms part of the infrastructure of international trade. Yet states' choice of effectiveness also drives the resource curses. Effectiveness sends the money that consumers spend on fuel and other everyday purchases to authoritarians and militias abroad. And effectiveness empowers those authoritarians and militias to steal more resources that consumers then buy as if clean.

XI. CONCLUSION

Each national authority decides what will be the property rules for its own persons. All states use the default rule that whoever is in coercive control over a foreign country will be regarded as the local authority over property in that country. Effectiveness is every country's autopilot. This rule drives the resource curse of authoritarianism. States also structure their property law so that a foreign militia's seizure of natural resources will anchor a sale chain that ends in perfect domestic title over finished goods. Again states decide that might abroad will make right at home, which drives the resource curse of civil conflict.

Commercial engagement with a resource-rich country is like plugging a high-voltage line into its political economy. If the country is well-wired politically and economically, it will glow brighter. If not, making the connection can cause short circuits, fires, and explosions. Importing states' policies leads them to make commercial connections everywhere:

the default is to engage with whoever can control resource-rich territory by whatever means.

States are not required to choose effectiveness, yet strong practical imperatives press for this choice. A state's choice of effectiveness aligns its laws with other states', which is an essential condition for its transnational trade. States' collective harmonization on effectiveness is a precondition of the global market that sustains the human population at its size. All states' laws are harmonized on this rule; their concert is in a minor key.

Effectiveness is everywhere. Nations guided by effectiveness will turn the deeds of regimes in full control of their territory, as in Equatorial Guinea, into their own law. Over some areas of the earth's land there is no governmental agency that exerts regular coercive control. These areas are within the borders of weak or failed states, as during Sierra Leone's civil war or in today's Democratic Republic of Congo. Importing-country governments must still decide with whom to engage commercially within such areas. Again, all governments use *might makes right* as their default. Using effectiveness, importing countries track the decisions of coercive actors who have no lawmaking powers, who claim no more authority than the rifles on their shoulders. States' synchronization on effectiveness sends consumers' cash to regimes that are as coercive as any on earth, and also to militias of barely imaginable inhumanity. All states' justice systems now enforce on their own soil the injustices of these violent men, making their crimes our own. Our moral situation is poor. The global market that sustains our lives is harmonized on a bad rule.

Fortunately, alternative policies are available. States can alter their own rules of trade so as to taper off their reliance on authoritarian oil and conflict minerals.⁴³ Indeed the ideals and interests of many powerful actors already point toward such reforms, which build on efforts that have already gained momentum. More broadly, the progressive abolition of effectiveness in international law over the past two centuries — for the slave trade, colonialism, apartheid, and so on — gives confidence that these reforms can be the next stage in that history. The global economy can be upgraded without losing its great benefits. For natural resources, states need no longer accept that might will make right.

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⁴³ See the Clean Trade policy framework in Wenar, *Blood Oil*, Part IV. For arguments that WTO member states can discriminate against authoritarian oil and conflict minerals see Lorand Bartels, "WTO Law Aspects of Clean Trade," (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2634567.