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The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption

CECILY ROSE*

Abstract

This article examines private sector complicity in governmental corruption that violates economic and social rights. Although banks and multinational corporations typically play critical roles in facilitating the diversion of public revenues away from the provision of social services, the link between the private sector, corruption, and human rights violations remains underexplored. This article therefore examines this relationship and explores the viability of a standard for assessing the complicity of the private sector in such violations of economic and social rights. Ultimately, the state-centred nature of the international human rights system limits the utility of any complicity standard for non-state actors.

Key words

complicity; corruption; human rights; non-state actors

1. Introduction

This article examines private sector complicity in governmental corruption that violates economic and social rights. Governmental corruption can negatively impact economic and social rights when, for example, the embezzlement of public revenues results in a reduction in spending on education, health care, or housing. Corruption is likely to violate economic and social rights in part because, under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the wide-ranging duties accepted by states regarding the provision of services tend to generate large public service contracts that create prime opportunities for corruption.[1] This trend is amplified in certain developing countries where tremendous natural resource wealth is frequently used not for the public good, but for the private benefit of elite government officials.[2] Such natural resource 'spoliation' has been especially prevalent in resource-rich African countries such as the Democratic Republic of Congo,

* Cecily Rose, PhD Candidate, University of Cambridge; LL M (Cantab); JD (Columbia); BA (Yale). The author is very grateful to Alison Kesby, Hikmat Maleh, Viren Mascarenhas, and Marko Milanovic [cer59@cam.ac.uk].

1 M. Sepúlveda Carmona, 'International Council on Human Rights Policy and Transparency International', *Corruption and Human Rights: Making the Connection* (2009), 45; 1966 International Covenant on Economic, Social and Cultural Rights, (1966) 993 UNTS 3, entered into force 3 January 1976.

2 I. Tamm, C. Lucky, and S. Humphreys, Open Society Justice Initiative, *Legal Remedies for the Resource Curse: A Digest of Experience in Using Law to Combat Natural Resource Corruption* (2005), 9.

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Sierra Leone, Liberia, Angola, Nigeria, Equatorial Guinea, and Chad.[3] Spoliation typically involves massive amounts of highly mobile wealth that is capable of being hidden in many ways.[4] It also entails capital flight of a considerable magnitude from developing countries, which tends to result in economic and social devastation.[5]

The principal agents of such spoliation are public officials in resource-rich countries, as well as banks and multinational corporations (MNCs) in the extractive industries.[6] Banks may, for example, fail to maintain adequate anti-money laundering procedures, while oil companies may facilitate the diversion of public revenues by bribing foreign public officials.[7] Although banks and MNCs typically play critical roles in facilitating the diversion of public revenues gained from natural resource extraction, the link between the private sector, corruption, and human rights violations remains underexplored.[8] This article therefore examines this relationship and explores the viability of a standard for assessing the complicity of the private sector in corruption-based violations of economic and social rights that are perpetrated by state actors (a phenomenon that will be referred to as 'private sector corruption').[9]

The article specifically takes up Andrew Clapham's suggestion that 'international civil responsibility' should apply to such involvement in human rights violations by non-state actors. Clapham proposes that the provision of the International Law Commission's Articles on State Responsibility, which concerns aiding and assisting (Article 16), may be applied, by analogy, to the complicity of non-state actors in human rights violations committed by states. A range of sources provides guidance on how Article 16 would apply to non-state actors as opposed to states, including the judgment by the International Court of Justice in the *Bosnia Genocide* case, the Rome Statute of the International Criminal Court, the jurisprudence of the ad hoc criminal tribunals, and the judgments of US federal courts in Alien Tort Claims Act cases. The application of this standard to Riggs Bank's involvement in Equatorial Guinea reveals some of the merits and difficulties involved in applying Article 16 to banks and MNCs.

Ultimately, a standard for evaluating the complicity of the private sector in such human rights violations highlights the harm caused by corruption, and the need for victims to be able to hold both private and state actors accountable for their involvement in such conduct. Although legal responses to corruption have predominantly relied on domestic criminal laws and efforts to improve revenue transparency, human rights law arguably has a role to play in the discourse on

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3 Ibid. Although corruption is a worldwide phenomenon that affects both developed and developing countries, this thesis focuses on the problem of corruption in resource-rich developing countries, particularly in Africa: Z. Pearson, Centre for Democratic Institutions, *Human Rights and Corruption* (2001), 3–4.

4 N. Kofele-Kale, 'Patrimonicide: The International Economic Crime of Indigenous Spoliation', (1996) 28 Vand. JTL 45; see also Tamm, Lucky, and Humphreys, *supra* note 2, at 9–10.

5 Kofele-Kale, ibid.

6 Tamm, Lucky, and Humphreys, *supra* note 2, at 10.

7 Ibid., at 11.

8 Carmona, *supra* note 1, at 2.

9 Thus, for the purposes of this article, the phrase 'private sector corruption' refers to acts of corruption, such as money laundering, that are committed by private actors in complicity with acts of corruption, such as embezzlement, that are perpetrated by the state; see section 3, *infra*, for the relationship between the private sector, corruption, and human rights violations.

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corruption. Nevertheless, the application of human rights law to the issue of private sector corruption is limited. International law does not actually impose human rights obligations on non-state actors such as banks and corporations, however much the corporate social responsibility movement seeks to hold private actors accountable through soft law mechanisms. Although commentators have argued that private actors may or should be held accountable for complicity in human rights violations, these arguments are ultimately untenable because of the persistently state-centred nature of human rights law. Moreover, the loose invocation of human rights rhetoric in anticorruption literature may actually weaken the normative value of human rights law, particularly economic and social rights. This article therefore critically considers the wisdom and utility of applying human rights law to the issue of private sector complicity in governmental corruption.

It may instead be argued that legal responses to corruption should be confined to the fairly specialized criminal legal regimes on money laundering, bribery, and stolen asset recovery. In addition, improvements in contract and revenue transparency also have the potential to provide the citizens of host countries with the tools necessary to combat corruption. Although these legal mechanisms do not serve as a means for recognizing or directly addressing the widespread harm that results from corruption, they may still allow for the punishment of wrongdoers and the empowerment of the citizens of resource-rich states.

Section 2 of this article discusses the definition of corruption, the legal basis on which it should be considered a human rights issue, and the link between the private sector, corruption, and human rights violations. Section 3 explores the legal basis (or lack thereof) on which private sector entities may be held accountable for corruption, and, in particular, the standard of complicity that could be employed in such an evaluation. Section 4 examines the viability of this complicity standard in light of its application to Riggs Bank's involvement with Equatorial Guinea. Finally, section 5 briefly examines the utility of the human rights framework with respect to acts of corruption, especially in light of alternative legal approaches.

2. THE LEGAL BASIS FOR CONSIDERING PRIVATE SECTOR CORRUPTION A HUMAN RIGHTS ISSUE

2.1. Defining corruption

While there is no generally accepted legal definition, Transparency International has operationally defined corruption as 'the abuse of entrusted power for private gain'.[10] This often-repeated definition encompasses a broad range of conduct, including petty as well as grand corruption.[11] This thesis focuses on grand corruption, which refers

10 Transparency International, *Frequently Asked Questions about Corruption*, available online at www.transparency.org/news_room/faq/corruption_faq. For a discussion of definitions of corruption, see Pearson, *supra* note 3, at 5–8. Difficulties formulating a universal definition of corruption stem, in part, from the complexity of the concept and the range of behaviours to which it refers. Much of the literature on corruption therefore adopts a minimalist definition that is 'concise and broad enough to be of use in most instances of corruption', ibid., at 6.

11 Ibid., at 7; Carmona, *supra* note 1, at 16; UN Global Compact, Principle 10, available online at www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle10.html.

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to the corruption of heads of state, ministers, and top governmental officials, and concerns large-scale transactions involving significant sums of money.[12] Although the term originally referred to bribery by international corporations of foreign public officials, it now encompasses all corruption at top levels of the public sphere, where the formation of policies and rules takes place.[13]

In the legal field, corruption has not been considered 'an individual and identifiable criminal act', but instead represents an umbrella term or a generic heading for a collection of different criminal acts.[14] The international and regional legal instruments concerning corruption do not provide a legal definition of corruption, but instead enumerate certain criminal acts that correspond to the notion of an abuse of entrusted power for private gain.[15] The UN Convention against Corruption, for example, calls for the criminalization of bribery, embezzlement, trading in influence, the abuse of functions or positions, and illicit enrichment by both the public and private sectors, but the Convention never explicitly stipulates that these acts amount to corruption.[16] Other regional instruments use the term 'corruption' interchangeably with bribery, one of the most common criminal acts of corruption.[17] The absence of a definition of corruption in these instruments, however, does not pose a serious practical problem because the term 'corruption' may simply be understood to refer to certain enumerated criminal acts. For the purposes of this article, 'corruption' will refer to all the criminal acts enumerated in the UN Convention against Corruption, which represents the most comprehensive and widely ratified legal instrument concerning corruption.

2.2. Corruption as a human rights violation

Corruption can violate economic and social rights when it results in the state's failure to make maximal use of its available resources. All economic, social, and cultural rights require states to take steps, to the maximum of their available resources, to achieve the progressive realization of the Covenant rights.[18] Corrupt acts may inhibit such progressive realization when they involve the state's diversion of resources away from the provision of public services, thereby diminishing any improvement or

12 Carmona, *supra* note 1, at 15.

13 Ibid., at note 14; G. Moody-Stuart, *Grand Corruption: How Business Bribes Damage Developing Countries* (1997).

14 Carmona, *supra* note 1, at 18; Tamm, Lucky, and Humphreys, *supra* note 2, at 9.

15 Carmona, *supra* note 1, at 16.

16 2003 UN Convention against Corruption, 2348 UNTS 41 (hereafter, 'UN Convention against Corruption'), Arts. 15, 16, 21 (bribery); Arts. 17, 22 (embezzlement), Art. 18 (trading in influence), Art. 19 (abuse of functions), Art. 20 (illicit enrichment). The Council of Europe's 1999 Criminal Law Convention on Corruption similarly criminalizes bribery and trading in influence, without defining corruption or stipulating that these acts amount to corruption. The 1999 Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, entered into force on 1 July 2002, (1999) *European Treaty Series*, No. 173; see also Carmona, *supra* note 1, at 17.

17 Carmona, *supra* note 1, at 17; see, e.g., 2000 United Nations Convention against Transnational Organised Crime, 2225 UNTS 209, entered into force on 29 September 2003; 1999 Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, entered into force on 1 November 2003, *European Treaty Series*, No. 174, Art. 2; convention drawn up on the basis of Art. K.3(2c) of the Treaty on European Union, on the fight against corruption involving officials of the European communities or officials of member states of the European Union, adopted by Council Act of 26 May 1997, *Official Journal* C 195, 25 June 1997, at 1–11.

18 ICESCR, Art. 2(1).

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progress. Corruption may also result in an explicit regress in the provision of services. Such 'deliberately retrogressive measures' would, according to the Committee on Economic, Social and Cultural Rights, 'require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[19]

Any assessment of whether a corrupt act violates economic and social rights should include an evaluation of what aspect of the state's responsibility has been triggered – that is, whether the state has failed in its duty to respect, protect, or fulfil.[20] Of the state's three levels of obligation with respect to human rights, the obligation to fulfil is particularly relevant to economic and social rights, such as the right to an adequate standard of living (including adequate food, clothing, and housing), the right to physical and mental health, and the right to education.[21] The obligation to fulfil requires states to take positive measures to ensure that individuals in its jurisdiction enjoy their rights, such as through social programmes that provide food and health care. Both the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights ('Maastricht Guidelines') and the Committee on Economic, Social and Cultural Rights have noted that states violate their duty to fulfil through the misallocation or diversion of public resources, which results in the non-enjoyment of the right.[22] Finally, the obligation to protect is also particularly relevant with respect to private actors, like corporations. This obligation requires states to prevent third parties from violating human rights, such as through the criminalization of certain corrupt practices committed by private actors, including bribery, embezzlement, and money laundering.

2.3. The link between the private sector, corruption, and human rights violations

While commentators have posited various theories about the relationship between corruption and human rights violations, little has been written about the link between the private sector, corruption, and human rights violations. In general, the corporate social responsibility movement has not satisfactorily grappled with this issue, as it has focused less attention on anticorruption standards than on labour, the environment, and human rights.[23] In addition, John Ruggie, the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, has dealt with this issue very sparingly.[24] Furthermore, international instruments are, for the most part, silent on

19 Committee on Economic, Social, and Cultural Rights, General Comment No. 3, The Nature of States Parties' Obligations, UN Doc. E/1991/23 (14 December 1990), para. 9.

20 Ibid., at 25–6, 43–4.

21 Arts. 11–13.

22 Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4 (11 August 2000) (hereafter, 'General Comment No. 14'), para. 52; 1997 Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights (January 1997) (hereafter, 'Maastricht Guidelines'), para. 14(g).

23 J. Bacio-Terracino, *Anti-Corruption: The Enabling CSR Principle* (2007), available online at www.business-humanrights.org/Categories/Issues/Other/Corruption.

24 UN Doc. A/HRC/14/27 (9 April 2010), para. 46.

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the subject. Yet, in reality, the role of the private sector can be critical, as some acts of public sector corruption would most likely never take place without the assistance of private actors.

Binding and non-binding international instruments regarding corruption provide little support for the notion that corporate complicity in corruption may contribute to human rights violations.[25] The preamble to the UN Convention against Corruption draws the link between corruption in general and human rights violations, as the Convention describes corruption as an 'insidious plague' that not only leads to violations of human rights, but also undermines democracy and the rule of law, 'distorts markets, erodes the quality of life, and allows organised crime, terrorism, and other threats to human security to flourish'.[26] The Convention merely implies a connection between human rights violations and private sector corruption – a phenomenon that the Convention addresses in considerable detail.

The United Nations Global Compact initially appears to recognize explicitly that the private sector shares responsibility for eliminating corruption.[27] The Global Compact describes itself as a 'strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles' in the areas of anticorruption and human rights, labour, and the environment.[28] Principle 10 provides that 'businesses should work against corruption in all its forms, including extortion and bribery'.[29] This principle focuses, however, not on the involvement of the private sector itself in corruption, but on incentives for corporations to combat corruption.[30]

After recognizing the negative impacts that corruption has had on the environment, labour standards, and basic human rights, the Global Compact notes that '[b]usiness has a vested interest in social stability and in the economic growth of local communities'.[31] In addition, the 'long-term sustainability of business depends on free and fair competition'.[32] Conversely, business suffers, 'albeit indirectly, from the impact of lost opportunities to extend markets and supply chains', as a consequence of corruption.[33] Although the Global Compact concludes by noting that '[g]lobal businesses have to be constantly vigilant to avoid being associated with these major international challenges', it does not acknowledge that corporations themselves

25 See, e.g., OECD, *OECD Guidelines for Multinational Enterprises: Text, Guidelines, Commentary*, DAFFE/IME/WPG (2000) 15 (Final) ('OECD Guidelines for Multinational Enterprises'), General Policies, paras. 1–2; Commentary, para. 4; UN Convention against Bribery, Foreword; 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, DAFFE/IME/BR(97)20 (entered into force on 15 February 1999) ('OECD Anti-Bribery Convention'), Preamble; Maastricht Guidelines, *supra* note 22, para. 14(g).

26 UN Convention against Bribery, Foreword.

27 UN Global Compact, Principle 10, available online at www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/principle10.html.

28 UN Global Compact, Overview of the UN Global Compact, available online at www.unglobalcompact.org/AboutTheGC/index.html.

29 Ibid.

30 Global Compact, Transparency and Anticorruption, available online at www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/anti-corruption.html.

31 Ibid.

32 Ibid.

33 Ibid.

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could be complicit in corruption.[34] The Global Compact thus points to the need for a clarification of the degree to which businesses are indeed involved in corruption.

3. Accountability for private sector corruption

Although these binding and non-binding instruments do not clearly link the private sector, corruption, and human rights violations, the oil industry alone is replete with examples of how the private sector may contribute to or facilitate public sector corruption that violates economic and social rights. The patterns of corruption that occur in resource-rich developing states typically involve the bribery of public officials by multinational corporations, and the money laundering of such bribes and/or stolen natural resource revenues.[35] Riggs Bank's involvement in the money laundering of Equatorial Guinea's oil revenues constitutes a prime example of such corruption, as will be explored below in section 4.

These patterns give rise to a need for the victims of corruption-based human rights violations to be able to hold accountable not only the states themselves, but also the private sector entities that play key roles in allowing such corruption to occur at all. Both international human rights treaties and domestic criminal laws are, however, ill-suited for this purpose: international human rights treaties do not reach the conduct of private actors, and domestic criminal laws do not tend to provide mechanisms for redress. Civil litigation, by contrast, has the potential to provide the avenue necessary for victims to seek reparations from the banks or corporations that bear some level of responsibility. Yet, international human rights law does not bind private actors and the corporate social responsibility movement has produced only soft law mechanisms, such as the UN Global Compact. Thus, serious difficulties impede the development of a civil standard that could be used to assess the complicity of private sector entities in governmental corruption that impacts human rights.

3.1. The inadequacy of international human rights treaties and criminal law

Ultimately, states, as opposed to banks or corporations, are responsible for progressively realizing economic and social rights. International human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not reach the conduct of the private sector, as they impose obligations on states alone.[36] Meanwhile, soft law mechanisms such as the UN Global Compact merely provide that businesses *should* ensure that they are not complicit in human rights abuses. In essence, nothing legally binds non-state actors in this regard, beyond domestic legislation enacted by states in fulfilment of their international obligations. The ICESCR, for example, requires states to protect the human rights of those

34 Ibid.

35 Tamm, Lucky, and Humphreys, *supra* note 2, at 9.

36 P. Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), 22; C. Tomuschat, *Human Rights: Between Idealism and Realism* (2003), 320.

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within their jurisdiction, such as through the enactment of legislation that prevents private actors from infringing upon the enjoyment of human rights. Yet, on the issue of preventing private sector corruption, the ICESCR provides no guidance to states on what their obligations might entail. The Covenant does not even mention corruption, and the Committee on Economic, Social and Cultural Rights only speaks obliquely of corruption in its references to the 'misallocation' of resources by states.[37] Because the ICESCR neither binds private actors nor touches on the issue of corruption, it represents a weak instrument for the purpose of holding private actors accountable for their involvement in corrupt acts (although it remains relevant for identifying the human rights obligations that private actors may have been complicit in violating).

While other international treaties that specifically concern corruption do seek to hold private actors accountable for such conduct, they largely provide for criminal sanctions, rather than civil remedies. The OECD Anti-Bribery Convention, for example, requires state parties to take fairly specific measures to establish that it is a criminal offence under national law for any person to bribe a foreign public official 'in order to obtain or retain business or other improper advantage in the conduct of international business'.[38] The OECD Anti-Bribery Convention also requires state parties to establish that complicity in the bribery of a foreign public official constitutes a criminal offence.[39] More broadly, the UN Convention against Corruption requires state parties to adopt, or, in some cases, to consider adopting, such legislative and other measures as may be necessary to establish a series of acts as criminal offences, including bribery as well as embezzlement, trading in influence, abuse of functions, and illicit enrichment.[40] While these two conventions, unlike the ICESCR, certainly reach the corrupt conduct of private actors through implementation at the national level, they do not necessarily provide robust mechanisms by which victims may seek redress for the violation of their economic and social rights.[41]

3.2. The development of a standard for private sector complicity in corruption

Given the need for remedies for victims of corruption-based human rights violations, civil litigation against private actors involved in public sector corruption could represent another avenue in international anticorruption efforts. Some academics have argued that potential exists for the progressive development of a law of complicity that applies to private actors involved in the commission of what may be termed international torts by states.[42] The following accordingly explores the legal basis (or the lack thereof) for holding private actors accountable for their involvement in

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37 General Comment No. 14, *supra* note 22, para. 52.

38 OECD Anti-Bribery Convention, Art. 1(1).

39 Ibid., Art. 1(2).

40 UN Convention against Corruption, *supra* note 16, Chapter III.

41 But see Art. 57(3)(c) of the UN Convention, which concerns the return and disposal of assets, and mentions the possibility of compensating victims of acts of corruption (Art. 57(3)(c)).

42 A. Clapham, *The Human Rights Obligations of Non-State Actors* (2006), 263; J. Crawford, K. Parlett, V. Kuuya, and F. Paddeu, 'Corporate Complicity in Human Rights Violations: A Discussion Paper', presented at the Lauterpacht Centre for International Law, Conference on Corporate Complicity (December 2009), 78–9.

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public sector corruption. As will be explained below, this analysis proceeds on the basis that the most appropriate framework for evaluating private sector complicity in this context may be found in the law on state responsibility rather than in the field of international criminal law. After deriving a standard for private sector complicity from Article 16 of the International Law Commission's (ILC) Articles on State Responsibility for Internationally Wrongful Acts ('Articles'), this section concludes by applying it to the case of Riggs Bank. Because international human rights law does not impose obligations on non-state actors such as banks and multinational corporations, however, the use of Article 16 to evaluate the complicity of private actors is ultimately unsatisfactory, even though it comprises the most appropriate framework currently available. The concept of international civil responsibility for private actors such as corporations also raises questions regarding the mechanism by which such responsibility would be enforced, but this issue lies beyond the scope of this article.

3.2.1. The applicability of the law on state responsibility for internationally wrongful acts

Andrew Clapham has argued that the rules on state responsibility for aiding and assisting may be adapted to apply to corporations involved in conduct that constitutes 'international torts'.[43] According to Clapham, human rights violations that cannot be described as international crimes should instead be characterized as 'international torts' that give rise to 'international civil responsibility'.[44] He argues that Article 16 of the Articles on State Responsibility may be adapted to provide guidance regarding such 'international civil responsibility' for non-state actors.[45]

If we accept this dichotomy between international crimes and 'international torts', then the violations of economic and social rights that result from corrupt acts would not be equivalent to international crimes, such as terrorism, drug trafficking, human trafficking, or crimes against humanity. The economic and social harm occasioned by bribery, for example, does not involve widespread or systematic attacks on the civilian population, as do the crimes against humanity of torture and rape. Thus, it may be argued that international criminal law does not represent the appropriate framework for considering the economic and social harm caused by corruption.[46] Human rights violations stemming from corrupt acts may therefore be viewed as international torts that should give rise to international civil responsibility for both state and non-state actors.[47]

43 Clapham, ibid., at 264.

44 Ibid., at 261.

45 Ibid., at 263.

46 Despite the inapplicability of international criminal law to acts of corruption, it has been repeatedly argued, with no legal basis, that corruption amounts to a crime against humanity; see Kenya National Commission on Human Rights, Regional Conference on the Human Rights Dimension of Corruption, *Nairobi Declaration* (March 2006), paras. 2, 9, 27; Transparency International, 11th International Anti-Corruption Conference, The Seoul Findings (May 2003), at 1; and N. Udombana, 'The Third World and the Right to Development: Agenda for the Next Millennium' (2000) 22 *Human Rights Quarterly* 753, 784; see also N. Kofele-Kale, 'The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law', (2000) 34 *International Law* 149, at 166.

47 Clapham, *supra* note 42, at 263.

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It should be noted that, in identifying which violations of international law constitute international torts, Clapham oscillates, without explanation, between identifying international torts as violations of the Universal Declaration of Human Rights (UDHR), and as violations of customary international law.[48] This inconsistency is significant because not all of the principles contained in the UDHR constitute customary international law.[49] In particular, the economic and social rights set forth in Article 25 of the UDHR, which include the rights to food and health care, are not considered to be customary norms.[50] Moreover, the alternative approach to international torts, which defines them as violations of customary international law, would likely have the effect of emptying the category of international torts. The international human rights norms that actually qualify as customary international law generally comprise international criminal prohibitions (i.e., the prohibition against torture), and therefore would not be classified as international torts.[51] Consequently, this article adopts the broader approach to international torts that embraces the non-customary principles contained in the UDHR, upon whose meaning the ICESCR elaborates.

The following takes up Clapham's proposal regarding Article 16, although his distinction between international torts and international crimes is open to criticism, as international criminal responsibility for a given act does not necessarily preclude individual civil responsibility for the same conduct.[52] A single human rights violation could arguably be characterized as both an international crime and an international tort, and could give rise to both individual criminal and civil responsibility. Moreover, given that the distinction between torts and crimes does not exist at the level of state responsibility, perhaps it is inappropriate to make such a distinction when deriving a formula for the accountability of non-state actors from the Articles on State Responsibility.[53] A detailed examination of the viability or usefulness of the category of international torts, however, lies beyond the scope of this article, which instead focuses on the proposed standard of complicity.

48 Ibid., at 261–4.

49 See H. Steiner, P. Alston, and R. Goodman, *International Human Rights in Context: Law, Politics, Morals* (2007), 137.

50 See American Law Institute, *Restatement (Third), The Foreign Relations of the United States*, Vol. 2 (1987), para. 702. This section identifies the following as violations of human rights that achieved the status of customary law: (a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; or (g) a consistent pattern of gross violations of internationally recognized human rights.

51 Ibid.

52 See, e.g., Art. 14 of the 1984 Convention against Torture, 1465 UNTS 112, which concerns the right to compensation for torture, and the Commentary to Art. 58 of the Articles on the Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission, which suggests that developments could occur in the field of individual civil responsibility.

53 International law could, of course, evolve so as to impose civil liability on individuals and non-state actors, but with few exceptions (such as the Rome Statute's victim compensation scheme), international law does not currently do so.

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3.2.2. The development of a complicity standard based on Article 16

Article 16, which concerns aid or assistance in the commission of an internationally wrongful act, provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State.

The Commentary to Article 16 explains that the scope of responsibility for aid or assistance is limited in three ways:

> First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[54]

Article 16 thereby sets forth a strict rule of complicity under the secondary rules of international law, which requires not only actual knowledge, but also an element of intention or purpose.[55]

With respect to the first limitation, the Commentary further explains that a state that provides 'material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act'.[56] Thus, the aiding or assisting state bears no international responsibility if it is unaware of the circumstances in which the other state intends to use its aid or assistance.[57] Regarding the second limitation, the Commentary notes that the aid or assistance must be clearly linked to the subsequent wrongful conduct, although it does not have to have been essential to the performance of the internationally wrongful act.[58] The aid or assistance is 'sufficient if it contributed significantly to that act'.[59] Finally, the Commentary also clarifies that a state is responsible only for its own conduct in giving aid or assistance, not for the internationally wrongful act of the other state.[60] Therefore, 'in cases where the internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself'.[61]

The *Bosnia Genocide* case provides useful insight into how Article 16 may be adapted and applied to various situations. In the *Bosnia Genocide* case, the International

54 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), 149(3) (hereafter, 'ILC Draft Articles, Commentary').

55 Crawford et al., *supra* note 42, para. 81. It is possible, however, for a specific set of primary rules to set a different standard that does not require an element of intention or purpose.

56 ILC Draft Articles, Commentary, *supra* note 54, at 149, para. 4.

57 Ibid.

58 Ibid, at 149, para. 5.

59 Ibid.

60 Ibid., at 148, para. 1. By contrast, a state would bear responsibility for the internationally wrongful act under Art. 17, concerning directing and controlling another state in the commission of an internationally wrongful act, and under Art. 18, concerning coercing another state to commit an internationally wrongful act: Crawford et al., *supra* note 42, para. 85.

61 ILC Draft Articles, Commentary, *supra* note 54, at 148, para. 1.

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Court of Justice ('the Court') endorsed Article 16 as reflecting customary international law.[62] In this case, the Court considered whether acts that could be characterized as 'complicity in genocide' under Article III(e) of the Genocide Convention could be attributed to organs of the Respondent, Serbia, or to persons acting under its instructions or effective control.[63] The Court focused on the notion that 'complicity', in the sense of Article III(e), 'includes the provision of means to enable or facilitate the commission of the crime'.[64] The Court noted that:

> although 'complicity', as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the 'aid or assistance' furnished by one State for the commission of a wrongful act by another State.[65]

The Court found that Article 16 merited consideration, even though it was not directly applicable to the present case, which concerned the complicity of the Federal Republic of Yugoslavia (FRY) in the acts of individuals and/or groups rather than a complicit relationship between states.[66] The Court accordingly found that its determination of whether the FRY was responsible for complicity in genocide required an analysis of whether it had furnished 'aid or assistance' in the commission of the genocide at Srebrenica, according to the general law of international responsibility.[67] In undertaking this analysis, the Court emphasized that the aiding and assisting state must have knowledge, as, under Article 16(a):

> the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least the organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator.[68]

Ultimately, the Court found that this condition was not met in this case because it had not been established beyond any doubt that the authorities of the FRY had supplied aid and assistance with clear awareness that the genocide was about to take place or was under way.[69]

Article 16 could be progressively developed so as to apply not only to the complicity of a state in the conduct of non-state actors, but also to the complicity of non-state actors, such as corporations, in human rights violations committed by states. Thus, the application of Article 16 to non-state actors, by analogy, requires that the private actor:

62 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2003] ICJ Rep., para. 420 (hereafter, '*Bosnia Genocide Case*'); see also Crawford et al., *supra* note 42, para. 83.

63 *Bosnia Genocide Case*, ibid., para. 418.

64 Ibid., para. 419.

65 Ibid.

66 Ibid., para. 420.

67 Ibid.

68 Ibid., para. 421. The Court did not address the question of whether 'complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator', Crawford et al., *supra* note 42, at para. 84.

69 *Bosnia Genocide Case*, *supra* note 62, para. 422.

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(a) is aware of the circumstances making the activity of the assisted state a violation of international human rights law;
(b) gives assistance with a view to facilitating the commission of such a violation and actually contributes significantly to the violation; and
(c) the act would be internationally wrongful if the complicit entity committed the act itself.[70]

Both the second and third elements raise difficult issues regarding the application of Article 16 to non-state actors.

3.2.2.1. The requirement of purpose. The second requirement is potentially problematic because it introduces an element of purpose, in addition to the requirement of awareness in the first element. Thus, corporations must not only be aware of the relevant circumstances, but must also purposefully facilitate the commission of a human rights violation. This purpose element is similar to that found in the Rome Statute of the International Criminal Court, and therefore merits a brief discussion of international criminal legal standards, which may be useful, by way of analogy, for the development of a civil standard. Article 25 of the Rome Statute, which concerns modes of individual criminal liability, imposes liability on a person who '[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.[71] The Rome Statute thereby requires that individuals have in some way assisted the commission or attempted commission of a crime with intent, not just mere knowledge, of the circumstances.

Although several US federal courts, in Alien Tort Claims Act (ATCA) cases, have adopted a purpose standard that is in keeping with Article 25 of the Rome Statute, this development has been very controversial. The standard set forth in the *Khulumani* and *Talisman* decisions, while in line with Article 25, departs from the well-established jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda on aiding and abetting, which follows a knowledge standard.[72] The standard that the Court of Appeals of the Second Circuit adopted in *Khulumani*, and then applied again in *Talisman*, provides that a defendant may be held liable under international law for aiding and abetting when the defendant provides practical assistance to the principal *with the purpose of* facilitating the commission of a given crime.[73] By contrast, the jurisprudence of the ad hoc tribunals just requires that the accomplice knows that his acts assist the commission of a crime by the principal.[74]

The purpose standard introduced in these ATCA cases has generated controversy because it arguably sets the *mens rea* requirement at such a high level that it would

70 Clapham, *supra* note 42, at 266; Crawford et al., *supra* note 42, para. 107.

71 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force on 1 July 2002, Art. 25(3)(c).

72 *Khulumani v. Barclays et al.*, (2007) 504 F.3d, 2 October 2009, at 277 (hereafter, '*Khulumani*'); *Presbyterian Church of Sudan*, No. 07–0016-cv, Slip Op., at 41–2.

73 *Khulumani*, ibid., at 277.

74 See *Prosecutor v. Furundzija*, Judgement, Case No. IT-95–17/1-T, Trial Chamber, 10 December 1998, paras. 245–249.

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effectively bar litigation against allegedly complicit corporations under the ATCA.[75] This standard potentially enables corporations to escape liability by arguing that their intent was to increase profits, not to facilitate any crime.[76] In the context of private sector complicity, requiring private actors to give assistance for the purpose of facilitating wrongful conduct may similarly bar liability in nearly all cases. The application of both the purpose and knowledge requirements will be explored below with respect to the conduct of Riggs Bank.

3.2.2.2. The requirement that the act would be internationally wrongful if committed by the complicit entity itself. The third requirement provides that the act would be internationally wrongful if it were committed by the complicit entity itself, namely the private actor. The application of this element to private actors as opposed to states is highly problematic because it operates on the presumption that private actors actually have human rights obligations. As discussed above, however, banks and corporations are not the subject of binding legal obligations in any international legal field, including international human rights law.[77] Although the current state of the international legal field thereby poses a significant obstacle to the application of Article 16, Clapham nonetheless suggests that its adaptation is relatively straightforward, based on the notion that private actors *should* have an obligation not to violate fundamental human rights.[78]

According to this line of argumentation, even though corporations are not obligated under international law to respect human rights, increasing pressure has been exerted on corporations to conduct themselves in a manner that is consistent with respect for human rights.[79] The corporate social responsibility movement has played the driving role in this development, particularly the OECD Guidelines for Multinational Enterprises and the UN Global Compact. Such soft law mechanisms increasingly provide that corporations should respect the rights embodied in the UDHR.[80] Although the private sector is necessarily removed from governmental decisions about the allocation of public resources to social services, these soft law mechanisms nonetheless provide that the private sector should respect economic, social, and cultural rights as well as civil and political rights.

The OECD Guidelines for Multinational Enterprises seek to impose the clearest obligation on the private sector to respect human rights. The Guidelines provide that enterprises should '[c]ontribute to economic, social and environmental progress with a view to achieving sustainable development' and also 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'.[81] In somewhat less powerful language,

75 C. Keitner, 'Conceptualizing Complicity in Alien Tort Cases', (2008) 60 *Hastings Law Journal* 61; Crawford et al., *supra* note 42.
76 Keitner, ibid., at 87.
77 Crawford et al., *supra* note 42, para. 27.
78 Clapham, *supra* note 42, at 266.
79 Ibid., at 264–70 (arguing that 'international law already applies to corporations and is developing the scope of their obligations not to commit or assist in human rights abuses').
80 Ibid.; see also S. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111 *Yale Law Journal* 443.
81 OECD Guidelines for Multinational Enterprises, General Policies, paras. 1–2.

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the UN Global Compact also provides that, although some of the principles may not directly apply to businesses, their 'consistency with the declaration is important'.[82] The Compact calls on businesses 'to develop an awareness of human rights and to work within their sphere of influence to uphold these universal values, on the basis that responsibility falls to every individual in society'.[83] The phrase 'universal values' refers to those listed in the UDHR, including the rights to food, housing, medical care, and education.[84] Thus, although international law imposes no human rights obligations upon corporations and banks, Clapham suggests that the application of Article 16 to private sector entities may be premised on the fact that the international system increasingly recognizes that they nonetheless have some responsibility to respect human rights.

Despite the theoretical elegance of adapting Article 16 to the complicity of private actors in human rights violations committed by states, the analogy breaks down at this point because international human rights law does not bind banks and corporations. An essential part of the framework necessary for developing a standard of private sector complicity is missing, as if a section of a bridge were absent. International human rights law relates to the conduct of private actors only insofar as the state enacts municipal laws in keeping with its treaty obligations to protect human rights.[85] Moreover, it is difficult to conceive of how private actors could have the same obligations as states with regard to economic and social rights because decisions about the allocation of public resources, by their very nature, tend to lie with governments alone. In addition, soft law mechanisms may provide useful, albeit very general guidance to private actors, but they have little to no legal effect.[86] Thus, despite the indisputable impacts of private sector corruption on human rights, the current realities of international human rights law effectively stymie the development of a standard of complicity. The application of Article 16 to Riggs Bank's involvement with Equatorial Guinea brings these problems into greater relief.

4. Case study: Riggs Bank and Equatorial Guinea

4.1. Factual background

In Equatorial Guinea, the quality of life for most citizens has either stagnated or declined in recent years, despite the enormous wealth deriving from the country's natural resources, particularly oil.[87] Although Equatorial Guinea has experienced rapid economic growth since the development of its oil resources began in 1997,

82 United Nations Global Compact, Human Rights, available online at www.unglobalcompact.org/AbouttheGC/TheTENPrinciples/humanRights.html.

83 Ibid. The preamble of the UDHR provides that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms'. It may be argued that the phrase 'every organ of society' includes entities such as corporations and banks.

84 Ibid.

85 Crawford et al., *supra* note 42, para. 120.

86 Ibid., para. 121.

87 Open Society Justice Initiative, *Corruption and Its Consequences in Equatorial Guinea: A Briefing Paper* (2009), 3; see also A. Vines, Human Rights Watch, *Well Oiled: Oil and Human Rights in Equatorial Guinea* (2009), 46.

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revenues from natural resource extraction have not gone towards the provision of key social services.[88] In 2006, for example, the IMF noted that, since the discovery of oil, Equatorial Guinea's economic growth had averaged 37 per cent.[89] At the same time, the situation with respect to education and health care in Equatorial Guinea has 'either worsened or improved only slightly and not in keeping with corresponding advances in other countries'.[90] Net enrolment in primary education, for example, fell from 96.7 per cent in 1991 to 91.1 per cent in 2000 to 69.4 per cent in 2007.[91]

With respect to health care, between 1990 and 2007, the annual number of deaths of infants and children under five in Equatorial Guinea actually increased, and two health indicators (measles immunization rates and the incidence of tuberculosis) worsened.[92] The infant mortality rate rose from 103 per 1000 live births in 1990 to 124 per 1000 live births in 2007.[93] The mortality rate of children under five similarly rose from 170 in 1990 to 206 in 2007.[94] Furthermore, the proportion of one-year-old children being immunized against measles dropped from 88 per cent in 1990 to 82 per cent in 1998 to 51 per cent in 2007.[95] Lastly, the incidence of tuberculosis rose from 107.5 per 100 000 in 1990 to 255.9 in 2007, having reached a peak of 272.7 in 2004.[96] According to the World Health Organisation, however, only US$17 million per year (a fraction of Equatorial Guinea's yearly oil revenues) could provide essential medical care for the entire population of Equatorial Guinea.[97]

The disparity between Equatorial Guinea's oil wealth and its lack of health care and other social services may be explained in large part by an extensive system of corruption, which has been exacerbated by the involvement of private sector entities.[98] The financial services provided by the American Riggs Bank, for example, played an instrumental role in the theft of the country's oil revenues for many years. Equatorial Guinea first opened accounts at Riggs Bank in 1995 and, by 2003, the bank's relationship with Equatorial Guinea had become its single largest, with

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88 Vines, ibid., at 2.

89 International Monetary Fund, *Republic of Equatorial Guinea: Staff Report 2006, Article IV Consultation* (2006), 7, para. 1.

90 Vines, *supra* note 87, at 3.

91 Open Society Justice Initiative, *supra* note 87, at note 8; United Nations Millennium Development Goals Indicators, available online at http://mdgs.un.org/unsd/mdg/Data.aspx.

92 Vines, *supra* note 87, at 49.

93 UNICEF, *The State of the World's Children 2009: Maternal and Newborn Health* (2008), Table 1: Basic Indicators.

94 Ibid.

95 Ibid., Table 3: Health.

96 Open Society Justice Initiative, *supra* note 87, at note 8; United Nations Millennium Development Goals Indicators, available at http://mdgs.un.org/unsd/mdg/Data.aspx.

97 World Health Organization, *Investing in Health: A Summary of the Findings of the Commission on Macroeconomics and Health* (2003), 15; Department for International Development, *Working Together for Better Health* (2007), 23; Global Witness, *Undue Diligence: How Banks Do Business with Corrupt Regimes* (2009), 32; International Monetary Fund, *Republic of Equatorial Guinea: 2008 Article IV Consultation – Staff Report*, IMF Country Report No. 09/102, 24 (2009).

98 Vines, *supra* note 87, at 3; Open Society Justice Initiative, *supra* note 87, at 7; see also K. Silverstein, 'The Crude Politics of Trading Oil', *The Nation*, 6 December 2002; K. Silverstein, 'Oil Boom Enriches African Ruler', *Los Angeles Times*, 20 January 2003.

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balances and outstanding loans approaching US$700 million.[99] Riggs had opened over 60 additional accounts and certificates of deposit for the government of Equatorial Guinea, as well as senior government officials and their family members.[100] During this period, Equatorial Guinea became an important source of oil for the United States, as a number of American oil companies (including Amerada Hess, ChevronTexaco, ExxonMobil, and Marathon) made substantial investments in the oilfields off Equatorial Guinea's coast and in its methanol and liquefied natural gas plants.[101] As the above statistics indicate, the situation in Equatorial Guinea did not improve following the closure of the Riggs Bank accounts in 2004.

The following focuses on one of the many known examples of Riggs's failure to conduct due diligence with respect to the Equatoguinean accounts, despite indicators of foreign corruption.[102] From 2000 to 2003, a total of US$26,483,982.57 was transferred from the Oil Account of Equatorial Guinea at Riggs Bank to an account in the name of Kalunga Compact S.A. at Banco Santander, Madrid.[103] The funds in the Oil Account were from payments made by American oil companies, particularly ExxonMobil and Marathon Oil, for the right to exploit crude oil in Equatorial Guinea.[104] Riggs Bank permitted withdrawals from the Oil Account on the basis of two signatures: one from the president of Equatorial Guinea and the other from either his son (the minister of mines) or his nephew (the secretary of state for treasury and budget).[105] As with many of the Riggs accounts, President Teodoro Obiang Nguema Mbasogo and his close relatives had complete discretion over the use of these funds.[106] Riggs allowed the wire transfers to Kalunga, which is owned in whole or in part by President Obiang, despite the fact that the company was unknown to the bank, and had accounts in jurisdictions with bank secrecy laws.[107] Based on circumstantial evidence, it appears that these embezzled funds were then laundered, at least in part, through the acquisition of various properties in Spain by President Obiang, his family members, and his inner circle.[108]

In 2003, the US Senate's Permanent Subcommittee on Investigations initiated an investigation to assess the enforcement and effectiveness of key US anti-money laundering provisions, with Riggs Bank as a case study.[109] In July 2004, the Subcommittee found that Riggs Bank had:

99 United States Senate, Permanent Subcommittee on Investigations, Committee on Government Affairs, *Money-Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act, Case Study Involving Riggs Bank*, 15 July 2004, 38 (hereafter, 'US Senate Report').

100 Ibid., at 38, 64.

101 Ibid., at 40.

102 For further examples, see ibid., at 12–98.

103 Asociación por Derechos Humanos de España, *Criminal Complaint Submitted to Central Pre-Trial Investigations Court*, Instructing Judge Baltasar Garzón, 22 September 2008, at 17 (hereafter, 'APDHE Criminal Complaint'); US Senate Report, *supra* note 99, at 55.

104 APDHE Criminal Complaint, ibid., at 12.

105 US Senate Report, *supra* note 99, at 3.

106 Vines, *supra* note 87, at 21.

107 Ibid., at 23; APDHE Criminal Complaint, *supra* note 103, at 13.

108 Ibid., at 17.

109 US Senate Report, *supra* note 99, at 1, 98.

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> serviced the E.G. accounts with little or no attention to the bank's anti-money laundering obligations, turned a blind eye to evidence suggesting the bank was handling the proceeds of foreign corruption, and allowed numerous suspicious transactions to take place without notifying law enforcement.[110]

Based on an internal Riggs memorandum, the Senate Subcommittee also found that Riggs was 'clearly' and 'fully aware' of the corruption and human rights abuses associated with Equatorial Guinea, yet still failed to exercise enhanced scrutiny over the account.[111] In addition, Riggs failed to designate the accounts as high-risk until October 2003.[112] By mid 2004 (when the Senate released its report), Riggs Bank had finally closed these accounts following a meeting at which President Obiang had refused to provide additional information about certain companies (including Kalunga), which had received over US$35 million in wire transfers from the Oil Account.[113]

The series of wire transfers described above formed the basis of a 2008 citizen complaint brought by the Spanish NGO, Asociación Por Derechos Humanos de España (APDHE), against a number of Equatoguinean officials and their family members.[114] The Complaint, which APDHE filed in Spain with Judge Baltasar Garzón, alleges that, through such money laundering, the economic and social rights of the Equatoguinean population 'are subject to continuous and systematic violation', as the population is deprived of the minimum standards necessary for survival, health, and education.[115] According to the complaint, these violations 'undoubtedly [have] a direct impact on the dignity of the citizens, whose most fundamental rights are deliberately curtailed'.[116] It may be noted that the fact that APDHE brought this complaint on behalf of the entire Equatoguinean population reflects the impossibility of more precisely identifying the victims of this system of corruption.

By contrast to the binding and non-binding instruments discussed above, the Complaint brought by APDHE draws a notably stark connection between private sector corruption and human rights violations:

> [M]ultinational corporations are clearly involved in Equatorial Guinea's corrupt practices. The corporations are responsible for the repression [caused by it] because they are inducing it, knowing and accepting that this is the only way in which they can preserve their abusive and extremely lucrative status quo. Therefore, the corporations must also be deemed responsible for the deplorable living conditions of Equatorial Guinea's population. Equatorial Guineans are dying, and their death is the foreseeable and necessary consequence of the looting of the country's wealth.[117]

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110 Ibid., at 38.
111 Ibid., at 46–7.
112 Ibid., at 47.
113 Ibid., at 67.
114 APDHE Criminal Complaint, *supra* note 103, at 1.
115 Ibid., at 3.
116 Ibid.
117 Ibid., at 9.

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The persuasiveness of this claim will be evaluated in the following section, which applies to Riggs Bank the standard for evaluating corporate complicity in human rights violations.

4.2. The application of the complicity standard to Riggs Bank

The first element of Article 16, as adapted to non-state actors, requires that Riggs Bank was aware of the circumstances that made the activities of Equatorial Guinea a violation of international human rights law. The initial question is whether the government's acts of corruption violated human rights law, while the second question is whether Riggs Bank was aware of Equatorial Guinea's intention to divert public revenues in violation of its obligation to fulfil certain economic and social rights.

First, the facts outlined above allow a strong case to be made that the Equatoguinean government violated the economic and social rights of its people through the embezzlement or misallocation of public revenues derived from oil extraction. The government violated its obligation to fulfil certain economic and social rights, such as health care and education, by diverting public revenues and thereby failing to take steps to progressively realize these rights. The embezzlement of public revenues by Equatoguinean officials constitutes a deliberately retrogressive measure that inhibits progressive realization and involves a patent failure to make maximal use of the state's available resources.[118] The government's failure to achieve any progressive realization is particularly pronounced in light of the financial windfall experienced by Equatorial Guinea following the discovery of oil off its coast in the mid 1990s. This dramatic surge in public revenues vastly increased the resources available to the state, arguably obliging the government to allocate a portion of the revenues for the improvement of social services such as health care and education. The fact that certain social indicators either remained the same or worsened between 1990 and 2007 evidences the government's failure to fulfil its obligations.[119]

Second, it is considerably more difficult to argue that Riggs Bank was aware of the circumstances that made the corruption of the Equatoguinean government a violation of international human rights law. According to the ICJ's interpretation of this element in the *Bosnia Genocide* case, Riggs's awareness would have to consist of actual knowledge of the government's intent to embezzle public revenues, to the detriment of the provision of basic services such as health care.[120] Based on the available evidence, however, the most that can be said is that, given Riggs's awareness that the funds in the Oil Account represented public oil revenues, its failure to adequately monitor this account amounted to an assumption of the risk that its financial services would be used to divert the funds away from public uses. While Riggs Bank was aware of the risk of corruption associated with the Equatoguinean bank accounts, it remains unclear whether it possessed actual knowledge of the government's intent to embezzle public revenues through wire transfers to foreign

118 See subsection 2.2, *supra*.
119 Vines, *supra* note 87, at 49.
120 *Bosnia Genocide Case*, *supra* note 62, para. 421.

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shell corporations.[121] The US Senate Subcommittee merely determined that Riggs failed to exercise enhanced scrutiny over the Equatoguinean accounts, despite the fact that an internal memorandum indicated that it was 'clearly' and 'fully aware' of corrupt management of the oil sector and of the human rights abuses associated with the government of Equatorial Guinea.[122] Thus, Riggs arguably had only constructive knowledge that embezzlement of public revenues held in its bank accounts was likely to occur.

Furthermore, even if Riggs did possess such actual knowledge, it may be argued that the bank did not provide its financial services with a clear awareness that violations of economic and social rights would occur as a result of the embezzlement of public oil revenues. References in an internal memorandum to the involvement of the World Bank and the IMF in Equatorial Guinea suggest that Riggs had at least a general awareness of the population's level of poverty and lack of basic services.[123] Yet, further evidence would be necessary to determine Riggs's knowledge of the impact that embezzlement of public revenues would have on the provision of such services. It is unclear that Riggs was aware of the link between embezzlement and the provision of social services in Equatorial Guinea.

Although it is difficult to prove that Riggs had the requisite awareness of the circumstances under Article 16, this standard may not represent an impossibly high threshold in other cases. It might be easier to prove, for example, that some of the multinational corporations involved in the Iraq Oil-for-Food Programme may have had actual knowledge of the Iraqi government's intent to divert oil revenues away from the provision of food and other humanitarian goods.[124] It could potentially be proven that many companies that provided humanitarian goods most likely knew that the Iraqi government's kickback scheme was for the purpose of redirecting funds in the UN escrow account away from humanitarian purposes, contrary to the design of the Programme.

The second requirement under Article 16 is that Riggs Bank gave assistance to the government of Equatorial Guinea with a view to facilitating the commission of its violation of economic and social rights, and actually contributed significantly to the violations. While a strong argument may be made that Riggs Bank did contribute significantly to the violation of the right to health care by facilitating the embezzlement of public revenues by the government, it is much more difficult to argue that the Bank provided its financial services with a view towards facilitating this violation. Riggs Bank's unquestioning provision of financial services to Equatoguinean officials undoubtedly facilitated the government's diversion of government funds from public to private uses. Although the Bank had no role in the government's decisions not to allocate public revenues towards social services such as health care and education, the bank did enable the government's diversion of funds. Thus, a

121 US Senate Report, *supra* note 99, at 47.

122 Ibid., at 46–7.

123 Ibid.

124 See, generally, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Manipulation of the Oil-for-Food Programme by the Iraqi Regime*, 27 October 2005; J. Meyer, M. Califano, and P. Volcker, *Good Intentions Corrupted: The Oil-for-Food Scandal and the Threat to the UN* (2006).

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clear link exists between the government's failure to provide social services and the bank's provision of financial services. As noted in the ILC Commentary to Article 16, however, it bears mention that Riggs's liability would extend only so far as its own conduct caused or contributed to the internationally wrongful act.[125]

It is more difficult to argue that Riggs Bank provided financial services with a view towards facilitating the government's violation of the right to health care through the diversion of public resources. While Riggs Bank was negligent, if not reckless, in its failure to comply with US anti-money laundering regulations, little evidence suggests that Riggs's non-compliance was for the purpose of facilitating violations of human rights through the diversion of public revenues away from the Equatoguinean people.[126] Moreover, it is unlikely that many banks or multinational corporations would share the intent of state actors in this manner. These types of private actors generally engage in acts of corruption for the purpose of retaining or obtaining business, not to reallocate public revenues. The purpose element of Article 16 is therefore highly problematic because it establishes a threshold that few, if any, cases are likely to meet. If the purpose element were to be omitted from the formulation of complicity adapted from Article 16, then the standard would be more workable with respect to private actors.

The final requirement under Article 16 is that it would have been internationally wrongful if Riggs itself had violated the right to health care of the Equatoguinean people through the diversion of public revenues. As discussed above, Clapham premises the application of this requirement of private actors on the notion that they *should* conduct themselves in a manner consistent with respect for the human rights of those affected by their activities, although international human rights law imposes no such obligation on non-state actors. If we accept this premise, then it may be argued that Riggs would have failed to respect the economic and social rights of the Equatoguinean people if the bank itself had embezzled oil revenues that were allocated for the provision of social services such as health care.[127] As previously argued, however, this premise is unacceptable because Clapham's legal concept of international civil responsibility cannot be based on how private actors should conduct themselves. In addition, private actors do not actually share decisions with governments about the allocation of public resources.

The above reveals that the application of Article 16 to Riggs Bank is not seamless, and that the bank could escape liability under its provisions, despite the harmful consequences of its conduct. First, more evidence would be necessary to determine whether Riggs had the requisite awareness of the circumstances that made the corrupt acts of the Equatoguinean government a violation of the right to health care.

125 Crawford, *supra* note 54, at 148.

126 It should be noted, however, that the account manager of the Equatoguinean accounts, among other misconduct, transferred US$1 million in Equatoguinean oil revenues from the E.G. Oil account at Riggs to an account at another bank that had been opened in the name of an offshore corporation controlled by the account manager's wife. On this basis, it could be argued that the Riggs account manager did share the intent of the government to embezzle funds for private use; see US Senate Report, *supra* note 99, at 4, 38, 62.

127 While such a scenario seems implausible, in this case, the Riggs Bank account manager of the Equatoguinean accounts actually did steal funds from the Oil Account; see ibid., at 4, 54–6.

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The available information, however, suggests that Riggs had constructive knowledge of the risks involved in doing business with Equatorial Guinea, although perhaps not actual knowledge that the government was embezzling public revenues in violation of economic and social rights. Second, Riggs does not appear to have provided its financial services with a view to facilitating such human rights violations. In light of the realities of how the private sector interacts with the public sector, this purpose element should be omitted if Article 16 is to have any applicability in this context. Finally, the adaptation of Article 16 is flawed because the requirement that private actors should, rather than must, respect human rights forms an unsatisfactory basis for international civil liability. Thus, it seems that international law is not yet capable of capturing private sector complicity in human rights violations such as these.

5. Whether international human rights law provides a useful framework for dealing with private sector corruption

In light of the above difficulties in formulating a standard of complicity, it may be argued that the human rights framework has been overextended to cover the issue of corruption. First, the liberal use of human rights rhetoric in anticorruption literature may actually dilute the meaning of human rights norms. Anticorruption organizations have often referred to the link between corruption and human rights without clearly and persuasively articulating the legal basis for this connection.[128] Through loose invocations of human rights norms, the anticorruption movement has adopted the power of human rights rhetoric, without the legal precision that should accompany its usage.[129] Such casual adoption of human rights language may reveal attempts to heighten the importance of, or draw greater attention to, the anticorruption cause. This type of co-option may also, however, risk weakening the normative value of human rights law, particularly economic and social rights, which are typically more difficult to define and enforce than civil and political rights.

Second, even when the link between private sector corruption and human rights violations has been fully articulated, the relationship between the two may be so attenuated that the exercise of drawing this connection lacks practical utility. While private sector corruption does undoubtedly have a negative impact on economic and social rights, both tracing the causal link and identifying the victims may be prohibitively difficult. Many instances of private sector corruption may be incapable of any sort of adjudication because the link between the corrupt act, such as the

128 One commentator has observed that Transparency International, which is self-consciously modelled after Amnesty International, 'has tried explicitly to ride the human rights band wagon'; see B. Rajagopal, 'Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship', (1999) 14 Conn. JIL 496. Yet, Transparency International has not always articulated a clear linkage between human rights and corruption; see, e.g., Transparency International, *Human Rights and Corruption*, Working Paper # 05/2008 (2008). In addition, Transparency International's basic information about why corruption matters provides only an anecdotal example: 'Human rights are denied where corruption is rife, because a fair trial comes with a hefty price tag where courts are corrupted'; see www.transparency.org/about_us.

129 See M. wa Mutua, 'The Ideology of Human Rights', (1995–96) 36 Virg. JIL 589, at 590; see also D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2002) 15 HHRJ 101, at 120.

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bribery of a foreign public official, and its impact on economic and social rights may be very difficult to delineate. Additionally, the task of demonstrating that a corporation has assisted a state's diversion of public resources away from social services may pose serious evidentiary issues, involving, among other things, the need for information about bank transactions and state budgetary matters.

Third, it may be argued that private sector involvement in public sector corruption remains beyond the scope of the state-centred international human rights system, despite the linkages that exist between the private sector, corruption, and human rights violations. Given that international human rights law does not impose any obligations directly upon the private sector, perhaps this is not the best framework for assessing and dealing with the implications of private sector corruption. Although the corporate social responsibility movement argues quite persuasively that international human rights obligations *should* apply to corporations, banks, etc., only the hortatory statements found in soft law mechanisms apply directly to private actors at this time. Thus, human rights law may not be an effective way to reach the conduct of non-state actors, such as banks and multinational corporations. As discussed above, this problem manifests itself in the unsatisfactory application to private actors of the third element of Article 16, which requires that the act would be internationally wrongful if the complicit entity committed the act itself. In light of these difficulties, a focus on corruption as a human rights issue could be perceived as drawing attention away from more technical and effective approaches to corruption, even though they lack the powerful rhetoric of the human rights system.[130]

5.1. Specialized legal tools as an alternative to human rights law

Specialized legal fields, such as those concerning revenue transparency, money laundering, and the bribery of foreign officials, may represent more powerful approaches to the problem of private sector corruption.

5.1.1. Revenue transparency

Revenue transparency has the potential to allow the citizens of resource-rich developing countries to hold both private actors and their governments accountable for the wealth generated from natural resource extraction. Over the last eight years, several NGOs have been founded for the express purpose of promoting revenue transparency in the extractive industries, including the Extractive Industries Transparency Initiative (EITI), Publish What You Pay (PWYP), and the Revenue Watch Institute.[131] While all of these organizations are devoted to dealing with the causes and effects of corruption, none of them employs human rights language in doing

130 Kennedy, ibid., at 108 (arguing that '[a]s a dominant and fashionable vocabulary for thinking about emancipation, human rights crowds out other ways of understanding harm and recompense').

131 Publish What You Pay was founded in 2002 by a number of NGOs in response to Global Witness's report, *A Crude Awakening*, about the oil and banking sectors' roles in Angola's conflict: see www.publishwhatyoupay.org/en/about/faqs. The Extractive Industries Transparency Initiative was launched in 2003: see http://eitransparency.org/eiti/history. The Revenue Watch Institute was first launched in 2002 as a programme of the Open Society Institute, and it became an independent organization in 2006: see www.revenuewatch.org/about-rwi/index.php. There has also been recent discussion of the need for greater transparency with respect to contracts between companies in the extractive industries and host

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so.[132] PWYP defines itself as 'a global civil society coalition that campaigns for transparency in the payment, receipt and management of revenues from the oil, gas and mining industries'.[133] PWYP emphasizes its role in empowering members of civil society in developing countries to hold their governments accountable for the management of natural resource revenues.[134] According to PWYP, while '[m]ining, gas, and oil companies cannot control how governments spend taxes, royalties and fees . . . they do have a responsibility to disclose the payments they make so citizens can hold their governments accountable'.[135] Moreover, '[c]ompanies that fail to do so are complicit in the disempowerment of the people of the countries to which the resources belong'.[136] In light of the current absence of any sort of international legal norm regarding transparency, the words 'responsibility' and 'complicit' appear to have an ethical rather than legal meaning, much like the principles set forth in the UN Global Compact.

PWYP essentially supports the work of EITI, which is a global standard that establishes a 'methodology for monitoring and reconciling company payments and government revenues at the country level'.[137] The EITI Principles recognize that, although 'the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction', such wealth can create negative economic and social impacts if not managed properly.[138] The EITI process works towards this goal in part through the regular publication of payments by oil, gas, and mining companies to governments, as well as the revenues received by such companies.[139] Efforts to improve revenue transparency are, however, fairly recent, and do not yet represent widespread or robust ways in which to prevent corruption (particularly in light of the fact that there are so far only five EITI-compliant countries: Azerbaijan, Ghana, Liberia, Mongolia, and Timor-Leste).[140]

5.1.2. Criminal sanctions for money laundering and bribery

Private actors that engage in acts of corruption may also face a range of criminal sanctions under anti-money laundering and anti-bribery laws.[141] Anti-money laundering laws can play a key role in preventing stolen money from being lodged outside the host state, as illustrated in the negative example of the due diligence failures of Riggs Bank.[142] The UN Convention against Corruption now requires member states

governments: see P. Rosenblum and S. Maples, Revenue Watch Institute, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (2009).

132 By contrast, Transparency International, which was founded in 1993, does use human rights language, as noted in note 128, *supra*; see, e.g., www.transparency.org/news_room/faq/faq_ti.

133 Publish What You Pay, FAQs, available online at www.publishwhatyoupay.org/en/about/faqs.

134 Ibid.

135 Publish What You Pay, Mission, available at online www.publishwhatyoupay.org/en/mission.

136 Ibid.

137 EITI Fact Sheet, 1 (26 November 2009).

138 EITI, The EITI Principles and Criteria, available at online http://eitransparency.org/eiti/principles.

139 Ibid.

140 EITI, EITI Countries, available online at http://eiti.org/implementingcountries.

141 See Tamm, Lucky, and Humphreys, *supra* note 2, at 19–40.

142 Ibid., at 31.

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to criminalize the laundering of the proceeds of a crime.[143] In addition, the Financial Action Task Force, an inter-governmental body that was created in 1989, works to bring about legislative and regulatory reform in this area.[144]

Anti-bribery laws, both in the 'home' country of the private actor and in the 'host' country of operation, have also begun to play a role in anticorruption efforts over the last decade.[145] Anti-bribery laws have been incorporated into domestic laws through the implementation of international conventions, such as the OECD Anti-Bribery Convention and the UN Convention against Corruption, as well as a series of regional conventions.[146] Criminal prosecutions against corporations that have allegedly bribed foreign officials have been most robust under the US Foreign Corrupt Practices Act, which dates back to 1977 and formed the model for the OECD Anti-Bribery Convention.[147] The humanitarian kickback scheme associated with the Iraq Oil-for-Food Programme, for example, has generated a significant number of criminal prosecutions in the United States under the FCPA against major corporations.[148] It should be noted, however, that, while the enforcement of such anti-bribery laws may play an important role in deterring private sector corruption, the large criminal fines generated by these criminal prosecutions do nothing to provide redress for those impacted by corruption in the countries of operation.

6. Conclusion

Despite arguments to the contrary, Article 16 does not provide a satisfactory basis for evaluating when the assistance provided to states by private actors should result in liability. Although Article 16 may represent the most appropriate available framework for analysing private sector involvement in public sector corruption, it is fundamentally inadequate. Article 16 does not apply seamlessly to private actors, and room for debate exists on the inclusion of a purpose requirement. Due to the state-centred nature of the international human rights system, Article 16 ultimately does not serve as an effective means for evaluating the considerable impact that banks and multinational corporations can have on the realization of economic and social rights.

Thus, although international human rights law importantly allows for a focus on the harm caused to victims by natural resource spoliation, it leaves us with no means for enforcement when private actors are concerned. The difficulties involved in the application of Article 16 to Riggs Bank point to general problems with efforts

143 UN Convention against Corruption, *supra* note 16, Art. 23.
144 Financial Action Task Force, available online at www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html.
145 Tamm, Lucky, and Humphreys, *supra* note 2, at 6.
146 See, e.g., 1996 Inter-American Convention against Corruption, entered into force on 3 June 1997; 2003 African Union Convention on Preventing and Combating Corruption, entered into force on 4 August 2006; and the Council of Europe's 1999 Criminal and Civil Law Conventions on Corruption, (1999) ETS No. 173.
147 15 USC 78dd-1 ff.; see also Tamm, Lucky, and Humphreys, *supra* note 2, at 20; P. Urofsky and D. Newcomb, Shearman & Sterling, LLP, *Recent Trends and Patterns in FCPA Enforcement* (1 October 2009).
148 Both the Department of Justice and the Securities and Exchange Commission have prosecuted, among others, Novo Nordisk A/S, Siemens AG, Fiat S.p.A., AB Volvo, Flowserve Corp, Akzo Nobel, N.V., Chevron Corp., and Ingersoll-Rand Co. Ltd: see Urofsky and Newcomb, ibid.

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to impose human rights obligations on non-state actors through the development of a complicity standard. A focus by commentators and NGOs on private sector complicity may ultimately detract from efforts to develop and implement less obvious but possibly more effective approaches to human rights violations that involve banks and corporations. Alien Tort Claims Act litigation against corporations has, for example, arguably created a sideshow that detracts from the legal community's efforts to deter such conduct in the first place.

Other legal approaches to the issue of private sector corruption may be of considerable utility, although they tend to offer little to the victims of violations of economic and social rights. The imposition of criminal sanctions against banks and multinational corporations under anti-money laundering and anti-bribery laws has the potential to prevent or deter future misconduct, although it does nothing to remedy the lack of basic social services that results from large-scale, systemic embezzlement of public revenues. Revenue transparency is also preventative, in that it allows civil society to pressure both state and non-state actors into more accountable behaviour. This approach to corruption, however, is still in the development stage, and does not allow for the recovery of stolen revenues. A human rights approach to corruption has the potential to form a needed complement to the existing mechanisms for dealing with the persistent phenomenon of natural resource spoliation but, at this moment, the enforcement of human rights norms through civil liability for private sector complicity remains out of reach.

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