Chapter 9 – Who should regulate transnational corruption?*

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“Well-ordered peoples have a duty to assist burdened societies.”

John Rawls, *The Law of Peoples*

“A State defines itself as a sovereign through the structure of its government, and the character of those who exercise government authority… That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents.”

Chief Justice John Roberts, Supreme Court of the United States, *McDonnell v. United States*

Public sector corruption often touches multiple jurisdictions. The birth of modern transnational anti-corruption law was marked by high-profile proceedings against Siemens and Sani Abacha. Both cases were notable for their geographic scope and complexity. Siemens paid, or is alleged to have paid, bribes in 26 of the 190 countries in which it did business, leading to investigations by 23 countries and 4 international organizations. Efforts to recover the billions of dollars stolen by Abacha prompted at least 13 separate proceedings in 8 different countries. A scan of recent enforcement actions reveals many other lesser-known cases in which bribepayers or money launderers have worked with corrupt officials in foreign countries. It is also significant that those officials, or their families, are often citizens or residents of, or frequent visitors to, foreign countries. Perhaps just as importantly, the adverse effects of the corrupt transactions documented in these cases frequently are felt across borders: foreign competitors can be prejudiced when officials allocate favors to bribepayers; officials who invest proceeds of corruption overseas can seize control of foreign enterprises and drive up the prices of foreign assets; and, to the extent that corruption creates economic or political instability in a country, the resulting social, economic and political problems can spill over to neighboring countries in the region, or even the entire world.

The prevalence of corrupt transactions with geographically complex facts inevitably raises the question: Who should regulate transnational corruption? Or to be more precise, when is regulation of foreign corrupt practices either permitted or required, not just legally, but

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morally? It seems intuitive that every country should try to regulate corruption of its own officials, but why should any country be permitted or required to regulate corruption of foreign public officials? And if they do regulate, are there any constraints on their decisions about which conduct to target or what sanctions to impose?

As we have seen in earlier chapters, the anti-impunity paradigm takes an expansive approach to the scope of transnational anti-corruption law. This expansiveness extends to questions about the geographic scope of anti-corruption law. In recent years, enforcement agencies in the U.S. and elsewhere have aggressively applied their anti-corruption laws to transactions with only minimal connections to their people or territory. For legal justifications, these agencies can point not just to their domestic legislation, but also international conventions such as the United Nations Convention against Corruption (the “UN Convention”). For moral justification they might point to national self-interest, but they can also point to an overriding obligation to protect people who will suffer grave harm if the corrupt officials in their governments are allowed to operate with impunity. In addition, the UN Convention arguably amounts to consent on the part of the people most likely to be aggrieved by aggressive enforcement actions.

The arguments that underpin this aspect of the anti-impunity paradigm are fundamentally sound – in easy cases. Not all cases are easy though. Regulation of transnational corruption requires many difficult decisions about matters such as which conduct to target and what sanctions to impose. Reasonable people can disagree about these issues. When these hard cases arise, it is difficult to justify a situation in which one country imposes its views about how to regulate on the people who will be most greatly affected by the decision, namely the inhabitants of the country governed by corrupt officials. The imperialistic approach to anti-corruption law was difficult to justify when Edmund Burke attempted to impeach Warren Hastings for corruption in India without calling a single witness from the subcontinent; it is even more difficult to justify in an age where equality has become the guiding rule. The fact that so many affected countries have signed the UN Convention does not dramatically alter this conclusion. A close examination of what was agreed to in the UN Convention suggests that it does not provide as much cover as proponents of the anti-impunity paradigm believe.

The Bonny Island affair

The rules that determine whether any given country can regulate a particular transaction typically refer to factors such as the country’s ties to the actors involved and where the relevant conduct takes place. Those rules frequently permit multiple countries to regulate. To illustrate, we can use the legal responses to the Bonny Island affair, a paradigmatic example of a corrupt transaction with geographically complex facts.
Bonny Island is an island in the Niger Delta region of Nigeria, the main source of oil and gas in the country. It is the location of, among other things, a large facility for piping natural gas from wellheads and converting it into liquefied natural gas ("LNG") so that it can be delivered to oceangoing tankers. The facility allows oil companies to sell gas associated with oil production that they would otherwise simply burn off, a wasteful and environmentally damaging practice. Bonny Island became infamous when U.S. enforcement agencies laid charges alleging that a consortium of multinational enterprises paid over $180 million in bribes to Nigerian public officials in order to obtain and retain contracts to build the LNG facility. The contracts were worth over $6 billion dollars. The losing bidder for the initial contract was a consortium led by Bechtel, a prominent U.S. firm, joined by firms from Japan, the United Arab Emirates, and Italy.

The Bonny Island facility was constructed by TSKJ, a joint venture between four companies with expertise in engineering, procurement, and construction ("EPC"):

- Technip S.A., incorporated in France and headquartered in Paris;
- Snamprogetti Netherlands B.V. ("Snamprogetti"), a Dutch corporation headquartered in Amsterdam that was a subsidiary of ENI, an Italian company headquartered in Milan;
- Kellogg Brown and Root, Inc. ("KBR"), incorporated in Delaware and headquartered in Houston, Texas, and a subsidiary of Halliburton Company, a multinational oil field services company that was also incorporated in Delaware and headquartered in Houston; and,
- JGC Corporation ("JGC"), a Japanese company headquartered in Yokohama.

Technip had securities traded on the New York Stock Exchange, as did the parent companies of Snamprogetti and KBR.

TSKJ operated through three special purpose companies registered in Madeira, each of which was jointly owned by the four joint venturers. TSKJ hired two agents to administer payments to the Nigerian officials: Jeffrey Tesler, a London-based lawyer and U.K. citizen, who operated through a Gibraltar corporation named Tri-Star; and Marubeni, a Japanese corporation. Tesler was responsible for payments to high-level Nigerian officials and a Nigerian political party, while Marubeni was responsible for dealings with lower level officials. Between 1994 and 2004, TSKJ paid over $130 million to Tri-Star, and $51 million to Marubeni.

The critical events in the implementation of the bribery scheme seemed to consist of meetings in London and Nigeria, as well as payments from TSKJ accounts in Amsterdam to accounts controlled by Tesler and Marubeni in Switzerland, Monaco and Japan respectively. U.S. prosecutors documented only a handful of instances in which the misconduct touched the United States: the payments to Tesler were transferred from the Netherlands to Switzerland and Monaco by way of correspondent bank accounts in New York; a couple of vaguely incriminating
Faxes were sent to Houston by Tesler and Marubeni; and a more incriminating email from KBR to Tesler was sent through Houston.¹

There is little conclusive publicly available information about who received the payments from Tesler and Marubeni or what they did with the funds. Media reports suggest that the recipients included three successive heads of state; a Vice President; and a Minister of Petroleum, as well as various executives in the state-owned oil company.²

The Bonny Island affair came to light in 2003 when a French investigation into unrelated misconduct by Elf-Aquitaine revealed that Technip had paid bribes in several countries, including Nigeria.³ The information was turned over to the U.S. enforcement agencies, which pursued the case vigorously. Between 2009 and 2012, all of the companies that participated in the joint venture, as well as Marubeni, were sanctioned under the Foreign Corrupt Practices Act of 1977 (“FCPA”) in proceedings initiated by both the U.S. Department of Justice and the Securities and Exchange Commission.⁴ Jack Stanley, CEO of KBR and a U.S. national, was sentenced to 30 months in prison. Tesler and Wojciech Chodan, an executive in KBR’s U.K. subsidiary (who was also a U.K. national), were extradited from the U.K. to the U.S. and subsequently pled guilty before a U.S. court. Tesler forfeited $148,964,568 and received a sentence of 21 months in prison. Chodan forfeited about $725,000 and received a fine of $20,000 plus one year’s probation. In total, the corporate and individual defendants were ordered to pay more than $1.7 billion to the U.S. Treasury.⁵

Other enforcement agencies followed the lead of the U.S. agencies. A U.K. subsidiary of KBR paid roughly $11 million to the U.K. government.⁶ A Paris court ordered two Technip executives to pay fines of €5,000 and €10,000 respectively.⁷ Late in 2010, Nigeria’s Economic and Financial Crimes Commission (“EFCC”) arrested several employees of the joint venture companies and reportedly laid charges against the current and former CEOs of KBR and its parent company Halliburton, including former U.S. Vice President Dick Cheney (the former

⁵ Id.
CEO of Halliburton). Shortly afterward, the joint venture companies reached a confidential settlement with the EFCC. In 2014, the joint venture companies paid penalties totaling $22.7 million to the African Development Bank.8

No individual Nigerian officials have been charged in connection with the Bonny Island affair, either in Nigeria or elsewhere. Since the scandal was uncovered, however, senior officials connected to the oil industry, including two former Petroleum Ministers and two former governors of states in the Niger Delta, have faced unrelated money laundering charges in Nigeria, the U.K., the U.S. and France.9

The scope of transnational anti-corruption laws: international law

Why did the U.S. legal system play the leading role in regulating a transaction that had so little connection to the U.S.? Why did U.S. law even apply? Did other laws apply besides those of the countries and international organizations that launched enforcement actions? The answers to these questions lie in the complex set of laws and practices that determine which laws apply to the regulation of transnational corrupt practices.

Every legal system has its own methods – sometimes only tacitly understood – for determining which transactions it governs. The conventional view is that national legal systems are bound to abide by overarching principles of international law – known technically as the law of “prescriptive jurisdiction” – in defining the scope of their laws. In other words, international law purports to set outer bounds on the potential scope of any given state’s laws. The applicable principles can be established by treaties, but in the absence of an applicable treaty, they are determined by reference to custom.

In the case of anti-corruption law, or at least its criminal aspects, most states are now bound by jurisdictional principles found in the UN Convention against Corruption. The vast majority of countries in the world have ratified the UN Convention and thereby endorsed its


remarkably expansive – but still non-exclusive – set of jurisdictional principles. The foremost of those principles is territoriality: the UN Convention requires parties to assert jurisdiction over corruption offences, including corruption relating to foreign public officials, on the basis of territoriality. In other words, states must regulate corrupt practices that occur in their territory. The UN Convention does not specify what sorts of territorial connections suffice but the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”), which has a similar territoriality provision, says that “[T]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.”

The UN Convention also permits, but does not require, parties to assert jurisdiction on the basis of the nationality, protective or passive personality principles. Nationality permits states to regulate conduct of their nationals, regardless of where it takes place. The protective principle permits a state to regulate conduct that threatens its “fundamental national interests.” Passive personality permits states to regulate offences committed “against” their nationals. As if these principles weren’t sufficient, in the case of money laundering the Convention permits states to assert jurisdiction over anyone who is complicit in misconduct that takes place in their territory, even when they act outside the state’s territory. Another section of the Convention permits states to assert jurisdiction over people present in their territory whom they fail to extradite, and requires them to assert jurisdiction when the person is one of their nationals. The UN Convention does not, however, go so far as to endorse the effects doctrine, which says that it is acceptable for a state to assert jurisdiction over any conduct that has effects within its territory. This controversial extension of the territoriality principle is sometimes used in antitrust law. The UN Convention also does not endorse the universality principle, which permits states to exercise jurisdiction over conduct with which it has no particular connection “in the interests of the international community” if the offense is of “universal concern.”

The upshot is that contemporary international law, as embodied in the UN Convention, would permit a large number of countries to apply their anti-corruption laws to some or all

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13 UNCAC, supra note 11, art. 42:2.
14 Id.
15 UNCAC, supra note 11, art. 42:2(c).
16 UNCAC, supra note 11, art. 42:3-4. The OECD Convention makes the exercise of jurisdiction obligatory for states that rely on the personality principle for other offences. OECD Convention, supra note 12, art. 4.2.
17 Cedric Ryngaert, Jurisdiction in International Law 82-84 (Oxford University Press, 2d ed. 2015).
aspects of the Bonny Island scheme. That list of countries would certainly include Nigeria, not only because Nigeria’s national interests were threatened, but also because it would be entitled to target Nigerian nationals (such as its public officials) or firms that paid bribes in Nigerian territory. The passive personality principle would add several more countries to the list of countries entitled to apply their laws, specifically, every country whose national firms were placed at a competitive disadvantage by the bribery scheme. At the top of this list would be the home countries of the members of the consortium that lost out to TSKJ in bidding for the initial EPC contract, namely, the U.S., the U.K., Japan, Italy and the United Arab Emirates. On this theory, each of those countries would be within its rights to apply its laws to the entire Bonny Island affair. Meanwhile, other principles endorsed by the UN Convention would permit additional countries to regulate specific components of the scheme. The nationality principle would allow each defendant to be regulated by its country of incorporation or citizenship. This would open the door for France, the U.S., the Netherlands, Japan, Portugal and Gibraltar to regulate the conduct of Technip, Snamprogetti, KBR, JGC, Marubeni, the TSKJ entities and Tri-Star respectively. The territoriality principle would permit each country in which misconduct took place to regulate the actors involved. Finally, in the case of money laundering, the territorial states would be entitled to apply their laws to everyone complicit in the transaction. So for instance, on this last basis Switzerland and Monaco could apply their money laundering laws to virtually everyone involved in the scheme on the grounds that they all conspired with Tesler to launder money in those two countries.

The scope of transnational anti-corruption law: national laws

In practice, countries do not apply their anti-bribery and anti-money laundering laws quite as broadly as permitted by international law. Most countries purport to rely only on territoriality and nationality. However, some countries, and in particular the U.S. and the U.K., have pushed the limits of those principles. In fact, one set of commentators describe the jurisdictional principles used in U.S. anti-corruption law as “potentially quasi-universal.”¹⁹

As far as bribery of foreign public officials is concerned, the key U.S. anti-bribery provisions are found in the FCPA. One of those provisions permits the U.S. to assert jurisdiction over foreign individuals and firms who act in furtherance of a bribe of a foreign public official while in U.S. territory.²⁰ The concept of an act in furtherance is defined broadly to include “use of the mails or any means or instrumentality of interstate commerce.” Consequently, an act as innocuous as mailing a letter or transferring funds through the U.S. payment system will qualify. Still, this part of the FCPA is basically consistent with the traditional principle of territorial jurisdiction since there is a strong argument to be made that it applies only to people who engage

¹⁹ Wouters et al, supra note 10, at 49.
in misconduct while they are physically present in U.S. territory.21 This provision was not at issue in the Bonny Island affair because the foreign participants in the scheme took pains to avoid traveling to the U.S.

The FCPA has two other anti-bribery provisions, and they both stretch the bounds of the territoriality principle. One of those provisions applies to “issuers” that are subject to certain reporting requirements under U.S. securities laws, basically, firms with securities traded on U.S. exchanges.22 The other anti-bribery provision applies to “domestic concerns,” defined as nationals or permanent residents of the U.S., as well as organizations that either have their principal place of business in the U.S. or are organized under U.S. law (national or subnational).23 Each of the anti-bribery provisions also extends to any “officer, director, agent, employee or stockholder acting on behalf of” the person who acts in U.S. territory, issuer or domestic concern as the case may be. There is more. Ordinarily, anyone who conspires to commit or aids or abets the commission of an offence, i.e. an accomplice, is liable in the same way as the person who actually commits or attempts to commit the offence. This suggests that the net of liability under the FCPA can be stretched to capture anyone who qualifies as an accomplice of an issuer, domestic concern or a related individual, although there is debate over whether a non-resident foreign national can be caught in this way.24

The Bonny Island affair involved all these categories of defendants: Technip was an issuer and KBR and its CEO were domestic concerns. Marubeni and Tesler were clearly both agents and accomplices of Technip and KBR, though the U.S. government charged Marubeni only as an accomplice.25 Finally, Snamprogetti and JGC signed agreements accepting the U.S. government’s argument that they could be liable under the FCPA solely as accomplices of KBR and the other defendants (a judge in a later unrelated case rejected this argument).26

The FCPA’s issuer and domestic concern provisions are both triggered only when an act in furtherance of a bribe “make[s] use of the mails or instrumentalities of interstate commerce.” However, this does not necessarily mean that the perpetrator must be aware of the connection to

24 United States v. Hoskins, 123 F.Supp.3d 316 (D. Conn. 2015) (holding that Congress did not intend non-resident foreign nationals to be liable under the FCPA solely as co-conspirators).
U.S. territory. Nor does it mean that the perpetrator has to be present in U.S. territory. Consequently, the U.S. government takes the position that these provisions extend to any person who pays a bribe by transferring money through a U.S. payment system, or who sends an email offering to pay a bribe through a U.S. server. This represents a significant extension of the territoriality principle, especially since most transfers denominated in U.S. dollars are made through a clearinghouse based in New York and many email communications are routed through U.S. servers. Without this aggressive application of the territoriality principle, the foreign Bonny Island defendants could have escaped liability under the FCPA.

Some of the applications of the FCPA to conduct with tenuous territorial connections to the U.S. can be justified under international law by pointing to the nationality principle, since many issuers, domestic concerns and related individuals qualify as U.S. nationals. In fact, the FCPA explicitly permits regulators to dispense with territorial links as the basis for jurisdiction over U.S. nationals (including both individual U.S. nationals and enterprises organized under U.S. law). The statute prohibits these “United States persons” – a subset of all issuers and domestic concerns – from acting in furtherance of a bribe outside the U.S., whether or not they make use of the means or instrumentalities of interstate commerce. This still leaves many cases in which the nationality principle is unavailing as a basis for jurisdiction and the territorial fig leaf of ‘use of the means or instrumentalities of interstate commerce’ seems critical. The most prominent examples are firms like Technip that are subject to U.S. securities laws and therefore qualify as issuers, but are neither organized under U.S. law nor based in the U.S. As Messrs. Tesler and Chodan discovered, foreign nationals who are officers, directors, employees, agents, or shareholders of issuers or domestic concerns can also be caught by the FCPA based on their use of instrumentalities. The same issue arises, though admittedly in a less troubling way, in relation to “domestic concerns” that are not U.S. nationals, a category which includes foreign nationals who are permanent residents of the U.S. and firms organized under foreign law whose principal place of business is in the U.S.

Although it didn’t come up in the Bonny Island cases, U.S. anti-money laundering law also relies on the territoriality and nationality principles; the relevant statutes only apply to extraterritorial conduct if it either occurs at least in part in the United States or is by U.S. nationals. Even limited in this way, the territorial scope of these laws is extremely broad.

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27 U.S. federal courts generally do not insist on proof that a defendant had notice of elements of an offense that are prescribed solely to confer jurisdiction on the federal government. See United States v. Feola, 420 U.S. 671, 677 (1975); United States v. Yermian, 468 U.S. 63, 68 (1984). Some courts examine whether a defendant knew or should have known that they were acting within U.S. jurisdiction in order to determine whether the Constitution’s due process requirement is satisfied. See, e.g., United States v. Davis, 905 F.2d 245, 249 (9th Cir. 1989).


29 Laundering of Monetary Instruments, 18 U.S.C. § 1956(f). The provision that applies to less serious forms of money laundering, 18 U.S.C. § 1957 also applies to permanent residents of the U.S. as well as “a sole proprietorship, partnership, company, or association composed principally of nationals or permanent resident aliens of the United States.” 18 U.S.C. § 1957(d).
Recall that money laundering involves two distinct acts, namely, a “predicate offense” and some sort of financial transaction or transfer designed to promote or conceal that offense. Under U.S. law, the predicate offense can be a violation of foreign rather than U.S. laws. This means that a corrupt transaction that takes place wholly outside the United States and involves no U.S. nationals will still be caught by U.S. law. All that is required is for some of the money involved in the scheme to pass through the U.S. So, for example, in principle, a Nigerian official who transferred the proceeds of a bribe from an account in Switzerland to a bank in Nigeria via a correspondent bank account in New York could be caught by U.S. money laundering law.

The core provisions of the U.K.’s anti-bribery legislation apply when any part of an offence takes place in the United Kingdom or is done by a U.K. national or resident – straightforward applications of the territoriality and nationality principles. The extraordinary feature of the U.K. Bribery Act is the famous Section 7, which makes it an offence for a corporation or partnership to fail to prevent bribery by people who provide services for it or on its behalf (including subsidiaries, as well as employees or agents). That provision applies even if no part of the violation takes place in the United Kingdom, so long as the organization carries on business, or part of a business, in the United Kingdom. This goes well beyond the principles of either nationality or territoriality.

At the same time, both international law and the domestic laws of many countries acknowledge the need to limit expansive assertions of jurisdiction. Under the heading “Protection of Sovereignty,” Article 4.1 of the UN Convention says:

“States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.”

As for domestic law, key limitations sometimes are set out expressly in legislation. Some countries carve out exceptions for conduct that is legal under local law or require double criminality in their anti-bribery laws. For example, the FCPA and the U.K. Bribery Act contain local law exceptions, and Belgium’s anti-bribery law only applies to extraterritorial conduct on the part of Belgian nationals that is criminal where it takes place.

Other jurisdictional limitations have been invented by the courts, particularly in the U.S. In the U.S. federal courts, the presumption against extraterritoriality holds that in the absence of explicit statutory language, U.S. statutes do not apply to extraterritorial conduct, meaning conduct with only tenuous connections to U.S. territory. So for example, the presumption limits...
the extent to which general purpose fraud statutes can be applied to foreign corrupt practices.\textsuperscript{33} In 2010, the U.S. Supreme Court handed down a landmark decision invoking the presumption against extraterritoriality to limit the scope of U.S. securities legislation, and since that time the presumption has been applied with renewed vigor.\textsuperscript{34} For instance, it appears that the presumption prevents private actors from bringing a civil claim under the RICO statute – e.g. because the defendant’s bribery caused competitive harm or their money laundering facilitated embezzlement – if the injury was suffered outside of the United States.\textsuperscript{35} The express provisions of the FCPA, such as the ones that make U.S. persons liable for bribery anywhere in the world, are sufficiently clear to rebut the presumption against extraterritoriality. The presumption could, however, be used to resist efforts to apply the FCPA to non-resident foreign nationals who act as accomplices of people or firms named expressly in the statute.\textsuperscript{36}

The U.S. Constitution commands that no person be deprived of life, liberty or property “without due process of law.”\textsuperscript{37} U.S. courts interpret this requirement to mean that in any case brought before them under U.S. law, two conditions have to be satisfied: a) the defendant must have sufficient contacts with the United States (or the relevant U.S. state) and b) it is fair and reasonable for the court to hear the case. This test gives the courts broad scope to consider factors such as whether the defendant had fair notice that they would be subject to U.S. law, the burden that the hearing will impose on the defendant or witnesses, and the interests of the U.S. and other states.\textsuperscript{38} Like the presumption against extraterritoriality, the due process requirement can be used to limit the application of U.S. anti-corruption law, especially to non-resident foreign nationals.\textsuperscript{39} Unlike the presumption, the due process requirement overrides express statutory language.

\textsuperscript{33} See European Community v. RJR Nabisco, 764 F.3d 129, 140 (2d Cir. 2014), rev’d, 136 S.Ct. 2090 (2016) (mail and wire fraud statutes do not rebut the presumption against extraterritoriality). A court can also arrive at this conclusion by deploying other principles of statutory interpretation that rely on the same policy considerations as the presumption against extraterritoriality. For instance, in United States v. Giffen, 326 F.Supp.2d 497 (S.D.N.Y. 2004), the court cited the void-for-vagueness doctrine and the principle of comity as grounds for concluding that bribery of a Kazakh public official did not violate the portion of the federal fraud statute that makes it an offence to participate in a scheme to deprive a person of another person’s honest services.

\textsuperscript{34} Morrison v. National Australia Bank, 561 U.S. 247 (2010).

\textsuperscript{35} RJR Nabisco, Inc. v. European Communities, 136 S.Ct. 2090 (2016).

\textsuperscript{36} See United States v. Hoskins, supra note 24.

\textsuperscript{37} This language is found in both the 5\textsuperscript{th} and 14\textsuperscript{th} amendments to the Constitution. The former applies to the federal government; the latter applies to the states.


\textsuperscript{39} See Sharef, supra note 38.
When is transnational law legitimate?

So far we have considered the principles used to determine which state is legally permitted or required to regulate a corrupt transaction that crosses international borders. Now it is time to step back and evaluate those legal principles critically. The first question to ask is: when is a state morally justified in regulating any given case of transnational corruption? Or to use a more common term, when is transnational anti-corruption law legitimate?

Every moral argument has to begin from one or more potentially contestable premises. The premise here will be that everyone in the world has a moral obligation to treat other human beings as rational actors deserving of dignity and respect and not solely as means to promote the interests of others. We will also assume that a state’s laws should promote the interests of the people it represents, and its laws can be evaluated according to whether they achieve, or are likely to achieve, that goal. For the time being there is no need to be terribly specific about where people’s interests might lie. In broad strokes, it seems safe to assume that the relevant interests include bodily integrity, material well-being, various personal or collective freedoms, and, collective expressions of values important to the relevant people’s identity.

Law is undeniably a key means of promoting these kinds of interests. To begin with, in modern societies at least, law plays a significant role in preventing people from engaging in harmful conduct, whether through deterrence, persuasion or incapacitation. Law also can help people who have been harmed to secure compensation. Finally, law has an expressive function; whenever it condemns a given form of conduct it simultaneously restates the value of a certain set of interests.

The moral justification for legal regulation is complicated by the fact that it generally involves coercion and punishment. Coercion is never straightforward to justify since it impinges on a basic personal freedom. Legal punishment typically involves not only coercion but also an element of condemnation, i.e., a statement that the defendant has done something wrong. Legal condemnation is typically backed by an implicit claim that the state’s moral judgement is authoritative, or in other words, a claim that the state’s judgement ought to be treated as binding. It usually is not difficult for an established state (or any other actor) to justify claiming authority; the hard question is whether subjects ought to respect that claim. As we shall see, however, some of the situations in which coercion is difficult to justify turn out to be situations in which a state ought to defer to the moral judgment of other actors and refrain from claiming that its own judgments are binding. Accordingly, we will begin by addressing the question of whether coercion is justified and only later return to the question of when condemnation is appropriate.

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40 Leslie Green offers this definition of authority and claims that all modern states exercises of coercion through law are “gilded with the claim of authority.” See Leslie Green, The Authority of the State 60, 75 (Oxford 1988).
Philosophers who have wrestled with the issue of when legal coercion is justified generally conclude that if the person being coerced has to be treated as a rational person deserving of dignity and respect, then they can only be coerced for reasons that they either have accepted or, acting rationally, ought to accept. These conditions significantly limit the range of people who can be coerced legitimately by any given state.41

That range certainly includes defendants who have given express consent to the application of a particular state’s laws. There is a presumption that respect for a rational individual’s interests entails respecting their freedom; individuals can override that presumption by making it clear that they have made a reasoned determination that their interests lie in being subject to law and demanding respect for their choice. Consent provides evidence of that kind of reasoned choice, provided it is informed and voluntary.

In business settings, express consent to a particular body of law is not uncommon. Commercial agreements routinely include clauses specifying which body of law should be used to resolve any disputes. This kind of clause often can be interpreted reasonably as a manifestation of consent to using the specified state’s laws to determine the legal implications of corruption, at least as between private parties. So for instance, if any of the agreements used by TSKJ or its members were governed by U.S. law, it would reasonable to refer to U.S. law to determine whether those agreements remained in force after evidence of the Bonny Island affair came to light. In principle, a person could go further and try to consent to application of the criminal laws of the U.S. (or some other state). Express consent to the application of criminal law, as opposed to laws concerning private parties’ rights, would be novel, but in theory it should be sufficient to establish legitimacy.

In principle, tacit consent may also justify legal coercion. The most plausible situation in which this might happen is when a foreigner deliberately enters the territory of a state. The idea that states regulate conduct in their territory is a well-established convention – we do not need the wisdom of St. Augustine to know what to do when in Rome. It seems reasonable to conclude that a foreigner who travels to the United States understands that convention and tacitly consents to application of its laws. Moreover, a person present in a state’s territory likely enjoys many of the benefits afforded to citizens. These arguments had little bearing on the U.S. enforcement actions in the Bonny Island case because the participants went out of their way to avoid traveling to the United States. Tacit consent did, however, make its appearance in the Bonny Island affair. Technip arguably consented to the application of U.S. law by choosing to issue securities governed by U.S. law; but regulation of corporations does not raise the same kind of concerns about coercion as regulation of individuals and so does not require the same kind of justification.

41 For a broad and illuminating discussion of these issues see, Lea Brilmayer, American Hegemony: Political Morality in a One-Superpower World (Yale University Press 1994).
What about the idea that it is permissible to coerce people who have reason to accept being coerced? Many philosophers are convinced that this kind of hypothetical consent justifies legal coercion of a state’s own citizens, even in the absence of express consent. They often disagree, however, about the basis for this conclusion. Some appear to believe that justified coercion is inherent in the relationship between a state and its citizens. Others suggest it is rational for citizens to accept the burdens of a legal system in exchange for the benefits it affords to them. More cautious views hold that acceptance is rational provided the legal system displays certain characteristics, such as promotion of “basic human rights” and allowing people subject to coercion to participate in democratic lawmaking processes. Each of these arguments supports legal coercion of citizens in order to promote interests of other citizens. This conclusion leaves little doubt that the U.S. is justified in applying coercive sanctions to one of its citizens. An example would be Jack Stanley, assuming of course that his conduct set back the interests of his fellow U.S. citizens, even though virtually all his actions took place overseas. It is more difficult, however, to rely on these arguments to justify coercive U.S. regulation of non-resident non-citizens like Tesler and Chodan.

Leaving aside the arguments that apply exclusively to a state’s coercion of its own citizens and returning to first principles, are there any situations in which we can say that rationality unavoidably leads to the conclusion that coercion is acceptable? If not, it will be difficult to justify coercion and punishment of non-resident non-citizens. The only plausible situations are when legal regulation is necessary to serve interests that are truly vital – so vital that any rational person would accept the need for them to be protected through law. A good example might be citizens’ interests in freedom from physical harm while they are in a state’s territory – surely a state is permitted to punish someone who murders its citizens in their homes by shooting them across the border. It is unnecessary for present purposes to settle on the list of interests that qualify as “vital,” but the interests protected by fundamental human rights would be a good start. Reasonable people can disagree about whether it is appropriate to use coercive sanctions to protect other interests — imagine trying to reach an international consensus on laws against apostasy or hate speech or copyright infringement.

Finally, it is worth noting that legal regulation can involve varying amounts of coercion. Less coercive forms of regulation do not require the same kind of justification as highly coercive forms such as fines and imprisonment. So for example, it might be legitimate to deny a corrupt foreign official a visa, even if it would not be legitimate to arrest and imprison her. Similarly, regulation of corporations, which has only indirect impact on individual stakeholders, requires less justification than direct regulation of the same individuals.

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What does all of this mean for the legitimacy of transnational anti-corruption law? The answer seems to be: it depends on who it targets and for what purpose. It is not terribly difficult for a state to justify anti-corruption laws aimed at people who act while physically present in its territory, are its nationals, or expressly agree to be subject to its laws. In other cases, i.e. those involving non-resident foreigners who act outside the state’s territory, anti-corruption law is only legitimate if it serves to promote truly vital interests. On this view, the expansive interpretations of the territoriality and nationality principles currently favored by the anti-corruption regimes of the U.S. and the U.K. are only legitimate if the interests they serve qualify as vital.

It is convenient to approach this question in two steps. The first step is to ask whether expansive regulation of foreign corrupt practices is necessary to serve vital interests of the regulating state’s own citizens. The second step is to ask whether such regulation is necessary to protect any vital interests of non-citizens. We can call the first type of justification “self-interested” and the second “altruistic”.

**Self-interested justifications for transnational anti-corruption law**

In some quarters, there is reflexive skepticism about whether people have any interest – in the sense used above – in regulating conduct that takes place outside the borders of their state, so-called extraterritorial conduct. This skepticism is at least superficially attractive when we think about laws motivated by peoples’ interests in bodily integrity. As a practical matter, there is little that German law can do to prevent a German citizen from being mugged in a dark alley in Buenos Aires, or even to provide meaningful condemnation or compensation. Alejandro Chehtman uses this example to support his argument that people generally only have an interest in their state’s criminal laws being applied to conduct that takes place in their territory.44

The interests served by extraterritorial regulation come into focus once we look beyond laws designed to protect the basic interest in bodily integrity. Since Cicero’s speech against Verres, echoed in Burke’s speeches against Hastings, it has been clear that corrupt practices in distant lands can threaten the interests of even the most powerful states. This is even more true in modern times, when people are connected across borders through international markets and

44 Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* 68 (Oxford 2011). Chehtman defines the interests protected by criminal law as the “interest of individuals in having a legal system in force containing rules that prohibit murder, rape, torture, and other wrongs” because such a system “contributes to our sense of being right-bearers, and that the legal system takes the protection of our rights seriously” or in other words, “contributes to our sense of dignity and security.” Id. at 40. This strikes me as an unnecessarily narrow specification of the interests protected by criminal law. Furthermore, the claim that a system of criminal law that is in force necessarily provides “security” seems to rest on an unacknowledged assumption that such a legal system has preventive effects. Chehtman fails to explain why those preventive effects do not affect conduct overseas. See also, Guyora Binder, Authority to Proscribe and Punish International Crimes, 63 *University of Toronto Law Journal* 278-309 (2013).
social networks, and can exploit those connections through ever-more sophisticated communication technologies. Under these conditions it should not be surprising if economic activities in one country, including but not limited to corruption of foreign public officials, have effects on the material well-being, personal freedoms and collective identity of people in other countries. In an interconnected and interdependent world, it is eminently plausible that a state serves the interests of the people it represents when it prevents, condemns or secures compensation for foreign corrupt practices.

Take the Bonny Island case. There are several ways in which the interests of people outside of Nigeria, e.g. in the United States or France, might be affected by this kind of corrupt behavior. For starters, they are likely to have economic interests in firms that lose out to bribepayers in the competition for government contracts. They also are likely to have economic interests in firms that may be asked to pay bribes in the future. Many firms consider bribery to be an expensive way of doing business with the government – in part because agreements with corrupt officials are unreliable and unenforceable – and appreciate preventive regulation that gives them an excuse to ‘just say no’ to requests for bribes. In addition, foreigners collectively might prefer to avoid gaining a reputation among Nigerians for being willing to engage in corrupt practices since it might lead to ill-will or even retaliation. Meanwhile, with respect to money laundering, citizens who aspire to live in New York or Paris may not appreciate being priced out of real estate markets by foreign officials who use the proceeds of corruption to bid up the prices of properties. More generally, virtually every state in the world has an interest in discouraging firms or individuals from facilitating criminal activity by holding themselves out indiscriminately as money launderers.

And then there are the non-economic interests at stake. Left unregulated, corruption of foreign public officials may pose a threat to values that are important to a society. The history of the FCPA suggests that, at least during the period following Watergate, it was important to Americans’ sense of national identity to have laws in place that expressed a firm commitment to integrity in both business and government. The FCPA was designed in part to make a moral statement about who Americans were and what values they stood for. When it enacted the FCPA, the U.S. House of Representatives went out of its way to describe foreign bribery as “counter to the moral expectations and values of the American public.”45 It also justified the statute on the grounds that bribery “erodes public confidence in the integrity of the free market system” and “puts pressure on ethical enterprises to lower their standards or risk losing business,” evoking fears of a kind of moral contagion.46 This fear was perhaps amplified by post-Watergate investigations that identified many large U.S. companies that made illicit payments in

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both foreign and domestic markets, raising the possibility of firms learning to pay bribes overseas and then bringing their corrupt practices back home.\textsuperscript{47} 

In an ideal world ethical businesspeople would not be susceptible to moral contagion,\textsuperscript{48} but in the real world it is a plausible concern. Take the Bonny Island affair. The bribery scheme was apparently masterminded by KBR, its Houston-based American-born CEO was personally involved, and both KBR and its parent, the Halliburton Company, did a lot of business with and had close ties to the U.S. government. Remember, Halliburton’s CEO during the relevant period was Dick Cheney, former Secretary of Defense and future Vice-President of the United States! If a culture of corruption took root at KBR it could easily lead to corruption of U.S. officials, something that would clearly affect the interests of U.S. citizens. Recall Edmund Burke’s determination to prevent “the breakers of law in India from becoming the makers of law for England.”\textsuperscript{49} Corrupt foreign officials who acquire control of domestic firms present a similar risk of moral contagion.

Does any of this justify the U.S. government’s treatment of Jeffrey Tesler? Probably not. It is highly unlikely that Tesler expressly consented to be bound by U.S. law, even in the course of agreeing to act as TSKJ’s agent. Tesler was never physically present in U.S. territory so there is no basis for arguing that he consented to anything by entering the country. A prosecutor might argue that his use of emails and wire transfers through the U.S. amounted to tacit consent to the application of U.S. law. This would be an update for the electronic age of John Locke’s argument that anyone who enjoys any of the benefits of a government, “whether it be barely travelling freely on the Highway,” is obliged to abide by that government’s laws.\textsuperscript{50} The modern version of Locke’s argument is significantly less persuasive than the original. Use of electronic services with ties to the U.S. should only count as consent to application of U.S. law if the potential defendant is aware it can be construed in that way, and even then, perhaps only if they have access to alternative service providers.

Not only is it difficult to find that Tesler consented to U.S. regulation, it is difficult to reach the conclusion that he ought to have done so. None of the standard arguments that justify coercion of citizens are available to justify coercion of a non-citizen like Tesler: There is nothing inherent in the nature of the relationship between the U.S. and a non-citizen that justifies coercion; by stipulating self-interested motivations we have assumed away the possibility that

\textsuperscript{47} S. Comm. on Banking, Housing and Urban Affairs, 94th Cong., Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices 39-40 (Comm. Print 1976) (analyzing information provided by 95 companies that voluntarily disclosed questionable or illegal foreign payments and describing 39 companies that reported questionable domestic activities).

\textsuperscript{48} Cf. Immanuel Kant, Perpetual Peace: A Philosophical Essay 113 (M. Campbell Smith trans., Macmillan 1917) (1795) (“the bad example which one free person gives another, (as scandalum acceptum) does no injury to the latter”).

\textsuperscript{49} Edmund Burke, in 8 The Writings and Speeches of Edmund Burke 96 (quoting Marshall at 30).

U.S. law is aimed at generating benefits for non-citizens that offset the burden of being coerced; and non-citizens have no rights to participate in the U.S. lawmaking process. Most importantly, the interests at stake for U.S. citizens do not seem as vital as, say, the interest in not being shot in their homes.

A comprehensive assessment of the legitimate scope of transnational anti-corruption law has to account for more than just the interests of citizens of the regulating state and potential defendants. There are others whose interests might be affected by transnational anti-corruption law, both positively and negatively. First and foremost in this group are non-citizens governed by foreign corrupt officials. This leads us to the topic of the next section.

Altruistic justifications for transnational anti-corruption law

When the U.S. first enacted the FCPA, its lawmakers appeared to be motivated primarily by self-interest. Over time, as the U.S. government and anti-corruption advocates pressed other countries to adopt their own laws regulating foreign corrupt practices, the stated rationales shifted to includes appeals to concern about the plight of foreigners, especially the inhabitants of developing countries. The new rhetoric captures the powerful moral intuition first tapped into by Burke, namely, that the inhabitants of countries governed by corrupt officials are the primary victims of corruption. The Bonny Island affair qualifies as a moral outrage mainly because it left millions of Nigerians trapped in poverty while an insatiably corrupt political class gorged itself on profits from their nation’s resources, not because of its impact on the shareholders of Bechtel, or any other U.S. citizens. With this intuition in mind, perhaps the U.S. legal response is best understood as an effort to promote the interests of Nigerians, as opposed to those of people in the United States. Is this an adequate justification?

As we discussed in Chapter 4, it is not difficult to make the case that corruption of public officials tends to prejudice citizens of the country governed by those officials. Nigeria provides as good an illustration as any country. Since independence, the Nigerian government has been renowned for pervasive corruption, and in particular, for the breathtaking sums of money diverted by high-level officials. The Bonny Island affair is not an outlier. The oil and gas sector, which recently has accounted for as much as 95 per cent of Nigeria’s export earnings, historically has suffered from lax oversight that makes it especially prone to corruption. In 2013 the central bank governor at the time reported that the state-owned oil company had failed to account for between $10.8 and $20 billion in oil revenue over a 19 month period. He was soon replaced.51 The Economist summarized the impact on Nigeria in graphic terms:

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The cost of all this graft vastly exceeds the actual amounts stolen. Investors are reluctant to put money into a country if they cannot be sure that contracts will be honoured. Local businesses deliberately stay small, hoping to stay beneath officialdom’s radar. Citizens are generally loth to pay taxes because they assume the money will be stolen. Billions of dollars in state spending are wasted on useless projects. On the outskirts of Sokoto in the far north of Nigeria a brand new power plant is going up, years behind schedule and over budget. The delay may be a mercy, for once it is switched on it will instantly start racking up big losses… Graft has also been one of the factors behind an insurgency in Nigeria’s north which its army, hollowed out by corrupt generals, has struggled to contain.52

In a poor country like Nigeria, corruption causes more than just inconvenience: it gravely impairs ordinary peoples’ abilities to lead satisfying and worthwhile lives. In rural parts of the country, nearly half the population lived in poverty in 2012, and poor public services were part of the reason why.53 In 2016, an economist estimated that 25 million Nigerians would have escaped poverty but for the country’s “excess corruption.”54 The methods used to generate this estimate were dubious, but the claim that there was a causal relationship between corruption in Nigeria and the impoverishment of millions of Nigerians was not.

On these facts, there is little doubt that the inhabitants of Nigeria have vital interests in preventing, condemning, and securing compensation for corruption of their public officials. In the absence of preventive intervention or compensation, millions will go without the minimum resources they need to live satisfying and worthwhile lives. Every state in the world is justified in resorting to coercive sanctions, when necessary, to protect such vital interests. If the question is whether expansive application of transnational anti-corruption law is morally justified, the answer is, at least in the case of Nigeria, compellingly, yes.

In fact, it follows from this line of argument that when truly vital interests are stake, the need to protect those interests should take priority over other considerations in the design and implementation of anti-corruption law. This means, for starters, that expansive application of transnational anti-corruption law might be morally required rather than just morally permissible. Recall our starting assumption that everyone in the world has an obligation to treat everyone else with dignity and respect. This arguably implies that no one should do anything that prevents other people from obtaining the minimum resources they require to live a satisfying and worthwhile life, including citizens of foreign states. If this universal obligation exists, it certainly encompasses an obligation not to interfere with so-called “just institutions,” meaning political institutions that others require to attain minimum acceptable living standards – that is the

52 “Corruption: The only thing that works,” Economist, June 20, 2015.
obligation that KBR and its co-conspirators violated. Many philosophers believe, consistent with the quote from Rawls in the epigraph, that the duty to support just institutions also includes an affirmative obligation, on both individuals and the states to which they belong, to do at least their fair share to promote just institutions, “at least when this can be done without too much cost to ourselves.”\textsuperscript{55} This suggests that states have an affirmative duty to protect the interests of people whose ability to enjoy the benefits of just institutions is threatened by corruption, whether through coercive sanctions or other measures. Thomas Pogge has made this argument most explicitly.\textsuperscript{56}

\textit{Reasons to doubt whether transnational anti-corruption law is truly necessary}

Is it safe to assume that citizens of countries like Nigeria need foreign legal systems to protect their vital interests in the face of transnational corruption? Without that assumption, it is difficult to justify the expansive approach to regulation of bribery and money laundering now favored by countries like the United States and the United Kingdom. In a case like the Bonny Island affair, the assumption that external intervention is necessary seems valid. However, not all cases, and perhaps not even all aspects of the Bonny Island cases, are so clearcut. In other situations there may be good reasons to doubt whether any given legal intervention is absolutely necessary. In many situations legal interventions will raise difficult questions, both factual and moral, especially once we push beyond general statements such as ‘there ought to be strict laws against corruption’ and look closely at specific prohibitions and enforcement strategies.

With any given set of allegations, the challenges begin with the process of figuring out what actually happened – who did what, when, and with whom – and evaluating its impact. In most cases, corruption is difficult to detect and so enforcement agencies are forced to draw inferences from inconclusive evidence. In cases where bribery is suspected, there often is no direct evidence showing whether anything of value found its way to a public official and what, if anything, the official provided in exchange. Meanwhile, in many money laundering cases it is easy to show that an official’s wealth exceeds anything that could have been earned from legitimate sources but extraordinarily difficult to prove that the assets were derived from any specific corrupt act.

As we have seen, most legal systems respond to these factual uncertainties by allowing liability to be imposed even in the absence of definitive proof that bribery or embezzlement, at least in an obvious form, has taken place. This way of circumventing factual obstacles quickly leads to moral challenges. Outside of the paradigmatic forms of bribery or money laundering, it


is difficult to decide which conduct deserves condemnation. In many instances, the overarching question becomes, does the proven conduct pose an undue risk of harm? Deciding what level of risk is undue is ultimately a question of values, informed by empirical judgments about what is likely to have happened given what is known to have happened. For example, suppose the issue is whether to condemn the payments Tesler made to the unnamed Nigerian political party. That decision requires weighing the value of private financing of election campaigns against the risk of improper influence, taking into account any constraints on party power imposed by electoral politics. Or consider the payments that Marubeni made to “lower-level” Nigerian officials on behalf of TSKJ. Suppose, hypothetically speaking, that the consortium members claimed these payments were the products of extortion, meaning that they were made to secure services to which TSKJ was legally entitled—perhaps, work visas for its employees—and were only made because the public officials threatened to shut down the project, which would cause ruinous losses for TSKJ (and others). Reasonable people can disagree about whether to condemn these payments as bribes or to excuse them on the grounds of extortion.57

The factual and moral challenges continue when an enforcement agency evaluates possible responses to specific instances of corruption. Suppose the agency is focused on designing a response that will prevent future misconduct, keeping in mind the downside risks of setting penalties so high that they discourage people from entering politics or discourage firms from doing business in ‘high-risk’ countries like Nigeria. As we saw in Chapter 6, crafting penalties that will deter or persuade people likely to be involved in economic crime is more of an art than a science. Was $1.7 billion worth of fines and forfeitures too much, just enough, or insufficient? Should there have been more individual prosecutions or longer terms of imprisonment? To predict the impact of any given enforcement strategy requires a certain amount of psychological insight, some of which is likely to be culturally specific. The culprits in the Bonny Island affair comprised a remarkably diverse cast of characters, including Nigerian politicians, Texas oilmen, employees of Japanese trading companies and an English solicitor. No court or enforcement agency can predict with confidence how its sanctions will influence people from all these different backgrounds, especially when they operate in organizational settings.

Even if the behavioral consequences of a regulatory strategy can be predicted, value judgements are required to decide whether the benefits of prevention outweigh the costs of discouraging foreign investment and scaring people out of politics. For instance, in the aftermath of the Haitian earthquake of 2010 there were suggestions that it would be appropriate to suspend enforcement of the FCPA in relation to Haiti in order to encourage foreign investment. The theory was that foreign investors were indispensable to the recovery effort but would find it impossible to operate without paying bribes. The idea went nowhere, but it highlighted a potential trade-off between corruption control and economic development, an important

consideration in the most impoverished nation in the Western hemisphere. It is important for die-hard corruption fighters to recognize that these value judgements will not always come out in favor of corruption control, even if they are made by local actors. For instance, in Brazil there is a well-known saying, “rouba mas faz.” It means, “he or she steals but gets things done.” There is some evidence that Brazilian voters take this aphorism to heart and, at least in mayoral elections, are willing to vote for politicians known to be corrupt if they are sufficiently effective.\textsuperscript{58} It is impossible to say whether those voters are making the wrong decision.

The task of determining an appropriate enforcement strategy is no easier if the goal is to impose sanctions that appropriately condemn, as opposed to prevent, corruption. Societies differ dramatically in the meanings they attach to different sanctions and so they frequently have different views on appropriate sanctions. The €5,000 fine imposed on Etienne Gory, Technip’s ex-commercial manager for Africa, might have expressed appropriate condemnation according to French standards, and seemed to be in line with the $20,000 fine imposed in Texas on KBR’s Chodan. More recently though, U.S. courts have seemed inclined to impose tougher sentences, including terms of imprisonment. Again, potentially contestable value judgments are inevitable.

Using the legal system to provide compensation for official corruption can be even more challenging. The first step is to calculate who lost what, a difficult task when there is limited information about exactly how officials have been corrupted and, what would have happened if they had behaved properly. Who is to say what would have happened if TSKJ had not paid bribes. Would the LNG facility have been completed? If yes, at what cost? To the same specifications and in the same timeframe? How much profit would the competing bidders have earned? How would the local community have been affected? Etc. The next step is to ask whether any victims should be denied compensation because they contributed in some way to the misconduct. U.S. courts have sometimes accepted this argument as a reason to deny compensation to governments whose high-level officials have been corrupted.\textsuperscript{59} If any government ever was culpable in that sense, it was the government of Nigeria during the planning and construction of the Bonny Island project. Finally, there is the thorny issue of how to deliver compensation to Nigerians. Should it be paid to the federal government, state governments, or non-governmental organizations that provide public services in the region? Leaving aside questions of legitimacy, there is the very real risk that officials of those bodies will misappropriate funds designated for compensation. It seems pointless to give stolen money back to the same people who stole it.

In short, except in the clearest of cases involving hard-core forms of bribery or money laundering, there may be reasonable doubts about whether any given legal prohibition or


enforcement strategy is the appropriate way to protect the various interests served by anti-corruption law. This is true even in cases like the Bonny Island affair where truly vital interests were at stake and many aspects of the case were clearcut. Remember our conclusion about when a state can legitimately coerce a non-resident person who acts extra-territorially: only when any rational person would agree that coercion is necessary to protect vital interests. This standard is less likely to be met if a rational person would have doubts about the need for a particular set of coercive sanctions.

So where does this leave us? Is it legitimate for states to regulate transnational corruption in situations where they cannot rely on traditional principles of territoriality or nationality? The answer seems to be that coercive regulation is only justifiable in clearcut cases where vital interests are at stake. This means that in difficult cases, i.e. cases in which there is factual or moral uncertainty, a relatively small number of states can legitimately exercise coercion.

In some of these difficult cases, vital interests are at stake and deserve to be given priority. In a country like Nigeria – and perhaps to an even greater extent in a poorer country like Haiti – decisions about anti-corruption law – i.e. what conduct to prohibit, who to target, what penalties to impose, and how to distribute any benefits from enforcement actions – can literally make the difference between life and death. Ideally, those decisions would be made by actors who have the motivation and ability to protect the interests of the people affected, taking into account the risks of both expansive and restrained approaches to regulation. Concretely, this means that anti-corruption laws should be drafted by legislators sworn to protect the people’s interests, and implemented by judges, prosecutors, and police officers subject to the same duty. Those officials should be informed about the needs and values of the people whose interests they are obliged to protect and should be accountable to them, either directly, through elections, or indirectly, through accountability mechanisms recognized by a constitution that enjoys widespread support. In many cases it should not actually be necessary to formalize these obligations, information channels, and accountability mechanisms because the officials will be drawn from the affected community. Officials who pay taxes to corrupt governments only to feel shortchanged every time they try to drive to work, who are called out in local media for their failure to respond to the latest scandal, and who have to listen to complaints about corruption from friends and family, are likely to be motivated, informed, and responsive even in the absence of legal mechanisms.

For all these reasons it is difficult to escape the conclusion that anti-corruption law generally ought to be designed and enforced by institutions located in countries governed by corrupt officials. If legal institutions from other states attempt to impose their views through coercion they are likely to make mistakes about where the affected people’s interests lie. Putting these decisions in the hands of foreign officials will violate the affected people’s interests in being able to choose, at least collectively, how to govern their own affairs.
This line of reasoning implies that states should refrain not only from legal coercion but also from legal condemnation in relation to transactions that are condoned by the people most affected. This is not to say that all condemnation is problematic in these cases, only the paradigmatically legal kind. There is nothing wrong with expressing views about moral issues that disagree with the views of the people most directly affected. Foreigners should be entitled to call a bribe a bribe; if Canadians want to call U.S. campaign finance a form of legalized corruption, they should feel free. There is nothing wrong with passing moral judgements of this kind. It is, however, objectionable to claim that those judgements ought to be binding on people who are better placed to make them. In other words, states should refrain from making claims to authority when confronted with difficult questions about how to respond to allegations that foreign officials have been corrupted. Advice and comment are acceptable, coercion and condemnation are not.

In legal terms, this means that states inclined to regulate foreign corrupt practices should generally defer to good faith determinations made by local legal institutions about how to proceed in particular cases. This is not necessarily incompatible with expansive assertions of jurisdiction. Again, expansive assertions of jurisdiction may be necessary to protect the vital interests of people ruled by corrupt officials. However, states that define their jurisdiction expansively should give themselves the option of deference to more legitimate decisionmakers by building in and giving effect to limitations such as double criminality conditions, local law defenses, the presumption against extraterritoriality, and due process requirements.

This conclusion hearkens back to Hastings’ defense to the charges laid against him by Edmund Burke. Hastings argued that his actions should be judged by the “Manners, Customs, Principles and Laws, peculiar to the Countries in which such Measures were adopted.” Burke rejected this “geographical morality” with his famous declaration that “the laws of morality are the same every where” and that bribery and peculation were just as actionable “in Europe, Asia, Africa and all the world over.” Burke was not entirely right. It is reasonable to expect only a partial moral consensus about how to respond to allegations of corruption. In the absence of such a consensus, legal regulation and the associated moral judgments are best left to local actors.

This approach will not lead to ideal outcomes. States governed by corrupt officials cannot always be counted on to protect their citizens’ interests against threats from within the state itself. And other states cannot be counted on to regulate corrupt acts committed by their nationals or on their territory when those acts primarily affect foreigners. Scruples about legitimacy can easily become excuses for impunity. Nigeria is a case in point: the fact that Nigerian enforcement officials never quite got around to prosecuting any Nigerian public officials in connection with the Bonny Island affair is telling but not surprising given indications that the corruption allegedly

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60 Edmund Burke, Speech on Opening of Impeachment (February 16, 1788), in 6 The Writings and Speeches of Edmund Burke 346 (quoting from Journals of the House of Lords xxxviii.56).
61 Id.
extended up to and included successive heads of state. It is also far from clear that countries such as France, Japan or even the U.K. are inclined to sanction corruption of Nigerian public officials, even when the corrupt practices are committed by their nationals or in their territory. In this non-ideal world, it is quite possible that other states, including states with little meaningful connection to the corrupt transactions, are motivated by a certain amount of altruism when they regulate transnational corruption. Though they lack legitimacy, those states might be relatively effective at protecting the interests of people victimized by corruption.

*International agreements as sources of legitimacy*

The problem of mismatches between legitimacy and effectiveness has a straightforward solution. If a state can legitimately regulate a particular corrupt transaction then it can legitimately call on other states for assistance, including states that are either more willing or able to regulate, in much the same way that the Sicilians called on Cicero to prosecute Verres. Even if Nigeria and the U.K. were the only countries that could legitimately regulate Jeffrey Tesler’s activities in relation to Bonny Island, and Nigeria’s interests should have been given priority, it would have been legitimate for the U.S. to regulate his conduct at Nigeria’s invitation.

This kind of invitation can be offered and accepted either through a formal treaty or an ad hoc international agreement. The UN Convention incorporates an invitation of this sort since it binds its signatories to permit each other to assert jurisdiction expansively. The OECD Convention has the same effect, to the extent its parties agree to permit broad assertions of territorial jurisdiction. However, the UN Convention only came into force in December 2005, after Tesler’s corrupt practices had ended. The OECD Convention came into force part of the way through the affair, but although the U.S. and the U.K. were both parties (as was Japan), Nigeria was not.

Extradition and mutual legal assistance treaties cure other mismatches between legitimacy and effectiveness. An extradition treaty ordinarily permits a state that has effective control over an individual to transfer control to the state that can legitimately prosecute or impose sanctions. A mutual legal assistance treaty operates similarly but governs transfer of evidence or information rather than people. In the case of Jeffrey Tesler, the U.K.-U.S. Extradition Treaty worked in a slightly different way. The U.K. not only had control over Tesler, it also could have legitimately prosecuted him since he was a U.K. national who engaged in egregious misconduct on English soil, given that U.K. law prohibited foreign bribery. Instead, pursuant to the treaty, the U.K. transferred Tesler to a country whose prosecutors had a doubtful claim to legitimacy. Whether or not the principle of territoriality supported the U.S. assertion of jurisdiction was the central issue in the extradition hearings, because U.K. law only permitted extradition if the offense was committed “in the territory” of the requesting state. The U.K. courts concluded that there was a sufficient territorial connection to the U.S. and blessed the
extradition. In legal terms the decision simply confirmed that the U.S. would be permitted to prosecute, but in moral terms it seems more appropriate to say that the U.K. courts conferred permission to prosecute and lent legitimacy to the U.S. proceedings.

At first glance therefore, modern anti-corruption treaties seem to cure the legitimacy deficit that would otherwise haunt states that try to sanction foreign corrupt practices without regard to traditional principles of territoriality or nationality. The UN Convention is particularly important here because it permits regulation on a quasi-universal basis and has been signed by many countries that suffer from high levels of corruption. This means that most of the states in which corruption is likely to pose a threat to peoples’ vital interests have explicitly authorized intervention by virtually every foreign state likely to be interested in intervening.

At the same time, the UN Convention provides at least two safeguards against the possibility of foreign actors intervening in ways that ignore the interests of locals. First, recall that parties’ obligations under the Convention are expressly subject to an obligation to respect one another’s sovereignty. This vaguely worded qualification presumably does not require parties to condone regulatory approaches that are clearly contrary to the purpose of the Convention. However, the qualification can and should be interpreted to require the parties to defer to states’ reasonably held views on how to regulate the corruption of their own officials. If sovereignty means anything it means the ability to regulate political corruption. This argument should resonate with U.S. lawyers. One of the epigraphs for this chapter comes from a judicial opinion in which the Supreme Court of the United States explained its reluctance to use a vague federal law to sanction the practices of a state governor. To repeat: “A State defines itself as a sovereign through the structure of its government, and the character of those who exercise government authority…That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents.”

The UN Convention protects countries governed by corrupt officials in a second way: it grants them rights to share in the benefits of enforcement undertaken by other countries. Those rights are set out in the Convention’s path-breaking chapter on “Asset Recovery” and are widely understood to be the key reasons why developing countries supported the adoption of the UN Convention. Chapter V of the UN Convention is titled “Asset Recovery” and its very first provision states:

“The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”

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64 UNCAC, supra note 11, art. 51.
Taken literally, the term “asset recovery” covers only return of misappropriated assets to their prior owners. In fact though, Chapter V covers not only stolen assets but also proceeds of crime and amounts owed as compensation for the harm caused by corruption. The Convention virtually mandates return of stolen assets. Notably, it also says that return of proceeds of corruption and payment of compensation should be given “priority consideration.”

This dimension of the Convention has been neglected. Several developed countries have made efforts to return proceeds of corruption seized from corrupt officials, but they have been less inclined to return proceeds of bribery taken from bribepayers. Remarkably, for the period between 1999 and 2012, only 3% of monetary sanctions imposed by states for bribery of foreign officials (i.e. not their own officials) was shared with other countries. This occurred despite the fact that a large portion of those monetary sanctions represented confiscation of proceeds of crime. For example, in the Bonny Island affair, of the $1.7 billion paid to the U.S. Treasury, $400 million represented disgorgement by the TSKJ firms, and Tesler’s forfeiture accounted for another $149 million. The U.S. also arguably violated the spirit of the UN Convention by imposing monetary penalties in the form of fines, which it was not obligated to share, rather than confiscations.

States cannot point to the UN Convention as a source of legitimacy for enforcement actions that fail to comply with the provisions on asset recovery. If they wish to take advantage of the expansive rights conferred by the UN Convention they must also abide by the corresponding duties.

Regulation by international organizations

States are not the only bodies involved in regulating transnational corruption. The major multilateral development banks and development agencies have developed elaborate regimes for investigating and sanctioning firms that engage in corrupt practices in connection with projects they fund. In the Bonny Island affair, the African Development Bank imposed more substantial penalties on the members of the TSKJ consortium than the U.K. government! It is far from obvious though why an organization styled as a “bank” should act as an anti-corruption agency, and observers in developing countries sometimes question the appropriateness of development banks playing this role.

At first glance, regulation by development finance institutions involves lower stakes than regulation by states. These institutions have no armies or police forces to enforce their rules and so they cannot directly coerce anyone. Development finance institutions do, however, have other

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65 UNCAC, supra note 11, arts. 31, 57.3.
sources of leverage. They can transmit information about corrupt practices to national enforcement agencies, which do have the power to arrest and imprison individuals – both bribepayers and recipients. Alternatively, they can release information to the public that shames firms or individuals or governments. Most important of all, the development finance institutions control access to capital, arguably the ultimate source of power. Some firms, and particularly EPC firms like the members of the TSKJ consortium, earn large proportions of their revenue from projects funded, at least in part, by multilateral development banks. For those firms, exclusion from bank-funded projects would be a death sentence, especially if several banks acted collectively. As a result, the development banks can use the threat of suspension or debarment to induce firms to pay financial penalties, adopt compliance programs or even fund anti-corruption programs. In a similar vein, the development banks, together with organizations like the United Nations Development Program and the International Monetary Fund, can condition countries’ access to funding on compliance with anti-corruption norms, but this only provides leverage over countries without access to alternative sources of funding.

When international organizations get into the business of regulating corruption they face the same challenges to their legitimacy as states. It is perfectly legitimate for those institutions to protect the interests of their members by sanctioning corruption. The members of the African Development Bank might reasonably believe that corruption is an avoidable expense and object to their funds being used to line the pockets of Nigerian officials. They might also wish to avoid being morally implicated in a project tainted by corruption. Most importantly of all, the development finance institutions and their member states share in an overriding moral obligation to protect inhabitants of badly misgoverned countries whose abilities to lead meaningful lives are threatened by corruption. In the case of development banks and development agencies, this moral obligation is typically also integral to their legally-mandated mission.

The challenge to the legitimacy of development finance institutions lies in determining how to fulfill this last set of obligations, namely obligations to the inhabitants of countries governed by corrupt officials. Sometimes those obligations are fulfilled by imposing sanctions. In other cases, sanctions can be counter-productive. For instance, if there are only a handful of firms operating in a particular sector, debarment of one firm might reduce competition for contracts to complete future projects, leading to higher costs or reduced quality. Reducing loans to a country may or may not prompt reform and could easily delay projects that would meaningfully improve standards of living. Sanctions that involve financial penalties are also difficult to evaluate because there is so much room for debate about what is required to achieve deterrence, retribution or compensation. The African Development Bank promised that the $22.7 million in penalties collected from the TSKJ companies would “flow to projects preventing and combating corruption in the Bank’s Member Countries on the African continent.”67 It is far from

67 African Development Bank, supra note 8.
obvious how the figure of $22.7 million was arrived at and why the funds collected were not sent exclusively to Nigeria, or even just the Niger Delta.

**Conclusion**

The anti-impunity paradigm encourages states to push traditional principles of territoriality and nationality to their limits or beyond, and to regulate on what has been aptly called a quasi-universal basis. This approach is difficult to justify purely by reference to national self-interest. It can, however, be justified as a necessary response to grave threats to the vital interests of people governed by corrupt officials. The urgency of facing those threats also contributes to the sense that it is appropriate for international organizations such as development finance institutions to join the coalition of anti-corruption regulators. The challenge is to determine when any given regulatory intervention is truly necessary, and who should make that determination. If the focus is on the interests of the people most at risk, then the right thing to do typically will be to defer to the views of their local institutions – at least so long as those institutions are operating in good faith and not simply trying to defend the indefensible. Regulators who ignore those local interests court the danger of being labelled neo-imperialists. This prescription is not inconsistent with the UN Convention, taking into account its overarching statement that parties ought to respect one another’s sovereignty. In any event, the UN Convention provides little support for enforcement actions that fail to comply with both the letter and the spirit of its provisions on asset recovery.