

# Panel: Combating International Corruption Through Law and Institutions

*Mariano-Florentino Cuellar, Panelist\**

When I served at the U.S. Department of the Treasury, I spent much of my time thinking about corruption, money laundering, drug trafficking, counterterrorism, and sanctions. My job at Treasury was stimulating in a lot of ways, but it was also an extraordinarily frustrating job. My frustration involved the substance of what we were trying to do in the Treasury, particularly with respect to international corruption. When I was in government, the frustration was most endemic with respect to governments presided over extreme poverty. I often spent time thinking about the government of Haiti in particular, because I was on a National Security Council committee dealing with the American relationship with Haiti. There were about eighteen different American agencies that all had a role to play in trying to assist Haiti.

This was at a time when American goals in Haiti focused on building national capacity. It was a challenge not unlike what we are facing now in Iraq and Afghanistan. Every time the Treasury had a discussion about the situation with the White House, it would quickly come back to one question: how to stop the people

\* Mariano-Florentino Cuéllar is an affiliated faculty member at Stanford University's Center for International Security and Cooperation (CISAC) and is an associate professor and the Deane F. Johnson Faculty Scholar at the Stanford Law School, where he teaches and writes about administrative, criminal, and international law. His academic work focuses how legal rules are implemented in complex political environments, particularly in the areas of criminal justice, international security, and regulatory policy. From 1997 to 1999, he served in the Clinton Administration as Senior Adviser to the Treasury Department's Under Secretary for Enforcement. While at Treasury, Cuéllar worked on firearms regulation policy, money laundering and financial crime, border enforcement and economic development, and international policing. He represented Treasury on the National Security Council's Haiti Working Group and the U.S. Attorney General's Working Group on Puerto Rico. He also co-chaired the Initiatives Subcommittee of the U.S. Attorney General's Council on White Collar Crime. He currently serves on the Steering Committee of Stanford University's International Initiative.

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that we thought we could trust in Haiti from making money disappear from Haitian bank accounts and reappear in Swiss bank accounts. Government officials came up with regulatory strategies. The White House representative might make a list of all the people he was going to call and reprimand in Haiti. But somehow, the money kept disappearing.

When I joined the government I thought of corruption issues primarily as issues involving economic development and business. By the time I finished this experience working in government, it became very clear to me that there was a more complex issue that was endemic and connected with corruption. In particular, it had to do with the ability of the American government to make a compelling political case for spending hundreds of millions of dollars around the world, particularly with respect to Haiti. It became clear that if we did not find a way of stopping money from disappearing in Haiti, we were going to be fighting a constant uphill battle, and probably a battle we could not win, to persuade people in Congress, people in civil society, and international non-governmental organizations (NGOs) to continue pouring money into Haiti.

The international corruption problem is a major problem. It is a problem that lawyers, people from the policy community, people in governments, and people who try to undo the knot between corruption and atrocity do not know how to fix. There are also a few larger issues that are illustrated by an anecdote about corruption.

For several years, the Revolutionary United Front (RUF) in Sierra Leone conducted a campaign of utter atrocity. The RUF hacked people to death, chopped people's hands off to intimidate them, and gouged people's eyes out. They essentially acted as if they were trying to achieve hell on earth. It is so difficult to read about what happened in Sierra Leone that when I first started doing research, it was quite hard even to finish books and articles about the subject, and, in particular, to read victim testimonies. People who had applied, for example, for refugee status in Europe and the United States talked about how utterly atrocious it could be to survive in the highlands of Sierra Leone, where diamond fields make it possible for people to pick up chunks of stone and actually become rich in their particular domain.

It was certainly not the case during the Cold War that one could expect quick United Nations Security Council action on such matters. One cannot really expect quick Security Council action now. But in a post-Cold War world there is at least one thing that we can expect from the Security Council — if none of the permanent members have a huge interest in what is going on and block a sanctions resolution

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of some kind, the Security Council is likely to seriously consider, and sometimes pass, a resolution.

In this day and age, we have a very imperfect UN, but we do have the beginnings of an international administrative law system. If the UN passes a broad, vague resolution, experts go to work on it and put some more detail into it. When the UN Security Council passed a resolution on the situation in Sierra Leone, one of the resolution's<sup>1</sup> requirements was that diamonds obtained from Sierra Leone could not have been trafficked as conflict diamonds. The Council did not want these diamonds to find their way into the American and the European markets or developed countries, where they would end up on engagement rings, and have this market continue to fuel the conflict.

The UN developed an elaborate strategy to enforce this resolution.<sup>2</sup> The UN planned to give Sierra Leone money to establish a licensing system that would include miners, workers who were working at the mines, middlemen, workers who would buy and sell rough diamonds, the high council on diamonds headquartered in Brussels, Belgium (that oversees the entire industry), and, finally, all the large legitimate players in the diamond industry. The UN's goal was to ensure that as a little chunk of earth with embedded rough diamond was mined out of the earth somewhere in Sierra Leone, a chain of custody could be established to know who had held on to that little piece. The chain would include what worker had given it to what factory boss, what factory boss had sold it or given it to his boss, who from the factory had then turned it over to a diamond broker and then what company the diamond broker had given it to.

This UN resolution benefited the Sierra Leone government because it enabled the government to charge duties on this plan and generate money. Unfortunately, the Revolutionary United Front found that it could make deals with people in Freetown, the capital of Sierra Leone, and establish a price for a diamond. Once a handshake had occurred over the price, the diamond would then turn up in the capital of Guinea, which borders Sierra Leone.

The diamond might be smuggled out of Sierra Leone, possibly requiring a tiny payment to be given to some Sierra Leone customs official who might be checking passengers as they were getting on the ferry to go to Guinea. Or the diamond might be smuggled simply by hiking across highlands and going directly into Guinea. Once in Guinea, the RUF representative would sit down at a bar or

1. S.C. Res 1643, para. 6, U.N. Doc. S/Res/1643 (Dec. 15, 2005).
2. See <http://www.worlddiamondcouncil.com> (follow "Export/Import Control") (process is called the "Kimberley Process").

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restaurant with a diamond broker, the diamond broker would inspect the merchandise, and money would change hands. A small payment would then be made to the customs authorities in Guinea, who would develop a completely counterfeit and fake certificate of origin indicating the diamond had actually been mined in Guinea, and the diamond would be sold to De Beers or some other company where it would find its way out as an engagement ring.

A key aspect of this chain of custody is the fact that the RUF wanted to turn the diamonds over very quickly and had, at one point or another in their history of assorted conflict, control of most of the diamond fields that were important in Sierra Leone. The RUF could actually sell the diamonds at an incredible discount, eighty or ninety percent below what a legitimate diamond would cost. As a result, it was amazingly quick and easy for the RUF officials to be able to sell diamonds. The middlemen who bought conflict diamonds could then make an incredible market compared to the market for legitimate diamonds.

If you compare the figures that the High Diamond Council in Belgium has on the importation of diamonds into Europe from Guinea with the figures that the Guinean government officially keeps, you will find an incredible disparity proving the existence of these illegal activities. For example, in 1997 the Guinean government reported that two million carats of diamonds were exported; however, the High Diamond Council in Belgium indicated that four million carats were received. So two million carats, each carat worth about eight or nine hundred dollars, account for the disparity.

The smuggling of conflict diamonds continued despite the elaborate administrative provisions that the UN included in its resolution. Although UN resolutions may not be the solution to the problem of international corruption, such resolutions are a tiny step in the right direction even if such a step is likely to leave several huge gaps. One such gap exists not because of the UN but because an elaborate system of bank secrecy exists around the world. This system is extraordinarily lucrative. Despite the praise for bank secrecy, in regards to money laundering controls and counter-terrorist financing, such secrecy effectively allows people with minimal identification and evidence to open a bank account, to access the account with numbered codes, and to move hundreds of millions of dollars around the world.

The second gap is evident in advanced industrialized countries where there are broad and elaborate political economies that provide resistance to more intense and strict financial regulation. Without bank secrecy havens, countries like the United States would have to find other ways to regulate their own banks.

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A third gap exists because the people who are responsible for fighting international and domestic corruption are fragmented into different agencies and have different responsibilities. UN prosecutors of one culture and investigators of a different culture may be concerned with different things. For example, there are agencies that have increasingly become concerned with only one aspect of this criminal finance problem—counter-terrorist financing. As a result, gaps continue to proliferate.

The fourth gap consists of jurisdictional problems that occur when countries point fingers at each other with respect to whose responsibility it is to resolve a problem.

A fifth gap left by the UN resolution exists because countries with strategic goals, even in this post-Cold War world, might actually depend on allowing extraordinarily corrupt regimes or rankings to proliferate.

Despite these problems, there is hope as seen in the beginnings of a new and different political coalition that includes NGOs which are traditionally concerned with human rights violations and atrocities. This coalition is increasingly understanding that one dimension of this problem does not just include post-conflict adjustments or transitions, but involves elaborate financial regulation. It is possible that as this coalition of different players and governments evolves over time, we will have a different measure of political will to do something about these problems.

*Jacqueline Hand, Panelist\**

I am going to be talking about an example similar to Mr. Cuellar's. The Probo Koala is a tanker ship which serves as a symbol for the unintended consequences of globalization, and the reality that there is no functioning regulatory system to manage globalization. This particular ship is multinational to an astounding degree. The builder is Korean, the owner is Greek, the flag is a Panamanian, and the charter was arranged by the London office of a Swiss company. This company, called Trafigura, is one of the largest commodity traders in the world with a turnover of forty-five billion dollars a year and equity of about a billion

\* Jacqueline Hand is a professor at University of Detroit Mercy School of Law. Professor Hand joined the UDM faculty after practicing in a major corporate law firm in the areas of banking, real estate and probate. As a professor, she has pursued her interest in environmental law by teaching in the area and by sponsoring an active environmental law society. She has published articles on Michigan's use of anti-nuisance statutes for farmland preservation. She also co-authored *Neighboring Landowners* (McGraw-Hill, 1988). Professor Hand is currently working on issues of international environmental law, and is writing an article on environmental impact assessment in India, based upon research completed under an Indian-American fellowship in that country.

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dollars.

Last summer, the ship *Probo Koala* arrived at the Port of Amsterdam. (Press reports indicate that it appears to have come from the U.S., although the United States does not seem to be implicated in the events which followed.) The ship has two separate holds, one was a holding container for slop, which is the by-product created by the cleaning of the second hold, which carried the payload of gasoline. The ship had prearranged with the Amsterdam port authorities to have the slop tank cleaned out for a payment of 15,000 euros. However, once the port authorities saw both the volume and the content of the slop, the price for disposal increased from 15,000 euros to 300,000 euros. True slops are made up of spent caustics soda (which is used to clean the tank), some gasoline residues, and extra water. The material in the hold of the *Probo Koala* included hydrogen sulfide and a substance called mercaptides, a byproduct of hydrocarbons. Some experts have speculated that this unexpected material is a result of illegally refining gasoline at sea. (Hydrogen sulfide and mercaptides are expected by-products of gasoline refining.)

When *Probo Koala* received the new price for cleaning out the slop tank, the London office of the Swiss company rejected the 300,000 euro offer. Instead, the ship reloaded the material and proceeded to Estonia to pick up a load of gasoline. From there it traveled to Nigeria and unloaded the gasoline. Finally, *Probo Koala* arrived in Abidjan in the Ivory Coast and arranged with a treatment company called Tommy to offload the slops. Trafigura, the Swiss Company, says that Tommy is properly certified to dispose of the wastes but it is quite clear when you look at statements from the United Nations Environment Programme (UNEP) that any company regularly dealing in this sort of materials knows that no processor exists in the Ivory Coast that could possibly handle this material safely. Some press reports suggest that Tommy is partially owned by Trafigura itself and/or by the family of the president of the country.

Once the slops were offloaded, in the middle of the night a dozen trucks took the waste to twenty different locations around Abidjan and dumped it. These locations included places close to market gardens, as well as housing and prisons. By morning, people began waking up, and finding that they had trouble breathing, a condition accompanied by stinging eyes, bleeding noses, and aching stomachs. Within the next four days, ten people had died, sixty-nine people were hospitalized, and thousands more were treated. More people would probably have been hospitalized if Ivory Coast's poverty did not severely limit the availability of hospital beds.

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This tragic incident is a telling example of globalization run amok. On its website, Traffigura continues to assert that the waste was just standard slops, not a hazardous waste for which the cost of disposal was externalized to a poor and vulnerable citizenry. This is a case of a corrupt and fraudulent decision, made with the collaboration of at least some officials in Ivory Coast. The local Ivory Coast population was sufficiently convinced of the collusion of the local officials that a group of locals surrounded the limousine of the Energy Minister, pulled him out, and took him over to one of these sites and made him breathe the material. Within several days government fell, but as sometimes happens in parliamentary systems, it was reconstituted a couple of days later without the Energy Minister.

This occurrence received quite a lot of press worldwide. My sources for this summary of events include Der Stern, the Hindu Times, the New York Times, and the BBC.<sup>3</sup> But this is only the most recent and the most visible example of the industrialized nations externalizing the cost of disposing of the worst of their waste in less developed nations. In Ivory Coast, the toxic material happened to have an immediate effect. However, one of the real problems with toxic materials is they can have a latency period of fifteen to twenty-five years before the symptoms of the various illnesses begin to show up, making timely protection and remediation particularly difficult.

In the period immediately following World War II, two independent structural changes in society began which have come together to produce this and similar incidents. First, massive industrialization fomented by the second war, created what was essentially a second industrial revolution, one characterized by the development of many potent new chemicals. This industrialization also included the beginnings of a revolution in the production of electronics of all kinds. We are just now beginning to realize the real challenge that dealing with electronic discarded-waste, will provide. The second is equally dramatic—the rise a geometric growth of transnational corporations.

When the 16th and 17th centuries saw the formation of the nation state as the dominant form of political organization in society, the system of international law developed around these entities. Since the 1940's a new economic (and effectively political) force has begun to dominate—the multinational corporation. The transnational corporation has become a major addition to the system, in many instances almost replacing smaller states. By 1990, the international system contained 37,000 transnational corporations, and if you count companies with

3. See, e.g., Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, N.Y. TIMES, Oct. 2, 2006, in “Health.”

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foreign subsidiaries, there were 170,000. Of the fifty largest economies in the world, roughly half are these large corporations. For example, General Motors, which is currently struggling, remains one of the largest economies in the world. These corporations wield massive power and often effectively operate beyond the realm of any single national regulatory authority over all their operations.

For the first twenty years or so after World War II, many chemicals and their by-products were created with very little regulation of their ultimate disposal. After publicity triggered by incidents such as Probo Koala, the United States passed a law that requires hazardous chemicals be tracked from generation to disposal and established a complex and expensive standards for their safe disposal.<sup>4</sup> When the cost of legal disposal increased dramatically, many companies began to ship this waste to the developing world. Similar regulations were gradually adopted in most of the industrial nations of the northern hemisphere. In one notorious example, the country of Guinea was offered \$600 million to accept whatever hazardous waste the arranger of the intermediary would bring to the country. This amount was twice Guinea's Gross National Product (GNP) for a single year. (The intermediary was going to make about \$400 billion profit from this deal.)

Once this approach to disposal became more generally known, the developing world became increasingly angry at the practice. The United Nations Environmental Program (UNEP) sponsored the development of a regime to regulate the practice of exporting hazardous materials to the less developed nations. The resulting Basel Convention<sup>5</sup> is probably the most comprehensive regulatory scheme operative in international environmental law today.

This treaty is built around the concept of prior informed consent. For example, a company which wishes to dispose of hazardous wastes in another country can negotiate a contract with a disposal company in that country. It is then required to inform its own government about the contract as well as a clear explanation of the nature and quantity of the waste to be disposed of. The exporting country is then required to send a letter to the government of the importing country, explaining the details of the contract and asking for its consent. The system presupposes that if the importing country is not technically competent to manage these wastes, it will refuse to approve the arrangement. However, if the country does consent, the

4. Resource Conservation and Recovery Act, 42 U.S.C. §6921 et seq. (1976) (incorporated within the Solid Waste Disposal Act, 42 U.S.C.A. §6901, et seq. (2007)).

5. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1992, available at <http://www.basel.int/text/con-e-rev.pdf>.

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materials enter the importing country regardless of technical competence to manage the waste safely. There is generally little follow up on the actual ultimate destination of the material.

Under the Basel Convention mechanism, if it turns out that the country is not able to take reasonably appropriate measures to dispose of the materials, or if the waste enters the country without the proper consent, then the materials are supposed to be returned to the country of export. But nothing in the treaty designates who pays for their return and proper disposal. The few times this retrieval has been attempted have not been successful. After some experience with the Basel Convention, regime leaders of the less developed world (and international environmental NGOs) were not happy with the lack of protection offered. After extensive lobbying, an amendment to the Basel Convention was adopted and named the Basel Ban. The amendment banned all hazardous waste exports from twenty-nine of the wealthiest and most industrial nations, including all the Organization for Economic Co-operation and Development (OECD) countries except the US. (The US has not ratified the Basel Convention and consequently is not a party.)<sup>6</sup>

The Basel Ban required sixty-two ratifications in order to go into effect. It now has sixty-two, but it is still not clear whether the Ban has in fact gone into effect because the same parties who made the ratifications were not the original signatories. It is still a matter of legal argument within the international community, but the Ban is generally assumed not to be in effect. The Basel Convention has been opposed by the United States, Canada, and South Korea. Although the United States is outside the Basel system officially, one of its provisions states that a party cannot trade waste with anybody who is not a party unless that party has comparable bilateral agreements. The United States does have bilateral agreements with Canada and a number of other jurisdictions and so can engage in much of the world trade in such waste.

Another effort to control the export of hazardous waste is the Bamako Convention.<sup>7</sup> The African states agreed that no hazardous waste should be imported into the continent of Africa. The Ivory Coast has signed on to this

6. Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Sept. 22, 1995, *available at* [http://untreaty.un.org/English/TreatyEvent2002/Texts/English/Basel\\_Conv\\_Amend\\_16.pdf](http://untreaty.un.org/English/TreatyEvent2002/Texts/English/Basel_Conv_Amend_16.pdf).

7. Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 20, 1991, *available at* <http://www.jus.uio.no/Im/hazardous.waste.ban.afican.import.bamako.convention.1991/portrait>.

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particular treaty, and any violation is considered illegal and criminal. Since nearly every African country signed onto the Bamako Convention, it is definitely in effect. In fact, however, its provisions are very ineffective because of the lack of an international mechanism for enforcement. The convention instead encourages individual member countries to pass their own civil and criminal laws for violations of the Convention.

Efforts at controlling this transport of hazardous waste are rounded out by a Basel Protocol on civil liability which is in the works, but is nowhere near getting accepted. The Protocol has been on the table for about six years and it has only received thirteen of the twenty signatures it needs to come into effect. Nobody seems very anxious to sign on. Even if the Protocol does come into effect, none of the provisions are realistically going to cause corporate decision makers, who stand to make profits of 300,000 euros from these violations, to change their practices. Thus, there is no obvious mechanism which, by way of criminal, and probably civil, costs or consequences, would change the decision to remove the wastes from Amsterdam where they could be disposed of safely but expensively, to Ivory Coast where disposal is dangerous to the population, but cheap. To date, international criminal liability only exists for defined war crimes, and, in general, enforcement at the international level is haphazard at best. As a result the only option for enforcement tends to be at the national level, where securing jurisdiction of the real decision makers is highly unlikely. For example, Ivory Coast jailed seven people, five of whom are locals and in low level positions such as guards at the port, as well as two middle-level French managers from Trafigura. These two managers had come from Nigeria to try to clamp down on the problem and have been in jail ever since. (The company is currently trying to have them released.)

In Amsterdam, the port authorities who originally accepted the waste from the Probo Koala and then let the ship leave the port are under investigation and potentially could be charged within the Netherlands. The European Community has called for an investigation, as has UNEP. The officials of the Port Authority are at risk of prosecution, but it is unlikely that there is going to be any consequences for the corporate officials who chose to put poor Africans at risk of injury.

So at this point, if a corporation makes an economic decision that this sort of corrupt violation is very much in their economic interests, there probably will be few consequences since there are currently only limited effective mechanisms to deter it. Further, the true multinational corporation is not within the control of any particular nation state. In the case of the Probo Koala, it is hard to see which

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country the Ivory Coast could effectively sue for compensation under international law.

The paradigmatic international environmental law case was decided in the 1920s. In this case, a copper smelter was spewing emissions into Idaho, and possibly Montana, ruining farmers' crops. The U.S. protested to the Canadian government and the matter was ultimately referred to an Arbitration Panel.<sup>8</sup> The panel concluded that the farmers received compensation for the loss of their crops and livestock from the Canadian government. Then, the Canadian government presumably collected the damages from the corporation which was acting within its jurisdiction.

This contrasts with the harm caused by the Probo Koala where no one country can be held responsible for Trafigura's actions. It is hard to imagine how a solution to this problem could occur where there are so many national entities involved. The only way that there is going to be an effective system to control this, is if a system can be devised to deter the actual generators or the transporters who potentially profit from unsafe, but cheap disposal methods. One possibility is to look to the system that was created with the United States Superfund law.<sup>9</sup> Under CERCLA, the generator, transporter and disposer of hazardous waste are all strictly liable for the proper disposal, liability enforced by the domestic court system. To be effective any system must have an effective system of enforcement. One model which might be followed is that of the World Trade Organization (WTO). Failure to comply with its dictates is met with economic sanctions, an enforcement mechanism that at least in theory could be applied directly against offending corporations without separate national involvement. Thus, once Trafigura, and/or the shipping company which owns the ship itself, are found to be strictly liable, by some sort of arbitration system, the resulting agreement is that a transporter in violation would be refused entry to ports overall for a set time period. There are many problems with this idea, both theoretical and practical, but as a starting point of discussion it does have the virtue of focusing on the real problem of regulating the actions of transnational corporation themselves, rather than on the nations which are able to exert limited control.

In conclusion, the tragedy of the Probo Koala is symptomatic of problems which arise from the intersection of changes in the scale and nature of industrialization and increasing globalization of economic transactions. It is

8. Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A. 1905 (1938 & 1941).

9. The Comprehensive Environmental Response, Compensation, and Liability Act, 1980 (42 U.S.C. § 9601 *et seq.*).

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exacerbated by an international legal regime developed to facilitate relations between nations which are ill equipped to control powerful multinational corporations driven by the single-minded pursuit of profit.

*Afterword provided by Professor Hand*

Approximately two weeks after this live Symposium, Trafigura agreed to pay \$197 million (US) to compensate Ivory Coast for the Probo Koala disaster, despite continuing to deny liability. As part of the settlement, Trafigura employees imprisoned by the African country were released from prison. A spokesman for the Ivory Coast has indicated that the money will be used to construct a new waste disposal plant and a new hospital in Abijan.<sup>10</sup> The settlement does not include the individual victims and a private law suit is being brought in British courts by a London law firm.<sup>11</sup> The Dutch have also agreed to contribute 1 million Euros for the clean up operation in the Ivory Coast.<sup>12</sup> The settlement has been criticized by Greenpeace because it believes that as a result the Ivory Coast can be expected to provide little assistance to securing compensation for individual victims. Thus, the situation is somewhat better than predicted by my presentation but still problematic.

*Bill Black, Panelist and Moderator\**

My name is Bill Black, and I am the executive director of the Institute for Fraud Prevention. I teach economics and law, but I am actually a criminologist, and I have just returned from a World Bank anticorruption mission abroad. I too have been in the government. A criminologist would look at some of the issues that have been brought up by Mr. Cuellar and Ms. Hand somewhat differently. What have been discussed so far are aspects of failed states that impact other states, mostly in the United States in terms of risks of terrorism. But failed states create

10. 30 BNA Int'l Env't Reporter 4 (2007)

11. *Id.*

12. *Two Arrests in Probo Koala Scandal*, DUTCH NEWS.NL, Feb 16, 2007, available at [http://www.dutchnews.nl/news/archives/2007/02/two\\_arrests\\_in\\_probo\\_koala\\_sca.php](http://www.dutchnews.nl/news/archives/2007/02/two_arrests_in_probo_koala_sca.php).

\* Dr. William Black is the Executive Director of the Institute for Fraud Prevention (IFP). IFP's mission is to fund and conduct research and provide expert advice to help develop best practices to fight fraud and corruption. Professor Black has taught at the LBJ School of Public Affairs at the University of Texas at Austin, as a Regents' Lecturer at the University of California at Irvine, and as a distinguished scholar in residence at Claremont McKenna. He received his A.B. in economics and a J.D. from the University of Michigan and a Ph. D. in Criminology, Law and Society from the University of California at Irvine. He has an international reputation in the fields of anti-fraud, anti-corruption, corporate governance and effective and ethical regulatory leadership. He has recently authored *The Best Way to Rob a Bank is to Own One*, which describes the concept of "control fraud," by which a CEO or heads of state use the resources and power of the corporation or nation to defraud customers, creditors, investors and citizens.

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risks in a whole host of dimensions.

In criminology jargon, one thing failed states do is create systems capacity problems, which is characteristic of severe, endemic corruption. Many of these capacity problems are deliberately generated, because the way to optimize corruption is to destroy internal controls, and that produces this inevitable result. The Kimberly Process<sup>13</sup> is a somewhat voluntary process involving the United Nations and a host of signatories. Under this process, the UN and member states work together with NGOs such as Amnesty International and diamond companies to try to create a system to prevent conflict or blood diamonds from being marketed in order to reduce support for these insurrections that involve such incredible brutalities.

The African continental war is a war that most Americans do not even know occurred. At the war's peak, there were nine nations fighting in Africa with armed forces in the field and in the government, which was at the time either Zaire or Congo. This continental war was related to a number of other conflicts, in particular, the Rwandan genocide. But it was one of many unfortunate conflicts that were going on at the time, many of which involved diamonds. Angola, along with the National Union for the Total Independence of Angola (UNITA), was financing many of the war activities, getting money from the United States through sale of diamonds. Sierra Leone, Liberia, and Ivory Coast were also all involved in the conflict diamond trade in one way or another. In criminology there is a concept called control fraud, which applies when someone controls an organization or a nation and uses that control as a weapon to defraud others, which can result in massive losses. Enron is a classic example. If the CEO is the person who is running the fraud, then that person can optimize the firm for fraud, which can cause losses that dwarf, for example, all other property losses in the United States for an entire year.

In the context of government, the same thing can happen. In government, it is the head of state instead of the CEO that is involved, and we often call this a kleptocracy. A head of state involved in control fraud is essentially looting from the government. These heads of state are the financial super-predators of the world. They cause enormous losses, which go well beyond financial losses, because in the process, such losses typically ruin the country.

Frequently you see both the public and private sectors controlling fraud and working together — crony capitalism is the most classic example. This is certainly

13. Kimberley Process, *supra* note 2.

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the case in the Congo and Zaire. And that is why white collar criminologists have long pointed out that white collar crimes kill more people than blue collar crimes do. And indeed, in this context, you get what is known in economics as Aggressions Law mechanism. Aggressions Law is a metaphor, which actually states that bad money drives good money out of circulation in hyperinflation. In hyperinflation, the local currency is constantly losing value so you rush to the store and you spend it that minute if you can, and you hoard the gold or the dollar or the euros because that is gaining in value. So soon the only thing in circulation is all the bad money.

Similarly, if you gain a competitive advantage by cheating, by disposing of the waste improperly, then unless there is some form of effective enforcement, the bad practices will drive good practices out of the marketplace. Bad practices will create a profit opportunity. Unsafe products and work sites are typical examples. People get killed by the environment. But people also get killed by counterfeit medicines, by fake booze, by infant formula that has no active ingredients.

The kleptocrats have the ultimate in perverse incentives, because the way you optimize a country for looting it is to do essentially everything wrong you can imagine to the country. So if you want to extort money, you make sure that everything has to come through you, because then you can extort money from everyone that needs the necessary permissions. The kleptocrats also tend to be very unpopular, and they have to stay in power. There are some well known techniques for staying in power when you are looting the place. One is to suppress rights – left, right and center; but there are other techniques. For example, emphasize your family ethnic loyalties, align yourself with a hated minority, utilize the traders in a number of countries that are ethnically different, repeat the colonial practices of divide and conquer, and, of course, have the handy “the other” to blame at all times.

In the context of Zaire, or Congo, Mobutu was a kleptocrat’s kleptocrat. A nation that should be extraordinarily rich because of its minerals was looted into poverty. One author refers to him as King Leopold’s ghost, Leopold being notoriously rapacious. He actually owned the Congo personally as opposed to Belgium owning the Congo. He was the strongest kleptocrat because of the Cold War embrace of the autocrats. Jeanne Kirkpatrick and others theorized that autocrats could change and be used to stop Communists in the meantime.<sup>14</sup>

The thing that pushes Congo over the edge is the Rwandan genocide, because

14. See Jeanne Kirkpatrick, *DICTATORSHIP AND DOUBLE STANDARDS: RATIONALISM AND REALISM IN POLITICS* (1982).

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remarkably the Tutsis end up winning. They invade the country, in essence, and many of the Hutus flee. The guesstimates are that roughly two million Hutus flee. So the Hutus commit genocide against the Tutsis, and some Hutus as well, and these camps are largely set up for the refugees in what is at that time Zaire. Those camps come to become controlled by the Hutu extremists, and the Hutu extremists do some cross-border raids. The Tutsis just experienced this enormous genocide, are not in the mood to put up with anything, and are very scared of this. So you quickly end up with cross border raids to try to get control. You have the worst of all situations, a combination of fear and hate.

So they begin coming across the border on the reprisal raids. And it leads to the first war of Zaire in 1996. Rwanda brings in Kabila as its person. There were eight nations that intervened with troops, plus the Rwandan troops, plus there are twenty different rebel movements at any given time. It is amazing how many sub-sub-subgroups there are, and many of the nation states are allied with the sub-sub-subgroups and using them against national rivals.

This is the worst war since World War II. More people died, more people raped, more starvation, more disease. It is a civil war; it's an ethnic war; indeed, it is the first Pan-African war. As war is a continuation of diplomacy by other means, this is simply a continuation of looting by other means. The allies turned out to be every bit as rapacious as the people that are allegedly invading and that the allies are supposedly defending against. The pros are felons.

Conservative economics has a theory of spontaneous organization that says whenever an economic institution is needed, a profit opportunity will exist, and it will spontaneously arise. Well, they certainly spontaneously arose in this context because western corporations rushed to join in; they rushed to join in with a host of different folks. Eight different nations were headquartered and had armies actually in the field in different parts of the Congo.

Congo has its army in portions, plus there are these rival insurrections. All of them are cutting deals with huge corporations that are willing to deal with these entities. The looting just becomes astonishing, and you get the army as thief. African borders do not make much sense in terms of ethnicities and the fear is once you start changing the borders, where would you stop. Here is a novel solution: we do not change the borders formally, we just occupy and we just loot. But we never make a claim that says this land is ours. They do not hit the worst of the inhibitions and they get so rapacious that the man they just installed actually turns on them. And of course they decide they have to get rid of him, he is assassinated and there is a second Congolese war in 1998.

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So my question out of all of this is so why are we all talking about diamonds? Why make movies about diamonds?<sup>15</sup> There is a whole series of these African conflicts. None of them involving the diamonds primarily are remotely as large as the Congolese wars. None of them are remotely as destructive. They are terrible, but they do not come close to the scale. Congo has more deaths, more atrocities, more looting. It is a war that threatened the entire continent's stability. It is a war that actually threatened the international economy, because it turns out the Congo has a unique source of many of the things we need in modern cell phones and other communications, unlike all of the other countries that were in conflict.

There certainly was not a lack of knowledge. In fact, there are a couple of UN reports that give you chapter and verse on how the Congo was looted and who was doing the looting. There were many efforts at mediation. But there was absolutely no effective international action against the mass theft of Congo's resources. There was very little helpful action by business. Overwhelmingly you would have to say that business rushed to the Department of Looting. And business follows Congo because it is such a producer. The United Nations asked business to take action against all the forms of looting, and they refused.

Now among all of these players, all of them look bad including the non-players that stay on the side and simply ignore it, like the United States. Zimbabwe especially looks bad and you can understand why Rwanda was so afraid. You can understand why Uganda was upset, but Mugabe has used the theft from the Congo to stave off bankruptcy. We keep having these headlines. Wait a minute, how did Zimbabwe make this latest interest payment? They did it by stealing from Congo and Zimbabwe, of course, has utterly refused to help or cooperate.

So again, why do we have all the attention now from DiCaprio and Blood Diamond? There's nothing unique about diamonds; yes, they helped fund other conflicts, but they did far less than these other much more valuable minerals in many cases. It was not diamonds that were the principle reason things were happening in Congo; rather it was other minerals that were far more important. So why the focus on diamonds? I would suggest to you it is because we are dealing with the world's most successful cartel and probably the world's best marketers as well. Because diamonds should be one of the cheaper things you can imagine, there are immense stocks of diamonds sitting in drawers. You all get a pittance for a diamond that you try to sell because diamonds are not worth much at all, and the only reason they are is because of this very effective cartel.

15. See, e.g., BLOOD DIAMOND (Warner Bros. Pictures, Inc. 2006).

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Now what does a cartel have to do? A cartel restricts production and sale. So who is threatened in this context? The people selling diamonds, right? Because if you are an official seller they, companies like De Beers, come and cut you a deal. They buy you out, and that puts you into the cartel. They did this famously with Russia, for example, back when it was the Soviet Union. But you cannot do that with hundreds of thousands of people along a very long river, and so De Beers found this incredibly brilliant strategy. They could be on the side of the angels, getting praised by Amnesty International and others; get the United Nations to enforce their cartel by cracking down. I am not saying that is such a bad idea, but you can see why if we cannot get this one to work, this Kimberley Process,<sup>16</sup> there is nothing that is ever going to work. This is a unique situation where the private enterprise has an enormously strong economic incentive to enforce these rules.

So do not use the phrase “legitimate sellers,” because there are no legitimate sellers. If you applied normal antitrust laws, they would all actually be in violation. On their websites, you will find an ode to what diamonds do for Africans, and Mandela is their greatest spokesperson in all of this.

16. See The Kimberley Process, *supra* note 2.