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## Rule of Law, State Capture, and Human Development in Africa

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# **RULE OF LAW, STATE CAPTURE, AND HUMAN DEVELOPMENT IN AFRICA**

JOHN MUKUM MBAKU\*

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## I. GENERAL INTRODUCTION

State capture involves the appropriation of state institutions, organs, and functions by individuals or groups. By doing so, these individuals and groups can have control over or influence the design and adoption of new laws, rules, and regulations, as well as the amendment or modification of existing ones.<sup>1</sup> Ivor Chipkin<sup>2</sup> argues that state capture occurs when “state institutions, potentially including the executive, state ministries, agencies, the judiciary and the legislature, regulate their business to favor private interests.”<sup>3</sup>

It has been argued that *state capture* is a “severe form of corruption.”<sup>4</sup> Historically, corruption has been defined to include the subversion of existing rules by civil servants and political elites to generate extra-legal income for themselves.<sup>5</sup> State capture, however,

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1. See, e.g., VESNA PESIC, STATE CAPTURE AND WIDESPREAD CORRUPTION IN SERBIA I (Ctr. European Policy Studies Working Document No. 262, 2007), <https://www.ceps.eu/publications/state-capture-and-widespread-corruption-serbia> (defining “state capture” as “any group or social strata, external to the state, that exercises decisive influence over state institutions and policies for its own interests against the public good”).

2. Ivor Chipkin, *Corruption's Other Scene: The Politics of Corruption in South Africa*, in GOVERNANCE, RESISTANCE AND THE POST-COLONIAL STATE: MANAGEMENT AND STATE BUILDING 21 (Jonathan Murphy & Nimruji Jammulamadaka eds., 2017).

3. *Id.* at 21.

4. *Id.* (explaining that the term “state capture” is an economic expression of corruption).

5. See, e.g., Nathaniel. H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 AM. BEHAV. SCIENTIST 8, 8 (1964) (noting that corruption is an “extra-legal institution used by individuals or groups to gain influence over the actions of the bureaucracy”); J. S. Nye, *Corruption and Political*

implicates the taking over of “rule-making” and “rule-interpreting” processes by private interests.<sup>6</sup> Studies of state capture can help us understand and more effectively appreciate the extent to which “firms, and the networks which control them, have acquired the ability to ‘shape the laws, policies and regulations . . . to their own advantage by providing illicit private gains to officials.’”<sup>7</sup>

Once private interests capture it, the state ceases to operate in the interest of the people. It functions and carries out its duties almost<sup>8</sup> exclusively to maximize the interests of the private parties or agents that have captured it. Why should citizens of a country be concerned with state capture? In addition to abandoning its traditional functions, which include providing necessary public goods and services (e.g., security of the person and property of the individual) to all citizens, there may be a significant increase in government impunity, which may include increased abuse of the fundamental rights of citizens, especially those of historically marginalized and deprived individuals and groups (e.g., women, girls, and religious and ethnic minorities), increasing levels of corruption, especially of the grand type,

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*Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) (explaining that “corruption is behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains”); Herbert H. Werlin, *The Consequences of Corruption: The Ghanaian Experience*, 88 POL. SCI. Q. 71, 72-73 (1973) (referring to an assumption that political parties are often motivated by “individual self-interest and the possibilities of financial gain”).

6. Chipkin, *supra* note 2, at 21.

7. Daniel C. Bach, *State ‘Capture’ Without State Control: Regionalization Through Trans-State Networks*, in *STATE, POWER, AND NEW POLITICAL ACTORS IN POSTCOLONIAL AFRICA* 235, 236 (Alessandro Triulzi & M. Cristina Ercolessi eds., 2004).

8. See generally John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT’L L. 959 (2013) [hereinafter Mbaku, *Providing a Foundation*] (finding that the extent to which the state neglects its obligations to the people is determined by how fully and completely the state’s institutions have been captured by private interests: In a country whose governing process is characterized by the separation of powers (with effective checks and balances) and an executive that is captured by private interests but a judiciary that remains independent, the government may still be able to function on behalf of the people because the judiciary, using its powers to determine the constitutionality of laws, can frustrate the ability of the executive to engage in rule-making and rule-interpretations that favor certain business interests).

significant reductions in openness and transparency in government communications, a deterioration in economic competitiveness as well as in rule of law institutions (e.g., the courts), and a general failure of the state to engage in necessary reforms to improve the country's institutional arrangements. Perhaps, more important, is the fact that the state would no longer be interested in promoting those activities, such as investment in formal and informal training for workers, that can significantly improve the people's ability to engage in activities (e.g., entrepreneurship and the creation of wealth) that can greatly enhance human development.<sup>9</sup>

In this paper, we will examine state capture with specific reference to African countries. In Section II, we will revisit the definition of state capture and provide a much more robust examination of the concept and show how it differs from corruption. In Section III, we explore state capture in Africa by drawing from the experiences of a few countries. In Section IV, we explore the relationship between state capture and the rule of law and how the former can significantly impact the latter. In Section V, we examine the impact of state capture on economic development. In Section VI, which is the concluding section, we provide policy recommendations, and, in doing so, we examine ways in which African countries can structure their governing processes to minimize state capture and its deleterious effects on governance generally and human development in particular.

## II. STATE CAPTURE AND CORRUPTION: A GENERAL OVERVIEW

In the last several years, legal scholars,<sup>10</sup> political scientists,<sup>11</sup> and

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9. See JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 103-04 (2007) [hereinafter MBAKU, CORRUPTION IN AFRICA] (examining, *inter alia*, the impact of corruption on development in the African countries); see generally JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA (2004) [hereinafter MBAKU, INSTITUTIONS AND DEVELOPMENT] (providing an analysis of the role of institutions in human development in Africa); Mbaiku, *Providing a Foundation*, *supra* note 8, at 977-78 (examining, *inter alia*, the important role played by the rule of law in wealth creation and human development).

10. INT'L LEGAL CTR., LAW AND DEVELOPMENT: THE FUTURE OF LAW AND

economists, have recognized the fact that “corruption is fundamentally a problem of governance.”<sup>12</sup> Corruption is usually pervasive in countries where civil servants and political elites are not adequately constrained by the law and the state is either too weak or unwilling to fully and effectively oversee the activities of public employees.<sup>13</sup> In such economies, there generally is an absence of “institutions that underpin the rule of law.”<sup>14</sup> Some scholars have argued that the “recognition that corruption is a system of the underlying weakness of the state, while important, has shifted the focus of analysis away from firms.”<sup>15</sup> But, why is an analysis of corruption that takes a firm-level perspective important? Hellman, et al.,<sup>16</sup> argue that it is important because it provides researchers with the opportunity to empirically examine “the efforts of firms to shape and influence the underlying rules of the game (i.e., legislation, laws, rules, and decrees) through private payments to public officials.”<sup>17</sup>

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DEVELOPMENT RESEARCH 9 (1974) (presenting a series of essays that examine the relationship between law and development); THEO SCHEEPERS, *A PRACTICAL GUIDE TO LAW AND DEVELOPMENT IN SOUTH AFRICA: AN INTRODUCTION TO THE LAW APPLICABLE TO DEVELOPMENT AND THE DEVELOPMENT MANAGEMENT PROCESS IN SOUTH AFRICA* vii-viii (2000) (examining, inter alia, the legal aspects of how to develop, implement, and manage development projects).

11. CLAUDE AKE, *DEMOCRACY AND DEVELOPMENT IN AFRICA* vii-viii (1996) (examining, inter alia, the causes of underdevelopment in Africa and presenting an alternative paradigm for development in Africa); *THE AFRICAN UNION AND NEW STRATEGIES FOR DEVELOPMENT IN AFRICA* 475-76 (Said Adejumbi & Adebayo Olukoshi eds., 2008) (examining, inter alia, various development strategies promoted by the African Union).

12. JOEL S. HELLMAN, GERAINT JONES, DANIEL KAUFMANN & MARK SCHANKERMAN, *MEASURING GOVERNANCE, CORRUPTION, AND STATE CAPTURE: HOW FIRMS AND BUREAUCRATS SHAPE THE BUSINESS ENVIRONMENT IN TRANSITION ECONOMIES* 4 (European Bank Reconstruction & Dev. & World Bank 1999).

13. *See, e.g.*, MBAKU, *CORRUPTION IN AFRICA*, *supra* note 9, at 102 (arguing that, “unless Africans engage in the reconstruction of the state through democratic constitution making to produce laws and institutions that significantly constrain the ability of civil servants to impose operating roadblocks, opportunistic civil servants are most likely to make them a permanent source of extralegal income for themselves and their superiors”).

14. HELLMAN, JONES, KAUFMANN & SCHANKERMAN, *supra* note 12, at 4.

15. *Id.*

16. *Id.*

17. *Id.* This is actually the definition provided by these authors for “state capture.” In practical terms, once the state is captured by private business interests,

But what is the relationship between corruption and state capture? Corruption usually refers to the activities of civil servants and political elites that intentionally secure extra-legal income for these individuals. For example, civil servants may extort payments from individuals and private business firms that seek services from the government. Businesses seeking import and production permits and individuals demanding services such as a passport to travel abroad or a government scholarship for their son or daughter to study abroad, may be forced to pay bribes to civil servants in order to bypass what they believe is an extremely onerous legal process for obtaining such services.<sup>18</sup>

The available literature about corruption distinguishes between grand and petty corruption. Grand corruption refers to the corrupt activities of high-ranking civil servants and political elites which involve large amounts of money and implicate efforts to influence

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the latter effectively become de facto legislators, designing or influencing the design of the laws that regulate socio-political interaction in the country. The capture of the legislative process is usually undertaken through the provision of illicit private gains to public officials, resulting in an effective corruption of the governing process. See, e.g., Joel Hellman & Daniel Kaufmann, *Confronting the Challenge of State Capture in Transition Economies*, 38 FIN. & DEV. 31, 31 (2001) (defining state capture “as the efforts of firms to shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials”).

18. See generally Kempe Ronald Hope, Sr., *An Analytical Perspective on Police Corruption and Police Reforms in Developing Societies*, in POLICE CORRUPTION AND POLICE REFORMS IN DEVELOPING SOCIETIES 3, 11-13 (Kempe Ronald Hope, Sr. ed., 2016) [hereinafter Hope, *An Analytical Perspective on Police Corruption*] (discussing the forms of police corruption and the costs police corruption imposes on society at large); Kempe Ronald Hope, Sr., *Corruption and Development in Africa*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 17, 19-21 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000) [hereinafter Hope, *Corruption and Development in Africa*] (discussing various factors contributing to ongoing corruption in Africa); Jacob van Klaveren, *The Concept of Corruption*, in POLITICAL CORRUPTION: A HANDBOOK 25, 25 (Arnold J. Heidenheimer et al. eds., 1989) (explaining that corruption occurs in everyday life when a “civil servant abuses his authority to obtain an extra income from the public”); VICTOR T. LE VINE, POLITICAL CORRUPTION: THE GHANA CASE 6-7 (1975) (explaining that a politically corrupt transaction “involves at least two people, at least one of them acting in an official or quasi-official capacity, in an exchange in which a political good is passed in at least one direction and at least one of the parties knows that the disposition of the political good is unscheduled, illegal, or unsanctioned”).

the public policy process. As argued by Arvind K. Jain,<sup>19</sup> grand corruption is “the acts of the political elite by which they exploit their power to make economic policies.”<sup>20</sup> Jain argues further that “politicians [in a democratic political system] are supposed to make resource allocation decisions based solely upon the interests of their principal—the populace.”<sup>21</sup> However, if a politician is corrupt, he or she will act with impunity and engage in various “forms of capriciousness and arbitrariness to maximize his private interests at the expense of the society as a whole,”<sup>22</sup> and, in doing so, will engage in the promotion of policies that benefit the private business interests that bribe the political elites.

Petty corruption (which is also referred to as “bureaucratic corruption” or “administrative corruption”), involves “the corrupt activities of the appointed bureaucrats in their dealings with either their superiors (the political elite) or with the public.”<sup>23</sup> Examples of petty corruption abound in the African economies.<sup>24</sup> For example, as already mentioned, individuals and business firms that are seeking access to public services may be forced to bribe civil servants in order to make the services available. Generally, “the bribe is paid either to ensure that the payor receives the service (to which he is legally entitled), or to remove bottlenecks in the bureaucratic process and enhance the ability of the payor to access the government services, or to allow an individual who is not legally entitled to receive a public service to do so.”<sup>25</sup>

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19. Arvind K. Jain, *Corruption: A Review*, 15 J. ECON. SURVS. 71 (2001).

20. *Id.* at 73.

21. *Id.*

22. John Mukum Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT’L & COMP. L. 661, 683 (2016) [hereinafter Mbaku, *International Law*] (discussing further the impact of bribes on policies involving resource allocation).

23. Jain, *supra* note 19, at 75; see Mbaku, *International Law*, *supra* note 22, at 683.

24. Mbaku, *International Law*, *supra* note 22, at 683 (explaining that petty corruption, for example, occurs when individuals and business firms seeking access to services may be forced to pay bribes in order to receive services).

25. John Mukum Mbaku, *Enhancing Africa’s Fight Against Corruption: The Role of International Law*, 3 GLOBAL BUS. L. REV. 9, 24 (2012) [hereinafter Mbaku, *Enhancing Africa’s Fight Against Corruption*]. Note that some scholars also refer to petty corruption as “administrative corruption.” *E.g.*, Yahong Zhang &

It is important to note that just because corruption is designated as “petty” does not mean that its impact on the economy and its citizens, especially the poor, is insignificant or benign. In fact, in many countries on the African continent, petty corruption remains a significant obstacle for people in organizing their private lives and engaging in activities that create wealth and generally improve their quality of life.<sup>26</sup> This is especially true for people on the political and economic margins and other historically vulnerable individuals and groups (e.g., women, the urban poor, rural dwellers, and children). It is often the case that the poor, unable to pay the bribes requested by civil servants, are usually prevented from having access to welfare-enhancing and, perhaps, life-saving services (e.g., clean water, shelter, basic health care, food, and police protection).<sup>27</sup>

Several years ago, the World Bank developed the concept of “state capture” to use as a tool to measure political instability in transition economies, primarily in Eastern Europe.<sup>28</sup> The World Bank defined state capture as “the actions of individuals, groups, or firms both in the public and private sectors to influence the *formation* of laws, regulations, decrees, and other government policies to their own advantage as a result of the illicit and non-transparent provision of private benefits to public officials.”<sup>29</sup> State capture, then, usually involves the activities of corrupt political actors who “change the regulations and institutions of the state in favor of their interests and the interests of their political alliance and supporters.”<sup>30</sup> Bureaucratic corruption, however, refers to the provision of benefits to public officials to influence how existing or established rules are

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José G. Vargas-Hernández, *Introduction: Corruption and Government Anti-Corruption Strategies*, in GOVERNMENT ANTI-CORRUPTION STRATEGIES: A CROSS-CULTURAL PERSPECTIVE xiii, xiv (Yahong Zhang & Cecilia Lavena eds., 2015).

26. Mbaku, *International Law*, *supra* note 22, at 683-84.

27. *Id.* at 684.

28. Zhang & Vargas-Hernández, *supra* note 25, at xiv.

29. WORLD BANK, ANTICORRUPTION IN TRANSITION: A CONTRIBUTION TO THE POLICY DEBATE xv (2000) (emphasis in original).

30. Zhang & Vargas-Hernández, *supra* note 25, at xiii, xiv; *see also* Hellman & Kaufmann, *supra* note 17, at 31 (referring to state capture as behavior of “oligarchs manipulating policy formation and even shaping the emerging rules of the game to their own, very substantial advantage”).

*implemented*.<sup>31</sup> If a private entrepreneur pays bribes to bureaucrats at the Inland Revenue Service to lower the taxes that his business enterprise legally owes the government, this is bureaucratic corruption. However, if a group of business interests bribes public officials to enact *new* legislation granting them monopoly control of the importation of certain goods into the country, this is considered part of the effort to capture the state.<sup>32</sup>

Where there is state capture, state institutions are no longer geared toward serving the needs and interests of the people writ large, but evolve into tools or mechanisms for the advancement of the interests of specific individuals and groups—the latter are those who have used illicit and non-transparent payments to secure control of rule-making or legislative processes. Of the various types of corruption that pervade any economy or political system, state capture is considered the most insidious and the one with the greatest transformational impact on the country because it can effectively institutionalize bureaucratic and grand corruption, as well as radically change the country's laws and institutions.<sup>33</sup>

Thus, unlike most types of corruption, state capture can fundamentally and radically transform the structure of the state and the institutional foundation on which the state is built.<sup>34</sup> In addition to changes in the country's laws and institutions, state capture can also

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31. CHERYL GRAY, JOEL HELLMAN & RANDI RYTERMAN, *ANTICORRUPTION IN TRANSITION 2: CORRUPTION IN ENTERPRISE-STATE INTERACTIONS IN EUROPE AND CENTRAL ASIA 1999–2002* 10 (World Bank 2004).

32. HELLMAN, JONES, KAUFMANN & SCHANKERMAN, *supra* note 12, at 20 (discussing “grand corruption” in which private payments are made to public officials to influence legislation, rules, laws, or decrees).

33. *See, e.g.*, S. I. COHEN, *ECONOMIC SYSTEMS ANALYSIS AND POLICIES: EXPLAINING GLOBAL DIFFERENCES, TRANSITIONS AND DEVELOPMENTS* 197 (2009) (examining various typologies of corruption and showing that state capture is a form of corruption); INT'L BUS. PUBL'NS, USA, UKRAINE INTELLIGENCE, SECURITY ACTIVITIES AND OPERATIONS HANDBOOK 20 (2006) (examining corruption and showing that state capture is a form of corruption and “represents a more severe threat to economic growth and foreign investment”).

34. *See* Akbar Noman & Joseph E. Stiglitz, *Strategies for African Development*, in *GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES* 3, 21–22 (Akbar Noman et al. eds., 2012) (discussing how deregulation, market liberalization, and privatization are susceptible to state capture).

lead to a radical restructuring of the relationship between the public and private sectors—state custodians (that is, civil servants and political elites) in a captured state may opt to engage in behaviors that grant business interests a lot of benefits but which impose significant costs on society at large. For example, politicians may favor regulations that actually allow firms to pollute and damage the ecosystem and, in the process, impose significant social and economic costs on the people including, especially, the poor.<sup>35</sup> State capture can also radically change the relationship between ethnocultural groups within the country, especially if some groups are perceived as the primary and permanent beneficiaries of the benefits generated through the capture process. In fact, ethnocultural groups that perceive themselves as having been marginalized and pushed to the economic and political margins by state capture may resort to violent and destructive mobilization to minimize their further exclusion and marginalization.<sup>36</sup>

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35. See Mushtaq H. Khan, *Governance and Growth: History, Ideology, and Methods of Proof*, in GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES 51, 61 (Akbar Noman et al. eds., 2012).

36. For many years, the indigenous peoples of Liberia argued that the government and the economy had been dominated and controlled by Americo-Liberians since the country's founding in 1847. The Americo-Liberians are the descendants of the freed American slaves who were brought to the area in the 1820s to establish the colony of Monrovia which eventually evolved into the country that is now called Liberia. Various indigenous ethnocultural groups in Liberia had argued for many years that the Americo-Liberian hegemony had promoted public policies that enriched the latter but impoverished the former. Thus, on April 12, 1980, when Master Sergeant Samuel Kanyon Doe, a member of the Krahn ethnocultural group, overthrew the government of William R. Tolbert, an Americo-Liberian, Sergeant Doe argued that he had done so to end more than a hundred years of the marginalization and infantilization of indigenous peoples. See GEORGE KLAY KIEH, JR., *THE FIRST LIBERIAN CIVIL WAR: THE CRISIS OF UNDERDEVELOPMENT 18-19* (2008); JULIUS MUTWOL, *PEACE AGREEMENTS AND CIVIL WARS IN AFRICA: INSURGENT MOTIVATIONS, STATE RESPONSES, AND THIRD-PARTY PEACEMAKING IN LIBERIA, RWANDA, AND SIERRA LEONE* 49-51 (2009). Other ethnocultural groups that have felt marginalized and pushed to the margins of political and economic spaces have used similar arguments as those employed by Liberia's indigenous groups to engage or participate in violent and destructive mobilization. For example, in 1994, the Hutus of Rwanda justified their genocide against their fellow citizens (i.e., the Tutsi and their Hutu sympathizers) on the ground that they were fighting to prevent their further marginalization by a government dominated by Tutsis. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 185-

Public policy responses to market failures (e.g., environmental pollution) are especially vulnerable to manipulation by public officials in states that have been captured by private interests.<sup>37</sup> For example, governments can address environmental pollution (which includes water, land, and air pollution) by (1) directly taxing the polluting business; (2) providing the polluter with subsidies not to pollute; (3) setting limits on emissions; or (4) making emissions tradeable by creating well-defined property rights on them.<sup>38</sup> Through one or more of these methods, the government can deal effectively with pollution and minimize its deleterious costs on society at large. However, where public officials have been captured by private business interests, the former may simply ignore passing legislation to implement any of these approaches to pollution control. In doing so, public officials will allow polluting businesses to earn non-competitive profits; nevertheless, society will be burdened with the monetary and non-monetary costs of the pollution.<sup>39</sup>

There is a special type of state capture called “prebendal predation,” which does not directly involve private business interests.<sup>40</sup> Within this system, which is created and directed by civil servants (i.e., state bureaucrats), these civil servants use their official positions to directly extract extra-legal income from citizens. Specifically, civil servants, “organized in pyramidal prebends, [are] able to extract resources from officials occupying a lower hierarchical position. Going down the ladder, the lowest-placed officials abusively [extract] bribes and illegal fees directly from

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86 (2001).

37. Khan, *supra* note 35, at 61 (discussing the problems that can result from policies seeking to correct specific market failures).

38. *Id.*

39. See ANDRÉ STANDING, CORRUPTION AND THE EXTRACTIVE INDUSTRIES IN AFRICA: CAN COMBATTING CORRUPTION CURE THE RESOURCE CURSE? 12 (Inst. Strategic Studies Paper No. 153, 2007) (providing that, in countries with weak institutions and high levels of corruption “related to mining and oil production,” costly interventions and community development programs may be less likely to materialize); see generally PATRICK BOND, UNSUSTAINABLE SOUTH AFRICA: ENVIRONMENT, DEVELOPMENT AND SOCIAL PROTEST 36 (2002) (providing that pollution leads to increases in water treatment costs and public health risks to many low-income households).

40. See generally PIERRE ENGLEBERT, AFRICA: UNITY, SOVEREIGNTY, AND SORROW 81-84 (2009) (referring to the creation of “prebends” in corrupt societies).

citizens.”<sup>41</sup>

In addition to the fact that all these types of state capture can distort public policy and negatively affect the ability of the government to provide citizens with public goods and services, state capture can also create or exacerbate income and wealth inequalities within the country.<sup>42</sup> For example, where big business interests have fully captured the state, legislatures will legislate primarily to meet the interests of these businesses for monopoly profits. That process would concentrate wealth in the hands of a few enterprise owners and deprive the population at large from participating gainfully in economic activities. Should such a process continue, it could lead to significant deterioration in the quality of life and negatively affect human development. In addition, with its control of the legislative process, the business interest that has captured the state may not be interested in using tax policy for redistributive purposes—specifically, such business interest may actually make sure that the government does not use tax policy to deal with poverty and improve the quality of life for individuals and households on the economic margins. One major development problem with state capture is that the private business or corporate interests that take control of the legislative process may not be interested in development-oriented public policies—in fact, they may be violently hostile to such policies since they may view them as obstacles to their ability to monopolize economic spaces and continue to generate above normal rates of return from their enterprises.<sup>43</sup>

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41. CRISTINA CORDUNEANU-HUCI, ALEXANDER HAMILTON, AND ISSEL MASSESS FERRER, UNDERSTANDING POLICY CHANGE: HOW TO APPLY POLITICAL ECONOMY CONCEPTS IN PRACTICE 65 (2013).

42. *See id.* at 69-70 (“It may be the case that the existence of corruption further entrenches inequality, as the rich and politically powerful are able to protect themselves from the government . . . while more marginalized groups are less able to prevent the abuse of public office for private gain.”).

43. *See, e.g.*, AARON TESFAYE, STATE AND ECONOMIC DEVELOPMENT IN AFRICA: THE CASE OF ETHIOPIA 4-5 (2017) (arguing, *inter alia*, that some of the corporate interests that have been involved in state capture “may not necessarily be imbued with the ideology of development”).

### III. STATE CAPTURE IN AFRICA

#### A. INTRODUCTION

The classical theory of authority within a state identifies three key groups, namely: (1) those who hold power—that is, the political elite; (2) civil servants or bureaucrats; and (3) the people or population.<sup>44</sup> The principal-agent framework has emerged as a mechanism to examine “how one group of actors—the principal—contracts with another set of actors—the agents—to get things done.”<sup>45</sup> In any modern country, the population at large is the principal and the political elite and the civil servants are the agents. Within this model, the people (i.e., the principal) are interested primarily in peace and security, the availability of certain public goods and services (e.g., police protection, national defense) that cannot be provided efficiently by the private market, and public policies that support entrepreneurial activities and the creation of wealth. The people form governments and empower them to maintain law and order and provide them with other public goods and services (e.g., social overhead capital—roads, schools, hospitals, public parks, and libraries), as well provide them with an institutional environment within which they can create the wealth that they need to meet their basic needs and improve their quality of life. In exchange, the individuals who perform these governmental functions (i.e., the agents) are provided decent compensation by the principal.<sup>46</sup>

Of course, the principal is quite concerned about the possibility that the agent could become opportunistic and engage in self-dealing or act with impunity for his own benefit instead of that of the principal. Thus, within such an institutional arrangement, the principal is continuously worried about how to select, monitor, supervise, and if necessary, discipline agents. One form of opportunism on the part of agents is *total oppression* of the principal by the agents—here, the agents set themselves up as “masters” and

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44. See generally 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215-25 (Guenter Roth & Claus Wittich eds., 1978) (describing types of authority).

45. JAN-ERIK LANE, *COMPARATIVE POLITICS: THE PRINCIPAL-AGENT PERSPECTIVE* 1 (2008).

46. *Id.* at 6.

proceed to treat the people or principal as slaves.<sup>47</sup> The agents would then extract as much value from the principal as possible, for example, through either confiscatory taxes or some form of tax farming—both are likely to involve the excessive use of force. This situation is what usually obtains in a captured state.<sup>48</sup>

Another form of opportunism by agents can involve the subjugation or oppression of, not the entire population, but of certain groups within the country. Some groups are treated harshly for the benefit of the agents and a few favored groups. The surplus value extracted from the marginalized groups is shared between the agents and the favored groups. This model of agent opportunism describes South Africa's apartheid system (1948–1994) and the political system that was established in Liberia in 1847.<sup>49</sup>

In the case of state capture, the agents can use tax farming or confiscatory taxes to extract value from the economy for themselves and favored groups—the latter are usually the business interests that have captured the state. Agents may prefer tax farming to direct taxation in countries, such as those in Africa, where governments do not have full control of national territory,<sup>50</sup> corruption is rampant, and high rates of illiteracy and other problems make it very difficult for the government to accurately determine household income.<sup>51</sup>

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47. *Id.* at 3.

48. *See id.* at 3–5.

49. Under the apartheid system, whites were the favored population and the Africans were the marginalized and exploited population. In Liberia, the Americo-Liberians were the favored population and the indigenous groups were the exploited and marginalized groups. *See generally* GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 239–41 (1981) (providing an overview of racial segregation and the marginalization of Africans in South Africa and the United States); Minion K. C. Morrison, *Prologue* to *LIBERIAN POLITICS: THE PORTRAIT BY AFRICAN AMERICAN DIPLOMAT J. MILTON TURNER* xxvii, xxxvii (Hanes Walton, Jr. et al. eds., 2002) (describing how the Liberian government maintained an undemocratic government at the expense of indigenous ethnocultural groups).

50. This could be due, for example, to the lack of infrastructure, including, especially, roads and bridges. Metin M. Cosgel & Thomas J. Miceli, *Tax Collection in History*, *ECON. WORKING PAPERS* 7, 10–11 (2007).

51. *See* KIBUTA ONGWAMUHANA, *TAX COMPLIANCE IN TANZANIA: ANALYSIS OF LAW AND POLICY AFFECTING VOLUNTARY TAXPAYER COMPLIANCE* 16 (2011) (explaining the issue through the lens of taxation).

At the other end of the spectrum, however, the state is well-constrained by the law, agents (i.e., civil servants and political elites) accept and respect the law, do not engage in self-dealing, do not act arbitrarily, capriciously, or with impunity, and work to maximize the interests of the principal (i.e., the people). Agents are fully accountable to the constitution and the people, and, because they do not have the opportunity and wherewithal to engage in corruption and other forms of opportunism, they would rather demand that the people pay them decent and competitive compensation packages than engage in self-aggrandizing activities. Adherence to the rule of law is a major characteristic of governance in such a polity. While business interests may still try to capture the state, they are less likely to succeed because civil servants and political elites accept and respect the law and are not likely to cooperate with those who attempt to corrupt them.<sup>52</sup>

In this section, we examine state capture in Africa by drawing examples from a few African countries. Although many social scientists have considered African countries, such as the Democratic Republic of Congo (DRC), as failed states—that is, states that are characterized by their “inability or unwillingness to protect their citizens from violence and perhaps even destruction, as well as their tendency to consider themselves beyond the reach of domestic or international law,” and “hence free to carry out aggression and violence”<sup>53</sup>—these states remain quite efficient when it comes to the protection of the interests of ruling elites and their economic or commercial partners or benefactors.

In the case of the DRC, for example, while it is quite clear that the state in Kinshasa has failed to provide the majority of Congolese citizens with basic services—security, including police protection; education; health care; clean water; and opportunities for self-

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52. See generally Mbaku, *Providing a Foundation*, *supra* note 8, at 964 (examining, *inter alia*, why the rule of law is critical to wealth creation and human development).

53. NOAM CHOMSKY, *FAILED STATES: THE ABUSE OF POWER AND THE ASSAULT ON DEMOCRACY* 1-2 (2007); see also ROBERT H. BATES, *WHEN THINGS FELL APART: STATE FAILURE IN LATE-CENTURY AFRICA* 137-39 (2008) (commenting on the give-and-take between security and prosperity within failed states).

actualization (which may include, for example, maintenance of a safe institutional environment within which citizens can engage in entrepreneurial activities to create wealth for themselves)—it is quite clear that the same state has provided the wherewithal for private business interests, particularly the foreign multinational companies that are active in the natural resources extraction sector, to maximize their objectives. These objectives include the extraction and sale of the country's natural resources without adequate compensation to the people of the DRC.<sup>54</sup> As far back as the time of colonialism, various commercial and business interests have successfully captured governing institutions in Congo and have proceeded to act with impunity expressly for the purpose of extracting the territory's natural resources for the benefit of the private interests, as well as for the security of the regime—for example, during colonialism, the colonial regime and in the post-independence period, the regimes of Mobutu Sese Seko and those of the two Kabilas (Joseph Kabila and his father, Laurent-Désiré Kabila).<sup>55</sup>

In Guinea, the state has been captured by several mining interests.<sup>56</sup> Guinea is one of Africa's poorest countries and the international community has accused many of its public officials of receiving bribes to sell the country's natural resources, including the Simandou Mines, the world's richest and largest deposits of iron-ore, to foreign interests at below market prices.<sup>57</sup> Before he died in office

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54. NATALIE RALPH, PEACEMAKING AND THE EXTRACTIVE INDUSTRIES: TOWARDS A FRAMEWORK FOR CORPORATE PEACE 66-68 (2015); Mungbalemwe Koyame & John F. Clark, *The Economic Impact of the Congo War*, in THE AFRICAN STAKES OF THE CONGO WAR 201, 207-09 (John F. Clark ed., 2002).

55. See FRANÇOIS NGOLET, CRISIS IN THE CONGO: THE RISE AND FALL OF LAURENT KABILA 233-34 (2010) (depicting the looting of Congo's natural resources); GEORGES NZONGOLA-NTALAJA, THE CONGO FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY 150-52, 238-39 (2002) (describing, inter alia, Mobutu's profiteering); DAVID RENTON ET AL., THE CONGO: PLUNDER & RESISTANCE 1-2 (2007) (explaining the impacts of Western colonialism in Congo).

56. ANDREI PANIBRATOV, INTERNATIONAL STRATEGY OF EMERGING MARKET FIRMS: ABSORBING GLOBAL KNOWLEDGE AND BUILDING COMPETITIVE ADVANTAGE 228 (2017).

57. IFEDAPO ADELEYE ET AL., THE CHANGING DYNAMICS OF INTERNATIONAL BUSINESS IN AFRICA (2015); GREGORY R. COPLEY, DEFENSE & FOREIGN AFFAIRS HANDBOOK 616 (1999); PANIBRATOV, *supra* note 56, at 228.

in 2008, President Lansana Conté agreed to hand over a license worth billions of pounds sterling to mine a share of the Simandou Mines to BSG Resources (BSGR), a company based in the British Crown dependency of Guernsey and which actually belonged to Israeli diamond magnate Beny Steinmetz. In exchange, BSGR pledged to invest a mere \$165 million to develop the two blocks (out of four blocks) of the Simandou Mines that had been granted to the company by President Conté—the other two blocs (or 50%) were left with Rio Tinto, which had purchased the entire concession many years earlier.

The international community questioned the deal and critics called Guinean officials idiots and criminals for making a deal that represented the giving away of valuable Guinean resources with virtually no returns to the people.<sup>58</sup> That the concessions granted to BSGR were very valuable is evidenced by the fact that shortly after it received the license from the Guinean authorities, BSGR sold 51% of the license to the Brazilian company Vale for \$2.5 billion. Rio Tinto later sold 46.6% of its stake in the Simandou Mines to Chinalco, a Hong Kong-based mining company, for \$1.3 billion.<sup>59</sup>

The various natural resource deals in Guinea represented a form of tax farming made possible by a state that had been captured by foreign business interests in exchange for bribes to the country's senior public officials. While the mass of Guinean citizens continued to swelter in poverty, the country's political elites were reaping significant personal benefits from the sale of licenses to exploit the country's natural resources.<sup>60</sup> For example, after the release of the Panama Papers, it was revealed that Mamadie Touré, the wife of President Conté, had agreed to "do everything necessary in order to obtain the signature from the authorities for the mining area in

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58. BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY* 202-03 (2016).

59. IMF, *Guinea: Poverty Reduction Strategy Paper—Joint Staff Advisory Note* para. 32 (Apr. 2013); YUSUF BANGURA, *DEVELOPMENTAL PATHWAYS TO POVERTY REDUCTION* 26 (2015); OBERMAYER & OBERMAIER, *supra* note 58, at 202.

60. OBERMAYER & OBERMAIER, *supra* note 58, at 204-5.

question for the company BSG Resources Guinea”<sup>61</sup> in exchange for various illicit payments. In addition, within a short time after Mamadie Touré became involved in facilitating the deal, her brother was hired as a VP with BSGR and the latter was awarded the Simandou license by the government of Guinea.<sup>62</sup>

Many other African countries besides Guinea and the Democratic Republic of Congo have suffered from state capture. These include, for example, Sierra Leone, Equatorial Guinea, South Africa, Liberia, and South Sudan.<sup>63</sup> In this section, we shall discuss only two situations—the Democratic Republic of Congo and South Africa.<sup>64</sup>

#### B. STATE CAPTURE IN AFRICA: THE DEMOCRATIC REPUBLIC OF CONGO

From Belgium’s King Leopold II<sup>65</sup> more than a hundred years ago to Mobutu<sup>66</sup> and the Kabilas,<sup>67</sup> a close alliance of private business

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61. *Id.* at 204.

62. *Id.* at 205.

63. SAMUEL MONDAYS ATUOBI, CORRUPTION AND STATE INSTABILITY IN WEST AFRICA: AN EXAMINATION OF POLICY OPTIONS 2-3, 7, 12 (2007); Michaela Elsbeth Martin & Hussein Solomon, *Understanding the Phenomenon of “State Capture” in South Africa*, 5 SOUTHERN AFR. PEACE & SECURITY STUD. 21, 21 (2016).

64. YUSUF BANGURA, DEVELOPMENT, DEMOCRACY AND COHESION: CRITICAL ESSAYS WITH INSIGHTS ON SIERRA LEONE AND WIDER AFRICA CONTEXTS 334, 344-49 (2015); SASHA JESPERSON, RETHINKING THE SECURITY-DEVELOPMENT NEXUS: ORGANIZED CRIME IN POST-CONFLICT STATES (2017).

65. *See generally* ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 1-4 (1999) (providing an overview of the impact of King Leopold’s exploits on colonial Congo and the DRC); JOHN DE COURCY MACDONNELL, KING LEOPOLD II: HIS RULE IN BELGIUM AND THE CONGO 5, 7 (Argosy-Antiquarian 1970) (1905) (providing an overview of the life of King Leopold II and his exploits in the Congo).

66. *See generally* RICHARD GOTT, MOBUTU’S CONGO 1-2 (1968) (providing an overview of Mobutu Sese Seko and the impact of his rule on the DRC).

67. Mobutu Sese Seko seized power from Joseph Kasavubu in a military coup in 1965 and ruled the country until he was forced out of office by Laurent-Désiré Kabila. The latter was assassinated by one of his bodyguards in 2001. He was succeeded a few days later by his son, Joseph Kabila, who remains the president of DRC to this day (2018). *See generally* DAVID RENTON ET AL., THE CONGO: PLUNDER & RESISTANCE 201 (2007) (describing how leaders have exchanged power in Congo throughout history); TOM BURGIS, THE LOOTING MACHINE: WARLORDS, TYCOONS, SMUGGLERS AND THE SYSTEMATIC THEFT OF AFRICA’S

interests and political elites has taken control of the Congolese state and has been able to use its position to steal billions of dollars' worth of resources belonging to the Congolese people. Each successive regime, beginning with that which was forcefully imposed by King Leopold's colonial officers to Joseph Kabila's rule, has formed partnerships with private business and commercial interests, most of them foreign, to defraud Congolese citizens of resources for poverty alleviation and human development.<sup>68</sup>

In a 2016 plea agreement in a Foreign Corrupt Practices Act (FCPA) case brought against New York based Och-Ziff Capital Management Group LLC (Och-Ziff) by the U.S. Department of Justice, the company admitted to its role in conspiracies to bribe public officials in several African countries, including the Democratic Republic of Congo (DRC).<sup>69</sup> Och-Ziff officials admitted that some of the company's business partners, including Israeli businessman Dan Gertler, paid over \$100 million to public officials in the DRC in order to obtain billions of dollars' worth of natural resources concessions at extremely low prices.<sup>70</sup>

Studies of political economy in the DRC have isolated several important "pillars" that undergird the history of the country's unique form of state capture, which has been referred to as "violent

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WEALTH 37 (2015) (detailing how Congolese leaders have plundered the country's natural resources).

68. See generally CORDUNEANU-HUCI, HAMILTON & FERRER, *supra* note 41, at 65-66 (depicting Congo as a kleptocracy).

69. Press Release, U.S. Dep't of Justice, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay \$213 Million Criminal Fine (Sept. 29, 2016), <https://www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213> (last visited Aug. 14, 2017); Plea Agreement, Exhibit 3: Statement of Facts, at 6, United States v. OZ Africa Mgmt. Grp., LLC, No. 16-515 (NGG) (E.D.N.Y. Sept. 29, 2016), <https://www.justice.gov/opa/file/899316/download>.

70. Jon Yeomans, *Glencore Paid \$100m to Dan Gertler in Congo Deals*, TELEGRAPH (Mar. 3, 2017, 12:01 AM), <http://www.telegraph.co.uk/business/2017/03/03/glencore-paid-100m-dan-gertler-congo-deals/>; see also HOUSE OF COMMONS INT'L DEV. COMM., WORKING EFFECTIVELY IN FRAGILE AND CONFLICT-AFFECTED STATES: DRC AND RWANDA, 2010-12, HC 1133, at Ev. 20 (UK); JAMES KAZONGO, DRC: RICHEST AND POOREST COUNTRY (2016); NON-STATE CHALLENGES IN A RE-ORDERED WORLD: THE JACKALS OF WESTPHALIA 68-69 (Stefano Ruzza et al. eds., 2016) (describing bribery and extortion in Congo).

kleptocracy.”<sup>71</sup> First, in order to ensure their monopolization of legislation and minimize any chances of a military overthrow of their regimes, successive Congolese leaders have usually practiced a form of “tax farming”<sup>72</sup> where various geographic areas of the country are placed under the control of military commanders. The military commanders then exploit the resources and peoples of their “land concessions” for their benefit and that of the ruler.<sup>73</sup> The exploitation of the resources of each concession is carried out through alliances with private (mostly foreign) businesses.<sup>74</sup> In this type of state capture, private business interests usually do not seek to control the national legislative process, but concentrate on legislation as it affects the specific geographic region where their activities are concentrated. With respect to the DRC, the relationship between the business oligarch and the military commander in charge of the region is critical to the successful exploitation of the mineral resources. Of course, the oligarchs, most of whom are foreigners, worry about the

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71. Sasha Lezhnev, *A Criminal State: Understanding and Countering Institutionalized Corruption and Violence in the Democratic Republic of Congo*, ENOUGH (Oct. 27, 2016), <https://enoughproject.org/reports/criminal-state-understanding-and-countering-institutionalized-corruption-and-violence-democr>.

72. CHARLES ADAMS, *FOR GOOD AND EVIL: THE IMPACT OF TAXES ON THE COURSE OF CIVILIZATION 70-72* (2nd ed. 1999); see also BRIAN DAVIES, *EMPIRE AND MILITARY REVOLUTION IN EASTERN EUROPE: RUSSIA'S TURKISH WARS IN THE EIGHTEENTH CENTURY 176* (2011) (describing similar military-tax set-ups).

73. In modern Congo, Mobutu Sese Seko, (1965–1997), Laurent-Désiré Kabila (1997–2001), and Joseph Kabila (2001–present). See generally AFRICAN FRONTIERS: INSURGENCY, GOVERNANCE AND PEACEBUILDING IN POSTCOLONIAL STATES 26-27 (John Idriss Lahai & Tanya Lyons eds., 2015) (suggesting that violence can stem from natural resource control); ROBERT B. EDGERTON, *THE TROUBLED HEART OF AFRICA: A HISTORY OF THE CONGO xi-xii* (2002) (explaining how Congo's leaders stole the nation's resources); GEORGES NZONGOLA-NTALAJA, *FROM ZAIRE TO THE DEMOCRATIC REPUBLIC OF THE CONGO 16-17* (2004) (commenting on businesses, leaders, and the military in relation to natural resources).

74. ABIODUN ALAO, *NATURAL RESOURCES AND CONFLICT IN AFRICA: THE TRAGEDY OF ENDOWMENT 278-80* (2007); VIRGIL HAWKINS, *STEALTH CONFLICTS: HOW THE WORLD'S WORST VIOLENCE IS IGNORED 149-50* (2008); GAVIN M. HILSON, *THE SOCIO-ECONOMIC IMPACTS OF ARTISANAL AND SMALL-SCALE MINING IN DEVELOPING COUNTRIES* (2006); Michael Renner, *Violent Mining Conflicts and Diamond Wars*, in *THE SOCIO-ECONOMIC IMPACTS OF ARTISANAL AND SMALL-SCALE MINING IN DEVELOPING COUNTRIES 81, 95-96* (Gavin M. Hilson ed., 2006).

policies of the central government in Kinshasa, especially as they relate to their safety within the country and the transmission of information about their activities within the DRC to international governmental and non-governmental organizations (e.g., the U.S. Department of Justice's FCPA enforcement arm)<sup>75</sup> that might prosecute them for violating certain international laws.

Of course, the business oligarchs who engage in the illegal exploitation of natural resources in various provinces in the DRC are aware that the central government in Kinshasa is *unlikely* to betray them and the generals that provide them protection for at least three reasons: (1) Kinshasa depends on the generals that administer the various provinces and hence provide security for the exploitation of the mineral resources which generate the illicit payments that form the bulk of their extra-legal income; (2) the military elites who rule the various geographic concessions within the country have the violence potential to overthrow the government in Kinshasa; and (3) the multinational companies and their owners are an important input in the generation of the revenues that flow to the central government. Thus, for purposes of regime survival and the continued flow of extra-legal income from the provinces to the center, Kinshasa is not likely to betray provincial benefactors including the various business interests that have captured the governing structures in these

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75. Where the foreign business executive operating in the DRC, for example, is suspected of engaging in practices that violate the United States' Foreign Corrupt Practices Act (FCPA), such as bribing foreign public officials in international business transactions, the U.S. Department of Justice might seek information from the government in Kinshasa in order to determine whether these activities fall within the jurisdiction of the FCPA and whether there is enough information to proceed with prosecution of the alleged violations. Alternatively, international non-governmental organizations, such as Global Witness, might be interested in investigating and exposing the corrupt activities of such oligarchs and cooperation of the government in Kinshasa can be very critical in such investigations. Hence, any multinational company engaged in such unscrupulous activities in the DRC must be concerned about cooperation between the government in Kinshasa and foreign actors (which may include governmental and non-governmental institutions) that could create legal problems for them. See U.S. DEP'T OF JUSTICE CRIMINAL DIV. & U.S. SEC. AND EXCH. COMM'N ENF'T DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20-21 (2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

regions.<sup>76</sup>

It is claimed that in a speech in the 1980s to his soldiers who were complaining about unpaid salaries, Mobutu declared as follows: “You have guns; you don’t need a salary.”<sup>77</sup> During the life of Mobutu’s regime and that of the Kabilas, the fear of assassination of political elites, including the president, and threats to the security of the regime enhanced the ability of top military commanders to engage in illicit mining and resource extraction as well as extort resources from Congolese civilians with the acquiescence of Mobutu and the Kabilas.<sup>78</sup> Thus, the country’s military commanders and their foreign business partners have, through capturing the Congolese state, become the de facto policy makers in the country.<sup>79</sup> Of course, military commanders and the foreign entrepreneurs who receive billions of dollars’ worth of lucrative mining concessions at extremely low prices are not the only ones who are getting rich; the president and other political elites are also enriching themselves. The victims of this violent kleptocracy are the Congolese people, who are sweltering in poverty in a country endowed with huge amounts of natural resources.<sup>80</sup>

Each regime in the DRC, whether colonial or post-independence, has used violence to destroy the opposition and ensure its survival. In fact, the methods used by Joseph Kabila to crush the opposition are not that different from those employed by earlier regimes, including

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76. Since the time of King Leopold II, the brutal Belgian colonialist who set the standard for the exploitation of the DRC’s national wealth, the country’s natural resource endowments have been monopolized by its political and military elites and their foreign business partners while the masses have remained trapped in a vicious cycle of poverty and material deprivation. See KEVIN C. DUNN, *IMAGINING THE CONGO: THE INTERNATIONAL RELATIONS OF IDENTITY* 45-47 (2003); HOCHSCHILD, *supra* note 65, at 301-04; NZONGOLA-NTALAJA, *supra* note 55, at 20-22.

77. JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* 116 (2012).

78. See Theodore Trefon, *Congo’s Environmental Catch-22*, in *IN PURSUIT OF PROSPERITY: U.S. FOREIGN POLICY IN AN ERA OF NATURAL RESOURCE SCARCITY* 191, 194-95 (David Reed ed., 2015).

79. PAUL ROBERT BARTROP, *A BIOGRAPHICAL ENCYCLOPEDIA OF CONTEMPORARY GENOCIDE: PORTRAITS OF EVIL AND GOOD* 151 (2012).

80. ALAO, *supra* note 74, at 23-25.

those of Mobutu, the senior Kabila,<sup>81</sup> and King Leopold II—”intimidation, repression, and violence to quash dissent, democratic aspirations, and the influence of rival elites.”<sup>82</sup> This is a pillar of the DRC’s unique form of state capture—violent kleptocracy.<sup>83</sup>

A captured state is usually characterized by the absence of openness and transparency, as well as accountability to both the constitution and the people. In addition to opacity in government communications, senior government officials are not held accountable for their actions. They can act with impunity and the government only pretends to care about corruption cleanups.<sup>84</sup> The state in the Democratic Republic of Congo is no exception. There is an absence of accountability, the country’s existing legal system enhances impunity by high-ranking officials, including the president, sexual violence against women and girls is pervasive, and the government only pretends to care about corruption control.<sup>85</sup> For example, the World Bank argues that “for state institutions to be inclusive, they first have to be effective, *accountable*, and representative.”<sup>86</sup> Inclusion, *accountability*, and representation, the World Bank argues, cannot take place in a state that has been

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81. Laurent-Désiré Kabila, father of Joseph Kabila, and the 3rd president of the DRC. He overthrew Mobutu Sese Seko on May 17, 1997. He was later assassinated by one of his bodyguards on January 16, 2001. Eight days following Laurent-Désiré’s assassination, his son, Joseph, became president of the DRC. *See generally* Tukumbi Lumumba-Kasongo, *Rethinking State Formation and the Post-Colonial Political Experience in the Democratic Republic of the Congo*, in *RECONSTRUCTING THE AUTHORITARIAN STATE IN AFRICA* 54, 99-100 (George Klay Kieh, Jr. & Pita Ogaba Agbese eds., 2013); Trefon, *supra* note 78, at 192-95; THOMAS TURNER, *THE CONGO WARS: CONFLICT, MYTH AND REALITY* 190 (2007).

82. *See* Lezhnev, *supra* note 71.

83. *See, e.g.*, JEANNE M. HASKIN, *THE TRAGIC STATE OF THE CONGO: FROM DECOLONIZATION TO DICTATORSHIP* 52 (2005).

84. *See Democratic Republic of Congo: Ending Impunity for Sexual Violence*, HUMAN RIGHTS WATCH (June 10, 2014, 1:01 AM), <https://www.hrw.org/news/2014/06/10/democratic-republic-congo-ending-impunity-sexual-violence> (stating that impunity has included rape and other forms of sexual violence against women and girls, as well as various types of human rights abuses).

85. KEVIN BALES, *BLOOD AND EARTH: MODERN SLAVERY, ECOCIDE, AND THE SECRET TO SAVING THE WORLD* 32-34 (2016); RAYMOND M. NGOMA, *TRAPPED IN THE CONGO DRAMA* 58-59, 116-17 (2013).

86. WORLD BANK, *MAKING TRANSITION WORK FOR EVERYONE: POVERTY AND INEQUALITY IN EUROPE AND CENTRAL ASIA* 186 (2000) (emphasis added).

captured.<sup>87</sup> Within such a state, the business interests that have captured the state will ensure that the legislative process cannot be used to build and sustain “inclusive state institutions” and, as a result, accountability and inclusiveness are likely to be missing from the political system.<sup>88</sup>

Joseph Kabila, as well as other presidents before him, has intentionally created divisions in the armed forces in order to minimize the threat of a coup d'état.<sup>89</sup> The Congolese military under Joseph Kabila, for example, is “divided and disorganized,”<sup>90</sup> a situation that has made it very difficult for peace and security to be maintained. The *Forces Armées de la République démocratique du Congo* (the Armed Forces of the Democratic Republic of Congo) currently consists of a blending of “Mobutu’s *Forces Armées Zaïroises* with Laurent-Désiré Kabila’s Alliance of Democratic Forces for the Liberation of Congo (AFDL) troops, including the Kadogo child soldiers, as well as remnants of the Katangese Tigers, soldiers from Jean-Pierre Bemba’s MLC and from the Rally for Congolese Democracy (RCD)-Goma, who were integrated during the 2003–2006 transition, as well as members from many rebel groups.”<sup>91</sup> As a result, the DRC has not been able to develop a professional army corps and this works quite well for Kabila and other political elites in the DRC who use the patchwork of conflicting military units to ensure their continued monopolization of the country’s political economy.<sup>92</sup>

Within a captured state, public officials and their private business partners usually take advantage of their control of legislation to maximize the benefits flowing to them from the economy. These private firms use their new-found power to “block any policy reforms that might eliminate [the] advantages” they enjoy.<sup>93</sup> In

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87. *Id.*

88. *Id.*

89. Kisangani N. F. Emizet, *Explaining the Rise and Fall of Military Regimes: Civil-Military Relations in the Congo*, 26 *ARMED FORCES & SOC.* 203, 216 (2000).

90. Lezhnev, *supra* note 71.

91. *Id.*

92. ARTUR USANOV ET AL., *COLTAN, CONGO AND CONFLICT* 64-65 (Hague Ctr. Strategic Studies 2013).

93. See Hellman & Kaufmann, *supra* note 17, at 31.

captured states of countries with relatively weak institutions and which have significant endowments of natural resources, such as the DRC, public officials usually farm out the exploitation of the country's resources to private, primarily foreign, business interests and, in exchange, they receive illicit payments from these firms. This form of grand corruption is quite pervasive in the DRC and has been so since the time of King Leopold II.<sup>94</sup> The companies that exploit the resources and the senior public officials in Kabila's DRC, like those in previous regimes (e.g., that of Mobutu's), have agreed on a system of opaque contracting where the private firms have complete control of the natural resource exploitation process (e.g., mining), with the protection of various army units, and, in exchange, senior political and military elites, including the president, receive regular payments that include money from trade in natural resources and "unofficial taxes, fees, and bribes."<sup>95</sup>

Captured states usually underspend on public goods and services—in fact, in some cases, the state may not supply services to large parts of the population, preferring instead to favor groups (e.g., senior civilian and military elites) who are members of the inner cycle of the kleptocracy. For example, in the DRC, while the president maintains a large cabinet and spends lavishly on himself, his family, and his inner circle of supporters,<sup>96</sup> very little money is

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94. See MATTHEW G. STANARD, *SELLING THE CONGO: A HISTORY OF EUROPEAN PRO-EMPIRE PROPAGANDA AND THE MAKING OF BELGIAN IMPERIALISM* 30 (2011) (finding that Leopold declared "monopolies on all raw materials, confiscated all 'vacant' lands in the Congo, granted huge concessions to European companies, prohibited Africans from selling goods such as elephant tusks to private traders, began to extract ivory and natural rubber, and taxed exports"); see generally HOCHSCHILD, *supra* note 65, at 304 (explaining that Leopold took advantage of his privately controlled state and did not share the profits with anyone); JULES MARCHAL, *LORD LEVERHULME'S GHOSTS: COLONIAL EXPLOITATION IN THE CONGO I* (Martin Thom trans., Verso 2008) (emphasizing that the Belgian Congo government regarded all land in the early 1900s as state property); MARTIN EWANS, *EUROPEAN ATROCITY, AFRICAN CATASTROPHE: LEOPOLD II, THE CONGO FREE STATE AND ITS AFTERMATH* 89 (2002) (demonstrating that Leopold created an area, *Domaine de la Couronne*, to exploit as private property); NEAL ASCHERSON, *THE KING INCORPORATED: LEOPOLD II IN THE AGE OF TRUSTS* 110 (1963) (showing that a Belgian banker Lambert represented Leopold in financial acquisitions).

95. E.g., Lezhnev, *supra* note 71, at 47.

96. See generally CONGO RESEARCH GRP., *ALL THE PRESIDENT'S WEALTH:*

allocated to primary and secondary education and health care. Furthermore, the government has not invested substantially in the provision of necessary infrastructure for economic growth and development.<sup>97</sup> During the last several years, the Kabila government has publicly announced several institutional reform efforts, but these efforts have not been designed to improve governance, but rather to help the country avoid being labelled a pariah state by the international community.<sup>98</sup> Such a label could bring sanctions against the country's leaders, prevent them from having access to the international financial system, as well as make it difficult for them to travel abroad. All of the DRC's post-independence regimes have manipulated institutional reforms to punish their opponents, enhance their ability to remain in power, and provide laws that are favorable to their business partners.<sup>99</sup>

Finally, public policy in a captured state, as it is in Kabila's DRC,

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THE KABILA FAMILY BUSINESS (2017), <https://allthewealth.congoresearchgroup.org/dist/assets/all-the-presidents-wealth-ENG.pdf> (providing more information on Joseph Kabila's family wealth).

97. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1030, THE DEMOCRATIC REPUBLIC OF THE CONGO: U.S. AGENCIES SHOULD TAKE FURTHER ACTIONS TO CONTRIBUTE TO THE EFFECTIVE REGULATION AND CONTROL OF THE MINERALS TRADE IN THE EASTERN DEMOCRATIC REPUBLIC OF THE CONGO 4 (2010), <https://www.gao.gov/new.items/d101030.pdf> (arguing, inter alia, that the lack of infrastructure will render impossible the effective monitoring and regulation of the mineral trade in the DRC); see also JOHANNES HERDERSCHEE ET AL., RESILIENCE OF AN AFRICAN GIANT: BOOSTING GROWTH AND DEVELOPMENT IN THE DEMOCRATIC REPUBLIC OF CONGO 65 (World Bank 2012), <http://documents.worldbank.org/curated/en/986871468243586272/pdf/648210PUB0Resi0C0disclosed010050110.pdf> (examining, inter alia, how the lack of infrastructure causes "geographic and economic isolation" for many regions of the DRC).

98. See CH. DIDIER GONDOLA, THE HISTORY OF CONGO 152 (2002) (remarking that in the early 1990s, the World Bank and the IMF considered the DRC as a "pariah state" and, as a consequence, the country lost its credibility in the "eyes of most of its lending partners," while also showing that throughout its existence as a sovereign state, the state in the DRC has never served "any socially meaningful purpose that could promote the interests, however[] defined, of the Zairian people[]; rather] it exists, to the extent to which it exists at all, to enrich and empower the small group that controls it," and during his more than thirty years in power, Mobutu Sese Seko "pilfered the nation's wealth, encouraged by the interests of Western powers").

99. See Lezhnev, *supra* note 71, at 58 (listing extractive companies that are operating in the DRC).

is usually characterized by confusion and uncertainty. This may be due to government incompetence, weak capacity, or, as argued by many researchers in the case of the DRC, deliberate action by the regime to enhance their ability to stay in power as well as engage in non-transparent resource extraction deals that allow the elites to generate extra-legal income for themselves.<sup>100</sup>

The Democratic Republic of Congo is not a failed state;<sup>101</sup> instead, it is a captured state in which the public policy process has been taken over by private business interests and is being used to benefit the country's civilian and military elites as well as various commercial interests. Hence, from the point of view of the country's senior level civil and military elites, as well as the entrepreneurial interests that bribe these public officials, the government in Kinshasa is quite efficient—it provides them with all the services that they need to operate freely in the DRC.

## C. STATE CAPTURE IN AFRICA: THE REPUBLIC OF SOUTH AFRICA

### *1. South Africa: A Long History of State Capture*

Since the four colonies—the Cape of Good Hope, Natal, the

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100. See LOUIS PUTZEL ET AL., CHINESE TRADE AND INVESTMENT AND THE FORESTS OF THE CONGO BASIN: SYNTHESIS OF SCOPING STUDIES IN CAMEROON, DEMOCRATIC REPUBLIC OF CONGO AND GABON vii (Ctr. Int'l Forestry Research Working Paper 67, 2011) (noting that one such deal is the \$6.2 billion “minerals-for-infrastructure” deal between Sicomine, which is a consortium of Chinese companies, and the Congolese government); see also JOHANNA JANSSON, THE SICOMINES AGREEMENT: CHANGE AND CONTINUITY IN THE DEMOCRATIC REPUBLIC OF CONGO'S INTERNATIONAL RELATIONS 5-6 (S. Afr. Inst. Int'l Affairs, 2011) (concluding through an opaque process that it has been difficult for researchers to determine the terms of the “minerals-for-infrastructure” deal, especially regarding what the responsibilities of the Chinese firms are, and perhaps, more importantly is what the roles of the various Congolese parastatals are, as well as who, the Chinese firms or the Congolese government, is responsible for environmental cleanup and ecosystem restoration once mineral extraction is completed).

101. See MATTHEW BUKOVAC, FAILED STATES: UNSTABLE COUNTRIES IN THE 21ST CENTURY 4 (2011) (quoting that a failed state is a country “where the government has failed at its basic responsibilities” to infer that while the DRC may be considered a failed state because it no longer provides basic services to the general population, it is not a failed state because it is quite effective when it comes to the provision of services to a select part of the population).

Transvaal, and the Orange River Colony—transformed themselves into the Union of South Africa in 1910 through the South Africa Act (9 Edward VII, c.9),<sup>102</sup> state capture has been an integral part of governance in South Africa. For example, immediately after the Union of South Africa came into being in 1910, the Union government, working with its business partners, proceeded to use legislation to exploit the country's majority African population for the benefit of governing elites, the minority white population, and business owners, including especially Afrikaner farmers and English mining interests.<sup>103</sup> Specifically, the government passed a series of laws to establish what came to be known as the Industrial Color Bar<sup>104</sup>—the government designed these segregationist laws to protect white labor against competition from Africans. The Union

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102. South Africa Act of 1909 § 9 (S. Afr.) (serving as the new country's constitution and showing that the British Parliament granted independence to four colonies).

103. *See* Natives Land Act 27 of 1913 (S. Afr.). Subsequently renamed the Bantu Land Act, 1913/Black Land Act, 1913, illustrating that, as the first major piece of segregationist legislation enacted by the new Union Parliament, the Act was designed to regulate the acquisition and utilization of land in the country and it came to represent an important pillar of the apartheid system that was officially established in 1948, while further showing that the Act prohibited whites from purchasing land from Africans and the latter from purchasing land from the former, and initially, the Act limited African land ownership to a mere 10 percent of the total land mass of the country, which was eventually expanded to 13 percent. *See* HARVEY M. FEINBERG, *OUR LAND, OUR LIFE, OUR FUTURE: BLACK SOUTH AFRICAN CHALLENGES TO TERRITORIAL SEGREGATION, 1913–1948* 156 (2015) (evaluating the role that the 1913 Natives Land Act played in territorial segregation in the Union of South Africa and beyond); *see generally* ARRIGO PALLOTTI & ULF ENGEL, *SOUTH AFRICA AFTER APARTHEID: POLICIES AND CHALLENGES OF THE DEMOCRATIC TRANSITION 2* (2016) (examining, inter alia, the continuing impact of apartheid-era laws on South Africans, especially those who were subjected to the country's segregationist policies).

104. GEORGE V. DOXEY, *THE INDUSTRIAL COLOUR BAR IN SOUTH AFRICA* 127 (1961); *see also* WILLIAM H. HUTT, *THE ECONOMICS OF THE COLOUR BAR* 58 (1964) (listing some of these laws); *see generally* Mines and Works Act of 1911 (S. Afr.) (permitting competency certificates for a number of skilled mining occupations); Mines and Works Amendment Act 25 of 1926 (S. Afr.) (re-enacting the 1911 Mines and Works Act); Minimum Wages Act of 1925 (S. Afr.) (initiating a form of job reservation which promotes employment for white people); Industrial Conciliation Act 11 of 1924 (S. Afr.) (excluding black people from membership of registered trade unions and prohibiting registration of black trade unions); Mines and Works Act of 1911 (S. Afr.) (permitting competency certificates for a number of skilled mining occupations).

government, fully captured by a coalition of mining interests and white labor unions, also introduced what came to be referred to as the “civilized labor policy,”—this policy created jobs for poor whites (mostly Afrikaners) in the public sector and “gave preferential treatment to industries that hired a significant percentage of civilized labor.”<sup>105</sup>

The overarching objective of those who controlled the South African state at this time was to restrict the economic activities of certain population groups, primarily those of African groups. By doing so, the government effectively reduced the participation of these groups in economic activities.<sup>106</sup> The system of *separate development* or *apartheid* that was established by the Nationalist Party in 1948 represented a formal recognition or acceptance of practices that had been part of the country’s history since early European settlers chose forced labor systems, the expropriation of the property rights of African groups in land, and racial segregation as part of public policy.<sup>107</sup> As a form of state capture, apartheid singled out part of the South African population for better treatment by the government and granted them a superior form of citizenship, while subjecting the majority, which consisted of several African

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105. John M. Mbatia, *Property Rights and Rent Seeking in South Africa*, 11 CATO J. 135, 142 (1991).

106. To effectively make certain that these groups remained on the economic margins, it was also critical that they not be allowed to participate in the political system, especially in the design of legislation. Thus, under the system that came into being with the formation of the Union of South Africa in 1910, all African groups (i.e., Zulu, Xhosa, Pedi, South Sotho (Basotho), Tswana, Venda, Ndebele, Tsonga, Swazi, and North Sotho (Bapedi), the Khoi, and San) were not allowed to participate in the country’s political system. *See generally* DOXEY, *supra* note 104, at 127 (emphasizing the impact of South Africa’s enactment of discriminatory laws); HUTT, *supra* note 104 (noting that restrictions on the economic activities of African groups affected their ability to engage in wage employment as well as in entrepreneurial activities); P. ERIC LOUW, *THE RISE, FALL, AND LEGACY OF APARTHEID* 57 (2004) (examining, inter alia, the Afrikaner Nationalist Period in South Africa (1948–1993) and the struggles of Africans to improve their political participation during this period and in the aftermath of the fall of the apartheid system and the emergence of non-racial democracy).

107. *E.g.*, *The History of Apartheid in South Africa*, STANFORD UNIV., <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> (last visited Feb. 28, 2018).

ethno-cultural groups, to an inferior form of citizenship.<sup>108</sup> The racist and cruel system transferred virtually all the value extracted from the economy to the white elites, business interests, and the favored group—whites in general.<sup>109</sup>

Nelson Mandela and his African National Congress compatriots fought to dismantle what was essentially a coalition of white business interests, white elites, and white labor designed to perpetuate permanent African inferiority. In a prepared speech delivered during his trial for treason before the Pretoria Supreme Court on April 20, 1964, Mandela argued that the apartheid system created two types of citizenships in South Africa: One for whites and, second, an extremely attenuated citizenship for Africans. He declared that South Africa is:

a land of extremes and remarkable contrasts. The whites enjoy what may well be the highest standard of living in the world, whilst Africans live in poverty and misery. Forty percent of the Africans live in hopelessly overcrowded and, in some cases, drought-stricken Reserves, where soil erosion and the overworking of the soil makes it impossible for them to live properly off the land. Thirty percent are laborers, labor tenants, and squatters on white farms and work and live under conditions similar to those of the serfs of the Middle Ages. The other thirty percent live in towns where they have developed economic and social habits which bring them closer in many respects to white standards. Yet most Africans, even in this group, are impoverished by low incomes and high cost of living.<sup>110</sup>

He went on to argue that the South Africa that he and his fellow freedom fighters envisioned was one in which citizenship would not be based on race, ethnicity, or some attributable trait, but on a shared vision for the peaceful coexistence of all groups, equality of

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108. See generally JESSICA PIOMBO, INSTITUTIONS, ETHNICITY, AND POLITICAL MOBILIZATION IN SOUTH AFRICA 10 (2009) (giving an introduction to ethnicity and ethnolinguistic groups in South Africa); TUKUFU ZUBERI ET AL., THE DEMOGRAPHY OF SOUTH AFRICA 11 (2005) (elaborating the racial classifications from 1911-1996).

109. E.g., LANE, *supra* note 45, at 256.

110. Nelson Mandela, I Am Prepared to Die (1964), <http://www.historyplace.com/speeches/mandela.htm>.

opportunity for self-actualization, and a society undergirded by the rule of law.<sup>111</sup> The country would eventually incorporate and enshrine these ideals in its permanent post-apartheid constitution—the Constitution of the Republic of South Africa, 1996—that is considered one of the most progressive in the world.<sup>112</sup>

## 2. *A Note of Clarification*

Before we examine state capture under South Africa's progressive constitution, we need to clarify certain issues that relate to the quality of institutions and state capture. Attempts by private business interests to capture the state can occur in any country. What is clear is that some countries are more susceptible and less able to deal with state capture than others. Especially vulnerable to state capture are countries that have relatively weak institutions—specifically, countries with governing processes that do not adequately constrain the state and, as a consequence, state custodians (i.e., civil servants and political elites) can easily engage in corrupt and rent-seeking activities. These countries are characterized by weak or ineffective checks and balances; opacity in the design and implementation of public policies, as well as in the development and adoption of post-constitutional laws; the absence of strong and robust civil societies; the lack of free and independent press; the failure of the government to provide citizens with the wherewithal to petition the state to redress their grievances; capriciousness in the allocation of public goods and services; and massive state interventions in the economy which significantly increase rents flowing to the government and, hence, the opportunities for those who have successfully captured the state to generate extra-legal income for themselves.

Of particular importance is the fact that in countries with weak institutions—that is, those whose states are quite susceptible to capture—there is an absence of institutional mechanisms to check on the ways through which the various rents are extracted, generated,

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111. *Id.*

112. VALERIE MØLLER & DENIS HUSCHKA, *QUALITY OF LIFE AND THE MILLENNIUM CHALLENGE: ADVANCES IN QUALITY-OF-LIFE STUDIES, THEORY AND RESEARCH* 142 (2009).

and actually allocated.<sup>113</sup> Of course, in such countries, corruption, which is often used by private business interests to capture the state, is pervasive.

In countries with strong and effective democratic institutions (e.g., an independent judiciary, a free press, a robust and politically-active civil society), individuals or groups that attempt to capture the state can easily be frustrated. It is often the case in countries with effective and fully functioning democratic systems that individuals who attempt to subvert national laws and engage in efforts to capture either the state or some of its institutions or agencies are exposed by the press. In the United States, for example, the events that are known generally as the Watergate Affair, and which centered on the abuse of power by the Nixon Administration, were exposed by the independent press.<sup>114</sup> The country's other democratic institutions, the judiciary and the legislature, all of which were independent of the offending executive, played critical roles in resolving what could have turned into a major constitutional crisis.<sup>115</sup>

But, with respect to state capture, what is the difference between a country with relatively strong and effective institutions and one with weak institutions? As had been examined earlier, countries with relatively weak institutions are quite susceptible to state capture and once the state has been captured and outside interests seize the legislative and reform processes, it is often very difficult to reverse course and bring about more effective laws and institutions. In the case of a country with strong and effective institutions, while private

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113. See generally ANDREW C. KUTCHINS, *RUSSIA AFTER THE FALL 9-10* (2002) (arguing that “powerful businesspeople and entrepreneurs will oppose the development of any institutions that may prevent them from being able to acquire valuable assets at below market price”); REGULATING THE VISIBLE HAND?: THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2015); THE POLITICAL ECONOMY OF GOOD GOVERNANCE (Sisay Asefa & Wei-Chiao Huang eds., 2015).

114. *The Watergate Story*, WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/special/watergate/part1.html> (last visited Feb. 28, 2018).

115. See generally WILLIAM DUDLEY, *WATERGATE* (2002); ELIZABETH DREW, *WASHINGTON JOURNAL: THE EVENTS OF 1973-1974* 112 (Duckworth Overlook 2014) (1974) (“[N]ot even the highest office in the land has the authority to break the law in the name of national security”); DAVID HOSANSKY, *EYEWITNESS TO WATERGATE* (2006).

interests may not be able to capture the entire government or governing process, they may be able to bring under their control branches of the government. For example, private business interests might be able to corrupt the executive and capture that branch of the government. Nevertheless, the country's other institutions, including especially the independent press, are usually able to expose such corruption, paving the way for the independent judiciary to take action to restore the integrity of the country's democratic institutions, including the executive branch. Thus, in countries with relatively strong and effective institutions, the threat of and potential for state capture is not entirely eliminated. However, while it is possible for private interests to capture certain branches of government, the process is usually short-lived because other institutions can expose the corrupt activities of elites in such political systems, as well as bring culprits to justice, and restore the country's democratic institutions.<sup>116</sup>

While a country may have strong and effective institutions, the behavior of its civil servants and political elites can significantly increase its vulnerability to capture. Thus, in the United States, a country with strong and relatively effective institutions, it has often been the case that some members of the various branches of government (e.g., President Richard Nixon of the executive branch<sup>117</sup> and Congressman John Jenrette of the U.S. House of Representatives)<sup>118</sup> have engaged in corrupt activities that have compromised their offices. Nevertheless, thanks to the country's relatively strong institutions (e.g., an independent press, an

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116. *See, e.g.*, PUBLIC PROTECTOR SOUTH AFRICA, STATE OF CAPTURE 29 (Report No. 6 of 2016/17, 2016) (investigating unethical and improper conduct of the President and other government officials).

117. *See generally* TOM COATES, THE WATERGATE AFFAIR, 1972: THE RESIGNATION OF PRESIDENT RICHARD M. NIXON (2002); MICHAEL A. GENOVESE, THE WATERGATE CRISIS 70 (1999) (discussing Nixon's defense); LOUIS W. LIEBOVICH, RICHARD NIXON, WATERGATE, AND THE PRESS: A HISTORICAL RETROSPECTIVE ix-x (2003) (elaborating on the consequences of the Watergate crisis, including the imprisonment of some of the nation's most powerful leaders).

118. *See* SCOTT CRASS, STATESMEN AND MISCHIEF MAKERS: OFFICEHOLDERS WHO WERE FOOTNOTES IN THE DEVELOPMENTS OF HISTORY FROM KENNEDY TO REAGAN (2016) (showing that while Richard Nixon was implicated in the Watergate Scandal, Congressman John Jenrette was involved in what the Federal Bureau of Investigation called ABSCAM).

independent judiciary), these activities have not resulted in the capture of the entire governing process, which occurred in countries such as the Democratic Republic of Congo that have extremely weak and dysfunctional institutional arrangements.<sup>119</sup>

The extent to which the government intervenes in or interferes with private exchange can have a significant impact on the state's susceptibility to capture. In many African countries, for example, government intervention in the economy is quite pervasive and, in addition, most natural resources are reserved exclusively for government exploitation. In these economies, then, the state is usually the largest economic actor and the one to which most of the rents created within the economy accrue. Government ownership of productive resources and high levels of state intervention in economic activities produce an environment where successful captors of the state are likely to have access to significant rents. Such a state—that is, one that owns and controls most of the country's productive resources, engages in significant levels of intervention in economic activities, and is characterized by relatively weak institutions—is quite susceptible to capture.<sup>120</sup>

Similarly, in South Africa, where the executive branch of government was, until recently, headed by President Jacob Zuma, who has been implicated in several corruption scandals over the last few years,<sup>121</sup> private business interests have been able to capture the executive branch of government. Nevertheless, the country's strong institutions, including an independent press, a very robust civil

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119. See *Attacks on Justice - Democratic Republic of the Congo*, <http://www.refworld.org/pdfid/48abdd680.pdf> (last visited Feb. 28, 2018) (highlighting that despite the political progress towards a democratic state based on the rule of law in the DRC, ongoing violence has hampered the effectiveness of the judicial system, and even though a new constitution granted judicial independence, the judiciary's situation is still worrying since impunity is the norm, and corruption and interference by the executive are widespread).

120. E.g., WORLD BANK, MAKING TRANSITION WORK FOR EVERYONE, *supra* note 86, at 15.

121. See, e.g., David Blair, *Jacob Zuma 'Should' Face 783 Criminal Charges, Declares South African Court*, TELEGRAPH (Apr. 29, 2016, 11:44 AM), <https://www.telegraph.co.uk/news/2016/04/29/south-african-court-clears-way-for-jacob-zuma-to-face-783-crimin/> (suggesting that, as the South African Court declares, Jacob Zuma “should” face many criminal charges).

society, and the independent office of the Public Protector, have been able to expose the alleged misdeeds of the president and his business partners.<sup>122</sup> It is now left to the country's other institutions (the legislature and the judiciary) to perform their constitutional functions and legally resolve all the issues associated with the alleged state capture.

In the years leading to the decision by South Africa's Public Protector to launch its investigation, there had arisen within South Africa's civil society debates and discussions about the possibility that, at the very least, the executive branch had been captured by private business interests.<sup>123</sup> Some members of civil society had come to the conclusion that the South African State was gradually becoming dysfunctional and that political power was no longer being used to enhance the national welfare. Instead, various government offices, including that of the President of the Republic, were being utilized to serve private interests.

### *3. The African National Congress and State Capture*

Some South Africans believe that their state's vulnerability to capture was triggered by the transformation of Mandela's African National Congress (ANC) into a political entity that was no longer interested in pursuing the ideals that revolve around liberating the country from apartheid.<sup>124</sup> The ANC's critics argued that rather than pursue and promote the ideals that brought the party to power (e.g., the democratic revolution, which was supposed to involve, at the very least, the overthrow and dismantling of the colonial and

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122. See PUBLIC PROTECTOR SOUTH AFRICA, *supra* note 116, at 27 (showing an investigation into complaints of improper and unethical conduct by the President and other government officials in removing and appointing ministers and directors to benefit the Gupta family business).

123. See State Capture Research Project, *How South Africa Is Being Stolen - Read the Shocking Report*, RAND DAILY MAIL (May 26, 2017, 6:50 AM), <https://www.businesslive.co.za/rdm/politics/2017-05-26-how-south-africa-is-being-stolen---read-the-shocking-report/> (demonstrating how empirically-based public reports note that state institutions have been captured and repurposed).

124. See *id.* ("It is now clear that while the ideological focus of the ANC is 'radical economic transformation', in practice Jacob Zuma's presidency is aimed at repurposing state institutions to consolidate the Zuma-centered power elite . . . popularly referred to as 'state capture.'").

racially-based anachronism known as apartheid and establish a democratic, non-racial, South Africa), the party evolved into an opportunistic entity, which was being used to maximize the interests of certain private interests at the expense of the South African people.<sup>125</sup> In the process, argued the ANC's critics (e.g., Julius Malema of the Economic Freedom Fighters), the party's leader, President Zuma, became a liability to the country and its democratic future—he was no longer willing to uphold the country's cherished ideals. According to his critics, the president's continued efforts to concentrate political power in the executive branch directly violated the ANC's key ideological principle to enhance democratic participation.<sup>126</sup>

That President Zuma and the ANC had evolved into opportunistic political beings, argued the ANC's critics, was finally revealed by the sacking of former finance minister, Nhlanhla Nene,<sup>127</sup> an action that was not received well by both domestic and international markets.<sup>128</sup>

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125. See, e.g., *ANC Silent on State Capture Because Party is Central to the Problem - Analyst*, CAPE TALK (Sep. 26, 2017, 1:04 PM), <http://www.capetalk.co.za/articles/273966/anc-silent-on-state-capture-because-party-is-central-to-the-problem-analyst> (arguing that the ANC needs to acknowledge its role in the state's capture); see also Masa Kekana, *Malema Blames ANC Voters for Current SA Crisis*, EYEWITNESS NEWS, <http://ewn.co.za/2017/04/13/julius-malema-blames-anc-voters-for-sa-s-crisis> (last visited Feb. 27, 2018) (blaming ANC voters for the current crisis in South Africa).

126. E.g., Michaela Elsbeth Martin & Hussein Solomon, *Understanding the Phenomenon of "State Capture" in South Africa*, 5 SOUTHERN AFR. PEACE SECURITY STUD. 21, 23 (2016); see also RICHARD PITHOUSE, WRITING THE DECLINE: ON THE STRUGGLE FOR SOUTH AFRICA'S DEMOCRACY 92 (2016) ("[T]he people of the [ANC] party are often the equivalent of the 90 people, out of more than 30,000, that, stepping over or around the bodies of the seven that didn't survive the contest, had a shot of becoming traffic cops and climbing Jacob's ladder.").

127. E.g., *Nhlanhla Nene: South Africa Uproar After Finance Minister Sacked*, BBC (Dec. 10, 2015), <http://www.bbc.co.uk/news/world-africa-35059563>; see also Andrew England, *Finance Minister Sacking Undermines South Africa's Reputation*, FIN. TIMES (Dec. 10, 2015), <https://www.ft.com/content/ef32278c-9f35-11e5-beba-5e33e2b79e46> (showing that the finance minister's dismissal actually resulted in the plummeting of the rand against the dollar and European currencies).

128. See Jason Burke, *South Africa: ANC in Chaos After Jacob Zuma Sacks Finance Minister*, GUARDIAN (Mar. 31, 2017, 2:05 PM),

Other critics of the ANC government argue that at the time it constitutionally captured power in 1994, the ANC always intended to capture the state and use its structures to promote its ideological and political interests. By the time the investigation into state capture began, the ANC government was totally in control of all state structures except the Judiciary, the Office of the Public Protector and the Independent Electoral Commission.<sup>129</sup> According to one observer, “[w]hat alarms the broader [South African] society, however, is the extent to which the elements of the state have been captured by President Jacob Zuma and those who surround him, for the promotion of their own personal wealth, and not that of the African National Congress nor the nation at large.”<sup>130</sup>

When President Zuma took office in 2009, he chose loyalty over competence, skill, and expertise when making appointments to key state institutions.<sup>131</sup> He is said to have used vacancies in the government to appoint his most loyal supporters, regardless of their qualifications, to high positions in the government. By 2015, the powerful and wealthy Gupta Family controlled the country’s economic and political systems. According to Floyd Shivambu,<sup>132</sup> deputy president of the Economic Freedom Fighters (EFF), the Guptas have complete control over the executive branch of the South African government, including the ability to manipulate the appointment and dismissal of cabinet ministers. They also use this influence effectively to extract extra-legal benefits for themselves, their business associates, and assorted benefactors.<sup>133</sup>

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<https://www.theguardian.com/world/2017/mar/31/south-africa-anc-jacob-zuma-cyril-ramaphosa> (emphasizing the criticisms of the President’s decision).

129. *E.g.*, Martin & Solomon, *supra* note 126, at 24.

130. *Id.*

131. *See, e.g.*, Gareth van Onselen, *State capture? We’ve been having it!*, RAND DAILY MAIL (Mar. 23, 2016, 1:14 PM), <https://www.businesslive.co.za/rdm/politics/2016-03-23-state-capture-weve-been-having-it/> (arguing that the ANC’s state capture was “set out at the party’s 1997 Mafikeng conference in the adoption of a cadre deployment resolution, whereby those loyal to the party would be placed throughout the state”).

132. *E.g.*, Floyd Shivambu, *State Capture: It’s Criminal, and It Is Nothing New*, DAILY MAVERICK (Mar. 24, 2016), <https://www.dailymaverick.co.za/opinionista/2016-03-24-state-capture-its-criminal-and-it-is-nothing-new/#.Wp3VYegbOUm>.

133. *See id.* (noting that Jacob Zuma is a business partner of the Guptas, so the Guptas then “abuse the fact that they are in a corrupt business relationship with

By the time the Office of Public Protector began its investigation, the president of the ANC, Jacob Zuma, had weakened the powers of many of the state's independent agencies to the point where they were no longer capable of effectively performing their assigned functions.<sup>134</sup>

#### *4. South Africa and the 2016 Public Protector's State Capture Report*

Many South Africans, including especially members of the opposition, praised the release of the Public Protector's report into state capture and argued that the successful completion of the investigation and its release augured well for the rule of law, constitutionalism, the fight against corruption and public financial malfeasance, and South Africa's democratic institutions.<sup>135</sup>

As if to reassure South Africans of why it was necessary for her to undertake the investigation, and to place the report and the investigation within a context that speaks to a need to protect the country's democratic order, Public Protector Madonsela opened the report with a quotation from decisions of the country's highest court—the Constitutional Court:

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalized during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this

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Zuma to bully government departments and state-owned companies into illegally siphoning money from the state into their own pockets”).

134. See, e.g., Lynsey Chutel, *South Africa's Biggest State Companies are Getting Caught up in Politics - and It's Starting to Hurt Them*, QUARTZ AFR. (Sept. 2, 2016), <https://qz.com/772027/south-africas-biggest-state-companies-are-getting-caught-up-in-politics-and-its-starting-to-hurt-them/> (recognizing that the political fighting in South Africa is “scaring off lenders from state-owned companies and potentially weakening everything in the economy from electricity to agriculture” by halting loans to many state companies).

135. See, e.g., *13 Damning Findings in the Public Protector's State Capture Report*, BUSINESSTECH (Nov. 2, 2016), <https://businesstech.co.za/news/general/142151/13-damning-findings-in-the-public-protectors-state-capture-report/> (noting that following the findings in the report, the Democratic Alliance leader, Mmusi Maimane, stated that President Zuma “should do the honourable thing and resign”).

reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:<sup>136</sup>

Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.<sup>137</sup>

These court decisions speak directly to several issues regarding the need to protect South Africa's democracy from the destructive effects of opportunistic state and non-state actors. The Constitutional Court recognizes (1) the destructive effects of "unchecked abuse of State power and resources"—a practice that was pervasive in the *ancient régime* (i.e., the apartheid government); (2) the fact that under South Africa's post-apartheid constitutional order, public officials who abuse their constitutional obligations will and must be punished; (3) that constitutionalism, accountability and the rule of law represent important constraints against government impunity and hence, must be safeguarded; and (4) the fact that the constitution is the foundation of the country's democratic order and must be protected. The need to protect the constitution and hence, the country's democracy, implies that those who threaten the latter, through, for example, their engagement in corrupt activities, must be brought to justice. Hence, the decision to investigate accusations of impropriety in the Zuma presidency was made possible by the need

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136. *E.g.*, *Economic Freedom Fighters v. Speaker of the National Assembly* 2016 (5) BCLR 618 (CC) at 4 para. 1 (S. Afr.); *see also* MICHAEL MARCHANT, *STATE OF CAPTURE? REPORT: SOUTH AFRICA'S DEMOCRACY FIGHTS BACK CORRUPTION 1* (2016) (providing additional commentary on the report); *see generally* HAROON BHORAT ET AL., *BETRAYAL OF THE PROMISE: HOW SOUTH AFRICA IS BEING STOLEN 3* (2017) (showing an independent analysis of the state capture report that was produced and released by Public Protector Madonsela).

137. *E.g.*, *Nyathi v. Member of the Executive Council for the Department of Health, Gauteng* 2008 (9) BCLR 865 (CC) (S. Afr.).

to protect the country's constitutional order.

What specifically was the Public Protector supposed to investigate? She was supposed to carry out "an investigation into complaints of alleged improper and unethical conduct by the president."<sup>138</sup> She was also supposed to investigate other "state functionariess relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of State Owned Entities (SOEs)" that resulted "in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses."<sup>139</sup> The Office of the Public Protector received complaints about government improprieties and in accordance with its powers elaborated in Section 182 of the Constitution and Sections Six and Seven of the Public Protector Act, 1994, proceeded to investigate.<sup>140</sup>

The report found evidence that points to significant wrongdoing, conflicts of interest, corruption, and a lot of governmental impunity.<sup>141</sup> Most of the wrongdoing, the report concluded, was tied to or arose out of the relationship between the Guptas and President Zuma and his son, Duduzane Zuma.<sup>142</sup> In his reaction to the report's findings and decision by President Zuma to seek to legally delay its release to the public,<sup>143</sup> leader of the opposition Democratic Alliance, Mmusi Maimane, stated that "[t]he manner in which Jacob Zuma has conducted himself is completely dishonorable and unbecoming of the nation's President. He has actively tried to delay the release of this report, disrespected the Office of the Public Protector, and wasted millions of rands<sup>144</sup> of public money in frivolous litigation."<sup>145</sup>

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138. South African President, Jacob Zuma. PUBLIC PROTECTOR SOUTH AFRICA, *supra* note 116, at 4.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. See Conor Gaffey, *South Africa: Five Things Thulu Madonsela's State Capture Report Told Us*, NEWSWEEK (Mar. 11, 2016, 2:56 PM), <http://www.newsweek.com/south-africa-five-thuli-madonsela-state-capture-report-516630> (noting that President Zuma had taken legal action to delay the publication of the report).

144. *Currencies*, CRN INDIA, <http://www.crnindia.com/currency/rand.html> (last visited Mar. 8, 2018) (defining the Rand as South Africa's currency).

Mmusi Maimane continued to welcome the remedial action that was prescribed after the report's release—the requirement that the President of the Republic appoint a commission of inquiry within 30 days of the report's release to undertake further investigation. This remedial action is in accordance with the requirements of §6(4)(c)(i) of the Public Protector Act and was designed to enhance the restoration of the country's democratic values.<sup>146</sup> Specifically, the President was expected to appoint a commission of inquiry headed by a judge, but the judge had to be selected by the country's Chief Justice and not President Zuma. In *Economic Freedom Fighters v. Speaker of the National Assembly and Others*; *Democratic Alliance v. Speaker of the National Assembly and Others*,<sup>147</sup> the Constitutional Court of South Africa held that President Zuma had breached the Constitution of the Republic of South Africa by not implementing the recommendations of the Public Protector's *Nklandla*<sup>148</sup> report.<sup>149</sup>

### *5. Findings of South Africa's State Capture Report*

Allegations by South Africa's Deputy Minister of Finance, Mcebisi Jonas, formed the heart of the Public Protector's investigation.<sup>150</sup> Jonas told Thuli Madonsela, the Public Protector, that he had been taken to the Gupta family home by President Zuma's son (Duduzane Zuma). While at the Guptas, one of the

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145. *13 Damning Findings in the Public Protector's State Capture Report*, *supra* note 135.

146. S. AFR. CONST., 1996, § 112 (“[I]f [the Public Protector] is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions.”).

147. *United Democratic Movement v. Speaker of the National Assembly and Others* 2017 (1) SA 21 (ZACC) (S. Afr.).

148. David Smith, *Jacob Zuma Faces Investigation Over Plans to Renovate Home*, *GUARDIAN* (Oct. 8, 2012, 7:24 PM), <https://www.theguardian.com/world/2012/oct/08/jacob-zuma-investigation-plans-home> (detailing the investigation launched by the Public Protector, according to whom President Zuma had unduly benefited from the publicly-financed improvements and the Constitutional Court subsequently determined that the National Assembly and President Zuma had failed to uphold the South African constitution).

149. *United Democratic Movement v. Speaker of the National Assembly and Others*, (1) SA 21 at 33 para. 83.

150. Ferial Haffajee, *4 Days in December*, *CITY PRESS* (Dec. 8, 2016, 10:35 AM), [https://city-press.news24.com/Special-Report/4\\_days\\_in\\_December/4-days-in-december-20161205-4](https://city-press.news24.com/Special-Report/4_days_in_December/4-days-in-december-20161205-4).

Gupta brothers, Ajay Gupta, had offered him the Minister of Finance position in Zuma's cabinet.<sup>151</sup> The offer was conditional on Jonas firing several Treasury officials who, according to Ajay, were a major obstacle to the maximization of certain Gupta family business objectives.<sup>152</sup> In addition to the offer, Ajay is also alleged to have offered Jonas a \$45 million bribe. Jonas told the Public Protector that he had declined all of Ajay's offers.<sup>153</sup>

With respect to the important findings of the investigation, the Public Protector determined first, that President Zuma had improperly and in violation of the Executive Ethics Code, permitted Gupta family members and his son, Duduzane Zuma, "to be involved in the process of removal and appointment of the Minister of Finance in December 2015."<sup>154</sup> Second, there was no evidence that President Zuma, as head of the executive branch, had investigated the allegations made by the Deputy Minister of Finance. This failure, the report continued, was especially glaring because the Minister's allegations had become public and were widely shared in the country. The report concluded that if the President did fail to investigate the allegations made by Jonas, then he may have violated provisions §2.3(c) of the Executive Ethics Code.<sup>155</sup>

Third, Des van Rooyen, who replaced former finance minister, Nhlanhla Nene, after President Zuma fired the latter, visited the Gupta home on several occasions, including on the day the government announced van Rooyen's appointment.<sup>156</sup> Fourth, the report also alleged that the President of the Republic and the Gupta family colluded and used state-owned enterprises, including Eskom, the country's electricity provider, and Denel, an arms manufacturer, to award the Gupta family group of businesses lucrative state contracts.<sup>157</sup> The report also asserts that the boards of state-owned enterprises were improperly appointed, in an effort to enhance the

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151. *Id.*

152. *Id.*

153. PUBLIC PROTECTOR SOUTH AFRICA, *supra* note 116, at 94.

154. *Id.* at 14.

155. *Id.*; *see also* Executive Members Act 82 of 1998 § 2.3(c), GN 19406 of GG (28 Oct. 1998) (S. Afr.).

156. PUBLIC PROTECTOR SOUTH AFRICA, *supra* note 116, at 14.

157. *Id.* at 18.

ability of the Gupta family group of businesses to secure government contracts.<sup>158</sup> These allegations point to a serious weakness in the structure of the South African economy generally and the management of state-owned enterprises in particular. If these allegations are true, then the executive branch has corruptly diverted state resources to private interests, depriving the public of valuable resources for poverty alleviation and human development. In addition, the presidency has unconstitutionally allowed the management of public policy to be dominated and controlled by private interests.<sup>159</sup>

Fifth, the report alleges that President Zuma and other members of his cabinet improperly interfered in the relationship between banks and Gupta family-owned business enterprises. By doing so, they granted these firms preferential treatment on matters that the country's independent regulatory agencies routinely managed.<sup>160</sup> Sixth, President Zuma used his position as the country's chief executive, as well as confidential information entrusted to him, to generate extra-legal income for himself, members of his family, and the Gupta family.<sup>161</sup> The president gave preferential treatment to the Gupta family when awarding state contracts, trade licenses, and access to credit.<sup>162</sup> Seventh, the government restructured its advertising spending to benefit a Gupta-owned newspaper, the *New Age*, a process that represented a direct threat to the sustainability of a competitive media market in the country.<sup>163</sup>

What is important for the purposes of this article is that the reader be given an overview of the extent to which the Public Protector's report determined the existence of significant improprieties and unconstitutional behavior within the South African State. Hence, it is not necessary to list all the findings of the report. Interested readers can access the report for themselves.<sup>164</sup>

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158. *Id.* at 16.

159. *Id.* at 47.

160. *Id.* at 10.

161. PUBLIC PROTECTOR SOUTH AFRICA, *supra* note 116, at 6.

162. *Id.* at 4.

163. *Id.* at 66.

164. *See generally id.* at 4-335 (listing the public prosecutor's findings based on investigation of unethical and improper conduct of the President and other

### 6. *Implications of the State Capture Report for Governance in South Africa*

The Public Protector's report found evidence alleging that the government granted the Gupta family privileged access to South Africa's executive branch during the last several years. Hence, the Gupta family has been able to exert significant influence on important policy decisions made by the government. From a political economy point of view, one can see at least two important implications for South Africans. First, is that this relationship between the Guptas and the presidency may have distorted economic incentives and created a situation where profitability in the economy was no longer determined by expertise, business acumen, and the ability to produce goods and services that are competitive in both price and quality. Instead, rent seeking and corruption had emerged as the two most important determinants of profitability. The ability of Gupta-owned businesses to distort market incentives through their influence on the government implied that they no longer needed to operate efficiently and competitively in order to maximize profit. That, of course, did not augur well for other firms, which were now unable to compete effectively against the politically-connected Guptas.

Second, in addition to the damage that this relationship created in the country's markets, there is the possibility that unless measures are undertaken to remedy the situation, South Africa's evolving democracy and its relatively young institutions could be permanently damaged.

The president has already been sanctioned by the Constitutional Court for failing to perform his constitutionally-mandated duty to "uphold, defend and respect the Constitution as the supreme law of the land," when he failed to comply with the findings of the Public Protector in the *Nkandla* case—the corruption scandal involving allegations that the president had used state funds to refurbish his private home outside the municipality of Nkandla.<sup>165</sup> Since then, many South Africans, especially members of the opposition, have

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government officials).

165. *United Democratic Movement v. Speaker of the National Assembly and Others*, (1) SA 21.

been calling on the President and some members of his political party to resign.<sup>166</sup> It is hoped that these existing pressures, coupled with the results of the State Capture<sup>167</sup> report, would force the President to put aside his personal interests and those of his benefactors to save the country's democracy.

Unlike democratic systems in many other countries in Africa, South Africa's democracy is not in its embryonic stages; however, the country's democratic system cannot be said to be fully matured and institutionalized either. Thus, as the country struggles to deepen and institutionalize its democracy, there is no doubt that it will encounter problems. Even the most developed and matured democracies, such as the United States, have been forced to deal with opportunistic behaviors, such as corruption and rent seeking, that are potentially damaging to their political and economic systems from time-to-time. Nevertheless, highly developed democracies, such as the United States, have been able to deal effectively with political scandals that have threatened their governing processes and created potential constitutional crises.<sup>168</sup>

Of course, the American Republic was able to effectively and fully handle political scandals, such as the Watergate Affair and the Abscam scandal because of the existence of strong democratic institutions—particularly, a robust independent press, an independent judiciary, and a legislature that is capable of checking on the exercise of government power. Perhaps, more important is the fact that the United States has a strong and politically active civil society that has functioned as an effective check on the government. Because U.S. institutions have been able to deal fully and effectively with the various threats to its constitutional order, the country has managed to deepen and institutionalize its democratic system. Thus, permanent

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166. Jason Burke, *Cyril Ramaphosa Chosen to Lead South Africa's Ruling ANC Party*, GUARDIAN (Dec. 18, 2017, 4:57 PM), <https://www.theguardian.com/world/2017/dec/18/cyril-ramaphosa-chosen-to-lead-south-africas-ruling-anc-party> (detailing the internal processes and elections of the ANC since December 2017). Zuma resigned as President of the Republic of South Africa, effective February 14, 2018.

167. PUBLIC PROTECTOR SOUTH AFRICA, *supra* note 116.

168. *Watergate: The Scandal that Brought Down Richard Nixon*, WATERGATE.INFO, <http://watergate.info> (last visited Mar. 18, 2018).

damage to South Africa's constitutional order would come not because the Guptas captured the executive branch, but from the failure of the country's other institutions and its citizens to deal fully with the "Gupta Affair."

The Public Protector's report reveals systemic and extensive abuse of power within the executive branch of government in South Africa.<sup>169</sup> It also reveals that the legislative branch is either unwilling or unable to perform the important function of serving as a check on the executive.<sup>170</sup> In addition, there are suggestions that corruption has compromised some of the country's counteracting agencies, such as the National Prosecuting Authority and the Directorate for Priority Crime Investigation (DPCI) (Hawks). Therefore, they may not be relied upon to deal fully and effectively with government impunity.<sup>171</sup>

Nevertheless, it is important for the reader and South Africans to recognize that the country still has democratic institutions that are capable of fully confronting and effectively resolving all the issues uncovered by the Public Protector's report. Importantly, the Office of the Public Protector, which is an independent state body, unearthed the events and activities behind the capture of the state by the Guptas by working along with robust civil society organizations (specifically independent media). In addition, the Constitutional Court remains quite independent and has already exhibited that independence by ruling against the government.<sup>172</sup> While the State Capture report has revealed serious threats to South Africa's fledgling democracy, it is important to recognize the fact that this is a battle over the country's constitutional order and its democratic institutions. The nature of this

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169. *Id.*

170. *Id.*

171. Danielle Hoffmeester, *The Independence of South Africa's DPCI Under Threat?*, S. AFR. CATH. BISHOP'S CONF. PARLIAMENTARY LIAISON OFF., May 2015, <http://www.cplo.org.za/wp-content/uploads/2015/02/BP-381-The-Independence-of-South-Africas-DPCI-under-Threat-May-2015.pdf>; Mtengwe Mhango, *Don't Touch Independence of NPA*, IOL (July 13, 2014, 7:27 AM), <https://www.iol.co.za/sundayindependent/dont-touch-independence-of-npa-1718836>.

172. See *Economic Freedom Fighters v. Speaker of the National Assembly*, (5) BCLR 618 at 51 para. 105 (finding the President's actions inconsistent with the Constitution).

battle will determine the future of the country and its democracy. Of course, the report itself is a testament to the effectiveness of, at the very least, some of the country's independent institutions and the resilience of its democratic system.

South Africans, however, must realize that while it is important that everyone involved in the Gupta Affair, including the President, other public servants, and the Guptas themselves, be prosecuted by a court of law, and if found guilty they should be punished as prescribed by the law, it is more important that the country place its emphasis on dealing with corruption and other forms of impunity by strengthening the country's institutions in order to foreclose any possibility of state capture again. Thus, the lesson for South Africans from this experience is that all political systems, including those which are undergirded by strong democratic institutions, are vulnerable to attack by individuals seeking to capture the state and use its structures for personal enrichment. Strengthening the country's democratic institutions and significantly enhancing the ability of civil society to monitor and check on the exercise of government power should safeguard the state against capture. Therefore, South Africans should insist on an effective judicial inquiry, followed by prosecutions of those found to be complicit in state capture and corruption. Finally, there should be systematic efforts to strengthen national institutions, including, especially efforts to minimize any attempts to interfere with freedom of the press.

## IV. STATE CAPTURE AND THE RULE OF LAW

### A. INTRODUCTION

State capture, as discussed earlier, is an extreme form of grand corruption.<sup>173</sup> The extent of corruption in a country is determined, by the nature of the country's institutional arrangements. Similarly, the ability of private business interests to capture the state is affected

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173. *See, e.g.*, GOVERNMENT ANTI-CORRUPTION STRATEGIES: A CROSS-CULTURAL PERSPECTIVE vii (Yahong Zhang & Cecilia Lavina eds., 2015) (examining, inter alia, political corruption in various cultural locations and how it relates to state capture).

significantly by whether the country's governance process is undergirded by the rule of law. For example, if a "country's institutional arrangements guarantee the rule of law, and civil servants and politicians (i.e., state custodians) are adequately constrained by the law, then corruption and other forms of impunity will be minimized."<sup>174</sup> Similarly, in a country where state custodians are well-constrained by the law, private business interests are likely to find it quite difficult to corruptly capture the state.

Of course, as discussed earlier, even in a country with an effective governance process, such as the United States, the state is still susceptible to capture. However, in a country whose governance system is undergirded by the rule of law, prospects for state capture are minimized. In this section, we shall examine how fidelity to the rule of law in a country can significantly minimize opportunities for state capture.

## B. WHAT IS THE RULE OF LAW?

Over the years, legal scholars and philosophers have struggled to define the concept called "rule of law."<sup>175</sup> Most scholars believe that the foundation for the modern definition of the rule of law was laid by British legal philosopher Albert Venn Dicey<sup>176</sup> in the 19th century. As argued by Dicey,<sup>177</sup> the rule of law must embody three critical concepts: (1) the law is supreme; (2) all citizens are equal before the law; and (3) the principle that the rights of individuals must be established through court decisions must be accepted and respected.<sup>178</sup> Notable modern contributors to the definition of the rule of law include the late Rt. Hon. Lord Bingham of Cornhill KG,<sup>179</sup> a

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174. Mbaku, *International Law*, *supra* note 22, at 663.

175. See CHRISTOPHER MAY, *THE RULE OF LAW: THE COMMON SENSE OF GLOBAL POLITICS* (2014) (examining, inter alia, the important role of the rule of law in international political economy); Mbaku, *Providing a Foundation*, *supra* note 8, at 959.

176. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* xi (1982).

177. *Id.*

178. *Id.*

179. TOM BINGHAM, *THE RULE OF LAW* vii (Penguin 2011) (examining the rule of law and providing a definition for it, as well as arguing that the rule of law is the foundation for the modern state system).

distinguished British judge and jurist, who, before his death in 2010, served as Master of the Rolls,<sup>180</sup> Lord Chief Justice,<sup>181</sup> and Senior Law Lord.<sup>182</sup>

On Thursday November 16, 2006 at the Center for Public Law, University of Cambridge,<sup>183</sup> Lord Bingham elaborated on eight sub-rules which, he argued, comprised the rule of law<sup>184</sup> Lord Bingham argued that “the core of the existing principle” of the rule of law is that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”<sup>185</sup> Lord Bingham set out the following sub-rules, which he stated undergird the Rule of Law:

1. the law must be accessible and so far as possible intelligible, clear and predictable;
2. questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. the law must afford adequate protection of fundamental human rights;

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180. See generally GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* (8th ed. 2006) (defining the position and roles of the Keeper or Master of the Rolls and Records of the Chancery of England, known as the Master of the Rolls).

181. CONSTITUTIONAL COMMITTEE, *CONSTITUTIONAL REFORM ACT 2005: REPORT WITH EVIDENCE*, 2005-6, HL 83, at 5 (UK) (defining the roles of the Lord Chief Justice of England and Wales before and after the Constitutional Reform Act of 2005).

182. REBECCA HUXLEY-BINNS & JACQUELINE MARTIN, *UNLOCKING THE ENGLISH LEGAL SYSTEM* (3d ed. 2010) (explaining the “law lord” system as it applies to England and Wales).

183. Bob Hepple, *Sir David Williams Obituary*, *GUARDIAN* (Sept. 22, 2009, 6:54 PM), <https://www.theguardian.com/uk/2009/sep/22/david-williams-obituary>.

184. Thomas Bingham, President, Supreme Court of the United Kingdom, *The Rule of Law*, Lecture at Sir David Williams Lectures (Nov. 16, 2006), in *The Rule of Law' Text Transcript*, CPL, <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript> (last visited Mar. 18, 2018).

185. *Id.*

5. means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
6. ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
7. that adjudicative procedures provided by the state should be fair; and
8. the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.<sup>186</sup>

Professor Robert Stein<sup>187</sup> has also contributed to the definition of the rule of law. Stein<sup>188</sup> began his analysis of the rule of law by referring to Lord Bingham's lecture<sup>189</sup> and interpreted Lord Bingham's eight sub-rules to imply that "the law is superior, applies equally, is known and predictable, and is administered through a separation of powers."<sup>190</sup> Stein then provides his own definition of the rule of law by arguing that a community governed by institutional arrangements that guarantee the rule of law must be characterized by the following:

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
3. Members of society have the right to participate in the creation and

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186. *Id.*

187. Robert Stein is the Everett Fraser Professor of Law at the University of Minnesota Law School. *See generally* Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293 (2009) (explaining the rule of law generally).

188. *Id.* (discussing Lord Bingham's presentation on the rule of law in 2006).

189. *See* Thomas Bingham, *supra* note 185 (breaking down the rule of law into eight sub-rules).

190. Stein, *supra* note 187, at 301.

refinement of laws that regulate their behaviors.

4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.

5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.<sup>191</sup>

The American Bar Association (ABA), an organization that oversees, guides, and represents, lawyers and law students, is also active in the movement to define the rule of law. The ABA also helps institutionalize this important legal concept in emerging democracies around the world. In 2007, the ABA launched a Rule of Law Initiative (ABA ROLI), designed to “strengthen legal institutions, to support legal professionals, to foster respect for human rights and to advance public understanding of the law of citizen rights.”<sup>192</sup> ABA ROLI currently operates in more than 100 countries around the world.<sup>193</sup>

Stating that “[t]he rule of law does not depend upon a U.S.-style separation of powers,” the ABA argues that “[t]he key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.”<sup>194</sup> Although the rule of law consists of several elements or sub-rules, the most relevant to state capture in Africa, is that no one, “not even the people who hold leadership positions in government, including the executive, judiciary officers, and legislators, is above

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191. See *id.* at 302 (noting that his definition is not “revolutionary” but based on experts in jurisprudence).

192. See *Our Origins & Principles*, AM. BAR ASS'N, [https://www.americanbar.org/advocacy/rule\\_of\\_law/about/origin\\_principles.html](https://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html) (last visited Dec. 20, 2017) (adding in its purpose to consolidate its overseas law programs).

193. *Id.* (including over 500 professional staff members).

194. *Part I: What is the Rule of Law?*, in ABA DIV. FOR PUB. EDUC., DIALOGUE ON THE RULE OF LAW 4, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> (last visited Dec. 20, 2017) (explaining that the rule of law does not depend on a U.S.-style system or parliamentary system).

the law—the law is supreme.”<sup>195</sup>

The United Nations (UN) has been among many international and multilateral organizations that have also been interested in the rule of law debate.<sup>196</sup> Recently, the UN promulgated and published its own definition for the rule of law. As stated by the UN,

[t]he ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>197</sup>

In Africa, and in many other countries around the world, the rule of law is an ideal that their citizens seek and hope to achieve—a governance process supported by the rule of law will ultimately enhance the peaceful coexistence of each country’s various population groups, promote inclusive economic growth, adequately constrain state custodians, and minimize opportunistic behaviors, and decrease contributions to state capture.<sup>198</sup>

### C. THE RULE OF LAW’S ELEMENTS

A very important element of the rule of law is that “the

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195. *Id.*

196. *See What is the Rule of Law?*, U.N. & RULE OF L., <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Dec. 20, 2017) (revisiting the issue on numerous occasions, recently at its 67th Session in 2012).

197. *Id.*

198. *See, e.g.*, WORLD BANK, WORLD DEVELOPMENT REPORT, 2002: BUILDING INSTITUTIONS FOR MARKETS 9, 17, 23 (2002) (ascribing how income and the rule of law are directly correlated); MAY, *supra* note 176, at 1-5 (describing how the rule of law shapes social imaginings); Mbaku, *Providing a Foundation*, *supra* note 8, at 964 (demonstrating how necessary reforms can change African institutional arrangements). All these works emphasize the importance of the rule of law to economic growth and human development. While the World Bank and May address their work to the global community writ large, Mbaku deals specifically with growth and development in Africa.

government must obey the law in its actions.”<sup>199</sup> In other words, the law is supreme and all citizens are bound by it. Hence, the first element of the rule of law is the supremacy of law. Justice Anthony M. Kennedy, Associate Justice of the U.S. Supreme Court, states that “[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials.”<sup>200</sup>

A country cannot fully maintain the rule of law if the majority of its citizens do not voluntarily accept and respect the law. If the majority of citizens in a country do not accept and respect the law, the forces of law and order (e.g., the police and the judiciary) will find it very difficult to perform their jobs. Within such countries, ensuring compliance to the laws would be extremely costly, and the government may be forced to devote a significant part of public revenues to law-and-order activities. Such a process could force a reduction in spending on other areas (e.g., health care, child nutrition, and human capital development) that are critical to economic growth and development. The second element of the rule of law, then, is that the majority of citizens must voluntarily accept and respect the law.<sup>201</sup>

In many of its rulings, the U.S. Supreme Court has contributed significantly to the development of jurisprudence on the rule of law. For example, in *United States v. United Mine Workers*,<sup>202</sup> the U.S. Supreme Court held:

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199. Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 JUDGES' J. 4, 6 (2007) (quoting Joseph Raz, *The Rule of Law and Its Virtue*, in LIBERTY AND THE RULE OF LAW 3-21 (Robert J. Cunningham ed., 1979) (emphasizing that this element is in every definition of the rule of law).

200. Stein, *supra* note 187, at 299.

201. See Margaret Levi, Tom R. Tyler & Audrey Sacks, *The Reasons for Compliance with Law*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 70 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012) (arguing, inter alia, and with respect to sub-Saharan Africa, that “voluntary compliance with the law is influenced by individuals’ views of the government’s legitimacy” and that “individuals’ conception of legitimacy depends significantly on the government’s trustworthiness (including its perceived competence) and its commitment to procedural justice”).

202. See *United States v. United Mine Workers*, 330 U.S. 258 (1947) (holding that a trial court appropriately issued a restraining order to prevent a strike).

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.<sup>203</sup>

The various definitions of the rule of law found in the international legal literature share the U.S. Supreme Court's pronouncements found in *U.S. v. United Mine Workers*<sup>204</sup> that "[t]here can be no free society without law administered through an independent judiciary."<sup>205</sup> As argued by Professor Erwin Chemerinsky,<sup>206</sup> "An independent judiciary is essential to the rule of law."<sup>207</sup> In stating that "[t]he 'rule of law' refers to a principle of governance in which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, . . .",<sup>208</sup> the United Nations also acknowledges independence of the judiciary as a critical element of the rule of law. The third element of the rule of law, then, is judicial independence.

In any country, law can only function effectively and fully if citizens "are aware of, understand, and appreciate the law."<sup>209</sup> Broad-based educational programs, specifically including those located in primary and secondary schools, can help citizens understand and appreciate the country's standing laws and constitution. Government should design these educational programs, however, to supplement and not replace citizenship participation in constitutional design and

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203. *Id.* at 312.

204. *Id.* (citing historical legal authority).

205. *Id.* (warning of the chaos that could arise should a man be allowed to determine for himself what is law).

206. See Chemerinsky, *supra* note 199, at 6 (noting how frequently the rule of law is not defined).

207. *Id.* at 8 (emphasizing this principle as "unassailable").

208. See Robert H. Wagstaff, *The Aftermath of Terrorism: Rule of Law Applies to Detainees in U.S. and U.K.*, VA. LAW. MAG. Feb. 2010, at 32 (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616.23 (Aug. 2004) (adding that the principle must also conform with international human rights)).

209. See Mbaku, *Providing a Foundation*, *supra* note 8, at 990 (arguing that school-based efforts should only supplement, not be the sole source where citizens are educated).

the creation of post-constitutional laws. The design and enactment of laws in the post-constitutional society must be open and transparent, providing citizens with the facilities to participate fully and effectively. The laws, of course, must be applied “predictably and uniformly”<sup>210</sup> and not in a capricious and arbitrary manner. The fourth and fifth elements of the rule of law are openness and transparency, and predictability.

The ABA<sup>211</sup> states that the rule of law developed in the United States “around the belief that a primary purpose of the rule of law is the protection of certain basic rights.”<sup>212</sup> In similar fashion, many of the people who participated in the decolonization of the European colonies in Africa believed that independence would grant the former colonies the right to rid themselves of European institutions, subsequently replacing these institutions with laws and governing processes developed by Africans.<sup>213</sup> The popular hope was that the post-independence constitutional order would adequately constrain state custodians, effectively preventing them from engaging in corruption, rent seeking, and other forms of political opportunism. Perhaps, more importantly, the new laws were expected to guarantee the protection of fundamental and human rights, as well as constrain non-state actors so that they, too, could not infringe on the rights of their fellow citizens, including especially those of women, and ethnic and religious minorities.<sup>214</sup> Hence, the sixth element of the rule of

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210. See *Part I: What is the Rule of Law?*, *supra* note 194, at 5 (noting that failure to apply the law thusly leads to unpredictable law).

211. *Id.*

212. *Id.* (stating that the United States was the first nation to write a document that gives rights to its people and binds the government to those rights).

213. See John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the "New" Global Era*, in *THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE* 1, 2 (John Mukum Mbaku & Julius Omozuanvbo Ihonvbere eds., 2003) (emphasizing the need for welfare policies, which were not fully developed under colonial rule).

214. See, e.g., *id.* at 2 (“Many Africans, especially the historically marginalized and deprived (e.g., women, rural inhabitants, ethnic minorities, and those forced to live on the urban periphery), believed that independence was an opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process—a people-driven, bottom-up, participatory, and transparent institutional reform process—institutional arrangements based on their own values, aspirations, traditions, and customs.”).

law is the protection of the fundamental rights of citizens.

#### D. THE RULE OF LAW AND STATE CAPTURE

State capture takes place when private business interests pay bribes to legislators. The question to be answered then is how can the existence of the rule of law prevent private interests from paying bribes to legislators in order to capture the state? Suppose, for example, that the governing process is undergirded by the rule of law and citizens accept and respect the supremacy of law. Will that minimize the chances that private business interests would capture the state?

In his study of administrative tribunals and common-law courts in the United States, John Dickinson<sup>215</sup> concluded that the law is an important check on the exercise of government power.<sup>216</sup> The ability of the people to effectively check on government activities is critical to the minimization of corruption and, and by implication, state capture. Many of the legal scholars and practitioners who have been involved in rule-of-law issues have argued that for the rule of law to function effectively and fully in a country, all of the country's citizens, including state custodians (i.e., civil servants and political elites) must be subject to laws which were earlier agreed upon.<sup>217</sup> Where such a legal regime exists, state custodians are not granted wide discretion to "either make their own laws, or subvert existing ones."<sup>218</sup> Governing elites—civil servants and politicians—like their fellow citizens, must accept and respect the country's laws, subject themselves to these laws, and refrain from engaging in corruption, rent seeking, and other forms of opportunism. Thus, where the law is supreme, state capture is likely to be minimized.

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215. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 32 (1921).

216. *See id.* at 32 (arguing that the law is less a check on the citizen by the government).

217. *See, e.g.,* Mbaku, *Providing a Foundation*, *supra* note 8, at 964 (necessitating the promotion of wealth creation by marginalized groups); Stein, *supra* note 188, at 301-02 (emphasizing that the law cannot be arbitrary or inconsistent).

218. *See* Mbaku, *Providing a Foundation*, *supra* note 8, at 995 (emphasizing the need for the law to apply to elites the same way it does to all other citizens).

Nevertheless, as we have seen with countries, such as the United States, which have strong and fully functioning rule-of-law systems, private business interests can still attempt to corrupt political elites in an effort to capture the state.<sup>219</sup> However, the critical point is that where the governing process is undergirded by the supremacy of law, the efforts of private interests to corruptly capture the state are most likely to be frustrated by the country's democratic institutions. Thus, for African countries that are interested in minimizing state capture, the principle of the supremacy of law must be a central feature of their governing processes.

Corruption control and hence, the minimization of state capture, would be very difficult if a majority of citizens do not voluntarily accept and respect the law. As has been argued by many legal scholars and practitioners, "[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law."<sup>220</sup> The forces of law and order, which include the police and the judiciary, are likely to find their jobs much easier to perform if the majority of the citizens voluntarily accept and obey the law. Thus, voluntary acceptance and respect of the law by a majority of citizens is critical for the minimization of state capture.

But, how can African countries make certain that a majority of their citizens voluntarily accept and respect the law? First, the laws chosen must be "relevant to the lives of the people whose behaviors the laws are expected to regulate, reflecting their values."<sup>221</sup> Second, the laws must not be externally imposed on the people.<sup>222</sup> They must be those that "the people understand, respect, and are able and willing to obey."<sup>223</sup> If the people make their own laws through a participatory and inclusive process, they are likely to choose laws

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219. See, e.g., L.H. LARUE, *POLITICAL DISCOURSE: A CASE STUDY OF THE WATERGATE AFFAIR 2* (1988) (arguing, inter alia, that Watergate was as much about a "breach of trust" as it was about the rule of law).

220. See *Part I: What is the Rule of Law?*, *supra* note 194, at 5 (declaring the rule of law an essential element of the social contract).

221. See Mbaku, *Providing a Foundation*, *supra* note 8, at 1003 (noting how citizens are more likely to accept and respect the laws when they had a say in their design and implementation).

222. *Id.* (adding the necessity of the laws mirroring the citizens' values to ensure compliance).

223. *Id.*

which are relevant to their lives and which they can obey.

The third way that an African country can garner support for its laws and institutions is to make certain that the process by which the people design and enact laws is open and transparent. While this process will enhance and maximize participation, it would also help citizens “know what the law is, understand the law, and make certain that the law reflects their values and is relevant to their lives, effectively enhancing compliance.”<sup>224</sup> Of course, if the process through which the laws are selected is open and transparent, citizens will be able to understand why some laws have been selected instead of others and why they must obey the laws.<sup>225</sup>

Finally, and most importantly, to make sure that citizens accept and respect the laws, the laws must be relevant to citizens' lives and the issues that they face on a daily basis. It is very important that citizens see the law as a tool that they can use to (i) deal with their problems, including organizing their private lives; (ii) peacefully resolve conflicts, including those arising from trade and other forms of free exchange, and (iii) enhance their ability to engage in various activities (e.g., start and run a business to create wealth) to improve their quality of life. One of the most important problems that governance systems in the African countries have encountered is that most citizens see their laws and institutions as foreign impositions—leftovers from the colonial period or in the case of post-independence constitutions, documents that were simply “cobbled together by a compliant constitution-making conference or convention, and then adopted by a ‘controlled’ plebiscite.”<sup>226</sup> Hence, it is important that citizens take ownership of their laws and institutions so that they can use them not only to organize their private lives and engage in various activities to maximize their values, but also so that they can adequately check on the activities of their governors and prevent the type of corruption that leads to state capture.

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224. *Id.* (encouraging citizens to participate in the political process).

225. See generally *Part I: What is the Rule of Law?*, *supra* note 194, at 5 (adding predictability as a necessary accompaniment).

226. See Victor T. Le Vine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 188 (1997) (noting that many African leaders legitimized their regimes through democratic constitutions).

Judicial independence is very important for corruption control and the minimization of state capture. The judiciary's independence is a multifaceted concept that requires that all officers of the judiciary be granted "security of tenure," "financial security," and "institutional independence."<sup>227</sup> Without an independent judiciary, it would not be possible for an African country to deal effectively with grand corruption and other behaviors that contribute to state capture. Hence, African countries that seek to minimize chances of state capture must make sure that they have judiciaries that are independent of the other branches of government.<sup>228</sup>

Finally, openness and transparency are critical to the fight against corruption and state capture. Gerring and Thacker argue that "[o]penness and transparency, which we may understand as the availability and accessibility of relevant information about the functioning of the polity, is commonly associated with the absence of corruption."<sup>229</sup> Since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral).<sup>230</sup>

Openness and transparency in government communication are important because they enhance the ability of citizens to fully

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227. See, e.g., U.S. CONST. art. III (demonstrating how the framers saw these elements as critical to the independence of the judiciary); *De Lange v. Smuts* 1998 (3) SA 785 (CC) at para. 59 (S. Afr.) (holding that judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law" and endorsed the ruling of the Canadian Supreme Court in *Valente v. The Queen*); *Valente v. The Queen*, [1985] 2 S.C.R. 673 ¶¶ IV, V, VI (Can.) (setting the standard for judiciary independence in Canada).

228. This, of course, calls for a governing process that is undergirded by the separation of powers with effective checks and balances. See generally ZOLTÁN BALÁZS, *THE PRINCIPLE OF THE SEPARATION OF POWERS: A DEFENSE* xii (2016) (arguing, inter alia, that the separation of powers is one of the most cherished principles of constitutional government); James Fowkes & Charles M. Fombad, *Introduction*, to *SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM* 1-9 (Charles M. Fombad ed., 2016) (presenting a series of essays that examine, inter alia, the various efforts by Africa's constitutional designers to separate the different branches of government).

229. John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 BRIT. J. POL. SCI. 295 (2004).

230. *Id.* at 316.

monitor and check on the activities of their government. In addition, “transparency enhances the ability of an individual who is interested in a public policy, or thinks or believes a decision might affect them, to understand and appreciate how that decision was made or arrived at and why.”<sup>231</sup> This will, in turn, improve the chances that citizens will voluntarily accept and obey the law, further improving compliance.

In many countries in Africa, national governments are often not fully representative of their diverse populations. Hence, ensuring that public decisions are undertaken through an open and transparent manner can minimize the distrust that many groups, especially the ethnocultural groups that have historically been marginalized, have for their governments. If a minority religious or ethnic group argues that national policies are influenced by and benefit the few groups that dominate the government, openness and transparency in policy design would, at the very minimum, (1) offer opportunities for all groups, including those who feel marginalized, to participate in policy design; and (2) enhance the ability of these groups to witness and understand how laws and other decisions affecting their lives are made.<sup>232</sup>

In general, openness and transparency enhance the ability of citizens to monitor and check on the activities of civil servants and politicians, significantly contributing to accountability and a subsequent reduction in corruption. Where corruption is minimized, chances of state capture are reduced significantly.

## V. STATE CAPTURE AND ECONOMIC DEVELOPMENT

The main objective of private interests that capture the state is to control the legislative process so that they can use it to enact laws that enhance their ability to earn profits that are above and beyond

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231. See Mbaku, *Providing a Foundation*, *supra* note 8, at 1012-13 (giving the example of public policies on health and safety).

232. See Christina H. Drew & Timothy L. Nyerges, *Transparency of Environmental Decision Making: A Case Study of Soil Cleanup Inside the Hanford 100 Area*, 7 J. RISK RES. 33, 36 (2004) (emphasizing, *inter alia*, openness and transparency in public policy design and implementation).

those available to them through traditional, competitive markets. Once a state is captured, such a state's efforts would be focused on passing legislation that favors the private interests that have captured it. Working with the civil servants and political elites that they have captured, the consortium of private interests would entrench themselves politically, weaken the state and its structures, set up barriers to entry into various sectors of the economy, undermine the ability of the government to promote competitive markets, and effectively derail the state's ability to provide all citizens with public goods and services.

Private business interests invest significant resources to capture the state because they believe that once they have control of the state, they can monopolize the entire economy or major sectors of it, ultimately earning above normal rates of return on investment. Through this process, they can distort economic incentives and discourage investment in productivity-enhancing technologies, and prevent efforts by the government to promote inclusive economic growth and development.

First, in a captured state, economic development is not likely to be a policy priority.<sup>233</sup> For example, the private interests that have captured the state may not be interested in maintaining the type of tax system that maximizes the revenues that the government needs to implement public policies (e.g., investment in education—especially at the primary and secondary levels, infrastructure, child nutrition, health care, and prenatal care for pregnant women) that promote human development. The business interests may, instead, prefer either extremely low tax rates or a tax system that allows them to evade paying taxes altogether.

Second, the business interests that have captured the state may make possible the passage of legislation that creates barriers to entry into the economy, making the latter extremely less competitive. In the process, the economy may remain locked into an inferior equilibrium, one in which the only beneficiaries are the private

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233. See John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 *BRIT. J. POL. SCI.* 295, 295, 297 (2004) (emphasizing, rather, the role of sovereignty and the composition of the executive).

interests that have captured the state. Foreign investment which brings necessary technology, improves productive efficiency, and enhances the country's ability to become globally competitive, is prevented from entering the economy. A country with a captured state can remain trapped in a state of underdevelopment that is characterized by extremely high levels of poverty and deprivation. Nevertheless, while the majority of the people in these economies may remain trapped in poverty, civil servants, politicians, and the business interests that have captured them can actually enjoy a significantly high standard of living.

In captured states, private business interests can manipulate public responses to market failure to minimize their production costs and enhance their ability to garner non-competitive profits. For example, one of the functions of a government is to address market failure with respect to environmental pollution (which includes water, land, and air pollution) by taxation and other policies that either (1) directly increase the opportunity cost to the polluter; or (2) provide necessary resources for cleanups; or (3) subsidize polluters to prevent them from polluting. Using one or a combination of these methods, the government can deal effectively with pollution and improve, for example, the quality of air and water available to citizens.

However, where the state is captured by private business interests, the government may actually ignore enacting necessary legislation which provides legal tools to fight pollution. This enhances the ability of polluting businesses to earn non-competitive profits. Meanwhile, citizens, especially those belonging to groups that are not politically connected, will be burdened by the costs of the pollution.<sup>234</sup> During military rule in Nigeria, for example, private mining interests were able to collude with the government and effectively frustrate any efforts to control pollution in the Niger Delta region of the country.<sup>235</sup> The result has been degradation of land, air

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234. See generally DANIEL A. OMOWEH, SHELL PETROLEUM DEVELOPMENT COMPANY, THE STATE AND UNDERDEVELOPMENT OF NIGERIA'S NIGER DELTA: A STUDY IN ENVIRONMENTAL DEGRADATION (2005) (examining, inter alia, the failure of the Nigerian state to prevent ecosystem degradation in the Niger Delta region of Nigeria).

235. See *id.* at 1 (explaining how Shell has produced crude oil in the Delta for

and water quality in the Niger Delta, significant increases in poverty, and serious damage to the health of the people.<sup>236</sup>

Since public policy in captured states is usually geared towards maximizing the economic interests of the private businesses that have captured the state, there is likely to be a concentration of wealth in the hands of a few enterprise owners and the state custodians who “work” for them. This effectively deprives the population writ large of access to resources for development. This situation could lead to significant deterioration in the quality of life and seriously undermine government efforts to promote poverty alleviation and human development.

In any country, public policy is the purview of the government—the government, working with the help of the people, designs and implements policies to enhance national development. In doing so, the government must make the welfare of the people the epicenter of public policy. Nevertheless, when the state is captured by private business interests, the state loses its ability to function for the best interests of its people. State agents (i.e., civil servants and politicians), whose job it is to serve the interests of the principal (i.e., the people), may engage in self-dealing to maximize their own interests and those of their benefactors. Because state capture creates incentives for custodians of the state to act opportunistically, it is antithetical to national development.

Finally, because state capture transfers the legislative function to non-elected individuals,<sup>237</sup> any efforts by citizens to deepen and institutionalize democracy are likely to be frustrated by enterprise owners who see democracy as a constraint to their economic ambitions. Hence, once a private interest captures the state, it might become difficult to reverse course because those in control of the structures of the state would make it very difficult for citizens to engage in the types of institutional reforms that restore national institutions and improve their democratic character.

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almost fifty years).

236. *See id.* (noting that Shell would dump untreated waste into the land and swamps, spill oil without cleanup, and flare the oil).

237. That is, the private business interests that invest in state capture.

## VI. CONCLUSION AND POLICY RECOMMENDATIONS

The legal and social science literature has defined state capture as a process where private operatives (e.g., private businesses) use corrupt means (e.g., the payment of bribes to civil servants and politicians) to either significantly influence or take control of the public policy process in a country. Once private interests appropriate state institutions, these private interests may not only have significant impact on public policy outcomes but may also significantly influence the making of the country's laws.

Although state capture can produce many outcomes, the most important are: (1) the interests of the people are substituted for those of the captors (that is, the actors who have successfully captured the state)—the state may, henceforth, devote its efforts to serving the needs of the captors instead of providing people with public goods and services; (2) the legislative process may no longer be within the purview of the people's elected representatives; instead, the captors may become *de facto* legislators; (3) public policies would no longer reflect national priorities. They are instead likely to reflect the interests of the captors—in fact, the government may eventually abandon national political and economic priorities in favor of those favored by the captors; (4) there is likely to be a slow, but steady, deterioration of the country's institutions; (5) there would be a preference for opacity in government communication, instead of openness and transparency; (6) there would most likely be a failure of the government to be accountable to the constitution and the people; and (7) there is likely to be a general deterioration in the legal system.

In addition to forcing a state to abandon its constitutional functions, which include maintaining law and order and providing other necessary public goods and services, state capture may significantly increase the level of government impunity. This is likely to include the abuse of citizens' rights, especially those of historically marginalized groups (e.g., women, girls, and religious and ethnic minorities). In addition, one may also see an increased deterioration in economic competitiveness, as well as in the country's governing structures.

But how can a state extricate itself from this economic and political quagmire? In the case of South Africa, a country with a very progressive constitution and relatively effective institutions, the solution lies in making certain that those institutions perform their jobs. The process has already begun—with the help of civil society and its organizations (e.g., the independent press), the Public Protector has already completed her investigation and released the results. It is now left to other institutions to follow the country's laws and take the process to its natural conclusion.<sup>238</sup>

An examination of state capture in South Africa shows that any state, regardless of how robust its institutions are, is still susceptible to state capture. However, as we have seen in the case of South Africa, the country's strong and independent institutions, particularly its independent press, can expose efforts to capture the state and pave the way for further investigation and prosecution by the state's other democratic institutions (e.g., the independent judiciary). While there are some suggestions that the National Prosecuting Authority and the Directorate for Priority Crime Investigation (DPCI) have been compromised and hence, cannot be relied upon to take the necessary remedial actions recommended by the Public Protector's report, it is important to note that the judiciary remains independent and quite capable of taking the necessary legal action in bringing the matter to a conclusion. The hope is that South Africa's institutions will deal fully and effectively with the Gupta Affair in order to minimize its impact on the country's democracy and democratic institutions.

With respect to the Democratic Republic of Congo and other countries that do not have effective and fully functioning laws and institutions, the recommendation is that they undertake comprehensive institutional reforms to provide, first, a constitution that ensures the separation of powers with effective checks and balances, and second, a governing process that is capable of enforcing all constitutional provisions. This can only be accomplished through engagement in robust, inclusive and participatory institutional reforms to totally transform the country's

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238. See S. AFR. CONST., 1996, § 112 (“If [the Public Protector] is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions.”).

institutional arrangements and provide the people with a governing process that is undergirded by a true separation of powers with effective checks and balances.

The lesson for South Africa and other African countries is that every state, no matter the nature of its institutions is vulnerable to capture. Nevertheless, countries whose governing processes are undergirded by a separation of powers with effective checks and balances (e.g., independent judiciary, a robust civil society, and an independent press) are more likely to be able to deal fully and effectively with any efforts to capture the state.