

2013

“Sed Quis Custodiet Ipsos Custodies?” (But Who Will Guard the Guardians?) The Case for Elevating Official Corruption to the Status of a Crime in Positive International Law

Ndiva Koefele-Kale

Southern Methodist University, Dedman School of Law

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [International Law Commons](#)

Recommended Citation

Koefele-Kale, Ndiva (2013) "“Sed Quis Custodiet Ipsos Custodies?” (But Who Will Guard the Guardians?) The Case for Elevating Official Corruption to the Status of a Crime in Positive International Law," *Annual Survey of International & Comparative Law*: Vol. 19: Iss. 1, Article 5.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol19/iss1/5>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

KEYNOTE ADDRESS TO THE 22ND
ANNUAL FULBRIGHT SYMPOSIUM –
CONFRONTING COMPLEXITY IN
INTERNATIONAL LAW

GOLDEN GATE UNIVERSITY
SCHOOL OF LAW

*“SED QUIS CUSTODIET IPSOS
CUSTODIES?”* (BUT WHO WILL GUARD
THE GUARDIANS?) THE CASE FOR
ELEVATING OFFICIAL CORRUPTION
TO THE STATUS OF A CRIME IN
POSITIVE INTERNATIONAL LAW

NDIVA KOEFELE-KALE
PROFESSOR OF LAW, SOUTHERN METHODIST UNIVERSITY
DEDMAN SCHOOL OF LAW

I. INTRODUCTION

Ladies and Gentlemen, let me begin by thanking the President of Golden Gate University, the Dean and Faculty of the law school, and the staff members of the Graduate Law Programs office for hosting this symposium to honor the memory of a great American and world statesman, the late Senator William J. Fulbright. I would also like to extend warm and fraternal greetings to Professor Chris Okeke for making

2 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XIX

it possible for me to be here today. Chris, I salute you and applaud your decades of inspiring leadership in legal education and your impressive contributions to the progressive development and advancement of international law!

Needless to say, I am honored and privileged to have received the invitation from the organizers of the Fulbright symposium. Now that I am here, I can honestly say to you that anyone foolish enough to include himself in a discussion that probes into the many complex issues that confront international law before such a distinguished audience will be prudent to keep his voice low and his speech short. I intend to heed my own advice.

My presentation fits into the theme for this year's symposium, as my goal here is to push back the frontiers of contemporary international law to find an effective antidote to the problem of **indigenous spoliation**: *the organized looting and stashing in foreign banks of the financial resources of a State; the arbitrary and systematic deprivation of the economic rights of the citizens of a nation by their leaders, elected and appointed, in military regimes as well as civilian governments in Africa, Asia, Latin America and Europe, on a scale so vast and never before seen in history.*

This "*insidious plague*" has contributed, in no small measure, to the destruction of the essential foundations of the socio-economic life of modern society. Textbook writers have described it variously as "embezzlement," "misappropriation," "fraudulent enrichment," and even "grand corruption." However, none of these terms adequately convey the full destructive force of this relatively new phenomenon. All they do is signify the raw act of taking. What we need is a new concept that captures the effect of this unprecedented scale of corruption that leaves in its wake the destruction of the social, political, economic, and moral foundation of the victim States.

During my time before you, I shall try to do *three things*: first, to situate the problem of corruption, specifically, *indigenous spoliation* (I also refer to this activity as "*patrimonicide*" or "*state theft*") in its global context; second, to identify the basic elements of a crime under positive international law in general and in particular crimes that shock the conscience of mankind; and third, to demonstrate that indigenous spoliation satisfies the basic elements of an international crime. In the process, I plan to make the doctrinal case for its inclusion among the core group of international law crimes that entail individual criminal responsibility.

II. INDIGENOUS SPOILIATION IN ITS GLOBAL CONTEXT

Four outstanding features separate the modern version of corruption from its historical antecedents. First, unlike past depredations, where the wealth remained in the territory for recycling, the modern context is characterized by “*great mobility of wealth and the capacity to hide and disguise it.*” For example, 80-90 percent of the outflows of illicit wealth originating from Africa remain outside the Continent. Much of the estimated \$10-\$30 billion fortune of the late President of the Philippines, Ferdinand Marcos, was stashed in about 7,270 gold accounts under different names in several Swiss banks. Over 100 banks around the world were involved in the handling of General Abacha’s stolen wealth, including Citigroup, HSBC, BNP Paribas, Credit Suisse, Standard Chartered and Deutsche Morgan Grenfell. You can well imagine the difficulty in detecting and tracing the whereabouts of stolen national assets. Not surprisingly, therefore, search and recapture efforts have been described as a game of hide-and-seek!

Second, the bulk of stolen national wealth is never reinvested in productive enterprises in their countries of origin. These predators prefer to invest their stolen wealth in other places, obviously to avoid detection and subsequent recovery.

Third, a feature of the modern version of indigenous spoliation is the *quantum of assets* involved. It is estimated that Africa’s political elite hold somewhere between \$700 and \$800 billion in offshore accounts outside the Continent. This amount easily dwarfs the \$54 billion World Bank aid that flowed to Africa over the past four decades. These private portfolios of looted assets stashed abroad are usually very large in relation to the total external debts of the countries from which the funds were stolen. In some cases, private wealth even exceeds a country’s total foreign debt. For instance, capital flight from Sub-Saharan Africa was equivalent to 145 percent of the total debt owed by these countries in the mid-1990s, or 25 percent of the continent’s Gross Domestic Product! General Abacha’s estimated net worth represented between 1.5 and 3.7 percent of Nigeria’s GDP, while Ferdinand Marcos’ fortune accounted for roughly 1.5-4.5 percent of the annual GDP of the Philippines.

Fourth, those most implicated in the systematic plunder of national wealth come from a particular class of people who hold public trust: these are heads of state and government, including high ranking public officials (elected and appointed) as well as their families and closest friends. A few examples will suffice: Chile’s former military strongman General Augusto Pinochet, who during his 25 years as head of state

4 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XIX

earned a modest annual salary that never went above \$40,000, is alleged to have hidden \$27 million in overseas accounts under false names. His financial adviser would explain the source of this immense fortune as the product of shrewd and prudent investing! It is reported that Nigeria's Sani Abacha, upon his death in 1998, left behind a fortune estimated anywhere between \$2 and \$5 billion. We have solid sources that during the period he was Head of State, the Central Bank of Nigeria had a standing order instruction to transfer \$15 million to his Swiss bank accounts every day!

As incredulous as this may sound, the recently ousted Egyptian dictator, Hosni Mubarak, may be richer than Bill Gates, founder of Microsoft! Reliable sources place the wealth of Mubarak and his family at somewhere between \$40 and \$70 billion. Mexican business tycoon, Carlos Slim, reputed to be the world's richest man, is worth a mere \$54 billion, while Bill Gates' net worth is about \$53 billion. How did a former military officer, turned civilian Head of State, whose official monthly salary as President, counting benefits, came to 4,750 Egyptian £ (\$808) in 2007 and 2008, amass so much wealth?

It is against this backdrop of home-grown plunder of the wealth of developing countries, by the very public officials vested with a fiduciary duty to protect these valuable resources, that one can begin to appreciate the question the Roman satirist **Juvenal** posed as far back as the 6th century B.C.: "*Sed quis custodiet ipsos custodiet?*" (But who will guard the guardians?). Who will protect us from our protectors? Who will hold these predators responsible for the systematic pillaging of our national wealth? We must look to international law for a solution to this problem.

III. DOCTRINAL FOUNDATION OF CRIMES UNDER POSITIVE INTERNATIONAL LAW: CHARACTERISTICS OF AN INTERNATIONAL CRIME

What factors distinguish a crime under international law from an ordinary crime? A review of the International Law Commission's formulation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, the body charged by the United Nations General Assembly with the progressive development and codification of international law, the Judgment of the Tribunal, as incorporated into the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, the Statutes of the various *ad hoc* international criminal tribunals (Yugoslavia, Rwanda, Cambodia, and Sierra Leone), and the Rome Statute of the ICC identifies five **key elements** that distinguish an international crime from an ordinary crime.

First, the principle of *individual criminal responsibility* for the commission of crimes against the peace and security of mankind has been universally recognized as *the enduring legacy* of the Nuremberg Charter and Judgment. Recall that the Nuremberg Tribunal rejected the defense's submission: "...that international law is concerned with the actions of sovereign States, and provides no punishment for individuals..." Instead, the Tribunal held that international law imposes duties and liabilities upon individuals as well as upon States. The principle of individual responsibility and punishment for international crimes is widely acknowledged as the cornerstone of international criminal law. It was most recently reaffirmed in the Statutes of the International Criminal Tribunals for the former Yugoslavia (art. 7 (1) and art. 23 (1)) and Rwanda (art. 6 (1) and art. 22 (1)) and in the Rome Statute of the ICC (art. 25 (2)). The recognition of the principle of individual criminal responsibility has made it possible to prosecute and punish individuals for serious violations of international law.

Second, the principle of *punishment* is the other half of the doctrine of individual responsibility for crimes under international law. Punishment is essential as a deterrent against violations of the law of nations. The Nuremberg Tribunal set the standard by acknowledging, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Article 3 of the Draft Code of Crimes codifies this principle by providing, "an individual who is responsible for a [crime under international law] shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime."¹

Third is the principle regarding *head of state immunity and defense of "obedience to superior orders."* The Nuremberg precedent also established: (a) the principle of the supremacy of international law over domestic law [Principle II], and (b) the principle of the exclusion of the official position of an individual, including a Head of State or other high-level official, or the mere existence of superior orders, as valid grounds for relieving an individual of responsibility for such crimes [Principle III]. These principles were incorporated into the Draft Code of Crimes art. 1 concluding, "crimes under international law [are] ... punishable as such whether or not they are punishable under national law;" the non-applicability of the defense of "obedience of superior orders" – save as mitigation of sentence – and the non-applicability of immunities up to

1. See also Rome Statute, art. 25 (3)).

6 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XIX

and including heads of state who commit a crime against the peace and security of mankind are covered, respectively, in articles 5 and 7 of the code.²

Fourth is the doctrine of *universal jurisdiction – or the duty to prosecute or extradite*. Nuremberg also recognized that certain crimes under positive international law should be treated as crimes of universal concern, understood as the worst crimes that affect the foundations of human society. These crimes have attained *jus cogens* status (Vienna Conv. Art. 53) imposing an *obligation erga omnes* on all States towards the international community as a whole. As a consequence, any State may fulfill that obligation of exercising universal jurisdiction over persons suspected of committing such crimes, even though the prohibited acts were not committed in its territory, were not committed by one of its nationals, or were not otherwise within its jurisdiction to prescribe and enforce. An obligation *erga omnes* also confers on any State a duty to prosecute or extradite under the *aut dedere aut judicare* principle.

Fifth is the principle of the *non-applicability of statutory limitations*. Statutory limitations are not mentioned in the Nuremberg Principles, and the Draft Code of Crimes is silent on the matter.³ However, in a bid to address the concern that statutes of limitations might forever block the possibility of holding the perpetrators of World War II crimes accountable, the United Nations General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes against Humanity in 1968. Article 1 declares,

[n]o statutory limitation shall apply [to these crimes] ... irrespective of the date of their commission," while article 4 provides that States ratifying the Convention "undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of crimes referred to...and that, where they exist, such limitations shall be abolished.

The principle of prescription was eventually included in article 29 of the Rome Statute, which provides, "crimes within the jurisdiction of the

2. See also Rome Statute, art. 27, ICTY Statute, art. 7(2)-(4), Rwanda Statute, art. 6(2)-(4).

3. Actually, article 7 of the 1991 version of the Draft Code states that "[n]o statutory limitation shall apply to crimes against the peace and security of mankind." However, this language was omitted from the 1996 Draft Code out of concern that the non-applicability of statutory limitations was a principle which could be applied only to the 'core crimes' (such as genocide and crimes against humanity) but not all international crimes.

Court shall not be subject to any statutes of limitations.” This recognition confirms the emergence of a customary international law norm on the non-applicability of statute of limitations to crimes against humanity among other core crimes in international law.

IV. THE DISTINGUISHING FEATURES OF A CRIME AGAINST HUMANITY

A. EARLY ATTEMPTS AT DEFINING CRIMES AGAINST HUMANITY

The five factors just discussed are common to *all* crimes in international law. While treaty law recognizes a core group of serious crimes of concern to the international community, not all share the same characteristics. It is therefore necessary to identify the essential characteristics of a crime against humanity, specifically the particular features that distinguish this crime from other international crimes, such as war crimes or the crime of aggression.

Three quick comments: First, there has been little agreement for nearly a century regarding the key factors that distinguish crimes against humanity from ordinary crimes, such as murder, kidnapping, assault, rape, and false imprisonment. Early attempts at defining these and other crimes in international law, focused more on identifying jurisdictional thresholds and not on internationalizing factors distinguishing them from ordinary crimes.

Second, when the Nuremberg Principles re-introduced the concept of crimes against humanity, it did so without providing a clear and concise definition, other than that they consist of a *small group of crimes of exceptional gravity that engage individual responsibility*. [Principle VI(c)]. The Nuremberg Principles defined crimes as punishable for being crimes against humanity “*when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.*” The link to crimes against peace or war crimes as part of the definition of crimes against humanity was omitted in subsequent attempts by the ILC to define the scope of this crime.

Third, the ILC itself has contributed largely to this definitional morass. In incorporating the Nuremberg Principles into the Draft Code of Crimes, the ILC elected not to draw up a draft article specifying particular characteristics of crimes against humanity. As a result, the ILC has had to shift gears many times between 1954 – when it issued its first Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind – and 1996 when the final version of the Draft Code was adopted by the United Nations General Assembly.

Be that as it may, in the 1991 Draft Code, the ILC introduced the concept of systematic or mass violations as crucial ingredients to defining crimes against humanity. The concept of “systematic or mass” violations is retained in the final version of the Draft Code adopted in 1996 as Article 18. The article defines crimes against humanity as a congeries of 11 inhumane acts (*see also* article 7(1) of the Rome Statute; article 5 of the Statute of the Yugoslavia Tribunal; article 3 of the Statute of the Rwanda Tribunal; article 2 of the Statute of the Special Court for Sierra Leone; and article 5 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia).

Pursuant to Article 18 of the Draft Code, two general conditions must be met for a prohibited activity to qualify as a crime against humanity. The first condition consists of two alternative requirements: that the inhumane acts be committed in **(a)** a systematic manner, meaning pursuant to a preconceived plan or policy and **(b)** ‘on a large scale,’ meaning that the acts be directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative.

A second condition which must be met before a prohibited act rises to the level of a crime against humanity within the meaning of Article 18 is that the act was instigated or directed by a Government or by any organization or group. This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from a government, group, or organization.

After a long history of repeatedly changing views, there now appears to be an emerging consensus of some of the components of the definition of crimes against humanity that distinguish these crimes from ordinary crimes. They consist of acts committed (1) as part of (2) a widespread or systematic (3) attack (4) against any civilian population and possibly, (5) with knowledge of the attack. However, the requirement of “widespread or systematic” acts “directed against any civilian population” is considered the most widely accepted international element for distinguishing crimes against humanity from common law crimes. This formulation is retained in numerous international instruments, such as, Rome Statute, article 5; Sierra Leone Statute, article 2; and Cambodia Extraordinary Chambers Law, article 5.

The formulation also reflects state practice as evidenced in the decisions of leading international criminal tribunals. The jurisprudence of both the

Yugoslavia and Rwanda Tribunals have weighed in on the first prong, “widespread or systematic acts,” by adopting an expansive definition of “systematic” as referring to the organized nature of the acts...and *the improbability of their random occurrence.*” This jurisprudence also makes clear that patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence. It remains unclear, however, when an act satisfies the *widespread* part of the requirement. It has been suggested that such a determination should be made on the basis of the quantum of victims involved and the severity of the damage inflicted. In the final analysis, this may not matter that much, because the requirement is framed in the disjunctive in article 18 of the Draft Code. Though not expressly included in article 5 of the Statute of the Yugoslavia Tribunal, the disjunctive approach has nonetheless been incorporated in its jurisprudence.

Understandably, the target of a crime against humanity is the civilian population. It is against this group that the seriousness or gravity of the crime can be measured. The ICTY Appeals Chambers in *Prosecutor v. Kunarac et al.* has explained,

The use of the word “population” does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population,” rather than against a limited and randomly selected number of individuals.

One would hope that seriousness as the basic concept underlying most of these international criminal statutes does not necessarily mean harmful to human life in a direct sense, as, say an attack on bodily integrity. Rather, an act may be—and has indeed been—characterized as sufficiently grave for the purposes of these instruments if its direct effect or its long-term repercussions undermine the substantive bases of life in conditions of good health as well as individual and collective dignity. Grave and severe damage to the socio-economic foundations of any State meets these criteria. Although such damage, by definition, does not immediately and directly destroy human life, its long-term effects may wreak havoc in the most diverse ways.

V. THE CASE FOR INDIGENOUS SPOILIATION AS A CRIME AGAINST HUMANITY

Ladies and Gentlemen, the building blocks for the inclusion of acts of indigenous spoliation as a crime that shocks the conscience of mankind are already in place, waiting to be harnessed. I would like to focus on three of these:

- First, it is important to point out that the list of crimes recognized in the Draft Code of Crimes, and, in particular, those prohibited acts identified as constituting crimes against humanity, were never intended to be exhaustive. The ILC acknowledged that the enumeration of crimes in the Draft Code could subsequently be supplemented by new instruments of the same legal nature. This aside, the Statutes of the various UN *ad hoc* criminal tribunals, as well as the Draft Code itself, all include in their definition of crimes against humanity, a category of “*other humane acts*” as a catchall for acts that cause the same harmful results as the acts listed in the main definition. These lists are illustrative, but not exclusionary; therefore, the *expressio unius est exclusio alterius* canon of construction will not apply to bar the addition of indigenous spoliation as a prohibited act.
- Second, “*extermination*,” one of the eleven acts that qualify as a crime against humanity (*see* Draft Code, article 18; Rome Statute, article 7(1)(b) and 7(2)(b)) includes in its definition, the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population. The list of enumerated acts under “crimes against humanity” can be expanded to include acts of indigenous spoliation, which, like extermination, also contribute to the destruction of a civilian population.
- Third, the central test for a crime against humanity is that its effects are systematic or widespread and directed against the civilian population. Let me pursue this point further. What is significantly new about contemporary indigenous spoliation is the social and economic devastation that follows when scarce capital in billions of dollars is allowed to leave any country, but particularly when it leaves a capital-poor developing country. It has been empirically demonstrated that the cumulative effect of this kind of capital flight on the development of victim States is

systematic and widespread, and the impact on the civilian population is direct as it:

- **Reduces economic growth and discourages foreign direct investments** because (a) it drives up the cost of capital investment, increases business costs and reduces profitability;⁴ and (b) it undermines the performance, integrity and effectiveness of the private sector. According to an IMF study, distortions generated by corruption result in lower investments and economic growth.
- **Decreases and diverts government revenues**, as evident in the systematic plunder of revenue generating agencies, such as tax collection⁵ and customs. In a given year, for instance, of the \$135 million in custom duties collected from one cash-strapped developing country, only \$14 million (about 10%) was paid into the state treasury; the rest evaporated into thin air! With less money for the government budget, less money will be available to address pressing societal needs. Cameroon's budget for 2009 stood at \$4.6 billion, of which \$715 million was earmarked for primary and secondary education, \$226 million for public health, and \$115 million for the agricultural sector (including fisheries, livestock, and the environment). The late President Omar Bongo's deposits in banks in Cyprus, Dubai, France, Greece, Switzerland, and the United States alone add up to \$280 million, enough to underwrite Cameroon's budget allocation for public health or a third of the primary and secondary education budget!
- **Generates economic distortions** in the public sector by diverting public investment away from essential sectors, such as education and public health, into capital-intensive projects where bribes and kickbacks are more plentiful.
- **Misallocates scarce resources.** State funds are diverted by a small bureaucratic/political oligarchy at the expense of the mass of the population. Evidence from across the globe confirms that corruption impacts the poor disproportionately. A direct consequence of this misallocation of scarce

4. According to one study, the impact of corruption on foreign direct investment can be equal to an extra 20 percent in tax—discouraging investment and reducing profit margins.

5. Corruption can reduce tax revenues by as much as 50 percent.

resources is that the limited funds intended for priority social sector spending are shifted to areas that benefit few people. Recent investigations by the U.S. Senate on Riggs Bank, one of Washington D.C.'s most venerable banks, revealed that this institution managed more than 60 accounts and Certificates of Deposits (CDs) for an African Government, including its officials and their family members, with balances and outstanding loans that together approached \$700 million in 2003. It might interest you to note that the President of this country flies in a \$30 million presidential jet while his unemployed wife maintains a bank credit card with a \$10,000 *daily* limit. Yet in this country 30 percent of the population is unemployed; 4 of every 10 children under age 5 suffer from malnutrition; for every 1,000 babies born in the country 101 die at birth; few ever get to visit a doctor, because the country can only boast 125 physicians; and only 44 percent of the population has access to potable water. Government spends less than 2 percent, or a miserly \$106 per capita, of the national budget for health service, one of the lowest in Sub-Saharan Africa.

- **Renders government regulations ineffective.** When in return for a substantial bribe, public servants systematically evade requirements for public health and protection of the environment, the consequences can be quite disastrous for peoples' livelihoods and a country or region's environment and bio-diversity.
- **Breeds impunity and dilutes public integrity.** Government officials, judges and magistrates who engage in acts of corruption wittingly or unwittingly contribute in strengthening the hold and influence of criminal and corrupt elements in that society. Corruption in the judiciary is fertile ground for impunity, uncertainty, and unpredictability for those who seek recourse, in particular the poor and the disadvantaged.
- **Undermines Democracy and Good Governance.** Corruption subverts formal processes and rules of conduct that are so essential in any democratic system: "[i]t erodes the institutional capacity of government as established procedures are disregarded, resources are siphoned off, and officials are assigned or promoted without regard to performance. Corruption in elections usually elects the

2013] CASE FOR ELEVATING OFFICIAL CORRUPTION 13

wrong people, those who are parasites and put personal greed over national interests. Corruption in legislative bodies undermines accountability and representation in policy making.”

- **Tramples on fundamental rights and freedoms.** A corrupt state creates a vicious circle in which the state quickly loses its authority and ability to govern for the common good. Corruption makes it possible for critics to be silenced, for justice to be subverted, and for human rights abuses to go unpunished. When corruption reigns, basic human rights and liberties are threatened and social and economic contracts become unpredictable. It comes as no surprise that countries that are high on Transparency International’s Annual Corruption Perception Index are the ones where respect for human rights is at the lowest.
- Finally, available evidence also indicates that corruption **encourages political instability.** Corruption in the administrative realm “results in the unequal provision of services, which undermines the State’s legitimacy and, in extreme cases, may render a country ungovernable and lead to political instability.” More frightening, stolen national funds are often used to buy weapons to fuel domestic conflict, and when this happens, the political stability of many of these victim States is placed in jeopardy. Such was the case in Angola, Liberia, and Sierra Leone, and continues to be the case in the Democratic Republic of the Congo and the Delta region in Nigeria, to name but a few of these conflict-prone States.

Crimes against humanity are inhumane acts that attack not just the individual, but by their very nature, humanity itself. These are acts so grave, on a scale so large, that their very execution diminishes the human race as a whole. As the Trial Chamber of the Yugoslavia Tribunal declared in the *Erdemovic* Case in 1996, crimes against humanity

[a]re serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and/or dignity. They are **inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community**, which must perforce demand their punishment. But crimes against humanity **also transcend the individual because when the individual is**

assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes [sic] crimes against humanity.

A crime against humanity is a crime that exposes the barbaric depths to which human beings can descend, a crime that evokes moral outrage and a crime of such unimaginable horror that it shocks the conscience of mankind. Can the same be said for indigenous spoliation? Does this act of State theft and its effect on society arouse the same kind of revulsion as the Rwanda genocide or the depravity of the Cambodian “killing fields?” Arguably “yes,” in degree, perhaps, though not in kind. This can be illustrated in the case of a head of State or a government minister who diverts for his private use, State resources that are sufficient to retire his country’s external debt or to underwrite the cost of basic services to millions of his compatriots. Such an act goes beyond the pale of civilized conduct and deserves to be recognized for what it is – a crime against humanity. Most decent people, I believe, would find such excesses not only revolting but, as one commentator was moved to admit, going beyond shame and almost beyond imagination. No one can deny that a people deprived of such vital life-sustaining financial oxygen, so to speak, can survive for long and in dignity. I believe there is reason for hope.

A. THE PROGRESSIVE MOVEMENT OF CUSTOMARY INTERNATIONAL LAW

Actions taken by the international community in the last decade or so reinforce the progressive movement of customary international law toward the inclusion of indigenous spoliation among the crimes that shock the conscience of mankind. Let’s mention three major developments.

First, international legislation: To combat the growing threat of official corruption, the international community has engaged in a spate of *international law making* in the past fifteen years. As a result, we can now discern an emerging global consensus wrapped around a number of regional and global anti-corruption instruments. The first comprehensive regional convention against official corruption was the 1996 Inter-American Convention against Corruption, followed in 1999 by the European Union Criminal Law Convention against Corruption and its companion Civil Law Convention against Corruption, then the 2002 African Union Convention for Preventing and Combating Corruption, and finally the 2004 United Nations Convention against Corruption, the first global anti-corruption instrument. A cursory review of the

2013] CASE FOR ELEVATING OFFICIAL CORRUPTION 15

preambles of these anti-corruption conventions captures the opprobrium the international community attaches to corruption.

The preambles:

- Acknowledge that corruption undermines the legitimacy of public institutions and strikes at society, moral order and justice, as well as at the comprehensive development of peoples;
- Recognize that representative democracy, an essential condition for stability, peace and development, requires by its nature the combating of every form of corruption in the performance of public functions, as well as acts of corruption specifically related to such performance;

Parties to these conventions are persuaded that fighting corruption strengthens democratic institutions and prevents distortions in the economy, improprieties in public administration and damage to society's moral fiber. They are also concerned with the fact that corruption is often a tool used by organized crime for the accomplishment of its purposes and recognize that to combat corruption effectively requires coordinated action by the international community.

But, it must be admitted that despite their promises, these anti-corruption instruments all fail to define official corruption as a crime under positive international law, which engages the responsibility of its authors *qua* individuals. None of the instruments stray from the traditional definition of corruption with its narrow focus on bribery involving public officials (either bribe-taking or bribe-giving). But even then, the definition of bribery embraced in these instruments excludes that class of officials who engage in outrageous acts of corruption outside the supply/demand-side framework. To make matters worse, not all the acts proscribed in these conventions are made mandatory on the States parties. Much is left to each State party that has not yet done so to enact domestic legislation criminalizing acts of corruption as defined in these instruments. These shortcomings aside, the few multilateral anti-corruption instruments in place represent a major advance in the global war against official corruption.

Second, judicial efforts to make these high-ranking predators account for their crimes have also picked up pace in countries around the globe. These severe judgments are contributing to subjecting official corruption to strict international discipline.

Finally, the writings of publicist: An increasing number of highly qualified publicists from around the globe also confirm that the exceptional nature of indigenous spoliation and its destructive impact on modern society support calls for its treatment as a crime under international law.

VI. SOMETHING OF A CONCLUSION

But for all these initiatives, the international community is still reluctant to accord indigenous spoliation the status of a crime in positive international law. Why? I think it is because we have been looking in the wrong places for answers. I am reminded of an Iranian parable about a **mullah** (a religious leader) who chose to search for the missing key to his wardrobe, not in the bedroom, the most probable place to have misplaced the key, because it was too dark and he could not see. Rather, this *wise* man chose to focus his search in the courtyard, the least probable place to look for a misplaced wardrobe key, because he could see better in the sunlight! I believe the mullah's predicament is an appropriate metaphor for the misdirected energy the international community has expended in finding *the* solution to this seemingly intractable problem.