

HUMAN RIGHTS LAW AND VICTIM-CENTERED REMEDIES FOR KLEPTOCRACY

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Richard E. Messick*
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My thanks to the Centre for Civil and Political Rights for organizing this conference bringing together members of the human rights and anticorruption communities to discuss issues of mutual concern. Our objectives are complementary and the problems on which we work overlapping. But, as a member of the anticorruption community, to date I fear we have not spent enough time thinking about ways we can collaborate to advance our shared objectives. That is why I feel so fortunate to be here today.

My topic is asset recovery. How nations’ human rights obligations affect, or should affect, the laws governing the return of large sums of corruptly-acquired money found in one country to the country from which it was stolen. The anticorruption community expects, and hopes, asset recovery will be a more commonplace occurrence as more countries crack down on large-scale, “grand” corruption. But recent experiences have raised a troubling question: how to ensure funds are returned the victims of corruption rather than simply going into the pockets of another ruling clique. Many in the anticorruption community think the answer lies with a greater focus on human rights. I welcome this chance to present my own, tentative thinking on the question and am anxious to hear the reactions of those expert on human rights law.

As we know from too many examples – Ferdinand Marcos of the Philippines, Sani Abacha of Nigeria, Suharto of Indonesia to name but a few – those who rule a country can steal obscene sums of their citizens’ wealth. Marcos looted somewhere between \$5 and \$10 billion, Abacha anywhere from \$2 to \$5 billion, and Suharto possibly as much as \$35 billion. Theft on such a breathtaking scale has called forth its own moniker: “kleptocracy.” Rule by thieves.

Not only have the Marcoses, Abachas, and Suhartos of the world taught us what kleptocracy means, they have also taught us that recovering the kleptocrat’s loot once he falls (kleptocrats are almost always “hes”) is no mean feat. Kleptocrats don’t keep their billions in the corner bank. Rather, as

* Consultant, Anticorruption and the Rule of Law. Thanks to Allison Gill for many valuable conversations over the years and perceptive comments on an earlier draft of this paper. Comments welcome: messickrick@gmail.com

Marcos, Abacha, and Suharto did, they conceal it in banks, real estate, and securities in other countries. That way, if -- or more likely when -- domestic politics turns against them, their assets are beyond the easy reach of local law enforcement.

Until the United Nations Convention Against Corruption, that was a good bet. Until UNCAC, a nation seeking the return of assets an ousted kleptocrat had stashed abroad faced a maze of complex, conflicting, and inconsistent national laws. Navigating these statutes made the recovery of stolen assets a long-shot at best. But since UNCAC came into force in December 2005, the odds have turned decisively against kleptocrats. The return of stolen assets is a “fundamental principle” of the convention. The convention harmonizes the procedures a state victimized by a fallen kleptocrat must follow to obtain assets hidden abroad. And victim countries are not left to their own devices when hunting down a deposed kleptocrat’s monies. UNCAC explicitly requires that parties provide “one another the widest measure of cooperation and assistance” during the hunt.

UNCAC was written at a time when the world appeared on the verge of a new era. Marcos, Abacha, and Suharto had been replaced by leaders committed to the rule of law and the welfare of all citizens. The search for the billions these rulers had pocketed was motivated by a need to rebuild their countries and make at least a down payment on the damage kleptocrat rule had wreaked on the populace. And the states where the billions were hidden were anxious to help find and return the money.

The UNCAC process for recovering stolen assets was written with this exact scenario in mind. Step one takes place in the deposed kleptocrat’s own country. It posits that, after the kleptocrat is deposed, a criminal investigation is opened. Evidence showing the kleptocrat’s wrongdoing and the assets he has accumulated as result is then presented to a domestic court. Following the procedures in national law for confiscating the proceeds of crime, the court issues an order directing the assets be seized and returned to the national treasury.

Step two takes place in the nation where the kleptocrat has stashed assets, the “requested” state. The victim nation presents the duly issued confiscation order to the requested state. Article 54 (2) of UNCAC then requires the requested state to:

“Take such measures as may be necessary to permit its competent authorities to ... seize property upon a seizure order issued by a court or competent authority of a requesting State Party....”

Once the property has been seized, UNCAC requires the requested state “give effect to the victim state’s confiscation order.” That means turning the confiscation order issued by the courts of the victim state into a legally enforceable order in the requested state. Cash and securities can then be directly transferred to the treasury of the victim state; real estate, automobiles, and other non-liquid assets sold and the proceeds transferred. In short, UNCAC provides a set of procedures that assures that once a kleptocrat’s assets are found in any of the 183 UNCAC state-parties, the assets can be easily and neatly gathered and returned to the nation that was the kleptocrat’s victim.

But recent experiences with asset recovery have not unfolded the way UNCAC’s authors envisioned. Instead of replacing a deposed kleptocrat with a democratically-inclined leader who respects the rule of law, either another kleptocrat or gang of kleptocrats has taken over. Rather than seeking the deposed kleptocrat’s assets to meet citizens’ needs and revitalize the nation’s economy, the newly installed rulers seek the assets to enrich themselves. And confiscation orders issue with no concern for due process or the rule of law.

When these are the conditions behind a request for assistance with asset recovery, how should requested states respond? How should they square their obligations under UNCAC with those under human rights treaties?

To my knowledge, authoritative answers have yet to be provided -- from a treaty body, an international human rights court, or learned commentary. In the remainder of my remarks, I want to suggest how I think these questions should be answered. My thinking is shaped by the Uzbekistan cases which my friend and colleague Brian Campbell reviewed yesterday. As he explained, they arise from what are believed to be tens of not hundreds of millions in bribes three international telecommunications companies passed to Gulnara Karimova, daughter of the country’s now deceased autocrat, and her cohorts in return for permission to provide cell phone service in the country. Thanks to investigations by law enforcement authorities, reports by treaty bodies and NGOs, and extensive media coverage, the venal behavior at issue in the cases, the harm it has produced, and the appalling conditions under which all but a few in Uzbekistan live are well documented.

As I explained above, UNCAC sets forth a two-step process for asset recovery. First is the issuance of a confiscation order by the victim state. In the Uzbek cases, the Tashkent Regional Criminal Court ordered the confiscation of bribes Gulnara received and related funds. The order issued as part of the

criminal conviction of two of Gulnara's associates in July 2015. After a very short trial, they were found guilty of a variety of financial crimes and given long prison sentences.

We know little about the trial. It was closed to the public; no transcript exists, and the case was not listed on the court's docket. What we do know about criminal trials in Uzbekistan is abhorrent: judges are commonly told by the government how to rule; defense counsel are not independent of government, and confessions often extracted by torture.

At some point in the process, it was revealed that the bribes Gulnara received had made their way into accounts in Belgium, Ireland, Luxembourg, and Switzerland. The four governments along with Uzbekistan are all parties to the International Covenant on Civil and Political Rights. Article 14 provides that:

“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The article goes on to list what constitutes a “fair” hearing and an “independent and impartial tribunal.” From what is known about the trial that led to the confiscation order, if any of these elements were observed the trial, it was only by accident.

Belgium, Ireland, Luxembourg, and Switzerland either have or will soon be presented with a request pursuant to UNCAC to return the monies Gulnara has on deposit in their banks. Must they honor the request despite the article 14 violations? UNCAC gives them some leeway. Article 54 provides that a state-party is to give effect to a foreign confiscation order “in accordance with its domestic law.” I read the laws of each as affording the government a way out. In Switzerland and Luxembourg, courts are barred from recognizing any judgment if the procedural principles set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms were not observed. In Belgium, courts are not to give effect to a confiscation order if “the rights of defense” are not observed, and legal commentary states that Irish courts can only recognize confiscation orders issued by the courts of countries which appear on a list issued by the government, a list that reportedly does not include Uzbekistan.

What standards, then, should the Belgian, Luxembourg, and Swiss courts apply when deciding whether the Uzbek trial satisfied the legal standard for recognition? What criteria should the Irish government use when deciding what countries' court judgements to honor? To my knowledge, these

are open questions in all four countries. I would ask those attending this conference whether there is a place here for treaty bodies and learned commentary to contribute to the answers.

For reasons of state or other cause, it appears that some or all of the four countries could return stolen assets even if their courts found a confiscation order was not entitled to recognition. Whatever the laws might allow, I would think the governments would be reluctant on policy grounds to return monies under these facts. But how and when governments can return stolen assets even if the request violates ICCPR article 14 raises legal questions that are little explored. I would again ask our colleagues from the human rights community whether these are issues for the community to examine.

Finally, I would think there are human right principles, if not obligations, in play here. Were one of the governments to return Gulnara's assets under the conditions described, they would be abetting a human rights violation as well as providing an incentive for future violations. But this too is an issue on which I would ask those who know human rights law to address.

Let's assume now that one or more of the four governments decide not to honor the confiscation order. That following whatever procedures their laws provide, one or more finds that the order was indeed issued as a result of a violation of article 14 and for this reason they refuse to recognize it.

Now what? If they refuse to honor the order, does that mean the funds stay in the accounts until Gulnara claims them? Given the facts on the public record, that would seem an unsatisfying solution – to say the least. But as a matter of law, if the confiscation order is invalid, who is entitled to the money? The Uzbek government?

Those not current on the evolving law of money laundering may be surprised to learn that it likely belongs to the four governments where the accounts are located. Their money laundering laws almost certainly give them the right to claim whatever bribe money Gulnara deposited in their countries' banks. The domestic laws of virtually all countries provide that when a foreign national invests the proceeds of a crime in their country, be it money from a bank robbery or a bribe, it constitutes the crime of money laundering. For the investment is a way of laundering, or hiding, the proceeds of a crime. And antimoney laundering laws almost always provide that the country where the money was laundered has the right to confiscate it.

But if the four governments have a legal claim to the funds, should they pursue it? Conduct a trial establishing the funds are the proceeds of bribes and then secure orders transferring the funds to their

nations' treasuries? While surely a result to be preferred to letting Gulnara keep them, it is hardly a satisfying one. Nor would it be a just result. The citizens of Belgium, Ireland, Luxembourg, and Switzerland did not pay higher prices for their cell phone service so the providers could recover money paid in bribes. They were not the ones deprived of education, basic health care, and other economic, social, and cultural rights because the nation's resources funded the garish, obscene lifestyles of Uzbek's kleptocrats.

An alternative would be voluntarily returning the funds to the government of Uzbekistan on the promise it will use them wisely. Its current rulers say they are reformers, and they have taken modest steps to spur the economy. So perhaps they should be taken at their word.

Such a course of action, however, is fraught with risks legal and political. Key officials in the new government bear responsibility for the worst abuses of the previous regime – torture and forced labor. Moreover, human rights conditions in the country are rivalled only by those in North Korea and Turkmenistan, and the steps the new government has taken have made slight difference at best. What confidence can one have the current government will use returned assets for anything other than to further its own ends?

Finally, the current Prime Minister headed the Uzbek telecom regulator at the time the three companies bribed Gulnara and her associates. He is therefore surely implicated in the wrongdoing if not a direct beneficiary. Thus, as the Uzbek government itself has noted in arbitration proceedings, it would be contrary to law to return the funds to the current government. For under the “clean hands” and related doctrines, it is unlawful to return the proceeds of a crime to those who “engaged in significant misconduct directly related to [the offense].”*

If the funds must not be returned to Gulnara or to the Uzbek government, and allowing the four countries to hang onto them isn't satisfactory, what then? As the concept note for the conference suggests, when there can no assurance that returned assets will not again be stolen, the only practical, just resolution is to return the money directly to victims. In this case to the citizens of Uzbekistan.

Yesterday afternoon you heard Aaron Bornstein describe how, in circumstances much like those in the Uzbek matter, Switzerland, Kazakhstan, and the United States crafted a method for returning stolen

* Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, p. 34, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf>

assets directly to Kazak citizens. The funds were transferred to a Kazak non-governmental organization with no ties to the government. Under the watchful eyes of the World Bank and the three governments, the NGO hired two reputable, international NGOs which devised programs to see they went to the neediest Kazaks.

Not only was this arrangement the most practical way to ensure the monies were not again stolen. It was the most just. Research shows it is the poorest who suffer the most from corruption on the scale Gulnara and cohorts practiced.

The Kazak solution was the result of fortuitous circumstances: three governments willing to work together to find a solution to a complex, delicate problem rather than raise countless legal squabbles. But given the financial and political stakes in asset recovery cases, we can't be sure that the governments involved in future cases will always be so cooperative. Thus the hunt for a firm legal foundation on which to rest victim-centered solutions.

This is why dialogue between the anticorruption and human rights communities is a priority. Thanks to the treaties defining states' duties to respect human rights—as expounded and interpreted by treaty bodies, courts, and learned commentators -- the materials for constructing this foundation are at hand.

The foundation of the foundation, if you will, is the International Covenant on Economic, Social and Cultural Rights. As the ESCR Committee has explained, the covenant creates “minimum core obligations” to ensure that all citizens have access to certain “minimum essential levels” of food, shelter, education, and health care. ** Lack of resources can excuse a violation, but only if a party can show it has made every effort to use all resources available to meet its minimum obligations.

That, a kleptocratic government surely cannot do. The wholesale theft of a nation's resources by countenancing bribery, extortion, conflict of interest, and other crimes of corruption would seem on its face a patent violation of the “minimum core obligations” the covenant mandates.

Even were a kleptocracy to meet its citizens' most basic needs, it would still be in violation of the covenant. Article 2(1) binds parties to “take steps... to the maximum of [their] available resources [to achieve] progressively the full realization of the rights” specified in the convention. As ESCR Committee reports and learned commentary both stress, article 2(1) thus demands that state-parties

** UN Committee on Economic, Social and Cultural Rights, General Comment No 3: The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant), December 1990, E/1991/23, available at: <http://www.refworld.org/docid/4538838e10.html>

continually strive to realize fully the rights guaranteed by the covenant. From this duty it follows, as the committee has observed, that where a state has taken “deliberately retrogressive measures” that reduce compliance with the covenant, a rebuttable presumption arises of an article 2(1) violation. A presumption no kleptocracy could rebut.

A maxim of Roman law states that there can be no legal right without a legal remedy: *Ubi jus ibi remedium*. Though I know little about the world’s great legal traditions, I am confident the same principle informs all of them. For the logic is impeccable. To declare a citizen has a right to a fair trial or to a minimum standard of living, one deprived of these rights must have a place to turn to enforce them. Otherwise the rights are nothing but words on parchment.

Indeed, it is this logic that informed the 2013 *Report of the Secretary-General to the Human Rights Council on the Realization of Economic, Social and Cultural Rights*. The Secretary-General there emphasized that without a remedy for violations of these rights, the rights themselves are meaningless.*** “A remedy,” the Secretary-General proclaimed, “is fundamental to the very notion of human rights.” Applied to topic at hand, the logic long recognized by all the world’s legal systems and reiterated by the Secretary-General provides unequivocal support for the proposition here. Assets stolen from the citizens of Uzbekistan or from the citizens of any other nation once victimized by kleptocrats and with no present assurance their governors will not again steal them must, as a matter of law, be returned directly to them.

Thank you for your attention and I look forward to your comments.

*** UN Human Rights Council, Report of the Secretary-General on the Question of the Realization in All Countries of Economic, Social and Cultural Rights, December 2013, A/HRC/25/31, available at: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>