

THE RECOVERY OF STOLEN ASSETS: A Fundamental Principle of the UN Convention against Corruption

Despite hundreds of billions of dollars in aid, the United Nations determined in 2004 that 54 countries had actually become poorer than they were 15 years previously. Most analysts now agree with findings of the World Bank that it is corruption that has been “the single greatest obstacle to economic and social development.” To confront this problem, 80 countries have ratified the United Nations Convention against Corruption (UNCAC), a document of unprecedented scope and application. The Convention has 71 articles addressing numerous tools to combat corruption such as codes of conduct, increased bank scrutiny of “politically exposed persons” and anti-money laundering measures. However, it is the “return of assets” that has been singled out as “a fundamental principle of this Convention.” This Brief examines why the return of assets is so critical, the obstacles standing in the way of recovering stolen monies, and what donors can do to make the situation better.



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SCOPE OF THE PROBLEM

Corruption impacts all aspects of life from access to clean water and clean air to life expectancy rates, poverty levels, and personal safety from crime and terrorism. Still, there are no universally accepted standards for measuring corruption. What is agreed upon is that by any measure the numbers involved are staggering:

- The World Bank estimates that more than \$1 trillion is paid in bribes each year. That figure does not even include amounts of public funds embezzled and plundered by high government officials.
- Transparency International estimates that former Indonesian leader Suharto embezzled anywhere between \$15-35 billion from his country, while Ferdinand Marcos in the Philippines, Mobutu in Zaire and Abacha in Nigeria are alleged to have embezzled up to \$5 billion each.

- A 2002 UNODC study estimated that between \$600 billion and \$1.8 trillion is the amount of money that is illegally laundered throughout the world each year, and a substantial portion of that is money derived from corruption.
- Press reports out of Chile described a 2006 discovery of 10 tons of gold stashed in a Hong Kong bank by the former dictator of Chile, Augusto Pinochet.
- After the 2004 Tsunami, over \$7 billion was pledged to aid devastated areas, but the flow of that money has slowed because of concerns about corruption. In Indonesia's Aceh province, the anticorruption group Gerakan Anti-Korupsi, estimates that 30 percent to 40 percent of tsunami aid money provided was stolen. Others estimate that a quarter of the 50,000 homes constructed for victims are already collapsing and will have to be rebuilt because 70% of the wood utilized did not meet building codes and will not last even 12 months.
- A 2004 report by the African Union claims that Africa loses an estimated \$148 billion annually to corrupt practices, a figure that represents 25% of the continent's gross domestic product.

The amount of money extorted and stolen each year from developing countries is over 10 times the approximately \$100 billion in foreign assistance being provided by all the governments and civil organizations in the world. There is little wonder that so many countries are falling behind and donors are becoming discouraged. However, the way out of this quandary is becoming clear. Perhaps the World Bank has said it best, “countries that tackle corruption and

improve their rule of law can increase their national incomes by as much as four times in the long term, and child mortality can fall as much as 75%.” No other aid project can yield so much for developing countries.

OBSTACLES TO OVERCOME

The UNCAC addresses the myriad of actions necessary for an effective global approach against corruption. As for asset recovery, the primary problems have been political will and the ease of instantaneous electronic transfers of large sums across borders in a globalized economy composed of 193 countries. Countries that are the victims of government corruption are often impeded by the fact that individuals still in power are the perpetrators or beneficiaries of corruption, while countries that are the recipients of stolen funds are sometimes reluctant to move against powerful interest groups such as banks. Where the political will exists, interests of sovereignty and a patchwork of inconsistent legal requirements have spread a protective umbrella over the activities of corrupt bureaucrats and money launderers of every stripe.

Often, governments seem to move at a glacial pace, largely ineffective when confronting crimes involving assets hidden across borders. There have been notable successes in a handful of large cases against kleptocrats caught in a regime change, but a huge challenge remains to systemize procedures for the thousands of cases involving hidden assets in the \$100,000 to \$5 million dollar range. There are solutions, but they involve increased coordination and action by developing countries victimized by corruption, the developed countries that receive stolen funds, and the donor community.

VICTIM COUNTRIES

Acquiring expertise:

The recovery of assets across international borders is nothing new. Countries have been doing it sporadically for generations. However, it is only in recent years that states have begun to understand the possibilities of more systematic cross-border asset recovery actions. Therefore, there is no large body of practitioners with substantial expertise in this area either

inside or outside governments. An asset recovery action is one of the most complex projects in the field of law, often requiring financial investigators to trace assets, forensic accountants to unravel complex transactions and attorneys skilled in multi-disciplinary, multi-jurisdictional litigation.

Most public officials in victim countries have never been trained in these complexities. Laundered money generally migrates to countries with large financial centers where the laws are usually more restrictive and complex with higher evidentiary and procedural standards than those in victim countries. Failure to fulfill the standards of the requested state has frustrated many attempts by victim countries to recover assets.

Accordingly, it is essential for victim countries to acquire expertise in the area of asset recovery and to become acquainted with the requirements and specialists in the financial center countries to be successful in this area. There is a growing number of resources available to help acquire the necessary expertise:

- The UNODC has released a “Mutual Legal Assistance Request Writer Tool”, a free of charge internet application [<http://www.unodc.org/mla/en/index.html>].
- The G-8 has planned “accelerated response teams” of forfeiture-related mutual legal assistance experts to be committed at the request of victim states whose assets have been secreted abroad, as well as case coordination task forces for specific cases.
- The World Bank and a number of financial center countries will provide ad hoc training to developing countries upon request.
- The Millennium Challenge Corporation in Washington, D.C. offers grants to qualifying countries to fight corruption which can include money for training of investigators, prosecutors and judges in asset recovery techniques.
- The Basel Institute on Governance has created the International Centre for Asset Recovery (ICAR) to provide training to developing

countries on asset recovery, follow-up mentoring and hands-on assistance in complex cases.

Financing and oversight of recovery actions:

Asset recovery is a costly and time consuming enterprise. It requires lawyers, forensic accountants, expert opinions, translators, travel expenses, etc. Private law firms often prove helpful in tracing and recovering assets abroad, as in the efforts of the Philippines against Ferdinand Marcos and Nigeria against the estate of Sani Abacha. Such firms are expensive, generally charging from \$200 to \$600 per hour. Corruption offenders can be relied upon to spare no expense to keep their ill gotten gains. As the former Mafia Don Gaspare Motolo said, “people prefer to be put behind bars and keep their money than to stay free without the money.” Some victim countries have invested considerable sums without any other result than being blamed by their constituencies, and many others have been reluctant to engage in asset recovery enterprises at high costs with uncertain results.

The other side of the coin is that over time, asset recovery programs can be enormously profitable. Nigeria recovered over \$700 million of the money stolen by Abacha, and over \$600 million was returned to the Philippines from the loot plundered by Marcos. Over a period of 15 years the United States recovered over \$6 billion from cases involving misconduct contributing to the savings-and-loan crisis of the 1980s and 1990s. Those cases cost less than \$1.5 billion, yielding a 425% return.

There are a number of steps that victim countries can take to limit their costs and increase their probabilities of substantial recoveries:

- The UNCAC is replete with provisions that will assist in this area, including Article 31 (hereafter, “Article” or “Art.” designates provisions of the UNCAC) on the freezing, seizure and confiscation of illegal assets.
- The G8, UNODC, ICAR and other organizations can provide technical assistance, strategic planning and case-management support. A professionally managed case frequently makes

the difference between a handsome recovery and one that costs more than is recaptured.

- Contingency fee arrangements may reduce risk and expense. However they are not permitted in some jurisdictions (Switzerland). Also some countries diminish their chances of success by restricting the hiring of outside counsel for government cases, instead relying upon in-house lawyers who are not specialists in asset recovery litigation. Both of these restrictions should be modified for cases of public corruption.
- Some large firms may take significant cases on a pro bono basis.

Coordinate early:

Victim countries can eliminate many of the false steps and much delay in asset recovery actions by initiating early communication and coordination with officials in the relevant recipient countries. Particularly, since the passage of UNCAC, financial centers should prove more helpful than in the past about navigating the asset recovery requirements in their country.

Simplify criminal actions:

Most corruption cases involve numerous violations of law, both large and small. Victim countries must streamline their actions to concentrate on the largest losses with the highest probability of success, and discard many attractive, but less cost effective claims. In many developing countries, government officials are the wealthiest citizens even though their official salaries are quite modest. Public officials should be held to the highest standards in the land. Too much time and resources are wasted trying to prove that unexplained wealth of government officials is illegal. The following changes to law will start to rectify matters quickly:

1. Require codes of conduct and declarations of assets from all public officials upon entry to public service and annually thereafter (Art. 8), regularly review those declarations and make any false statements punishable under the criminal law.
2. Legislate that any unexplained wealth of government officials is subject to criminal penalties

and forfeiture (Art. 20), that professionals who aid and abet officials to conceal fruits of corruption are subject to criminal and civil penalties, and that rewards of between 10 and 20% can be paid for information leading to asset recoveries.

Establishing non-criminal avenues for recovery:

Typically, jurisdictions only allow confiscation of assets on the basis of a criminal conviction. In many instances, however, it is not possible to get a criminal conviction. Corrupt leaders may have protected themselves with legal abuses such as constitutional amendments creating lifelong immunities (eg. Pinochet's "senator for life" status). Alternatively, the defendant might have died (Abacha) or fled (Fujimori), or the evidence might not cover specific requirements of the crime that are related to the assets in question or might simply not satisfy a criminal standard of proof. For those situations, countries should enact laws permitting forfeiture actions to be brought against the stolen property itself (In Rem Forfeitures). These laws exist in South Africa and the United States, and all they require is proof of the nexus between property subject to forfeiture and criminal conduct.

Article 54(1)(c) of the UNCAC recommends that states parties establish non-criminal systems of confiscation, which have several advantages for recovery actions: the standard of evidence is lower ("preponderance of the evidence" rather than "beyond a reasonable doubt"); they are not subject to some of the more restrictive traditional safeguards of international cooperation such as the offense for which the defendant is accused has to be a crime in the receiving state (dual criminality); and it opens more formal avenues for negotiation and settlements. This is already the practice in some jurisdictions such as the US, Ireland, the UK, Italy, Colombia, Slovenia, and South Africa, as well as some Australian and Canadian States.

Return and management of confiscated assets:

Some financial centers have been reluctant to repatriate assets to, or even to cooperate with, countries with which there are concerns that returned assets will be wasted or stolen again

because of corruption. While Article 57 mandates that confiscated property shall be returned to its prior legitimate owners, subsection 5 of that article permits state parties to enter into mutually acceptable arrangements for the disposal of confiscated property. In any event, it benefits victim countries to maintain good practices with regard to disposition of all assets recovered.

RECIPIENT COUNTRIES (FINANCIAL CENTERS)

Intensify political will/enact conforming legislation:

In the final analysis, the success or failure of UNCAC rests upon the effectiveness of its implementation. Recipient countries must swiftly enact new laws that conform to the provisions of UNCAC. Particular attention should be focused on increasing scrutiny by financial institutions on transactions of Politically Exposed Persons (PEPs). However, if new laws are not accompanied by governmental action to change past irresolute practices, corruption will continue unabated.

Freezing assets:

Article 31 of the UNCAC requires each state party to implement measures to enable "the identification, tracing, freezing or seizure" of proceeds of crime and property used in crime. As freezing assets may restrict basic rights, many jurisdictions have elaborate judicial procedures before a freeze order can be effective. Overly burdensome procedures impose delays which often allow the corrupt funds to disappear before the order is issued. To avoid this, laws must be changed to allow rapid freezing procedures (within 24 hours). There must still be measures to protect constitutional safeguards. Switzerland accomplishes this by mandating financial institutions to automatically freeze reported transactions for five days, while a magistrate reviews the reasonableness of the measure. France allows for administrative freezing by the Financial Intelligence Unit upon receiving a report of a suspicious transaction.

Burden of proof:

Many recipient countries now require victim countries to prove that assets of corrupt officials were not obtained lawfully before an action to freeze or confiscate assets will be considered. These difficulties of proof have allowed

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numerous corrupt officials to retain millions of dollars that they could never have possibly earned lawfully through their government positions. Recipient countries should consider criminalizing unexplained, substantial increases in wealth of public officials (Art. 20) and allowing confiscation of assets where public officials cannot demonstrate the lawful origin of alleged proceeds of crime (Art. 31(8)).

Technical assistance:

Financial centers should recognize that victim countries are not familiar with the peculiarities of the laws of every recipient country, and therefore financial centers should provide technical support and ensure that political impediments to asset recovery are minimized.

DONOR COMMUNITY

Use the UNCAC to foster reforms in donor countries:

Corrupt officials generally choose the larger financial centers to shelter their ill-gotten gains, and it is those same financial centers that are the key sources of bribery payments to officials in developing countries. Donor agencies can sponsor analyses comparing the laws and practices of their country with the standards set forth in the UNCAC. Local law professors may perform this kind of “gap analysis” gratis in exchange for assistance in publication. Donor agencies will have greater credibility to hold recipient countries to UNCAC standards if their own countries are in compliance themselves.

Fund “gap analyses” in developing countries:

The UNCAC can be a powerful tool for reforming a culture of corruption in developing countries, as well as insuring that laws are in place to enforce anti-corruption provisions through a vigorous asset recovery program. All too often corrupt officials succeed in keeping their stolen funds because the laws of the victim country are woefully inadequate. An accurate “gap analysis” will reveal the deficiencies in local laws and can be used to lobby legislatures for corrective actions. For example, in November 2006, the Corruption Eradication Commission of Indonesia (funded by GTZ) published a thorough comparison of its laws and the requirements of UNCAC, together with recommendations to cure the areas of deficiency.

Fund training, technical assistance and capacity building:

Chapter VI of the UNCAC provides an agreed framework for providing support to developing countries in the areas of anticorruption and asset recovery. Training programs must be developed and efficiently delivered to build the capacity of investigators, prosecutors and members of the judiciary. The instruction must be coordinated and systematic in order to avoid promulgating insufficient or erroneous information

which can debilitate an asset recovery program. Properly delivered, and followed up with mentoring and technical assistance for difficult cases, such programs over time will build up an international network of asset recovery specialists in both victim and financial center countries that will close down money laundering sanctuaries.

Establish a trust fund for significant cases:

There are certain cases which could establish useful precedents or which are so important to individual countries that they should go forward even if the victim country lacks the resources to prosecute litigation. For those cases, a fund should be created to distribute loans for legal fees and expenses. The loans could be repaid with interest from recoveries. Donor countries could replenish the fund with additional monies upon proper requests supported by evidence of high probabilities of success.

Pressure governments to make legal systems compatible:

The global patchwork of disparate laws on mutual legal assistance requests, standards of proof, criminalization, freezing and confiscation, etc. has given aid, comfort and protection to corrupt officials whose unconstrained looting keeps over 3 billion people in abject poverty and despair. Donor agencies should use their influence to convince financial center countries and victim countries to standardize these inconsistent provisions. The planet cannot longer afford to allow this unconscionable situation to continue.

ADDITIONAL RESOURCES

UNODC (2006), “Asset recovery: Background paper”, Paper presented at the First Conference of State Parties of the United Nations Convention against Corruption [http://www.unodc.org/pdf/crime/convention_corruption/cosp/session1/V0658399e.pdf]

UNODC (2004), “The UN Anticorruption Toolkit”, Chapters IX and X. [http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf]

G8 Ministerial Meeting (2004) “Recovering Proceeds of Corruption: G8 Justice and Home Affairs Ministerial Declaration”

G8 (2005) “G8 Best Practices for the Administration of Seized Assets” [<http://apgml.org/issues/docs/15/G8%20Asset%20Management%20Best%20practices%20042705%20FINAL.doc>]

US Government Accountability Office. Foreign Regimes’ Assets. [<http://www.gao.gov/new.items/do41006.pdf>]

Gap Analysis Study Report, Corruption Eradication Commission, the Republic of Indonesia Jakarta, November 2006

Récents développements en matière d’entraide civile, pénale et administrative. L. Moreillon, L. Gaillard, Ch. Bovet, M. Harari, P. Gossin; édité par R. Gani. Publication CEDIDAC 58 2004, Université de Lausanne.