

# PRACTICAL HURDLES TO EFFECTIVE INTERNATIONAL RECOVERY OF STOLEN ASSETS

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## *Abstrak*

*Korupsi merupakan salah satu faktor penghambat pembangunan. Dalam kaitannya dengan hal tersebut, upaya pengembalian aset menjadi hal yang penting bila dilihat dari perspektif kebijakan pembangunan. Selain membahas tantangan-tantangan dalam praktek pengembalian aset dari segi teknis dan politis-ekonomi dengan memberikan contoh-contoh kasus di berbagai negara, tulisan ini juga memberikan rekomendasi mengenai bagaimana masyarakat internasional dapat menanggulangi permasalahan tersebut, di antaranya dengan mendorong keterlibatan aktor non-negara dalam proses pengembalian aset, peningkatan kapasitas pejabat penegak hukum yang lebih berkelanjutan, serta penggunaan aset yang telah dikembalikan bagi proyek-proyek sosial.*

*Kata kunci : UNCAC, development, resources, non-state actors*

## I. INTRODUCTION

### 1. A LITTLE HISTORY OF ASSET RECOVERY

Although corruption is not a new phenomenon, it has taken the international community some time to take concerted efforts against it. During colonisation, corruption was a welcome means to buy political allegiances. Even after decolonisation and especially during the cold war, former colonial powers and their corporations as well as new political players continued to use corruption to secure political influence and access to markets and resources.<sup>1</sup> Many of the heroes celebrated as liberators from colonialism and the second generation of leaders in the decolonised countries ultimately succumbed to the seduction of newly

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<sup>1</sup> Pieth, M. 2008. Recovering Stolen Assets – A New Issue. In: Recovering Stolen Assets. Pieth, Mark (ed.). Bern: Peter Lang AG.

found, easy riches and lived sumptuous lives while their people sometimes barely survived on a dollar or less per day. Corrupt politicians, kleptocrats and dictators stole enormous sums of money either by directly depleting the state coffers – tales are being told of Nigeria's late dictator Sani Abacha's private chauffeur collecting trucks full of cash from the central bank every week to finance the personal needs of Abacha and his family – or by devising more or less sophisticated kick-back schemes that led to selling out their countries' most valuable assets, notably natural resources and state enterprises, to foreign companies, to name but two typical corruption typologies.

Whilst a number of regional legal instruments, such as the Inter-American Convention against Corruption (1996), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the Civil and Criminal Law Conventions against Corruption of the Council of Europe (1999), and the AU Convention on Preventing and Combating Corruption (2003) have helped to raise the profile of the fight against corruption in the international arena, it was not until the inauguration of the United Nations Convention against Corruption (UNCAC) in 2005 that states from across the globe for the first time conjointly acknowledged the destructive forces and effects of corruption and, more importantly, decided to take action. Of particular significance: The UNCAC was also the first international legal instruments that acknowledged the fundamental right of states to have their stolen assets repatriated.

## **2. WHY SHOULD WE BE CONCERNED?**

Despite these increased efforts by the international community to prevent and combat corruption, nearly a decade after the inauguration of the UNCAC the World Bank still estimates the global annual volume of corruption to be between USD 20 and 40 billion.<sup>2</sup> This corresponds to about 15-30% of all official development assistance (ODA). Whilst this may be of concern to taxpayers in donor countries, the citizens of the aid

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<sup>2</sup> World Bank and UNODC. 2007. Stolen Asset Recovery Initiative: Challenges, Opportunities, and an Action Plan. World Bank Group and United Nations Office on Drugs and Crime (UNODC), p.9.

recipient countries are the ones suffering from this most. Monies that are lost through corrupt activities are missing in such crucial areas as the fight against HIV and malaria for example. They are also missing in education, infrastructure and social care. Corruption of course is not exclusive to the developing world – embezzlement of public funds is also a well-known phenomenon in certain European countries. However, the negative impact of corruption on poverty reduction, economic growth and social stability is particularly drastic in developing countries. As they are hindered in their development by the masses of stolen assets stashed away in international financial centres, they are often referred to as “victim countries”.

When it comes to the efforts to repatriate these stolen assets, the small amounts that have been repatriated internationally in the past 15 years, which on average come up to USD 333 million per year or USD 5 billion in total, stand in sharp contrast to the sums estimated to be lost to corruption every year.<sup>3</sup> Yet already “only” USD 333 million buys enough lifesaving HIV/Aids medication for approximately 20 million people, or enough vaccines to immunise between 200 and 300 million people against malaria. When we consider these figures, it is easy to imagine the potential impact on development if the estimated USD 20-40 billion of corruption per year were either never lost to corruption in the first place or at least repatriated again promptly by the financial centres that harbour them.

Finally, if these humanitarian and moral considerations are not enough for developed countries and financial centres to take effective steps to prevent further stolen funds from entering their jurisdiction and to effectively repatriate such funds should their preventative barriers have failed, legal (UNCAC and implementing domestic legislation) and reputational risks hopefully will be. Indeed, one of the challenges for the countries of the North serving as the destination or transit station of illegal assets (the “requested countries” in asset recovery speak) is the allegation that they have become rich and continue to make money with

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<sup>3</sup> Stephenson, K.M., L. Gray, R. Power, J.P. Brun, G. Dunker and M. Panjer. 2011. Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action. World Bank: Washington, DC ., p.11.

the assets of less developed regions and, ultimately, of poor people. Unless financial centres wish to continue being exposed to this criticism, they should prove their commitment to the global fight against corruption, the repatriation of asset recovery and, ultimately, the alleviation of poverty, by participating actively in the international asset recovery processes.

## II. PRACTICAL BARRIERS TO ASSET RECOVERY

Before looking into the specific obstacles to asset recovery, it is worth mentioning a few particular complexities in relation to international as opposed to national asset recovery cases. As is almost self-explanatory, international cases usually involve multiple jurisdictions. By way of example, in the case of Sani Abacha mentioned earlier, at least six jurisdictions, including the Bahamas, Jersey, Liechtenstein, Luxemburg, Switzerland and the UK were involved in addition to Nigeria. In addition, the sums in international cases tend to be particularly high. The same Sani Abacha is estimated to have embezzled some USD 3 to 5 billion<sup>4</sup>, while Ferdinand Marcos of the Philippines is estimated to have stolen some USD 5 to 10 billion.<sup>5</sup> This results in extremely long proceedings, as for example in the case of Marcos where the time span between the first freezing measures in Switzerland and the final repatriation was 17 years. As a result, one can say that international asset recovery cases are challenging as a rule. The following chapters will take a closer look at the very practical, sometimes almost profane challenges to successful asset recovery that add to these complexities, dividing these into i) technical, ii) politico-economic and iii) development policy challenges.

Finally, it is worth mentioning that the practical hurdles discussed in this paper are in many cases issues that impede not only effective asset recovery, but that hamper effective corruption prevention and

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<sup>4</sup> Jimu, Ignasio. 2009. *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan*. Basel Institute on Governance Working Paper Series No. 6.

<sup>5</sup> The World Bank. 2007. *Opt. cit.*

enforcement in general. Indeed, it is important to understand that the recovery and repatriation of stolen assets is only the last in many steps that start at the preliminary investigation and end with the effective transfer of stolen asset to the country of origin. As a consequence, when we discuss practical hurdles to asset recovery we have to look broadly at the process of enforcement of anti-corruption legislation.

## 1. *TECHNICAL OBSTACLES*

### *a) Lack of capacities*

One of the biggest and most serious challenges for asset recovery is missing capacities in requesting countries. Oftentimes, countries that have been brought to the verge of collapse by a corrupt ruling class do not have sufficiently functioning law enforcement and judicial bodies to carry out the necessary preliminary investigations properly. The experience of the International Centre for Asset Recovery (ICAR) has shown that tracing assets or analysing financial data are among the key skills lacking in many of the concerned agencies. Many countries also do not have access to basic infrastructure such as computers or internet connections. This seriously impedes all stages of the investigation, including pre-investigation and financial intelligence gathering, and renders proper case management and documentation difficult.

This in turn presents a considerable challenge also at the stage in which mutual legal assistance (MLA) requests should be submitted to and admitted by foreign courts. Cases like the one of Haiti's Jean-Claude Duvalier show how important it is that the concerned authorities in the requesting countries possess certain key capacities and skills, notably in relation to the submission of MLA requests. Haiti at the time of its request was what would be considered a "failing state" and its MLA requests were either insufficient or not forthcoming at all. This nearly resulted in the asset freezing measures having to be lifted by Switzerland because of the statute of limitations running out. The result would have been that the family of Duvalier would have regained their illegally acquired monies. To avoid this, the Swiss Federal Council, in a rather unconventional and unprecedented step, had to use the Constitution as a legal basis to extend

the freezing measures until an adequate MLA could be submitted.<sup>6</sup> Whilst it is to be applauded that the Swiss state took this measure, it is clear that we cannot rely on such systems in the future and capacity building measures are thus crucial.

*b) Lack of resources*

Lack of (financial) resources is also often a major concern for many requesting countries. As was seen at the example of Marcos of the Philippines, asset recovery proceedings, from the stage of preliminary investigation to the effective repatriation of the stolen and recovered assets, are sometimes extremely lengthy and, as a consequence, potentially expensive. Also, when skills are not available in the authorities of the requesting states, they often have to resort to hiring legal representation both locally as well as in the requested countries, which is easily available but can easily become a considerable financial burden. A particular challenge of financial nature arises in preparation for or during court proceedings abroad, which may be decidedly more expensive than in the requesting countries.

International initiatives such as the Basel Institute's ICAR and programmes offered by the World Bank and UNODC offer such assistance at low rates or even free of charge. Sometimes the requested states agree to cover the costs of a legal counsel for the requesting state, as was done by Switzerland in cases relating to Mali and Haiti, to ensure that an important asset recovery case would not fail due to a lack of capacities or resources in the requesting state. Yet all these programmes can only serve a limited number of cases and countries. They also only offer short-term solutions to a more fundamental problem which requesting states have to address. As a result of this lack of resources, many cases are either never properly investigated or, if they are, their investigation further depletes the limited resources of the concerned requesting state without guarantee of success. The vulnerability of developing countries in this regard is best illustrated by so-called vulture funds to which some requesting countries in the past have fallen victim.

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<sup>6</sup> More information on the case Duvalier and other important international asset recovery cases at: <http://www.assetrecovery.org>.

*c) Formal requirements for MLA requests*

Formal requirements for MLA requests are also a challenge on their own. Each country has their own specific requirements as to how requests have to be filed and what criteria have to be fulfilled. In Switzerland for example, according to the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) of 1981, foreign requests and their enclosures shall be submitted in writing only and either in German, French or Italian language or be accompanied by an officially certified translation into one of these languages. It must also meet a number of formal contents requirements (e.g. contain information of the subject matter and the reason for the request, a legal qualification of the offence(s), information about the office from which the request emanates and, if necessary, the authority having criminal jurisdiction, and finally as exact and comprehensible as possible information about the person being the target of the criminal proceedings. The request should also contain a summary of the relevant facts and the text of the regulations applicable at the place where the offence was committed. Finally, the request should be accompanied by the original or an officially authenticated copy of an enforceable judgment and the original or an officially authenticated copy of the warrant of arrest or of any other document issued in accordance with the regulations of the requesting State and having the same effect.<sup>7</sup> Other countries have similar specific requirements, though they vary from one country to another, and this variation presents a considerable challenge to foreign jurisdictions.

Adding to this requirement to comply with certain formats and conditions for submitting an MLA request is that when major corruption cases are uncovered, it can result in strong national political and public pressure for the relevant authorities to act quickly. As a result, MLA requests are often submitted too hastily and with insufficient information. This has been observed in some cases that came to light following the

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<sup>7</sup> This is not an exhaustive list of the requirements under Swiss law but a summary of key provisions of IMAC. For further information on requirements under Swiss law, consult the relevant legislation (IMAC of 1981) at

<http://www.assetrecovery.org/kc/node/ca0de4af-a33e-11dc-bf1b-335d0754ba85.2>

Arab Spring. Asset recovery efforts might be scotched as a consequence because such vague or technically insufficient requests might be labelled as “fishing expedition” and as a result will not be admitted despite the fact that with more careful preparation they could possibly yield significant results.

*d) Unclear institutional responsibilities*

Another technical hurdle to effective asset recovery, as to effective corruption prevention and enforcement in general, relates to the institutional distribution of responsibilities in requesting and requested states. In many countries, requesting and requested alike, not one but many institutions share responsibilities in relation to anti-corruption and asset recovery. This is indeed no problem as such, as also highlighted by the UN Convention against Corruption (UNCAC) which simply stipulates the need of “*a body or bodies, as appropriate, that prevent corruption (...)*” (Art. 6 UNCAC) and that each state party shall “*(...) ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement*” (Art. 36 UNCAC).

However, it is clear that whatever the exact institutional setting, the respective responsibilities of each institution involved need to be clear and not competing or overlapping, the institutions need to follow a single country-wide strategy, and inter-institutional communication and cooperation needs to be systematised and enforced. This unfortunately is often not the case and, as we will discuss in the next chapter, the establishment of multiple institutions with overlapping and inconsistent mandates is indeed sometimes employed to actively sabotage a country’s efforts to combat corruption.

In asset recovery, it may mean that cases are investigated multiple times but information is not shared so that each institution ends up with an insufficient dossier. When these institutions compete for public funds or for political influence, they will not willingly share this information and as such may consciously or unconsciously harm the case. In such a complex institutional setting, a central authority in charge of requesting and receiving MLA requests may exist, but experience shows that this authority is often not chosen due to its particular capacities or its

positioning within the broader institutional setting, but for political reasons. Depending on how clearly the tasks in relation to the submission or execution of an MLA request, this will then have a (negative) impact on the effective processing of such requests.

*e) Gaps in of ineffective enforcement of banking regulations in the requested states*

Even though the international financial sector has undergone a considerable revamp of its regulatory environment and, thus, of its internal control and compliance systems, the fact that considerable amounts of money continue to be lost to corruption and end up in financial centres of developed countries indicates that regulations and strategies to prevent illicit flows of capitals are not yet sufficient, or not sufficiently enforced. This is further aggravated by the fact that criminals develop ever more elaborate techniques to cover-up the origin of their illicit and it is becoming increasingly difficult for financial institutions to identify suspicious transactions. In turn, the countries that are the rightful owners of such stolen assets will have a difficult time tracing these assets, proving their criminal origin and ultimately making a case to recover them.

## **2. POLITICAL ECONOMY BARRIERS TO ASSET RECOVERY**

*a) Lack of political will*

Decidedly the single most powerful obstacle to asset recovery efforts is lack of political will. If key people at the highest political level lack the will to curtail corruption and recover assets, this often translates into a lack of effort to create and maintain the necessary legal and institutional structures. An example of this is the trend of newly elected leaders to create a new anti-corruption institution to demonstrate their will to fight corruption. Often, the promise of a new anti-corruption law or agency is a key component of election campaigning. However, as seen earlier, this can subsequently lead to the opposite result, with even more anti-corruption institutions not cooperating, creating competition rather than

cooperation and aligned and reinforced efforts. Ultimately, the anti-corruption architecture of a country can suffer more than it benefits.

Lack of political will may also translate into efforts to actively undermine existing anti-corruption structures. In Indonesia, the public is observing carefully how the political leadership including the President and his cabinet and Parliament treat the Corruption Eradication Commission KPK. Notably the election of commissioners is always widely discussed and seen as a signal for the level of political support to the anti-corruption cause. Indeed manning anti-corruption institutions with weak leadership is a popular measure in some countries to undermine anti-corruption efforts, as is interference with anti-corruption agencies' operational activities or curtailing the agencies' budgets. Alternatively broad anti-corruption reforms are announced and possibly even implemented, but when the scope of these reforms is looked at more closely one notices that key areas (e.g. procurement or other corruption prone services; political party financing, conflict of interest regulations in the executive and other areas too likely to expose those in power) have wilfully been excluded from reform. Another way of undermining anti-corruption efforts is the wilful institutional weakening of key agencies. For example, despite multiple domestic or foreign funded programmes to establish a comprehensive case management system, case documentation in many countries remains extremely poor. This makes it easy to delay an effective case investigation or even to have key evidence disappear without anyone noticing for a long time.

*b) Conflicts of interest*

On the side of requested states or financial centres, lack of political will is sometimes partially the result of a lack of viable economic alternatives. A small island state with an economy primarily consisting of offshore banking services will be reluctant to introduce tighter banking regulations that could potentially destroy the very foundation of its economy. Whilst the authors of this paper do not in any way endorse this rational, the point is worth noting as it illustrates that preventing corruption and money laundering is not always as clear cut an issue as it may seem at first sight, and conflicting interests and priorities are at play.

In requesting states, lack of political will mostly derive from either personal or institutional conflicts of interest. Political and economic elites are often closely entwined and corruption at these interfaces is ripe. Elites in these countries have thus a vested interest in curtailing anti-corruption efforts, and this holds usually true for the ruling elite as well as the (in democracy) opposition. Also, whilst politicians may be replaced in democratic elections, in political coups or in popular uprisings as recently in a number of MENA region countries during the so-called Arab Spring, vested interests prevail in the bureaucracy as it is not possible to replace an entire state apparatus.

Conflicts of interest is also a serious problem at lower levels of the administration, when individual public officials are confronted with the choice of accepting bribes and actively or passively resisting anti-corruption reform or with taking a strong stance against corruption. The conflict may first and foremost be financial, when salaries are too low to nourish a family, or the conflict may be in consideration of one's professional career when it becomes clear that without corruption one will ultimately hit a glass ceiling. The conflict may also be a combination of these two factors and contain a social component, as is the case in Bhutan. The Bhutanese Anti-Corruption Agency, which must be applauded for the excellent work it does in the corruption prevention and enforcement, suffers enormously from its inability to attract enough and qualified staff. The reason for that simply is that an ACC staff member must fear social ostracism, and this usually concerns not only him or her, but his/her entire family and relatives. In a small society like Bhutan, this can have substantial consequences on the lives of those concerned. It takes thus great courage and personal sacrifice to actively engage in the fight against corruption, and whilst we are recounting the example of Bhutan, this situation is well known from other countries too where anti-corruption fighters are not only exposed to social ostracism but indeed to threats to their lives and those of their families.

*c) Corruption in anti-corruption institutions*

Another obstacle that intertwines closely with the conflicts of interest situations discussed in the previous sections is the fact that in

some countries, the very institutions tasked with enforcing anti-corruption legislation are amongst the most corrupt institutions in the country. The Global Corruption Barometer (GCB) 2007 of Transparency International (TI) finds that the police and the judiciary are the most corrupt institutions across the world, i.e. in low, middle and high income countries alike.<sup>8</sup> This offers fruitful ground for the independence of the judiciary to be jeopardized and opens doors to the political elite to influence the judiciary in an unduly manner.

*d) Misuse of asset recovery for political power games*

Political power games and sometimes even actions of revenge can also be the reason for a sudden increase in anti-corruption efforts and attempts to trace and repatriate stolen assets. When the judiciary and law enforcement agencies are not free from political influence (see previous section), there is a risk that ruling parties instrumentalise and manipulate these institutions in order to settle scores with opposition parties or other political exponents that may be a threat to the continuity of their “reign”.

A case in example is Bangladesh where the two major political parties have been playing “revolving door” with the leadership of the country since its independence and have both been marked by excessive levels of corruption. In addition, the top leadership of the two parties, Sheikh Hasina (Bangladesh Awami League) and Khaleda Zia (Bangladesh Nationalist Party), have historically been living in a personal and political feud for decades. It is commonplace whenever one of the two takes over Government in another, more or less transparent election, to announce a new push to fight corruption and, as a first step in this new push, to launch investigations into all members of the opposition party, notably the leader and their families. The problem here is not, as is the case in other countries sometimes, that the accusations of corruption are unfounded. They are most likely true, although of course we will abide by the rule of “innocence until proven”. Yet when anti-corruption and asset recovery become instruments in the hands of kleptocratic regimes with the aim of weakening political enemies and the opposition, the anti-

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<sup>8</sup> Transparency International. 2007. Global Corruption Barometer. Berlin: TI. [http://archive.transparency.org/policy\\_research/surveys\\_indices/gcb/2007](http://archive.transparency.org/policy_research/surveys_indices/gcb/2007).

corruption movement loses all its credibility and, as it clearly being manipulated, its effectiveness.

Such situations also pose challenges to the requested countries. They risk becoming the puppet of political power games that are based on no actual interest in recovering stolen assets or prosecuting a corruption case. Becoming such a puppet in turn can reflect badly on the requested country: Mostly the power games are about accusations and less about leading a serious investigation. As a consequence, often the cases do not come to a satisfactory closure and assets are neither properly traced nor eventually recovered so as to be repatriated. To please the local electorate, the requesting country will accuse the requested country of lack of cooperation, of stealing foreign countries' wealth, and of not being serious about asset recovery, whilst the requested country is hard pressed to act on little to no valid information. As a result, the requested countries will become increasingly suspicious and hesitant about being particularly forthcoming in asset recovery cases and other, more founded requests for cooperation will fall victim to this climate of suspicions.

*e) Political Considerations form the Side of the Requested State*

Some requested states undertake long considerations before deciding whether or not assets are finally repatriated. In theory, the case is clear, of course: If the monies legally belong to another country it is difficult to argue why they cannot be transferred back. The reality however is such that requested states might have the well-founded suspicion that the money in question will be re-laundered and disappear once it is repatriated. As described above, sometimes regime changes only come with a change in name of the respective leader, but the level of corruption and the corrupt political and networks remain exactly the same. Even worse as discussed above, asset recovery and anti-corruption may simply be instrumentalised for political power games. Consequently, monies are recovered from one corrupt political leader only to transfer them back to the next.

Of course, if such a scenario is likely, the requested countries are in a conflict of interest themselves: on the one side they will want to adhere to the law and court rulings and repatriate the monies that have been

hidden in their jurisdictions. On the other side, they will want to follow through with their own anti-corruption commitments, and transferring previously stolen monies back into the hands of similarly corrupt regimes certainly does not further such a cause. It can become difficult to balance these considerations with the strictly legal ones.

### 3. **BARRIERS SEEN FROM A DEVELOPMENT POLICY-PERSPECTIVE**

#### *a) Political coherence in the requested country*

The previous section on political considerations of the requested countries also points at another potential dilemma that requested countries have and that can seriously undermine effective asset recovery, namely that of policy coherence. In requested countries, as in any country alike, policy agendas sometimes compete. In relation to asset recovery, the concerned portfolios are primarily justice, foreign affairs, official development assistance (ODA) and foreign trade. From a foreign affairs perspective, considerations (such as the ones discussed in section 2.e above) influencing the assessment of an asset recovery case are likely to be different than when the requested countries justice people make the same assessment, from a purely legal perspective. Similarly, people in charge of the foreign trade dossier might view the strict enforcement of foreign bribery legislation, which has a considerable impact on preventing the exodus of stolen funds from developing countries, as potentially hindering foreign trade. The BAE case in the United Kingdom is a case in example for this, while this view is clearly difficult to argue from an ODA perspective.

Developed, requested countries are therefore hard pressed to bring in line their different portfolios that relate directly or indirectly to the effective international recovery of stolen assets, with a view to coherently supporting this important international effort.

#### *b) Efficiency and proportionality*

As has been shown earlier, proceedings in asset recovery cases can be extremely time-intensive due to their complexity and the fact that

oftentimes, many different jurisdictions are involved. As a result, sometimes a case can evolve over years. That, of course, results in tremendous costs in both requested and requesting states. When asset recovery proceedings taking five to ten years or more, this raises questions of whether the effort and the expenditure is actually worth the effort especially in cases where smaller sums are concerned. It is clear that from a viewpoint of seeking political and social stability, and for purely legal considerations and considerations of justice, such arguments do not hold up. However, when requesting states suffer from lack of resources it is a point to be considered.

*c) Monitoring: Neo-colonial or Indispensable?*

Once a court order stands in the requested as well as in the requesting country, the final step of effectively repatriating the concerned assets has to be effectuated. As has been described in this paper, in some cases there might be grounds for suspicion that the monies that will flow back to the countries where they legally belong could be channelled away illicitly again upon their return. As a result and also because of the development policy agendas many requested countries follow, the monitoring of the repatriation and the ultimate use of the repatriated assets is a key concern to many stakeholders.

It is clear that the requesting country which had its assets legally repatriated has the full sovereignty over decisions pertaining to the use of such assets. A monitoring executed by the requested, repatriating country is thus politically neither feasible nor sensible. At the same time, having studied cases of asset repatriation monitoring the World Bank comes to the conclusion that countries “that had embraced a policy of openness and transparency in the design of arrangements for the management of returned assets have benefitted from this approach.”<sup>9</sup>

Especially involving stakeholders of non-governmental institutions like civil society organisations (CSOs) might convey to the public that the assets are used in a transparent manner. Another argument in favour of monitoring through CSOs is that these organisations, anchored locally in

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<sup>9</sup> World Bank, *Stolen Asset Recovery: Management of Returned Assets*, 2009, p. xi.

the requesting country, have a good understanding of where funds are most needed and the capacity or network to monitor whether the funds are used as originally planned.

One such example is the case of the Abacha monies that were returned from Switzerland. At the end of lengthy negotiations, the Nigerian government agreed to a collaborative monitoring mechanism involving Swiss and Nigerian NGOs. The case example of Nigeria concluded with mixed results, with the principal criticism of monitoring mechanisms being that of accountability and legitimacy of those institutions monitoring the repatriation and use of funds. Nonetheless the principal idea still deserves adequate consideration, though there is a need for devising a more comprehensive, accountable and legitimate mechanism.

### III. CONCLUSIONS

The discussion in this paper has shown that recovering stolen assets and repatriating them to their rightful owners is not an easy undertaking. Obstacles are manifold and the challenge is that those obstacles do not only occur on a purely technical level, but also on the more sensitive socio-economic and political levels. They even have an impact on development assistance policies. However, cases like the one of Duvalier show that successful recovery can be possible, even if many hurdles have to be overcome first and both requested and requesting country have to be tenacious. Some additional visions of possible ways forward might be appropriate to be considered in more detail.

As has been mentioned in the treatise on repatriation and monitoring, the involvement of civil society organisations, or more generally non-state actors (NSAs), can assist in overcoming some of the aforementioned hurdles. The potential of such actors, especially when it comes to ensuring more transparency and accountability in the whole asset recovery process, is considerable. Also, NSAs often have a considerable amount of expertise. NGOs like French-based Sherpa have shown the influence civil society actors can have on legal questions pertaining to asset recovery. Sherpa and Transparency International

France managed to secure a court ruling in France that henceforward, petitions of civil parties, notably NGOs with a clear mandate in anti-corruption and/or asset recovery, can be admitted before criminal courts. As a consequence, NGOs in France can now open a case on behalf of the victim state which Sherpa and TI did in relation to assets allegedly stolen from DRC Congo, Gabon and Guinea.

Another new way forward to overcome some of the practical hurdles discussed above is the training of so called "Asset Recovery Champions". The key purpose of this activity is to render asset recovery capacity building more sustainable. So far, laudable efforts have been made to train law enforcement officials in essential investigation and asset recovery. As has been shown in the chapter above on capacities, the availability of such basic skills is indispensable for the success of asset recovery cases. However, it is important that the knowledge obtained by few in a handful of trainings does not get lost as a result of the frequent staff rotation in concerned agencies, and is spread beyond those immediately trained in donor funded trainings. As a consequence, and very much supported by ICAR's train-the-trainer programmes, it is essential that trainings specifically target selected "champions" who will take it upon themselves to spread and institutionalise knowledge gained.

Finally, another recent development in the international policy debate around asset recovery revolves around the concept of using confiscated criminal assets also for social purposes.<sup>10</sup> So far, in most countries, assets that have been confiscated will, after a Court has rendered final judgment, incorporate those assets in the general state budget. Certain countries have taken rather innovative approaches, having laws and regulations in place that offer the possibility to use confiscated criminal assets for social purposes. Italy would be such a case, where parts of criminal monies that have been confiscated are used for social projects. Assessing the value added of such a concept in the international asset recovery processes could help overcome some of the

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<sup>10</sup> European Parliament. 2012. The need for new EU legislation allowing the assets confiscated from criminal organisations to be used for civil society and in particular for social purposes. Brussels: EU Parliament Committee on Civil Liberties, Justice and Home Affairs. <http://www.ipolnet.eu/parl.union.eu/ipolnet/cms>

political and developmental considerations regarding the ultimate destination and use of repatriated assets.

Resuming, more success in asset recovery cases will gradually come over the years. However, this will not happen without committed actors from all sides: requesting countries, requested countries, politicians as well as NSAs and the banking sector have to play together for asset recovery to become more effective. As a result there still is a need for more awareness rising and capacity building measures, for more policy coherence and self-criticism by all concerned stakeholders, and especially for more concerted actions and for the continuous reflection about new, innovative approaches.

“That old law about 'an eye for an eye' leaves everybody blind.  
The time is always right to do the right thing.”  
- Martin Luther King, Jr. -