

Ignasio Jimu

International Centre for Asset Recovery

**Managing Proceeds of Asset Recovery:
The Case of Nigeria, Peru, the Philippines
and Kazakhstan**

GOVERNANCE

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Basel Institute on Governance International Centre for Asset Recovery

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Abstract

This paper looks at the use of proceeds of asset recovered from Sani Abacha, Vladimir Montesinos, and Ferdinand Marcos and their families. It will also briefly address a much more recent case involving Kazakhstan. Repatriation of stolen monies makes available additional resources for development activities. The challenge is to ensure efficient, accountable and transparent use of such assets, given states may lack capacity or political will and that corruption may be prevalent at various levels of government. Transparency allows for better utilisation of recovered assets, and better targeting of resources into sectors that have potential to benefit the victims of corruption, who happen to be mostly the poor. Lack of effective follow up mechanisms may lead to the inappropriate allocation of resources into sectors that have little effect on alleviating poverty. The cases under review here offer lessons on how to manage repatriation and utilisation of proceeds of asset recovery. Further lessons relate to the participation of third parties and the benefits of making the results of the entire process public.

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1. Introduction

Asset recovery has become one of the major themes in discourses on development funding, due in part to the enormous amount of resources that are lost annually by developing countries and countries in transition to corruption. Although there is a lack of international legal consensus on the definition of corruption, it is generally understood as the abuse of public office for private gain. According to the World Bank (1997:8):

‘Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for private benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues.’ (Akçay 2006:33)

In this article the emphasis is on illicit assets obtained through bribery, patronage or theft from state budgets. Proceeds of these forms of corruption are generally transferred from one jurisdiction to another in order to disguise their source. Eventually it becomes difficult to distinguish licit from illicit assets and the proceeds of corruption from other forms of criminal conduct. Estimates suggest that cross-border flows of proceeds of corruption, criminal activities, and tax evasion amount to between USD 1 trillion and USD 1.6 trillion per year. In Africa an estimated amount in excess of USD 148 billion or about 25 percent of gross domestic product (GDP) is lost in this way.¹ In public procurement alone, it is estimated that corruption diverts 10 to 20 percent (sometimes as much as 50 percent) of contract values, while bribes received by public officials in developing countries and countries in transition amount to between USD 20 billion and USD 40 billion per year, which is also equivalent to between 20 percent and 40 percent of official development assistance (ODA).²

These losses are enormous when perceived from the development point of view. The true value of the loss is symbolised by the lost opportunity to invest in development work or alleviation of poverty and human suffering in low income countries, a fact well articulated in the shadow report by the Nigerian Network on Stolen Assets (NNSA), an umbrella organisation of groups working on anti-corruption, social and economic rights, public policy, health, and the environment:

‘We find that assets do not merely represent static, monetary amounts, inert numbers. Assets contain rather a potential for work. A potential that does not become realised until unleashed by wise investment. Thus assets represent the potential to create prosperity.’³

It is estimated that every USD 100 million lost or recovered could fund first-line treatment for over 600,000 people with HIV/AIDS for a full year, or drugs for the treatment of malaria for between 50 and 100 million people, or 250,000 water connections for poor households, or full immunisations for 4 million children.⁴ Preventing corruption and recovering stolen assets are twin processes that can contribute to development.

1 The World Bank and United Nations Office on Drugs and Crime, *Fact Sheet on Stolen Asset Recovery*, available at http://www.unodc.org/pdf/Star_FactSheet.pdf.

2 The World Bank and UN Office on Drugs and Crime, *Fact Sheet on Stolen Asset Recovery*, available at http://www.unodc.org/pdf/Star_FactSheet.pdf.

3 Report by Ugolor, D., Nwafor, A. and Nardine, J.H. on behalf of the Nigerian Network on Stolen Assets, ‘Shadow Report on the PEMFAR Monitoring Exercise’ (2006) (page 4), available at http://www.evb.ch/cm_data/Report_Abacha.pdf.

4 The World Bank and United Nations Office on Drugs and Crime, *Fact Sheet on Stolen Asset Recovery*, available at http://www.unodc.org/pdf/Star_FactSheet.pdf, or Asset Recovery - A Breakthrough by the UN Convention against Corruption (UNCAC), available at <http://www.gtz.de/de/dokumente/en-gtz-asset-recovery-2007.pdf>.

The corollary is that failing to curtail corruption and recover stolen assets essentially is a denial of access to safe drinking water, primary health care, basic education, good roads, and adequate housing and security. While corruption often benefits the privileged, it hurts and deprives the poor, and threatens their prospects for a better life. Corruption is also a hindrance to legitimate business and affects economic and financial stability by altering the proper functioning of market mechanisms to the advantage of dishonest operators. According to Akçay (2006) corruption reduces economic growth by retarding long-term domestic and foreign investments. It also enhances inflation, depreciates national currency, misallocates talent to rent seeking activities, pushes firms underground, distorts markets and the allocation of resources, increases income inequality and poverty, reduces tax revenues, distorts the fundamental role of the government (on enforcement or contracts and protection of property rights), and undermines the legitimacy of government and of the market economy. The recovery of stolen assets can go a long way in mitigating the harm that corruption causes, especially if it overcomes impunity and therefore initiates a virtuous circle in a given country.

Corruption and the rule of law are closely linked and there is good reason to believe that efforts to reduce corruption and strengthen the rule of law are mutually reinforcing. This is confirmed by the case studies under review here, where huge sums of money were stolen by high ranking government officials presiding over regimes characterised by general breakdown of rule law. The focus of this paper is not how much money is stolen each year or how much effort countries are making at recovering proceeds of corruption and other forms of criminal activity. Rather, the focus is on money that has already been recovered and repatriated to the countries of origin. In particular, it asks how the recipient states have utilised funds that have since been repatriated. Attention is on Nigeria, Peru and the Philippines, the countries which have seen some of the most important and successful asset recovery cases in the last 20 years. In particular the paper seeks to examine the utilisation of proceeds repatriated from the loot of Sani Abacha, Vladimir Montesinos and Ferdinand Marcos, respectively. In these three cases it is estimated that billions of dollars were looted and stashed in foreign jurisdictions, including Swiss and US financial institutions. The amounts involved were particularly large in relation to national budgets of the concerned countries. It is estimated that Marcos looted between 1.5 and 4.5 percent of annual gross domestic product (GDP) of the Philippines; Abacha stole between 1.5 and 3.7 percent (The World Bank 2007). In the case of Abacha and Marcos, the focus is on money recovered and repatriated from Switzerland only. In the case of Montesinos (Peru), monies were recovered from the Cayman Islands, the US and Switzerland. While there is sufficient information on the utilisation of the Abacha loot, because of the monitoring⁵ mechanism instituted by involved governments at the time of repatriation, there is relatively little information on the other two cases. By examining what happened (or did not happen) in these three cases the article draws several lessons on how to manage the repatriation and utilisation of the proceeds of corruption passed through the national budgets of the governments. By way of comparison, the paper will also consider a scenario in which assets did not pass through the government machinery, namely the repatriation through the BOTA Foundation (Kazakhstan) of frozen assets originating from disputed transactions involving an American businessman and Kazakh officials.

5 The notion of monitoring draws on the use of this term in the *Shadow report of the PEMFAR Monitoring Exercise* (2006) by the Nigerian Network on Stolen Asset, and also in the report titled *Utilization of Repatriated Abacha Loot: results of the Field Monitoring Exercise* (2006) prepared by the World Bank with cooperation from the Federal Ministry of Finance (Nigeria).

2. Case studies

2.1. The Abacha loot in Nigeria

General Sani Abacha was president of Nigeria from 1993 to 1998. Investigations carried out after his sudden death in June 1998 revealed that he looted between USD 3 billion and USD 5 billion of public money. His methods included theft from the public treasury through the central bank, inflation of the value of public contracts, extortion of bribes from contractors, and fraudulent transactions (The World Bank 2007). The proceeds were laundered through a complex web of banks and front companies in several countries, principally in Nigeria, the United Kingdom, Switzerland, Luxembourg, Liechtenstein, Jersey, and the Bahamas. Investigations ordered by his successors, General Abdusalam Abubakar and General Olusegun Obasanjo, led to recovery of some of the assets. A decree made on 26 May 1999 by General Abubakar (Decree No. 53) facilitated the recovery of USD 800 million in cash and assets from members of the Abacha family and his associates (Daniel and Maton (2008); Monfrini 2008; United Nations and The World Bank 2007). The money recovered by the decree was eventually utilised by the government for housing projects and education in all the 36 states of the Federal Republic of Nigeria (Freeman 2004). However, this paper focuses on USD 505.5 million, which were hidden in Swiss banks and successfully repatriated by Switzerland to Nigeria in September and November 2005 and early 2006 (The World Bank 2007).

Following long negotiations, Nigeria and Switzerland agreed in 2004 that the USD 505.5 million should go into pro-poor projects, under the watchful eye of a third party entity (Daniel and Maton 2008; Monfrini 2008). The World Bank was then identified as a neutral party to review the utilisation of the resources, and was supposed to be part of an ongoing programme to improve public finance management in Nigeria. Through the World Bank, the Swiss government provided a grant of about USD 280,000 to co-finance the Public Expenditure Management and Financial Accountability Review (PEMFAR). PEMFAR was initiated as a means of executing reforms in budget spending, with regard to the Nigeria's national economic empowerment development strategy (NEEDS) priorities in education, health, and basic infrastructure (power, roads, and water). Out of a total sum of USD 505 million repatriated from Switzerland, and according to the agreement reached on priority pro-poor sectors, the allocations were to power (USD 168.5 million), works (USD 144.5 million), health (USD 84.1 million), education (USD 60.1 million), and water resources (USD 48.2 million) (Okonjo-Iweala and Osafo-Kwaako 2008, World Bank, 2006).

The World Bank mobilised Integrity, a Nigerian civil society organisation, to prepare and administer the field monitoring survey of selected projects funded by the Abacha Loot (The World Bank 2007). Integrity, together with other local civil society organisations (CSOs) reviewed 51 project sites (Okonjo-Iweala and Osafo-Kwaako 2008). A total of 168 people were interviewed, including contractors and local government officials involved in the projects, and also some potential project beneficiaries. The participation of the civil society organisations came as an afterthought following pressure from both Swiss NGO coalition and civil society organisations under the umbrella of Nigerian Network on Stolen Assets (NNSA)⁶, an organisation of groups working on anti-corruption, social and economic rights, public

⁶ Simon Hirsbrunner 'Stolen Asset Recovery: Swiss Experience', Economics of Corruption Training in Passau, 4. - 10. Oktober 2008, available at http://www.wiwi.unipassau.de/fileadmin/dokumente/lehrstuhle/lambsdorff/Economics_of_Corruption_2008/Poster_EOC2008_simon.pdf.

policy, health, and environment. The review of 51 projects across the five priority sectors (roads, power, health, education and water) and in Nigeria's six geo-political zones found that the funds allocated to various projects increased budget spending in pro-poor development projects. The sectors were selected by the government of Nigeria based on the potential to help Nigeria move towards achieving the Millennium Development Goals (MDG). In terms of allocation to specific sectors, about 77 percent (by value) of the repatriated funds spending went into roads, power and health sectors (The World Bank and Federal Ministry of Finance (Nigeria) 2006). An analysis of actual federal budget spending in five MDG sectors of health, education, water, electricity and roads for 2003/05 fiscal years showed that these sectors received a considerably increased allocation in the 2004 relative to the 2003 level, that is, from N57.6 billion (USD 443,076,923.08) to N175.1 billion (USD 1, 346,923,076.92) respectively (The World Bank and Federal Ministry of Finance (Nigeria) 2006). The trend for the five pro-poor sectors was sustained in the 2005 budget (The World Bank and Federal Ministry of Finance (Nigeria) 2006). It was further noted that the overall increase in federal government spending in these five sectors was substantially larger than the amount of recovered Abacha Loot (Table 1). Of the 51 projects reviewed, 23 were described as completed, 26 were at various stages of completion, and 2 were described as stopped.⁷ All the 23 completed projects were described as functioning, though at varying levels of utilisation.

Table 1 Utilisation of repatriated Abacha funds

No.	Sector	Allocation, based on preliminary information (NGN billion)	Funds Accounted for via Projects List (NGN billion)
1	Power - Rural Electrification - Power Generation	21.70	21.94 8.10 13.84
2	Works - Priority Economic Roads	18.60	17.06
3	Health - Primary Health Care - Vaccination Programmes	10.83	10.84 2.02 8.82
4	Basic and Secondary Education - Primary Schools - Junior Secondary Schools - Federal Government Colleges	7.74	7.79 3.16 3.40 1.23
5	Water - Potable Water and Rural Irrigation	6.20	7.53
Total		NGN 65.07 billion USD 500,538,461.54	NGN 65.16 billion USD 501,230,769.23

The World Bank and Federal Ministry of Finance (Nigeria) (2006), *Utilization of Repatriated Abacha Loot Results of the field monitoring exercise*
(Exchange rate: USD 1 = NGN 130)

⁷ Utilization of Repatriated Abacha Loot, Results of the Field Monitoring Exercise Report Prepared by the World Bank with Cooperation from the Federal Ministry of Finance December 2006, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:21169861~menuPK:258658~pagePK:2865106~piPK:2865128~theSitePK:25864,0,0.html>.

The greatest challenge encountered in following up on the allocation and expenditure of the Abacha loot related to the appropriation and tracking of the funds in the national budget. Follow-ups showed that, between 2004 and 2005, there was a substantial increase in allocations to various spending agencies, but due to incomplete utilisation of appropriated funds in 2004, some spending by implementing agencies was actually undertaken as part of the 2005 capital budget (The World Bank and Federal Ministry of Finance (Nigeria) 2006). Despite specific targets in the five pro-poor sectors, there were several instances in which spending agencies used their share of the Abacha loot either to defray outstanding arrears or to make partial payments for ongoing multi-year projects. There were also several cases in which projects that had been completed prior to the repatriation of the funds were subsequently paid for using the Abacha loot. In some cases, projects were still incomplete at the time of the survey in 2006, although part of the projects' costs had been paid for using repatriated Abacha funds (The World Bank and Federal Ministry of Finance (Nigeria) 2006). The other challenge had to do with maintaining good quality of the work financed or completed using repatriated funds. The Network of Stolen Assets in Nigeria (NNSA) mentioned in its shadow report that many projects implemented using the Abacha loot were not of good quality. Lack of good faith and corruption prevented funds from being translated into infrastructure development benefiting communities.⁸ For instance, the review process reported that several projects lagged behind schedules or were virtually abandoned. Some of the completed projects manifested poor workmanship, outputs requiring major refurbishment shortly after the completion of construction. The civil society report enumerated several factors that bordered on 'lack of good faith', lack of political will, and also ghost projects (projects, and even local government areas, that never existed). In one project, the contractor abandoned the work after a local official refused to accept a bribe in exchange for signing off on the project's completion. Except for instances in which work on projects was hampered by changes in project design after construction had commenced, in other projects progress was reported to be slow due to lack of materials and lack of funding from the Federal Government of Nigeria (FGN).⁹ Further, the review process was partial in the sense that a full physical inspection of projects was not possible given that a comprehensive list of the projects funded by the repatriated funds was not made available by the government (Ugolor et al. 2006).

8 Report by Ugolor, D., Nwafor, A. and Nardine, J.H. on behalf of the Nigerian Network on Stolen Assets, '*Shadow Report on the PEMFAR Monitoring Exercise*', available at http://www.evb.ch/cm_data/Report_Abacha.pdf.

9 Report by Ugolor, D., Nwafor, A. and Nardine, J.H. on behalf of the Nigerian Network on Stolen Assets, '*Shadow Report on the PEMFAR Monitoring Exercise*' (Pages 57-8), available at http://www.evb.ch/cm_data/Report_Abacha.pdf.

Case studies of review of projects in education and health sectors*Education*

A review of projects in the education sector led to interviews with 67 stakeholders, a group including the contractors/supervisor/architect/government representative/local government service providers, and parent-teacher associations (PTA) and students. A total of 18 projects were reviewed, of which 15 involved construction of physical infrastructure. Of the 18 projects, 8 were described as ‘completed’, 9 were at various stages of completion, whilst 1 was ‘abandoned’. All the completed projects were described by the respondents as having ‘100%’ utilisation levels even though desks/chairs were not provided for the classrooms, and there were problems of inadequate staffing. The review committee observed that many stakeholders had no idea of the source of funding for various projects. Those that knew about the source of the funding had little idea about the actual amount of money involved. There was lack of agreement on the existence of a scheme to ensure proper ongoing maintenance and sustainability, in particular replacement of equipment and spare parts, requisite staffing levels or consumable items. Also, stakeholder involvement was not clearly defined. 14 out of 43 service beneficiaries either ‘didn’t know’, or did not express an opinion, or didn’t seem to understand the extent of consultation of stakeholders in the process of projects design. 29 out of 43 service ‘beneficiaries’, who suggested that there were some consultations pointed that the projects arose through a direct ‘request’ made by the community or the community ‘chose’ the site and provided the land or the community ‘formed committees’ to monitor/maintain the infrastructure created. Apparently, the local government (LG) Executive Secretary for Education claimed not to have been included in any of the processes around project selection and design.

Health

A total of 8 projects involving construction of physical infrastructure for primary health care centers were reviewed. A total of 31 respondents were interviewed, of which 17 were categorised as service providers (a category that included contractor/Supervisor/Architect/Government representative/Local Government Staff), while 14 were in the category of end user/community member/leader. 16 out of 17 service providers reported that thorough consultation with various stakeholders was done during the project design. Evidence of consultation included ‘centrality’ of the site of the health center, ‘provision of land’ for the project by the community, and previous ‘requests’ by the community for a health center as evidence that there was adequate consultation. Only two projects were described as completed and 6 were described to be at various stages of completion. One of the projects was started in 2004, whilst 7 were started in 2005. Further, 5 out of 8 projects were said to be experiencing delays with completion. Some of the reasons that slowed progress ranged from disputes with the community, poor site accesses, lack of commitment of the contractor to ‘tardy release of funds’.

Source: The World Bank and Federal Ministry of Finance (Nigeria) (2006), *Utilization of Repatriated Abacha Loot: Results of the field monitoring exercise*, Report Prepared by the World Bank with Cooperation from the Federal Ministry of Finance, December 2006, Abuja, available at http://siteresources.worldbank.org/INTNIGERIA/Resources/Abacha_Funds_Monitoring_1221.pdf.

2.2. The case of Vladimiro Montesinos Torres in Peru

Vladimiro Montesinos Torres was head of Peru's secret service (Servicio de Inteligencia Nacional SIN) and *de facto* advisor to President Alberto Fujimori between 1990 and 2000. During these years, corruption reached a high level of sophistication whereby state structures were manipulated in a way to gain personal benefits for the members of government in an organised and (on the face of it) legal form. In 2000, secret videos were televised showing Montesinos bribing the opposition. The scandal caused Montesinos to flee Peru, but also discredited the government and the president who resigned as a consequence. Subsequent investigations revealed Montesinos to be at the centre of a multi-million dollar illegal business, responsible for the extortion of high profile entrepreneurs, embezzlement, graft, arms trading, and drug trafficking (Jorge 2008). The actual amount of money accumulated by Montesinos is not known, but it is estimated that during the rule of Fujimori close to USD 2 billion was stolen. These bribes were facilitated by legal provisions that allowed the executive to deny disclosure of the bidding process for military hardware on the grounds of 'national security'. Montesinos and his cronies used shell companies to launder the proceeds from one financial centre to another. Since his conviction a few years ago the government of Peru has recovered nearly over USD 185 million,¹⁰ of which nearly USD 33 million was returned by the Cayman Islands in August 2001, 77.5 million by the Swiss Government in August 2002, and USD 20 million by the United States in January 2004 (The World Bank 2007). The balance could have come from other jurisdictions such as Luxembourg, Mexico, Panama, Trinidad and Tobago and Uruguay, where Montesinos and his associates were known to have operated bank accounts.¹¹

The government of Peru created the Fondo Especial de Administracion del Dinero Obtenido Illicitamente en perjuicio del Estado (FEDADOI) (Special Fund for Management of Illegally Obtained Money against Interests of the State).¹² In effect the FEDADOI is a special fund created to manage the assets recovered from corrupt officials by the government (The World Bank 2004). The fund has been managed by a board of five members appointed from different government ministries. Although guidelines and detailed procedures are defined to ensure the transparent use of the recovered assets, money held in the fund has so far ended up mainly supplementing the budgets of public institutions that have a member on the board (The World Bank 2007; UNCAC Team 2007a). It is also reported that spending has often adhered to standard budgetary procedures, but since the spending items are not clearly set out in advance, questionable spending allocations occur quite often (UNCAC Team 2007a). For example, the Interior Ministry received over USD 9 million in 2004 for the payment of vacations for both active and retired police personnel for the 1995 and 1996 fiscal years (The World Bank 2007). Other disbursements went into the police reform process, which included payments for the purchase of new uniforms and life insurance for the officers (Costa 2006:220). Further, money from the fund was also used to pay close to USD 400,000 in legal fees towards the repatriation of former president Alberto Fujimori from Chile.¹³ Other disbursements have been made towards

10 The World Bank and UN Office on Drugs and Crime, *Fact Sheet on Stolen Asset Recovery*, available at http://www.unodc.org/pdf/Star_FactSheet.pdf.

11 Basel Institute on Governance (BIG)/International Centre on Asset Recovery (ICAR) 'Efforts to Recover Assets Looted by Vladimir Montesinos of Peru', available at <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=1aafec73-a345-11dc-bf1b-335d0754ba85>.

12 Decreto de Urgencia N° 122-2001 (27 October 2001), available at <http://www.minjus.gob.pe/normatividad/decretos/ds001-2002-jus.pdf>.

13 Peru's Justice Minister Alejandro Tudela was reported as saying that lawyers would be paid from the Special Trust for the Management of Money Obtained Illegally (FEDADOI), which collects and administers illicit funds. Source: 'Fujimori Extradition to Cost Peru 400,000 Dollars',

reparations to the victims of misrule during the Fujimori-Montesinos rule. Notwithstanding the necessity of reparations, individual payments competed with other urgent programmes, were quite costly, subject to political manipulation, and also controversial (ICTJ and APRODEH 2002). Approximately USD 8.2 million is reported to have been allocated to the judiciary in support of investment in information technology and infrastructure (the installation of local area networks (LAN) on court buildings, a nation-wide data and voice network, and database licenses (both servers and user licenses)) (The World Bank 2004: 24). Besides these few facts, very little information is available about how effective the fund has been.

2.3. The case of Ferdinand Marcos in the Philippines

Ferdinand Marcos served as president of the Philippines from 1965 to 1986. He was removed from power by the ‘people power revolution’ on allegations of corruption. It is estimated that Marcos and members of his family siphoned off between USD 5 billion and USD 10 billion from government contracts (The World Bank 2007). Like Sani Abacha of Nigeria, Marcos and members of his family accumulated wealth through six channels: the takeover of large private enterprises, the creation of state-owned monopolies in important sectors of the economy, the awarding of government loans to private individuals acting as fronts or his cronies, the raiding of the public treasury and government financial institutions, the receipt of kickbacks and commissions from firms working in the Philippines, and the diversion of foreign aid and other forms of international assistance (The World Bank 2007). The proceeds were laundered through shell corporations, which invested the money in real estate in the United States, or by depositing the funds in various domestic and offshore banks under pseudonyms, and in unnumbered accounts or accounts with code names (The World Bank 2007). The amount hidden and frozen in Switzerland at the time Marcos left office was USD 356 million (Salvioni 2008).

In February 2004, after a long legal process, the Philippines received USD 624 million (USD 365 million dollar frozen plus interest accumulated at the time of transfer) in Marcos funds from the Government of Switzerland. The monies were remitted to the Philippines’ Treasury (The World Bank 2007). While the funds were in the escrow account in the Philippine National Bank, the Swiss authorities, through the Zurich cantonal attorney, oversaw the choice of investments that could be made from the account (Freeman 2004). The funds were later transferred to an off-budget fund known as the ‘Agrarian Reform Fund’, meant for land acquisition and distribution (LAD) and support services. A number of transactions involving the fund have been questionable. In October 2006, the Commission on Audit reported that a significant portion of the Marcos funds had been used to finance excessive and unnecessary expenses that were unlikely to benefit the intended beneficiaries of the agrarian reform. Some of the money was also spent on items unrelated to priority projects, while other amounts were spent on procuring items at inflated prices (The World Bank 2007).

Allegations of mismanagement have been made in relation to a number of transactions. The Department of Land Reform (DLR) reportedly appropriated about USD 57 million (P2.7 billion) to pay the cash advances to the Land Bank of the Philippines (LBP) and USD 46.5 million (P2.2 billion) for office operations of the comprehensive agrarian reform programme (CARP) implementing agencies.¹⁴ Further, USD 10.4 million (P494 million) was withdrawn on the request of the Department of

People’s Daily Online, 12 November 2005, available at http://english.people.com.cn/200511/12/eng20051112_220720.html.

¹⁴ House of Representatives (Philippines), ‘Full Accounting of Recovered Marcos Money Sought’, The Committee of Oversight of September 5, 2005, Vol. 13, No. 69, available at http://www.congress.gov.ph/committees/commnews/commnews_det.php?newsid=420.

Agriculture to support a hybrid rice programme, ostensibly because the majority of the farmers participating in the hybrid rice technology were also beneficiaries of the agrarian reform. The USD 10.4 million (P494 million) was spent on 217,000 bags of hybrid rice distributed to different regions in the country. However, the director of agriculture could not give a definite number of agrarian reform beneficiaries who received such assistance. Another questionable expenditure was that the cost of the survey of land at USD 33.8 million (P1.6 billion) exceeded the cost of land acquisition at an amount of USD 21.1 million (P1 billion).¹⁵ It surfaced that Marcos' recovered ill-gotten wealth was mixed with monies in the General Fund, making it difficult to render a full account of it. Further, in March 2006 the press release from the Senate President of the Philippines alluded to massive corruption in the acquisition of liquid fertiliser for the farmers using the repatriated Marcos funds, which seemed to have been perpetrated by staff at the department of agriculture (DA) and some lawmakers sometime between 2004 and 2006. The press release read in part:

‘The fertilizer scam and the plunder of the Marcos funds is not a fight between the Senate and the House of Representatives. It is not even a fight at all. What we need is a clear and credible explanation on where these funds went, did the agrarian reform beneficiaries benefit from it? Or only one person benefited from it?’¹⁶

Moreover the Swiss Court’s decision¹⁷ related to the Marcos case required that one third of the returned monies should be distributed to the thousands of Philippinos who have suffered during the martial law system as victims of human rights violations committed by the security forces of the dictator (persons who were detained, tortured, summarily executed or who have disappeared). The Philippines’ authorities had promised to inform the Swiss authorities about the status of the victim’s compensation procedure. So far, they have neither compensated the victims, nor taken any action as to the allocation of the money.¹⁸ The requirement remains therefore unfulfilled.

A bill (Law on Compensation to victims of Human Rights Violations during Marcos Regime) was drafted in 2003 but was never implemented. In late 2007, members of the Congress discussed the issue on several occasions. The bill passed by the Senate sets right holders and request the creation of an Ad Hoc Committee and the compensation of victims, at the latest within two years following the entry into force of the law. Since then, the passage of the law by the Chamber of Deputies has been pending.

This bill is also consistent with the Philippines’ commitments under the International Covenant on Civil and Political Rights, and the Convention against Torture, among others, to respect the rights guaranteed therein and to redress violations committed by its agents.¹⁹

2.4. The case of the Bota Foundation in Kazakhstan

A 1999 case involving a US citizen investigated under the US Foreign Corrupt Practices Act uncovered corrupt payments to Kazakh officials amounting to USD 84

¹⁵ House of Representatives (Philippines), ‘Full Accounting of Recovered Marcos Money Sought’, The Committee of Oversight of the September 5, 2005, Vol. 13, No. 69, available at http://www.congress.gov.ph/committees/commnews/commnews_det.php?newsid=420.

¹⁶ Press Release by the Philippine Senate President and Liberal Party head Franklin M. Drilon titled ‘Drilon Surprised over Nograles Reaction on COA Report’ (28 March 2006), available at http://www.senate.gov.ph/press_release/2006/0328_drilon1.asp.

¹⁷ ATF 123 II 595, cons. 7 c.

¹⁸ available at http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch_id=20083880.

¹⁹ available at http://www.akbayan.org/index.php?option=com_content&view=article&id=205:marcos-victims-compensation-bill-hb922&catid=15:bills&Itemid=100.

million paid into Swiss bank.²⁰ The details of the case correspond with US investigations of James H. Giffen, a New York banker indicted in 2003 on charges of making more than USD 78 million in unlawful payments to two senior Kazakh officials. Giffen allegedly made the payments in the 1990s on behalf of US petroleum companies, including Mobil Oil Corp, to obtain concessions to exploit oil resources. The BOTA ('young camel' in Kazak) is an independent not-for-profit foundation established in May 2008²¹ following a 2007 trilateral agreement between the governments of the Republic of Kazakhstan, the United States of America and the Swiss Confederation to channel the funds into projects that benefit disadvantaged children in Kazakhstan. With funds expected to be released in June 2009, the Foundation planned to begin its child welfare programmes in September 2009. It is to draw initially on the USD 84 million in recovered funds and to work towards mobilising additional funds from individuals, corporations and governments.²²

The board of trustees of BOTA Foundation has seven members: five local Kazakh citizens and one representative each from the governments of the US and Switzerland (the US ambassador in Kazakhstan and Pietro Veglio respectively).²³ The five local Kazakh Board members have been nominated and vetted by the governments, and their services are not salaried. They receive 'reasonable costs of reimbursement for expenditures incurred in connection with the carrying out of their functions'.²⁴ The BOTA Foundation intends to spend 85 percent of its funding on direct programme expenses including a conditional cash transfer, social services, and tuition assistance programme.²⁵ The Conditional Cash Transfers Program will encourage and enable poor households to access services that may improve child development and welfare by promoting increased access to knowledge and improved practices in the areas of maternal and child health, pre-primary school attendance and increased home-based care of children with disabilities. The Social Services Program will seek to provide grants and technical assistance to community-based groups and non-governmental welfare service providers. The Tuition Assistance Program will provide post-secondary education scholarships to young people who would otherwise lack the resources to carry out their studies. For the 2009-2010 academic year, up to 100 students will be selected, thereby increasing interest and opportunities for enrolment of youth from poor and vulnerable families in the post-secondary education scheme.

There has been criticism of some aspects of the initiative. First of all, discussions leading to the establishment of the BOTA Foundation were conducted in a bureaucratic and intransparent style and with minimal and selective involvement of Kazakh civil society. However, one has to consider that the restitution process was complex and politically sensitive. The governments of the US and Switzerland wanted to make sure from the outset that the restituted funds would be used by the BOTA Foundation according to the objectives of the trilateral Agreement in a fully transparent and accountable way, without any interference by the Kazakh government. Secondly, the trilateral agreement tolerates impunity on the part of Kazakh officials implicated in the alleged corruption and who are no longer liable to investigation and prosecution. Thirdly, the Kazakh board members have been hand-picked as the governments of the US and Switzerland wanted to select five Kazakh citizens who

20 Alima Bissenova in an article titled 'Swiss to Hand Over USD 84 Million in Blocked Assets to Kazakhstan', Ref., available at <http://www.cacianalyst.org/?q=taxonomy/term/4&page=5>.

21 IREX 'The BOTA Foundation', available at <http://irex.org/programs/bota/index.asp>.

22 available at <http://botafoundation.org.kz/index.html?id=68>.

23 Stefan Howald, 'Money from Corrupt Deals for Kazakh Children', *Finanzplatz Informationen* 3/2008, available at http://www.aktionfinanzplatz.ch/pdf/en/AFP_Kazakh_0908.pdf. Also reported in The World Bank's News Release No. 2008/07/KZ (Kazakhstan BOTA Foundation Established), available at http://siteresources.worldbank.org/INTKAZAKHSTAN/News%20and%20Events/21790077/Bota_Establishment_June08_eng.pdf.

24 available at <http://botafoundation.org.kz/index.html?id=68>.

25 IREX 'The BOTA Foundation', available at <http://irex.org/programs/bota/index.asp>.

were really independent from any government interference and not subject to undue pressure. Further, there are flaws in terms of how to assess the implementation of the aims of the BOTA Foundation by NGOs that are part of a professionalised service industry.²⁶ The BOTA Foundation was mandated to competitively hire a reputable international organisation to provide initial management, as well as technical design and delivery of the programmes. However, making the BOTA Foundation fully operational was a demanding task. In October 2008, under the supervision of the World Bank, the Board of Trustees selected the International Research & Exchanges Board (IREX) to manage the foundation for the first four years, while Save the Children acts as a subcontracting consultant.²⁷ IREX and Save the Children international staff include six international specialists, who will normally be replaced by Kazakh specialists over the next four years. In the meantime the consortium ITEX/Save the Children has started implementing the BOTA Programme. Preliminary results of some of the initiated activities can be expected in 2010.

3. Discussion: lessons from the cases

Asset recovery is a vital means of fighting corruption and promoting development in developing countries. As shown by increased allocations in the pro-poor sectors in Nigeria following the repatriation of USD 505 million Abacha loot from Switzerland, the fight against corruption and the fight against poverty are complementary. However, using recovered assets to fund anti-poverty projects, and to promote development requires better oversight mechanisms. Where there are no such mechanisms, as was the case in repatriation of the Montesinos loot to Peru and the case of Marcos in the Philippines, recovered assets end up financing activities that are not pro-poor or may be corruptly repossessed by those entrusted with the management of such funds. Having oversight mechanisms is not the end in itself. There is a need for continuous monitoring as illustrated by the implementation of projects using the Abacha loot and by the allegations of corruption in the case of the Agrarian Reform Funds in the Philippines. Appropriation of the Abacha loot in the national budget and the Marcos funds in the general fund for agrarian reform created difficulties in following up the flow of funds and in building commitment to careful utilisation by government field staff and the public. The actual implementation of the projects was also affected by problems of inefficiency, lack of good faith and corruption (cf. Ugolor et al. 2006). By implication, the lack of effective follow up mechanisms at all levels, especially at the level of implementation of development projects, is as bad as having no mechanism at the level of disbursement of resources.

Consensus is emerging that corruption erodes economic development while recovery of money and assets of illicit origin and repatriation to the countries of origin promotes development (Turner 2004). The total amount of public money embezzled by Abacha, Montesinos and Marcos is far greater than what the governments concerned were able to recoup. In the case of Abacha, the estimated amount of money stolen stands at between USD 3 and USD 5 billion but so far only about USD 1.2 billion of the funds frozen in foreign jurisdictions have actually been repatriated (UNCAC-Team 2007). Large amounts of money remain frozen in other countries, of which close to USD 1.3 billion was presumably held in Luxembourg and Liechtenstein as of 2007 (UNCAC-Team 2007). The same situation applies in the case of funds stolen by the Marcos family. Once the hurdles to recovering these funds have been overcome, the greatest

26 Stefan Howald, ‘Money from Corrupt Deals for Kazakh Children’, *Finanzplatz Informationen* 3/2008, available at http://www.aktionfinanzplatz.ch/pdf/en/AFP_Kazakh_0908.pdf.

27 available at <http://botafoundation.org.kz/index.html?id=68>.

challenge is to ensure that they are used properly and efficiently (Lugon-Moulin 2008) towards achieving national and international development targets, for example, the Millennium Development Goals (MDGs) (Veglio and Siegenthaler 2008). Within developing countries, the process of recovering proceeds of corruption is often complicated by the immunity of politicians and officials from prosecution in corruption-related offences (Turner 2004). For developed countries that serve as financial centres for stolen money, the challenge is to meet legal standards before stolen funds could be repatriated. It took Nigeria and Peru close to five years to achieve positive results in terms of monies repatriated, while the Philippines had to wait almost 20 years. These facts point to the need for improvements in systems to identify assets that have been acquired illicitly, to facilitate the authorities' power to freeze and confiscate such assets, and to create instruments to facilitate repatriation to the countries from which such assets were looted. The United Nations Convention against Corruption (UNCAC) mentioned earlier in this paper is one of the instruments meeting this need.

If the quality of life of people in developing countries is to improve, repatriated funds should not be misused a second time, but spent on poverty alleviation. Drawing from World Bank (2007:29) report on recovering stolen assets, basic principles that need to be followed in managing repatriated resources include:

- Public recording of receipt of the asset (amount, value, date of receipt, and date of availability for use) and safeguarding of those assets once received
- Public declaration of intended use of the asset (specific uses, amounts, time period of availability, entity responsible for executing the activity and expending the asset and accountable for results) through the approved budget
- Public or official reporting of actual expenditures (amount, object of expenditure, and date) and results achieved
- Timely auditing of financial statements and results to verify the accuracy of reporting, to identify weaknesses, and to assure that appropriate processes were followed (procurement, hiring, accounting, etc.)
- Official response to material weaknesses identified in audit findings, specifying the corrective actions to be taken and actually taken

These suggestions are corroborated by Veglio and Siegenthaler (2008) in their contribution on recovering stolen assets. They suggest that the ideal arrangement for efficient utilisation of repatriated funds is for the recipient governments to spend money on a limited number of visible programmes or projects, introduce special tracking arrangements (budget codes), keep proper records on the utilisation of recovered money, allow for the participation of third parties in following up on spending as was the case with the civil society organisations (CSOs) in the Abacha Loot case in Nigeria, and also making the results of the entire process public. Notably, CSOs in Nigeria worked in partnership with their counterparts in Switzerland to campaign for speedy repatriation of looted funds, and played an oversight role in the utilisation of funds repatriated to Nigeria (Okonjo-Iweala and Osafo-Kwaako 2008). The Marcos case and allegations of corrupt practices in the management of the Agrarian Fund suggest that elected bodies, such as the house of representative and the senate, play an important role in overseeing the activities of government departments and agencies charged with the disbursement of recovered assets. The same applies in the Montesinos' case, though the circumstances are different.

The case of the BOTA Foundation in Kazakhstan illustrates that channelling recovered stolen assets to developing countries through independent foundations is an

experiment whose merits might shape future efforts towards managing proceeds of corruption. It is however too early to draw conclusions as to which of the models – channelling funds through the treasury of the recipient country or channelling funds via an independent body – is likely to deliver the best results in terms of development outcomes and governance indicators. In the end, this also depends on country circumstances. For example, in a country like Brazil it would make sense to allocate restituted money to the National Conditional Cash Transfer Program, instead of artificially creating a social programme and a foreign tracking system. But in countries where governance and public institutions are weak and corruption is rampant it is generally better to design a specific programme through a so-called ring-fenced approach. However, the fact that restitution via independent bodies and proper tracking systems is expensive needs to be taken into consideration.

4. Conclusions

While there are several cases of attempts to recover stolen funds, there are few cases of successful repatriation, and even fewer that demonstrate that repatriated assets are eventually used for the benefit of the victims of corruption, generally the poor. Successful implementation of any asset recovery initiative implies that involved countries accept the principles of restitution. Countries and territories with significant financial centers should take, as a matter of urgency, all necessary legal and administrative measures to repatriate illicitly acquired state funds and assets. In recipient countries, accounting for recovered assets appears to be difficult because of problems associated with adhering to sound practices in public financial management, but also because resources are fungible. Foreign insistence on tracking systems is often perceived as intrusive (The World Bank 2007). The recipient government has to be convinced that a proper restitution process is in its best interest. Since the United Nations Convention on Corruption (UNCAC) states that governments should restitute money without conditionality, any agreement on this would be a voluntary agreement. The ideal situation is one in which governments receiving stolen funds have effective accounting mechanisms for all budgeted activities. In other words, there is need for a system of checks and balances (both internal and external to a given country) and also accountability and transparency in the way governments implement development projects and provides services and public goods regardless of the source of the funds. The responsibility, as enormous and as technical as it might be, could be enhanced by the mobilisation of different stakeholders within government (executive), the NGO community, elected national and regional assemblies and the people at the grassroots, who are in many cases the beneficiaries of projects financed by recovered assets.

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