

What's Yours Is Mine

New Actors and New Approaches to Asset Recovery in Global Corruption Cases

Andrew Marshall

Abstract

This study is about recovering money stolen by corrupt politicians and officials. Asset recovery is a key element in deterring and punishing the corrupt, and the reduction of corruption is critical to development. The money can be put to better uses once recovered, and it amounts to billions.

But there's another reason why this is significant for those who are primarily focused on development: among the key issues in asset recovery are greater accountability and transparency, which are also increasingly regarded as key to long-term development success.

The main argument of this study is that corruption investigations and asset recovery are being tackled in new ways by new actors from the private sector, civil society, and media, and that this can help improve the prospects for justice. It would be too much to call this a revolution: it's an evolutionary process. It needs long-term support if it is to prosper as a policy choice, and it raises some issues for policymakers and those who carry out the recoveries. But if the agenda for accountability is to advance at the same pace as transparency, the prosecution of the corrupt and the return of the money they stole is critical.

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The paper draws heavily on the work of several organizations that have defined and mapped this field very thoroughly already: The Stolen Asset Recovery Initiative of the World Bank and UNODC; Transparency International; Global Witness; and the International Centre for Asset Recovery (ICAR) at the Basel Institute on Governance. I am responsible, though, for any errors, omissions or misunderstandings.

Contents

Preface.....	ii
Introduction	1
Why stolen asset recovery matters.....	4
Why corruption became a “problem”	4
Why recovery is an issue.....	5
Why tackling recovery is tough.....	6
Box 2: The Stolen Asset Recovery Procedure	8
Follow the rules: Legal, technical and procedural problems	9
Making the rules work: Removing the barriers	9
Going around the rules: Private action and alternative approaches.....	12
Going above the rules: Transnational approaches and the ICC	14
Conclusion	15
Follow the money: Why people rob banks.	16
In the Money: Offshore Finance and Bank Secrecy	16
Behind the Money: Due Diligence.....	17
On the Money: Media, Information, and the Future.....	19
Conclusion	22
Follow the leader: The problem of politics.....	24
Leadership from above.....	24
Leadership from below	26
Leadership from outside.....	27
Conclusions.....	30
Conclusion and Recommendations.....	31
1. Build on new approaches to recovering stolen loot.....	32
2. Fix the problems with global financial intelligence.....	32
3. Get tougher with corrupt politicians and countries that won’t co-operate.....	33
4. Build global support for recovering the proceeds of corruption.....	33
Works Cited.....	35

Preface

Assets recovery is not normally thought of as a development issue. However, assets stashed abroad by corrupt government officials deprive developing countries of valuable capital that could otherwise be invested at home. Moreover, their recovery is difficult, and can get mired in decade-long international legal processes. Finding ways of improving asset recovery can thus both help deter future corruption (for instance, greater transparency and international coordination could make it more difficult for corrupt officials to hide assets abroad) as well as speedup the return of stolen assets to legitimate governments—often the governments of countries that can least spare them.

In this paper commissioned by CGD, Andrew Marshall, a former journalist and former Managing Director at the global private investigative firm Kroll, brings a practitioner's experience to the issue of asset recovery. Marshall argues that while progress has been made in the past two decades, the issue is so complex and multifaceted that any real impact will require action by a coalition of actors. Marshall's insightful analysis and concrete recommendations are particularly timely given the ongoing efforts of post-Arab spring countries and western governments to recover assets lost over decades of misrule.

Todd Moss
Center for Global Development

Introduction

This study is about recovering money stolen by corrupt politicians and officials. Asset recovery is a key element in deterring and punishing the corrupt, and the reduction of corruption is critical to development. The money can be put to better uses once recovered, and it amounts to billions.

But there's another reason why this is significant for those who are primarily focused on development: amongst the key issues in asset recovery are greater accountability and transparency, which are also increasingly regarded as key to long-term development success.

The main argument of this study is that corruption investigations and asset recovery are being tackled in new ways by new actors from the private sector, civil society and media, and that this can help improve the prospects for justice. It would be too much to call this a revolution: it's an evolutionary process. It needs long-term support if it is to prosper as a policy choice, and it raises some issues for policymakers and those who carry out the recoveries. But if the agenda for accountability is to advance at the same pace as transparency, the prosecution of the corrupt and the return of the money they stole is critical.

The main recommendations of this study for policy makers are:

Build on new approaches to recovering stolen loot: Donors should explore new ways of helping start, fund and staff asset recoveries, using capabilities from other governments or the private sector. The U.S. Department of Justice should explore new targets for its Kleptocracy Initiative. Media, civil society, NGOs and victim groups have new roles to play.

Fix the problems with global financial intelligence: It is too easy for corrupt politicians to hide money, and too hard for investigators to find it. The U.S. and U.K. need to fix the due diligence process, and work with banks and others to make the global financial information system function better.

Get tougher with corrupt politicians and countries that won't co-operate: Pursuing corrupt politicians is important. Refusing visas to the corrupt and their enablers should be encouraged – and publicized. Development and policy officials need to get more comfortable with punishment and recovery.

Build greater global support for recovering the proceeds of corruption: The U.S. and U.K. Governments should build support for asset recovery at home, and find allies in emerging financial and political powers abroad: financial integrity and transparency need a broader underpinning.

A lot of excellent policy work has already been done in this area. Notably, the World Bank and the United Nations Office on Drugs and Crime have an initiative called Stolen Assets Recovery Initiative (StAR¹). This study quotes from its work: StAR's work has been groundbreaking. It also relies on the work of three NGOs: Transparency International, Global Witness and the International Center for Asset Recovery at the Basel Institute on Governance. Individual countries have also come up with new strategies, with the U.S. in particular playing a leading role. The UK, too, has developed new thinking, as has Switzerland – both states where stolen assets have been laundered and hidden.

What new can be said? Previous analyses have primarily focused on one critical actor – government – and one critical area – rules and laws. The author's background is in media, and in an investigative company. Because of my experience, I want to focus on:

- The emerging global information system around banks, financial institutions and intermediaries, and the risk, compliance and investigations industry
- Media, and their role in identifying and punishing corruption.
- NGOs, and their prospects for a more prominent role.

The first section looks at the rationale and role of asset recovery: why it has become a significant issue.

The core argument that has been made in the last twenty years is about the importance of the legal and procedural issues that have bedeviled the best known cases (the Duvaliers, for example) and the second section of the study deals with these.

But there are other areas that are increasingly receiving attention. Another central issue is the investigative process: following the money. While it is too much to expect to *remove* the obstacles that exist to financial investigation, it is possible to apply existing rules better, and to develop new approaches. The third section looks at this.

Most studies indicate that there is nothing that can be done without political commitment to prosecute, investigate, seize and return money. Leadership does not come from politicians only: civil society and the media play significant roles, and external attitudes are pivotal. The fourth section deals with these.

The fifth section wraps up the discussion with some conclusions and recommendations. What can be observed about progress in developing asset recovery, and what can be said about future steps?

A key theme is that asset recovery needs to move out of the shadows, with investigators and prosecutors making new alliances, and development and policy professionals accepting the importance of the recovery agenda, enforcement and the accountability it involves. The recovery of assets, and investigations – in the media or public sector – deserve more attention and more funding.

¹ http://www1.worldbank.org/finance/star_site/about-us.html

The results of co-operation in asset recovery can be impressive. Failure can be profoundly morale-sapping. Michela Wrong's excellent book "It's Our Turn To Eat" documents the failure of John Githongo, Kenya's anti-corruption campaigner - despite his strenuous efforts, and the danger he placed himself in.² Her book isn't especially optimistic about tackling corruption; but it is clear-sighted about the reasons for pursuing it. Some of the author's thoughts on the subject came from being involved, peripherally, with the aftermath of Githongo's campaign.

Enormous progress has been made in finding the guilty, prosecuting them, and getting back the money they have stolen. At its root this is because of wide-ranging changes in how the world sees accountability and transparency: for that to continue will require effort and imagination. The broader theme of this paper is advancing that agenda, in the longer term.

² (Wrong, 2010) pp 317-332

Why stolen asset recovery matters

On the 17 December 2010, a Tunisian street vendor called Mohammed Bouazizi set himself on fire, precipitating demonstrations that would spread across the Middle East. Within days, President Zine El Abidine Ben Ali was removed from power. Within weeks, Egyptian President Hosni Mubarak would follow, and within months, Libyan President Muammar Gaddafi.

More than two years later, officials from the different countries are still fighting to get back money stolen by these officials and their friends and families. A house in London; executive jets; stakes in leading Italian companies have all been the subject of litigation. The good news is that the efforts got started promptly with some signal successes. This is by now a process that banks and governments understand well. The G8 put asset recovery as one of the main goals of transition, and its codification into 2012's Action Plan on Asset Recovery³ showed real commitment, marked by the Arab Forum on Asset Recovery held in Doha. The bad news: remarkably little has yet been settled, despite the time and effort and money involved. There are recriminations and accusations between the countries that have lost money and those where it may have ended up, and a lot of frustration.

“Beyond shedding light on the devastating impact of grand corruption, the Arab spring has revealed major anti-money laundering deficiencies, and the huge difficulties of getting the money back even after the dictator has been pushed from power,” said one group of NGOs working on the issue.⁴

Why corruption became a “problem”

It was only in the late twentieth century that corruption abroad, rather than at home, became an issue. The U.S. first made international corruption into a political issue in the 1970s, with the Foreign Corrupt Practices Act, a landmark piece of legislation. Other countries took decades to follow (in some cases, they still haven't) with legislation outlawing bribery abroad. Pressure from U.S. companies concerned that they alone would be penalized for bribery has helped to propel the agenda. But wider shifts helped.

One key is the end of the Cold War. Dictators who had hitherto been regarded as “regional strongmen” rapidly became regarded as what they were: simply corrupt dictators. At the same time, the rapid spread of capitalism created new opportunities for corruption, and new concerns about it. NGOs, especially Transparency International which was founded in 1993 by a former World Bank official, made exposing and punishing corruption their cause.

There was a normative shift in the 1990s: corruption was not an inevitable evil, like bad weather. It was something to outlaw and punish. This took international legal form. “The

³ (Deauville Partnership with Arab Countries in Transition -- Action Plan on Asset Recovery, 2012)

⁴ (UNCAC Coalition, 2011)

1997 OECD Convention marked the beginning of an international movement based on the premise that we all have a stake in the integrity of the global marketplace that deserves the protection of law,” writes one academic.⁵

An agenda, policy recommendations, and action have followed, including the landmark United Nations Convention against Corruption (UNCAC). The G20 countries have also committed themselves to recovering the proceeds of corruption, and at their 2010 summit passed a surprisingly ambitious anti-corruption plan. Aid agencies have built anti-corruption into their policies, including references in the Accra Agenda for Action.

Why recovery is an issue

Recovery of stolen assets has taken its place as one of the pillars of anti-corruption action.

Why? “Three incentives drive the asset recovery agenda: a resource mobilization incentive; a law enforcement incentive; and moral and reputational considerations, which encompass both the belief that it is wrong for corrupt officials to benefit from stolen loot and the concern that the reputations of those who fail to act will be tarnished,” says the Stolen Asset Recovery Initiative. “Similar incentives drive public policy on the proceeds of crime. There are parallels between these agendas, not least because efforts to tackle the proceeds of corruption use the institutional and legal framework established for broader law enforcement purposes.”⁶

It is not just that a problem (corruption) has been recognized, but also a solution (legal action to freeze and recover the proceeds). In the 1980s, it became more common to use asset forfeiture against criminals, going against the economic basis of criminality and in particular drug trafficking. Controls on money laundering were stepped up. In the same way, the tightening of the rules after 9/11 affected the way that countries and governments went after the corrupt. The fight against corruption has become part of a broader effort to establish rules and definitions for dealing with international and transnational criminality in a context of globalization and concern about its risks.

The first landmark in the recovery of assets, the case of former Philippine President Ferdinand E. Marcos precedes the end of the Cold War, in 1986.⁷ The task was tough, but some valuable precedents were laid down. Since then, there have been dozens of cases, with more or less success: Haiti and the Duvaliers, the second major case, came soon after, and it continues to this day. Other, more successful cases came in the 2000s, including Nigeria and Sani Abacha, and Vlademiro Montesinos in Peru.

⁵ (Carrington, 2010)

⁶ (World Bank and UNODC, 2009)

⁷ (World Bank and UNODC)

Increasingly the work has been codified. In 2007 the World Bank with the United Nations Office on Drugs and Crime launched the Stolen Asset Recovery (StAR) Initiative, “an initiative to help developing countries recover assets stolen by corrupt leaders, help invest them in effective development programs and combat safe havens internationally.” It was a bold and interesting move, putting ideas, people, money and action behind the concept, and combining a development and financial institution with one focused on criminality and law enforcement. The project aimed to build institutional capacity in developing countries, strengthen the integrity of financial markets, assist asset recovery, and monitor the use of recovered assets.

Yet the record of successes is less than might be expected. In the first case, the record has been poor. “Marcos and associates made off with an estimated \$5-\$10 billion through a variety of corrupt schemes,” notes the Bank. “To date, the Philippines has managed to recover about US\$684 million from foreign jurisdictions.” Early in 2013, it looked likely that the search would finally sputter out, as lawmakers in the Philippines proposed disbanding the Presidential Commission on Good Government, the asset-recovery program launched in 1987. The cost and returns were not matching up.

“There remains a huge gap between the results achieved and the estimated billions of dollars that are stolen from developing countries,” says StAR. “A total of \$1.225 billion assets were frozen between 2006 and 2009 and \$277 million assets were returned to the country of origin. These amounts are only a tiny fraction of the estimated \$20 billion to \$40 billion that are stolen annually from developing countries and hidden in financial centers.”⁸

Why tackling recovery is tough

After the Arab Spring, there were promises that asset recovery would be a priority. But two years later, the Egyptian government complained that too little had been done by the British government. Assem al-Gohary, head of Egypt's Illicit Gains Authority, told the BBC: “The British government is obliged by law to help us. But it doesn't want to make any effort at all to recover the money. It just says: ‘Give us evidence’. Is this reasonable? We are in Egypt, looking for money in the UK.”⁹ There were accusations that Britain had allowed former officials and their cronies to keep millions of pounds of property and business assets in the UK, because “ministers are more interested in preserving the City of London's cozy relationship with the Arab financial sector than in securing justice.”¹⁰

A British minister retorted in the politest possible way that rules are rules. “It will take time to achieve the results we all want. Asset recovery requires painstaking work and we must ensure proper judicial processes are followed,” wrote Jeremy Browne, the UK's Minister of

⁸ (OECD and The World Bank, 2011)

⁹ (Whewell, 2012)

¹⁰ (Shenker, 2012)

State for Crime Prevention, in Al-Ahram. “Whilst there is a moral imperative for this work to be carried out swiftly, it should not be at the cost of depriving individuals of their rights.”

Most international co-operation is hard if it is worth anything. But in its complexities, legal and financial niceties, and adversarial nature, asset recovery presents problems that tax the brain and sap the spirit. An asset recovery is like engaging in a knife fight while conducting a divorce case by telex, in Latin. It requires brains, patience and aggression. Finding those with the required skills is not easy. “Few countries have expertise in this area and governments tend not to prioritise it, whether on the requesting or requested side.”¹¹ It is a specialist area, or more accurately several specialist areas.

The processes can be described as: Instigation, tracing, freezing, confiscation or forfeiture, and return.

The **legal—procedural** obstacles are usually primary. Asset recovery involves working across borders, between governments, which is tough at the best of times.

There are reasons why it is hard to find and seize someone’s assets: individuals have rights and amongst them, in most societies, are rights to privacy, due process, protection of private property and equal and fair treatment under the law.¹² This applies to ex-dictators too. It may even apply more, since international law reserves certain prerogatives to states and their representatives. It is no small matter to abandon these: most people don’t believe that an individual should have their bank accounts taken by the U.S. government on arbitrary grounds, or just because it has taken a dislike to a foreign politician.

The second set of obstacles is **informational and financial**. Investigators are trying to find money that has been deliberately concealed by a disciplined, well-funded, well-informed individual with access to state power, global banks and smart lawyers. And money can be moved very rapidly.

There are other layers of difficulty that are primarily **political**. In many cases, the pursuing government will lack the capability to investigate. In the case of Libya, for example, the state had almost vanished. Even had it not, the Libyan government had not built capabilities to chase funds stolen by its rulers. And in cases where anti-corruption efforts have been pursued subsequent governments have not always been supportive. In the countries where assets have been transferred, there will also be politics.

¹¹ (World Bank, 2011)

¹² See the discussion in (Attisso, 2010) and (International Council on Human Rights Policy (ICHRP), 2010)

Box 2: The Stolen Asset Recovery Procedure

Instigation:
Start the process

- The case may start with the changing of a regime, peacefully or otherwise, a criminal prosecution, whistleblower allegations, or media claims.

Tracing:
Where are the assets?

- Investigators trace assets via documents, electronic data, informants, accounting, and information from banks and governments. Some may be available locally or via open sources; much will require help from overseas governments. It is important that this be done discreetly and fast.

Freezing:
Stop assets from moving.

- Once the assets have been located, they must be frozen in place by a prosecutor, magistrate or judge. Different jurisdictions have different rules. Again, it will be critical to maintain confidentiality until the freeze is in place, and to gain co-operation with other governments.

Confiscation/forfeiture:
Take the assets

- The assets must now be taken through a confiscation or seizure order. There are different routes depending on jurisdiction and circumstances, including criminal or civil proceedings. Again, requires working with other jurisdictions to get orders and to enforce them.

Repatriation:
Bring back the assets

- Assets must be transferred back to where they came from. This raises a number of issues, like costs to other jurisdictions, compensating those who may have lost out in other ways, and ensuring that the proceeds go to the right place (and do not get embezzled again).

Follow the rules: Legal, technical and procedural problems

The toughest, most detailed and least glamorous part of the work that has been done to ease recovery of stolen assets concerns the removal or easing of legal and procedural barriers.

Making the rules work: Removing the barriers

It's hard for countries to work together. They have different legal systems, police forces, governments, political processes and histories, embedded in different sovereignties (and conceptions of sovereignty). There are processes for requesting help from other countries – Mutual Legal Assistance requests, for example – and the strengths and weaknesses of this government-to-government system account for many of the issues. StAR's landmark study *Removing the Barriers to Recovery*¹³ lists a series of steps to make things easier using official channels, the most established way of proceeding. Most of the barriers identified are in the categories of legal, technical and procedural:

Asking for assistance: MLAs can be large, complex and hard to understand or execute. Some countries may require information that is hard to find, or have very detailed procedures, and a request may seem too vague. It's important to be flexible, but the word "legal" is there for a reason.

Managing assistance: Simply managing the MLA process can be bureaucratic, slow and frustrating – getting confirmation, responses, addresses and names, processes, timelines, clarity on jurisdiction.

Co-coordinating domestically: MLAs, information and co-operation requests are complex to co-ordinate domestically, and can receive less attention than local matters.

MLATs: A Mutual Legal Assistance Treaty is the basis for legal co-operation. Not every jurisdiction has such agreements with every other jurisdiction, some are old, and some don't reflect the realities of international asset recovery.

Refusal of MLA: it is too easy for a country to simply refuse an MLA with little response, or a bland reference to "economic interests".

Informal assistance: in many cases, co-operation will be speedier and more effective if done informally, without an MLA – but through a structured process. Contacting witnesses, temporary freezes, provision of public records can all be done in this way.

Statutes of limitation: many corruption cases go back years. Officials may also remain in office to wait out the limitation. There are ways round this (changing laws, or using alternative offences).

¹³ (Kevin Stephenson, Larissa Gray, Ric Power, 2011)

Legal co-ordination: Prosecutors may wish to reach a plea agreement – but that may have big implications for other jurisdictions and cases.

Dual criminality: some extradition laws require that the offence on which an individual is being extradited should be an offence in both countries.

Confidentiality: in some countries, if a financial institution sends information on a customer, it has to notify them. In an asset search, this gives a well-resourced criminal time to shift cash and disappear.

Immunity: In some cases an individual is immune from prosecution because of holding office. Some countries may also extend immunities to foreign officials.

Moving quickly: Sometimes, an expedited procedure is needed on information, assets or people. It is useful to be able to make temporary freezes without an MLA when time is tight.

Non-conviction based confiscation: This allows for confiscation of assets even where the asset holder has not been convicted, but some countries do not permit it. This can be a problem if the corrupt leader is “dead, a fugitive, absent, immune from prosecution.”

Standard of proof: An asset search is a speculative business. Very strict standards may make it practically impossible to get restraint orders – but on the other hand, there needs to be evidence.

Restraint and confiscation: Freezing assets, keeping them frozen and then taking them can be protracted and complex, but the freeze needs to be rapid or money will move. Laws often need to be updated, and to accommodate complex cases. Foreign orders may not be enforceable.

Handling the money at the end: Jurisdictions need legislation for disposing of assets, and selling them promptly, so they hold their value. Who sends money back, and to whom? With what conditions?

To some degree, these issues can be dealt with by gradually changing laws – piecemeal legal reform. To some degree, it requires changes of attitude, which is harder. This classic route – using criminal law, and official machinery – is tough.

One of the biggest and most significant advances has been the use of non-conviction-based civil forfeiture: using civil, not criminal action, and going directly against assets rather than individuals. This avoids problems associated with individuals who haven't been convicted (or are still in office), or where the criminal trial is still under way. “Because it is against the property, an NCB forfeiture action is not dependent on a criminal conviction and may be pursued even if the corrupt official is dead, a fugitive, has been acquitted of a related

criminal offense, is immune from criminal prosecution, or enjoys residual political influence making criminal prosecution not possible,” wrote Linda Samuel, a senior U.S. official.¹⁴

One example of new ways to focus skills, money and co-ordination has come about through the U.K. government’s realignment of anti-corruption strategy in the early 2000s, under the Department for International Development. Making DFID the focus emphasised that corruption was a development issue. “The Department for International Development (DFID) is the U.K. Government lead for UNCAC. It also has a specific interest in preventing U.K. individuals and companies from contributing to corruption overseas, especially in developing countries. It funds the Metropolitan Police's Proceeds of Corruption Unit and the City of London Police's Overseas Anti-Corruption Unit, as well as a small corruption intelligence cell in SOCA and part of the asset recovery work of the Crown Prosecution Service.”¹⁵ The logic behind the move was that without such funding and support, anti-corruption work wouldn’t get the backing it needed.

How successful has this been? While the results aren’t negligible, they are small in the overall scale of grand corruption. There is evidence that the investment has played a useful role in realigning British government efforts, and in particular in tackling cases of corruption in Nigeria.

The US, too, has been coming up with new ideas to make the existing system function better, and investing in resources and institutional capacity. In 2010, Attorney General Eric Holder announced the creation of a new Kleptocracy unit at the Justice Department, focused specifically on this issue. “The unit is housed in the Asset Forfeiture and Money Laundering Section of the department’s Criminal Division and... staffed by five lawyers, Justice Department officials said. The Federal Bureau of Investigation’s Asset Forfeiture and Money Laundering Unit, based in the bureau’s Washington headquarters, has diverted two agents to the effort... They will supplement the work of established anti-corruption groups in U.S. Immigration and Customs Enforcement and the FBI’s Washington field office.”

Switzerland, too, has moved to make the rules work better, through the Restitution of Illicit Assets Act (RIAA), also known as *Lex Duvalier*. “Specifically, the RIAA allows for asset confiscation in situations where the current state of the victim country renders it impossible to conduct a proper exchange procedure via traditional judicial procedures. In these cases, the RIAA would allow a unique “burden shift,” requiring the Swiss government to show that: (1) the funds held in Switzerland by an alleged corrupt official are significantly larger than what someone could have credibly earned in office; and that (2) the country from which the funds originate is known to be corrupt. The burden of proving that the money came from legal sources would then shift to the allegedly corrupt official, rather than the Swiss state.”

¹⁴ http://www.unafei.or.jp/english/pdf/PDF_ThirdGGSeminar/Third_GGSeminar_P3-9.pdf

¹⁵ (Williams, 2011)

Making the existing rule set work better is a valuable goal. There's no doubt that the search for assets of the deposed Arab rulers got off to a swifter start than in most previous transitions. Changes in the rules have had valuable effects in Nigeria, Peru and other asset recoveries, too. But the rules aren't always right for the situations that anti-corruption campaigners and others find themselves in. This has led governments, NGOs and private actors to seek other ways forward that go beyond the classic route, which is so heavily reliant on official channels.

Going around the rules: Private action and alternative approaches.

Government-to-government action isn't the only way of tackling asset recovery. Non-state actors and processes play an important role already, and may play an increasing one in the future. Is it plausible to look to this as one way around the logjam that results from government co-operation and its weakness?

The use of civil litigation, rather than criminal law, has great promise and potential. As one expert writes, "Civil law, allowing for confiscation and recovery based on the balance of probabilities, has a clear advantage, as the evidentiary threshold is not as demanding as it is with criminal actions. This civil standard or burden of proof also means that in civil proceedings, the link between the assets and the criminal acts at their origin needs be established only on the grounds of a balance of probabilities. Finally, civil recovery also opens alternative approaches as far as civil actions against third parties are concerned and for the participation of victims in the action. It also has the advantage of civil recovery in a totally different jurisdiction or even in several jurisdictions at once."¹⁶

Civil cases can be very useful as part of a strategic effort against a large, systematic corruption case that has used specialist means – offshore jurisdictions, trusts and shell companies. Several governments have used civil litigation to pursue stolen assets, as a complement and substitute for criminal approaches.

Using the "classic," government-led route, most evidence and intelligence is generated by government investigators. But that needn't be the case. "Some techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders), but others may not (for example, physical surveillance, information from public sources, and witness interviews),"¹⁷ says StAR. In civil cases, private investigators can seek information in many ways. "Private investigators do not have the powers granted to law enforcement; however, they will be able to use publicly available sources and apply to the court for some civil orders (such as production orders, on-site review of records, pre-filing testimony, or expert reports)."

¹⁶ (Bacarese, 2008)

¹⁷ (Jean-Pierre Brun et al., 2011)

Civil cases often involve expertise from outside government – typically, lawyers, accountants and investigators. This helps address issues of capability. But they are typically expensive, by the standard of government salaries in London and Washington, let alone Cairo and Kinshasa. So their use raises issues of finance and value for money, as well as accountability and management.

Civil processes bring other complex questions. They have been associated with negotiated settlements, where former officials return some of their assets while retaining a portion, as in the Abacha case: this is seen as a trade-off for greater speed, though it is of course highly controversial. The growth of civil litigation is also helping to spur the growth of new financial approaches, again not without complexity. Commercial litigation funding for asset recovery in corruption cases has been explored, and it is intriguing if also full of risk.

Some argue that civil law, and a culture of using it to tackle corruption in cases brought by the private sector, could transform the landscape. “Instead of pushing for criminalization, donors should support civil law remedies against corruption,” argues Bryane Michael, a consultant and academic.¹⁸ As well as laying out an easier path for governments to follow, civil law also opens the possibility that other, non-government parties get involved. “At present, businesses have no incentive to denounce corruption because they gain little by blowing the whistle—and they lose a lot from the loss of favorable relations with government officials. But when businesses can win money from suing for damages from the solicitation of bribery, these businesses have an incentive to denounce corruption.”

As Paul Carrington, Professor of Law at Duke University has written, the U.S. has always mixed private and public actions in the area of corruption. He points to the False Claims Act, which incentivizes “relators” to come to court with cases of fraud against the government.¹⁹

There are other routes for recovery that place more emphasis on the restoration of justice in the countries where bribery takes place. Some analysts have suggested action based on claims that corruption breaches human rights. “A recent publication by the International Council on Human Rights Policy and Transparency International outlines a systematic approach and suggest lines of argument that would support the causal links between corruption and a range of human rights violations,” StAR says.²⁰

There have been cases. In 2007, the Open Society Justice Initiative together with the Spanish human rights organization Asociación pro Derechos Humanos de España (APDHE) and EG Justice, a U.S.-based organization, filed a complaint to the African Commission on Human and Peoples’ Rights, arguing that the diversion of oil wealth by the rulers of

¹⁸ (Michael, 2007)

¹⁹ (Carrington, 2010)

²⁰ (World Bank and UNODC, 2009)

Equatorial Guinea violates the African Charter on Human and Peoples' Rights.²¹ And in France, a similar case has been brought successfully. "The initial complaint in the case, filed by anti-corruption groups Transparency International (TI) and SHERPA [advocacy website], accused the late Omar Bongo of Gabon, Denis Sassou-Nguesso of the Democratic Republic of the Congo (DRC), Teodoro Obiang Nguema of Equatorial Guinea and their relatives of acquiring luxury homes and cars in France with African public funds."²²

All of these processes could lead to new ways of bringing legal action that don't require governments to deal with governments, or don't *only* require this. They could lead to lower burdens of proof and other innovations. They could lead to more cases as new plaintiffs emerge even where governments are unwilling or unable to act. But it needs to be underlined that none are simple, each requires funding and expertise, and some are untested. Civil law isn't easy or cheap. Private settlements raises big ethical questions, and some prosecutors and investigators would say that adding new plaintiffs by allowing more civil society groups to get involved will simply muddy the water.

Going above the rules: Transnational approaches and the ICC

If existing rules don't work very well, that is in part because they are *international* rules for a *transnational* problem. As with many other phenomena linked to globalization, the initiative goes to criminals if the rules rely on traditional interstate mechanisms: the exchange of messages, diplomatic niceties, embassies, protocol. Criminals don't have to send MLAs.

One solution might be to create new machinery at a transnational level, or to repurpose existing institutions. The most-cited potential forum is the International Criminal Court²³. As legal theorist Sonja Starr has argued, "International criminal tribunals could contribute meaningfully to the fight against kleptocracy. They have considerable powers to trace, freeze, and seize stolen funds, and can exercise jurisdiction where other domestic or international remedies are unavailable... There is a strong legal argument for treating grand corruption as a crime against humanity based on existing treaties."²⁴

There are reasons, however, why governments have been very hesitant in granting authority to the ICC and why they haven't created a transnational structure to do more. The United States, of course, is not a participant in the ICC.

It might seem logical for StAR, attached as it is to a multilateral organization and an international one, to operate as the global agency to carry out recoveries. That is not how it is designed. StAR cannot be involved in litigation or criminal proceedings, StAR cannot finance or get involved in legal representation, nor can StAR manage cases or be party to

²¹ (APDHE v. Equatorial Guinea, 2009)

²² (Posner, 2010)

²³ Others have suggested the World Bank could create a legal forum.

²⁴ (Starr, 2007)

confidential communications between states. Its role is to support and assist, to facilitate communications and to help partners make informed decisions.²⁵ Governments are reluctant to cede power in this area to a “global FBI.”

Rather than aim for a single forum for asset recovery, it seems more useful to move towards a more open playing field – if not a single global regime, then a set of best practices and common approaches, as StAR has done – with many multiple “good” approaches. The ICC was used to seize assets belonging to members of the former Gadaffi regime in 2013, a potentially important precedent.

Conclusion

A lot of thought has gone on into making asset recovery better understood, and the barriers are clearer. But some of the obstacles will remain, because they are difficult and because the process is supposed to be hard. Government-to-government action will continue to be the primary focus of asset recovery, and it will be hard.

While traditional government routes to recovery remain bureaucratically challenged, there is every incentive for others – private law firms, investigators, financiers, non-profits and all – to seek new routes. As StAR says, “Developments in this area are unlikely to be driven through a negotiated process in the framework of international agreement. Instead, alternative avenues will be opened through the decisions of national authorities, judiciaries and activist litigants.” In other words: watch this space.

²⁵ (World Bank and UNODC, 2008)

Follow the money: Why people rob banks.

The second cluster of issues concerns money: the rules that govern it, information about it, and the people that move it. Dealing with money means moving further into banking and the private sector.

Following the money is connected with political and legal questions of accountability. Who was responsible? Not just who paid and received the bribe: who held it, spent it, transferred it? One element of asset recovery is punitive, making clear that there can be no impunity for anyone, whether principal or intermediary.

This is not *just* about finding information or money. Actually bringing the money back is not that difficult. It can be done with a wire transfer. Having *the right to do so* is another thing. It is conditional on having gathered the right evidence, and on having done so in the right way to meet legal requirements and convince judges and juries.

In the Money: Offshore Finance and Bank Secrecy

It is becoming harder to hide money because of changes in the way secrecy jurisdictions are regarded, because of the spread of due diligence, and because of the trend towards greater transparency. But in these make less difference than they should.

Though domestic financial institutions are often used to hide money, the vast majority of asset recoveries involve overseas accounts, trusts and companies, says the OECD. “[C]orrupt PEPs nearly universally attempt to move their money outside of their home country.”²⁶ In particular, offshore jurisdictions frequently have regulatory set-ups that are perfect for a corrupt official seeking to obscure links to money, with shell companies, nominee directors, and secrecy.”

It isn’t impossible to identify assets held in this way: there are techniques for “piercing the veil,” ranging from government approaches through litigation, use of confidential informants, contacts with intermediary firms, open source information and plain luck. But it is hard.

The most straightforward way of concealing assets, traditionally, was a bank account in a country like Switzerland which protected the holder’s identity. As AML laws and post-9/11 regulations came into play, this became harder to sustain. Many countries clamped down on tax evasion, and offshore financial centers have become a lightning rod for international political action. Even Switzerland has shifted. Indeed, at the 2009 G20 meeting, world leaders “declared that ‘the era of banking secrecy is over’.”²⁷

²⁶ (FATF, 2011)

²⁷ (Alex Barker, Vanessa Houlder, Jamil Anderlini, 2009)

Critics argue this relies largely on the idea that official requests for information will be complied with. In other words, if you don't already know that money is hidden somewhere, you won't learn anything. And in many cases, the action has just moved elsewhere. "We have seen a massive uptick in hiring hundreds of private bankers" in Singapore and Hong Kong "to take the business leaving Switzerland," said Raymond W. Baker, the director of Global Financial Integrity, a research institute in Washington.²⁸

As the Tax Justice Network says, "the 'banking secrecy' mentioned by G20 leaders is only one part of the story. Serious tax evaders often hide their identities behind offshore companies... Similarly, offshore trusts, foundations and other entities remain wholly secretive... and no progress has been made towards requiring their proper registration and disclosure of financial records, including payments to beneficiaries."²⁹ In other words, it is still very easy to obscure ownership or make it hard to trace.

Dealing with tax havens, bank secrecy and money laundering is helpful to development in other ways besides its impact on corruption. Even if it isn't as fast as many would like, change seems to be positive. "Expect the pace of change to quicken over the next year or two,"³⁰ says *The Economist*. But will this be global – or only a facet of Western democracies? Pressure on offshore jurisdictions may continue to grow in the West, while money moves quietly East.

And even if the rules can be tightened, what difference will it make if the rules don't work?

Behind the Money: Due Diligence

In theory, the rules require banks and other institutions to scrutinize their customers – a system known as know your customer, or customer due diligence. They are then supposed to make sure that the business that customer does is in line with their status and income, and that they know roughly where the money came from and goes to. And they have procedures to check if account holders are linked to politicians, or Politically Exposed Persons. Many companies apply similar processes to prevent bribes being paid.

But when the OECD examined the mechanisms for laundering money stolen by officials, it found that frequently, banks had no idea they were dealing with an official; or they ignored this fact; or, sometimes, sought to conceal it.³¹

Even if banks and companies do carry out due diligence, the process is far from watertight. They might check all the names concerned with corporate and government databases that list politicians, fraudsters, and terrorists to ensure they aren't dealing with a "bad guy" or a

²⁸ (Browning, 2010)

²⁹ (Tax Justice Network, 2011)

³⁰ (Avoiding Tax: Havens Above, 2011)

³¹ (FATF, 2011)

PEP. But the information concerned might not be there, or might be unreliable. The company registry might not require much in the way of background information; it may be easy to register a company without checks. It may be very unclear who the beneficial owner is, and the rules may not require that is made clear. In some countries, the information can be “fixed.” There are databases of information on the families and close networks of politicians and politically-exposed persons – but some of those aren’t much good. Surprisingly, there are relatively few rules about how due diligence is done in practice, or what it means. Even “PEP” is inexact (the U.S. uses a different terminology, “Senior Foreign Political Figure.”)

The level of scrutiny has increased enormously in the last twenty years, because of concerns about drug money laundering and terrorism. The global supervision of regulation is supposed to be done by the Paris-based Financial Action Task Force. But the FATF has been too vague about due diligence, and doesn’t check sufficiently on whether its rules are being applied.

The FATF examined the workings of the anti-money laundering system with regards to corruption in 2011. It concluded that “past cases demonstrate that AML standards are not always being implemented by financial institutions; nor are AML laws and regulations being enforced by regulatory authorities or supervisors.” That was because rules weren’t enforced, the FATF said.³²

If financial regulators and banks stuck to and applied existing rules – and if those existing rules were better enforced, expressed, implemented – part of the problem of finding stolen assets would ease, if not disappear.

It would of course be much harder to hide those assets in the first place. But better due diligence procedures would also ensure that banks had more information about their customers, which in turn would speed investigations. In the world of global financial intelligence, the due diligence process is one of the keystones, along with the Suspicious Activity Report to regulators when a customer or account is doing things it shouldn’t. If the bank knows it has money from a PEP on its books, and becomes aware of corruption, then it can respond when there is evidence of wrongdoing. After the Arab Spring, for example, many banks responded rapidly to the ousting of Arab leaders by freezing accounts – because they knew that PEPs were clients.

Critics say that banks and financial regulators could tackle this. “The available evidence leads to one clear conclusion across each of the cases: the end result is that the bank has done business with a high profile customer who is involved in some way with the capture of the state’s resource revenues,” the NGO Global Witness reported. However, “It is not clear that by doing business with these customers the banks have failed in their regulatory obligation to

³² (FATF, 2011)

'know their customer,' because the standard set by the regulation may be insufficient, even if met, to prevent banks doing business with such dubious customers.”

Regulations need toughening; but equally, there is a role in the private sector for better self-regulation, better information sharing, and monitoring and validation by outside partners. The problems also lie in government, where there are big obstacles to sharing information, caused by turf wars, data protection, legal issues and national suspicions. This is supposed to be mitigated by the existence of national Financial Intelligence Units, like America's FINCEN. But sharing information between FIUs and other government departments in the same country is often problematic. Between FIUs globally it is often riven with issues, let alone sharing between FIUs and the private sector.³³ In theory, FIUs and law enforcement agencies are able to detect evidence of corruption through SARS and report it to originating countries. In practice, the FATF says it “did not find any instance of a foreign FIU, regulator, or law enforcement agency discovering evidence of corruption and proactively alerting the affected country.”

There is some good news. FIUs have improved co-ordination. In the case of the Arab Spring, alerts went out, banks identified and froze assets, and in many ways things worked as they should. There is a system, in other words, for gathering, analyzing and sharing global financial intelligence about stolen assets, and it is evolving, but it is far from perfect.

On the Money: Media, Information, and the Future.

Asset recovery has benefited in many ways from wider changes in global governance and attitudes. One of those has been the shift towards greater openness and transparency, accompanied by an explosion in the availability of information and the ways it can be shared and analyzed.

Might the information revolution change the balance of power between investigators and the corrupt? To what degree can media be a useful part of the investigative process in corruption cases, and the return of stolen assets? After all, from 19th century exposes of political corruption to the present day, investigations into corruption have been the stuff of Pulitzer prizes and great front pages.

The media has historically played two separate roles with regard to corruption. Firstly, it has been an actor in its own right, probing and exposing corruption - the media as investigator - but it is rarely aiming directly at *recovering assets*. Secondly, the media has been a resource for others who are investigating corruption; “open source material,” including media, can be very useful - the media as resource. And as well as the media industry itself, there is a large information industry collecting, storing and distributing raw information and data that is useful for asset recovery. Companies like Lexis Nexis and Dow Jones provide media and other information in structured databases to consumers, business and government. This

³³ (HM Treasury, 2007)

industry is a supplier to the compliance and risk industry, and to these functions in banks and corporations.

In some ways, we live in a very exciting era for investigative journalism. Starting in the late 1990s, a flood of new, digital media - websites, blogs and microblogs - have supplemented and supplanted traditional reporting. In the last decade, user generated content and social media have also arrived on the scene— information that is created by users and “citizen journalists.” This has paralleled the increase in new ways of finding and using information from the web, from public records and from other digital sources. There have probably never been so many different ways for an investigative journalist to pursue a story, or to get it published.

And yet at the same time, there have never been so many obituaries written for investigative journalism. Fully funded professional investigative journalism is expensive and not always popular with sales-conscious media owners, reeling from the loss of advertising to the web. This has led to concerns that in the long run, the digital revolution might actually weaken the reporting and investigation of corruption.³⁴ The problems have been far worse in developing and transitional nations, where investigative journalism never had much of a foothold in the first place.

There are reasons to be optimistic. Firstly, the techniques and traditions of investigative journalism have been exported by non-profits and NGOs. “This vital tradition has now spread globally.... Enterprising newspapers and magazines in Brazil, China, and India now field investigative teams. The number of nonprofit investigative reporting groups has jumped from only three in the late 1980s to some 40 today, with vibrant centers in such diverse places as Romania, the Philippines, Jordan, and South Africa.”³⁵ With the export of techniques has also gone a small but important flow of resources.

This has created hybrids that combine NGO form with media activities. In the Philippines, for example, the Philippines Centre for Investigative Journalism created the case that brought down another President after Marcos, Joseph Estrada. “In the course of a year, we uncovered the companies he and his wives had formed to set up businesses and found the dozen or so fabulous mansions he was building for them. We found he had acquired \$40 million of real estate after just two years in office and unmasked the dummy companies that fronted for the purchases.... Not long after they were published, our articles were used as evidence in the president’s impeachment.”³⁶ It should be noted, though, that the Estrada case recovered little in the way of assets.

A series of NGOs have increasingly taken on the role of crusading investigator. Global Witness, largely working on natural resources issues, has put energy and enthusiasm into

³⁴ (Tessler, 2011)

³⁵ http://www.ned.org/cima/CIMA-Investigative_Journalism_Report.pdf

³⁶ (Coronel, 2008)

campaigning investigations that have uncovered scandals. One good example is its work on the Obiangs of Equatorial Guinea. It gathered documentation that was used in its own reports, in newspaper and media stories, about the assets of the Obiangs, employing investigators who had also worked in government and media. This work formed part of a decade's work of activity by government, NGOs and media that closed a bank and brought asset recovery measures against the Obiangs and their loot.

There is potential for an expansion of the media's role as investigative *resource*, too. The spread of the internet means that even though a journalist in a developing country may have to fight for money and work, his or her chance of being noticed on the other side of the planet are better than ever. Reporters (and investigators) sitting in London and New York can read bloggers in Nigeria in real time.

This can change the investigative context, alerting officials in financial centers to accusations of corruption that can trigger prosecutions and recoveries. "To prompt [a Suspicious Activity Report by a bank], the financial institution in the financial center must learn about the predicate offence in the country of origin of the crime in some way," the OECD points out.³⁷ That is getting easier. According to FINCEN, when it analyzed SARs relating to corruption, "There were about a dozen SARs in which it appears that the financial institution was alerted to the suspicious activity through searches for the PEP counterparty following media coverage of potential corruption."³⁸ Note that the bank probably never read or saw the originating media publication: it found the news through an information provider like Lexis-Nexis, or via the internet.

These developments underline that "media" in the traditional sense is becoming just one part of a complex ecology of information and intelligence. It is raw material for the information industry, which in turn is feedstock for government, private investigators, compliance officers and risk consulting companies. Information flows between these groups in complex ways, and should create opportunities.

The boom in new technology has also triggered a new wave of tools and resources for the investigator. Specialist database technology and algorithms that detect fraud through pattern-matching can transform the task of analyzing vast amounts of accounting data; other tools make it possible to analyze huge amounts of email. Some of these are too expensive for anyone but a large private firm or a government; others can be downloaded in ten minutes, and the skills to use and produce them are no longer esoteric. Computer-aided investigations are matched by the development of computer-assisted reporting, database journalism and open data projects.

New media has also started to deliver what may be a new generation of anti-corruption apps. Some of these map incidents of corruption – they are only likely to be effective in tracking

³⁷ (International Centre for Asset Recovery, 2009)

³⁸ (FINCEN, May 2011)

small-scale corruption. Others may help drive larger-scale projects. The Investigative Dashboard, for example, is a web project by a cluster of NGOs aimed specifically at identifying assets of the corrupt.³⁹ Though these remain unproven, they hold out some interesting prospects.

Some caveats are in order. Firstly, more data won't help if there aren't investigators – trained officials, journalists – to use it. The wave of new funding for openness initiatives will only help, in the area of corruption, if there are people with the skills to mine, analyze and use it. Secondly, the critical information in such cases is rarely available through open source media. It must either be obtained through hard-fought legal cases, or investigative techniques like interception, searches or informants. Thirdly, if information is not successfully harnessed to a legal strategy, it is just data.

A new age of citizen journalism triumphing against corruption is some way away. There has been enthusiasm, and some examples. Wikileaks was the most prominent, yet the controversy around it– and the limited results in terms of corruption - show its limits. It did unveil significant documents. But there were few from government officials responsible for looting assets. (They are perhaps more careful with their data than the U.S. government). Secondly, it published the data. This would not be helpful to investigators, for whom useful data should be part of a legal strategy. Yet Wikileaks showed the potential for new techniques – online whistleblowers, hacked data, crowdsourced analysis– that will point investigators in new directions.

Taking these together – new technologies, new players, new processes – underlines that the process of discovering, assessing and publishing information is going through a revolution. Advocates believe this will be transformational. “Social media will undoubtedly play a central role in combating corruption in the twenty-first century,” writes a group of analysts. “Political activists, campaigners and civil society organizations are in an unprecedented position to leverage their impact.”⁴⁰

It is impossible to ignore the limitations. For all that has happened, most investigations are still done by professional investigators, working with professional investigative tools, drawing on confidential information obtained through official channels. The role of non-traditional investigators, like that of alternative legal approaches, is in its infancy.

Conclusion

More tools, more information and more people with an investigative brief are starting to change the balance of power. There are new models of investigation through non-profits, civil law, private investigators, media and citizen action.

³⁹ (Investigative Dashboard)

⁴⁰ (Bekri, D., Dunn, B., Oguzertem, I., Su, Y., Upreti, S., 2011)

As StAR has pointed out, the shifts in transparency and information could improve the interchange of information through investigative leads, financial center due diligences and government asset recovery. “Civil society and media reporting has often proved an effective means of bringing leads to the attention of the authorities and exerting pressure for prompt, effective follow-up,” they note. “Leads can also be generated in financial centers. ... Information may also be generated by many of the administrative channels... or through civil society and media reporting of the activities of corrupt officials.”⁴¹ Bringing in more information from a wider set of sources can help to create *a different style* of investigative approach. This could contribute to a more proactive approach towards the detection of corruption and the targeting of individuals and groups for asset recovery, an intelligence-led approach that uses government, information from the private sector (banks and investigators) and media and civil society.⁴²

As we saw in the previous section, there are moves afoot to create new legal approaches to asset recovery. Could a counterpart to this be more open, citizen-based investigations? Most investigative professionals will see this as unrealistic, unwieldy. But as new models are born, it shouldn't be ruled out. Investigators and prosecutors need to get more comfortable with the new world of openness, think about its possibilities, and build new alliances.

This should not obscure the need for progress on basics: better regulation, and better use of existing regulation. These are difficult tasks because they require some political effort in a sustained way in an area that is unglamorous and unexciting, and where there is opposition. Progress depends on politics.

⁴¹ (World Bank and UNODC, 2009)

⁴² (World Bank and UNODC, 2009)

Follow the leader: The problem of politics

Lack of political commitment to asset recovery is consistently diagnosed as one of the most significant obstacles. Political commitment means starting, carrying on with the work, and bringing it to a close, overcoming obstacles and resistance. The Government of the Philippines worked over 18 years to recover Marcos's loot, for example. It makes little sense to think of commitment just in terms of personal acts: the government and even the bureaucracy turned over several times during this period. Approaching this purely as a question of individual decisions or volition makes little sense.

Leadership from above

Senior domestic political leadership has to be the first place to look for political commitment in asset recovery; sometimes, sadly, it is also the least likely place to find it.

After the departure of the Duvaliers, Haiti made some quick progress on beginning the legal work to recover its assets. But as the government confronted domestic problems and international obstacles, the case collapsed. "According to The New York Times, despite sending twenty-five requests for assistance to Haitian officials regarding cases in New York, by September 1988, Haiti's government had "inexplicably stopped cooperating—and, not so incidentally, stopped paying its legal bills."⁴³

How much sense does it make to say that *commitment* was lacking here? The lack of government structure or resource mean that it is hard to distinguish between commitment and capability. One central problem is countries that won't pursue assets because, essentially, they can't.

Equatorial Guinea is at the other end of the spectrum. Teodoro Obiang Nguema Mbasogo has made no effort to deal with corruption, beyond taking control of the country's treasury personally "claiming he alone could protect the country from internal corruption."⁴⁴ The country could afford to go after the corrupt, but of course these are precisely the people in power. Is this a lack of political *commitment*? So another problem that must be faced is that of corrupt states where the rulers will not pursue assets because they won't investigate themselves.

If we exclude cases like Equatorial Guinea (*won't act*) and Haiti (*can't act*), is it possible to say anything useful about the politics of asset recovery?

It seems more useful to focus on states where there is some intention to act, and some capability, and see why they succeed or fail. In Nigeria, for example, Olusegun Obasanjo, elected in 1999, confronted corruption and the corrupt, pursued (some of) the guilty and

⁴³ (Mark V. Vlastic, Gregory Cooper, 2011)

⁴⁴ (Sands, 2012)

brought back (some of) their assets. In Kenya, the government of Mwai Kibaki, elected in 2002, didn't.⁴⁵ The two make a good comparative study for several reasons; and we have two good eye witness accounts, one from Nuhu Ribadu, Nigerian anti-corruption chief, one based on testimony from John Githongo, the Kenyan equivalent.⁴⁶

What was different between the two cases? Individual character and background? Both Kibaki and Obasanjo had held power then had spells outside government before returning. Kibaki was regarded as an outsider who had come in: though a former minister, he represented the triumph of the opposition. Obasanjo had been head of state before; he was an insider who had stepped outside the paradigm.

It is interesting to compare the two investigators they chose, and their style. Nuhu Ribadu of Nigeria was from law enforcement, now charged with cleaning out the system; he was kept at arm's length by Obasanjo and was sometimes considered overly independent. Githongo was from civil society, and was drawn in by the President, who kept him close. It could be argued that these represent two competing models – the outsider inside (Githongo) and the insider outside (Ribadu) and that the latter prevailed: better to have the government experience and then build relations with civil society than the other way around. But it is also true that neither could have done much without solid political backing; Ribadu mostly got it and Githongo didn't.

A key difference was the terms of the political transition. Obasanjo had some political independence by virtue of the transition to civilian rule, and his own election. In Kenya, community issues worked against the corruption struggle. Ethnic groups that had been kept away from the trough under Daniel Arap Moi saw their opportunity, and Kibaki was their man. In addition, key officials remained in place who had been complicit in corruption before and would be so again. It is at least arguable that Obasanjo had a stronger and more independent political base to work on, while Kibaki faced old enemies and had uncertain friends. The transition made Obasanjo strong; it made Kibaki weak.

The chances of getting action on corruption in general and asset recovery in particular depend on intervening at key moments, like political transitions. But these also bring their problems. "Unfortunately, these transition periods also generate behavior which, oftentimes, leads to a repressive exercise of power. Opportunists prefer to use them to consolidate their

⁴⁵ Nigeria's successes against corruption under Obasanjo are regarded by many as only skin-deep, and later years saw reverses. The argument here focusses only on asset recovery and on the period when Obasanjo was in power.

⁴⁶ The Kenyan book is written by Michela Wrong, formerly Financial Times correspondent in Africa, but she makes it clear it is written from interviews with Githongo. Ribadu's book is written in the first person, but was given a "publishable voice" by Caroline Lambert, formerly the Economist's correspondent in Africa, Ribadu says.

hold on the political and economic infrastructure. Reformist fervor takes the form of mere rhetoric and the true partisans of anti-corruption are obliged to retreat.”⁴⁷

Sometimes – often - the transition is not clear cut. In Tunisia, for example, a transitional government followed the Ben Ali regime. “The transitional government, which included former regime figures, may have felt it did not have the mandate or wanted to protect its own,” said the Financial Times. “But critics say even the subsequent democratically elected government... which is struggling to balance the stability demanded by investors with the accountability demanded by activists and victims of the former regime, may worry about alienating constituencies it depends on.”

What happens in transitions is of critical importance: who comes to power, under what terms, their prior experience, and current political alignments. “To date, the most successful [asset recoveries] have been carried out in countries, where corrupt government officials were discredited, despised, or dead, and replaced by political reform champions committed to eradicate corruption and recover stolen public assets. Previous officeholders became useful targets against which the new political establishment of the country could unite,” notes one study. “The window of opportunity enabled the new policy champions to consolidate their power base, to put in place a functioning system of checks and balances, and to implement their anti-corruption agenda.”⁴⁸

Leadership from below

In general, a widespread, diverse base for an anti-corruption effort is useful (if not a sufficient condition for success). At the broadest level, fighting corruption is about ideas, and about a base of popular understanding and support, and this relates also to recovery.

In Nigeria, Ribadu says: “The war against corruption cannot be won in isolation; it has to be owned and embraced by the people. An essential element of the EFCC’s success was the credibility it built in Nigeria. Ordinary Nigerians, jaded by endemic corruption, were jolted out of their cynicism when the commission made high profile arrests and secured convictions. For the first time, there was a small light at the end of the tunnel. The public increasingly turned to the EFCC to complain about fraudsters and corrupt officials, providing information that helped or initiated investigations.”⁴⁹

In Kenya, Githongo was chosen partly because of his knowledge of civil society groups and of media (he had worked in both). But links with civil society would not have changed the fact that the government did not support the anti-corruption agenda. There was little pressure on it to do so; and there was much opposing pressure to make it halt any efforts.

⁴⁷ (Kpundeh, 1998)

⁴⁸ (Pavletic, 2009)

⁴⁹ (Ribadu, 2010)

In both Kenya and Nigeria civil society was a “reserve army” for anti-corruption efforts and asset recovery. International NGOs such as Transparency International can provide critical support: TI operates through local franchises and in many cases, former TI leaders or board members (including both Obasanjo and Githongo) have gone on to play critical roles in anti-corruption efforts and asset recoveries.

But as with the government, the likelihood is that civil society institutions will be riddled with problems inherited from the previous regime: poor training, inadequate resources, weak links with the rest of the world, political or patronage ties. Building support for decisions about asset recovery can be done from the broader base of society –but it is hard, and it does not seem to be decisive.

Leadership from outside

The apparently frustrating situation with domestic leadership and civil society leaves open the question of what can be done by other countries to promote change. Can more useful levers for the success of asset recovery be found in the wider international community?

The United States government has historically tended to regard recovery narrowly, as a legal and law enforcement question. So while the area receives support, asset recovery has lived in a silo. “The U.S. legal framework that enables it to provide assistance in asset recovery cases stems from potent national laws, flexible mutual assistance authority, and a forceful commitment to combating grand corruption and assisting other nations in asset recovery efforts that is embodied in a consolidated national strategy,” wrote Linda Samuel, then the DoJ official responsible.

The approach has evolved and matured. In August 2006, the United States issued a National Strategy to Internationalize Efforts Against Kleptocracy, which included commitments to vigorously prosecute foreign corruption offenses and forfeit illicitly acquired assets, investigate and prosecute criminal violations associated with high level foreign official corruption and related money laundering, as well as to refuse entry to the corrupt if they sought entry to the US.⁵⁰

The Kleptocracy Initiative is the latest, and potentially one of the most impressive, initiatives. It brings asset recovery further into the mainstream, away from being a specialist area. “Like our criminal corruption prosecutions of domestic officials, our FCPA investigations, and our capacity-building efforts, our work to recover and repatriate the stolen assets of foreign corrupt officials sends the message that we believe in the dignity of every citizen, and stand against foreign leaders who steal from their people,” said Lanny Breuer, Assistant Attorney General, in 2011.⁵¹

⁵⁰ Samuel provides a good overview of policy and efforts. (Samuel, 2009)

⁵¹ (Breuer, Wednesday, May 25, 2011)

Capacity building in affected countries is an obvious area for support. Personnel can be transferred or trained or mentored. The expertise for such activities can be found in the US, UK, Switzerland and elsewhere, in law firms, accounting and investigative firms and in NGOs as well as in government. Directly funding recovery actions is another approach, as Switzerland has done. Providing legal and professional assistance is a useful way of adding to capacity and bringing in international expertise, but has limitations, and may raise issues of national sovereignty.

Indeed, external support to asset recovery – through funding, through policy interventions, through diplomacy – can be controversial, as it bears on past and present issues of probity and political alignment. As StAR points out, “the asset recovery agenda pushes at the margins of the traditional mandate and scope of development assistance.”⁵²

“Asset recovery entails investigative and legal work that most development agencies are ill equipped to advise on or supervise,” says StAR. “In addition, dealing with litigation and the prosecutions of corrupt officials raises concerns about involvement in the internal affairs of partner countries and liability issues that make it difficult to provide assistance in specific cases, the very area where developing countries need help. The law enforcement and prosecution services in financial centers are the best placed to advise and assist their counterparts in developing countries.”⁵³ Hence while asset recovery has tried to become more mainstream, the silo is still a reality.

Development agencies “have proved less effective in seeing the whole picture... development agencies have tended to focus on [corruption] prevention, paying little attention to effective law enforcement. These bridges will have to be crossed if development assistance is to be effective in supporting the asset recovery agenda,”⁵⁴ says StAR.

Additionally, there are concerns about conditionality and strategies which penalize countries that don’t pursue corruption. Political commitment is seen as something that needs to come domestically, or through positive encouragement.

Yet external pressure can be critical. Nigeria is an interesting test case, where international pressures, including the threat of financial sanctions, was a driving force. “The FATF naming and shaming proved to be an exceptionally effective tool for the outside world to exert the right kind and the right amount of pressure,” says Ribadu. “The specter of sanctions, at a time when Nigeria was hungry for international approval, forced the country’s authorities to take action. This was a relatively quiet, inexpensive, and obscure stick. Yet it ultimately did more for Nigeria than any other external intervention. More countries around Africa could use a similar kind of catalyst.”⁵⁵

⁵² (World Bank and UNODC, 2009)

⁵³ (World Bank and UNODC, 2009)

⁵⁴ (World Bank and UNODC, 2009)

⁵⁵ (Ribadu, 2010)

In Kenya, inconsistent external attitudes and lack of pressure clearly played a role in letting the authorities off the hook. “One of the most disturbing aspects of the book is the dismal performance both of the World Bank and of Britain’s Department for International Development (DFID),” wrote *The Economist* in a review of Wrong’s book on Kenya. “The bank has been indulgent towards Kenya’s leaders and inept when it tried to do something about their corruption. There was a “dangerous coziness” between the bank and Kenya’s government.” DFID doesn’t come off any better.⁵⁶

What is the lesson here? International pressure can be an effective way to make sure anti-corruption investigations are pursued, though without domestic support and energy, it isn’t likely to be effective. And international pressure needs to be coordinated with other policy considerations, not simply subordinated to them.

In 2011 as part of the anti-Kleptocracy Initiative, for example, the U.S. government acted against Teodorin Nguema Obiang, the favorite son of the ruler of Equatorial Guinea. “The anticorruption suit seeks to seize, among other items, a \$30 million Malibu mansion, a \$38 million Gulfstream Jet , and over \$3 million of Michael Jackson memorabilia, all allegedly purchased out of the proceeds of grand corruption in Equatorial Guinea,” said Kenneth Hurwitz, senior legal officer on anticorruption with the Open Society Justice Initiative.⁵⁷

The action against Obiang sends a strong message: that even where countries cannot or will not act, the U.S. will. It is one possible answer to the “hard cases” of political commitment mentioned earlier: if other countries can’t act or won’t, the U.S. can and will.

But is it politically dependent, or linked to U.S. foreign policy interests in the region? Would it continue if it inconvenienced U.S. banks? Is it acceptable for governments to take action like this against other governments, for the U.S. to take a unilateral decision on who is and is not corrupt? Is any official to be fair game? Who makes that decision? It helped greatly, of course, that NGOs, the media and the U.S. Congress had already passed judgment on Obiang, and that there was clear evidence of money laundering. In this sense, paying attention to the wider policy context – and the broader pool of investigations, intelligence and opinion about the Obiangs – has been crucial. In this sense, it is important for asset recovery professionals to think more about the wider community interested in these issues, and build wider networks.

There are two other issues around political leadership that have started to emerge: the need to globalize it, and the need to keep it strong in the West.

Often the key impediment to investigations lies in New York, London or Washington. These are the centers of power that have in many cases maintained corrupt politicians in power;

⁵⁶ (How to ruin a country, 2009)

⁵⁷ (Hurwitz, 2011)

this is where the companies are headquartered that pay the bribes (along with Berlin, Paris, Geneva and Zurich) and the banks that take the money.

As earlier noted, angry words have been exchanged about the willingness of the U.K. to help with the search for the assets of Hosni Mubarak and his family, for example, suggesting that London is still not an easy place to go hunting for stolen money. Asset recoveries focus on foreigners pursuing foreign criminals for assets that will go abroad. This doesn't always come high on the agenda, and if there is legal resistance from banks or others, they may be able to delay action if not prevail. It is this political blockage that the U.K. has sought to tackle by funding police forces, but there is clearly more to be done.

In the US, there is a need to maintain momentum on corruption. Fighting corruption has costs, and if U.S. business feels that it alone is asked to pay them (through implementation of FCPA for example), it may be hard to maintain. And if the momentum behind anti-corruption efforts remains the preserve of the Anglosphere, it won't be sustained. As other countries become more significant in global investment and trade, but also in aid, development and political relations, will the emphasis on pursuing corruption be maintained? Will politicians that have received their bribes from companies in Shanghai or Mumbai, and banked the proceeds in Hong Kong or Dubai, be vulnerable?

Conclusions

The good news is that much has been done to ensure that countries will decide to pursue the corrupt and their money. Asset recovery has been a central preoccupation in the Arab Spring countries, in part because revulsion at corruption was a central part of the regime changes there. Governments, media and NGOs ensured that there were capabilities to act, and the material for a political discussion. There have been successes.

Maintaining commitment – even if it is strong at the outset – is tough, and the Arab Spring nations are now involved in grueling transitions, or in some cases facing internal unrest, instability and political uncertainty. The people and organizations that are necessary to ensure action on prosecution and asset recovery are a relatively small group but they need a lot of friends. The recovery effort is a fragile thing.

Leadership intentions can be supported at times of transition, capability can be provided, and the impact of failure to confront corruption can be made clear. In the future it seems likely that non-governmental organizations, media and civil society will increasingly demand asset recovery as part of transitions. It will also emerge when transition is not on the agenda. There will be pressure for asset recovery in hard cases, where countries won't chase the corrupt.

Conclusion and Recommendations

International efforts to recover assets from corrupt politicians have seen great advances in the last two decades, from the struggle that surrounded the Duvaliers in the 1980s to the much more focused efforts that have followed the Arab Spring. But much remains to be done to make asset recovery work.

It is too easy for corrupt politicians to hide money. This is not just a question of prevention. It also makes it all the harder for investigators to trace money, and it weakens the system of global financial intelligence that is intended to deter criminality and speed recovery. As one practitioner has pointed out, “Originally a development issue, the proceeds of corruption and asset recovery are beginning to be addressed as part of the broader international dialogue on the reform of the international financial system.”⁵⁸

There is a solid agenda of legal reform and procedural work to make asset recovery function properly. International legal co-operation isn’t easy. Procedural reform is critical, and the only reason for not going into it in more depth is that it is well-understood and (thanks to StAR) well documented.

The more interesting new areas for action, though, are outside the conventional paradigm. This has emphasized government-to-government action. In practice, many different actors have often been involved, and are increasingly. In Nigeria, results came from welding together criminal and civil action, using private law firms, mediated settlements, and NGO monitoring of returned assets.

A new era of action against the corrupt may be opening up. Compare, for example, the many different forms of action against the Obiangs. Governments, NGOs, media and civil society groups have brought litigation, reported on the location of assets, and named and shamed financial organizations that have colluded with the corrupt. Transparency International, APDHE, SHERPA, Global Witness, EG Justice, the U.S. Congress, the U.S. Department of Justice and many others have all worked around the issue. Have they succeeded in finding and returning the loot? Not yet. Have they embarrassed, impeded, and disrupted the Obiang regime? Yes. At this level, asset recovery is part of a broader strategy of detecting and punishing the corrupt. Media and civil society efforts may not always succeed – but nor did the old paradigm.

So can another model of recovery emerge? Transparency International’s branch in France emphasizes that governments alone cannot take on the burden. “It has now become obvious that the effective implementation of this central principle of UNCAC cannot remain the sole initiative of the States. This is particularly true when they fail to engage in recovery processes because the presumed authors of misappropriation or those close to them still are in positions of power or because their institutions are not solid enough to become involved in

⁵⁸ (Gilman)

this type of international cooperation. In those countries in which the misappropriated funds are invested, diplomatic considerations make it impossible to carry out the least initiative in most cases.”⁵⁹

As asset recovery matures and becomes more mainstream, there are increasingly large roles for the private sector and NGOs. The use of civil approaches has opened the door wider for the use of law firms, private investigation and accounting firms. NGOs have been collecting information and pursuing investigations for some time; in the last few years they have brought cases themselves. Banks have increasingly played a role in volunteering information where corruption is suspected, precipitating recovery. The roles of government, NGO, and media are increasingly being shared and overlap.

It is around these issues that this paper’s recommendations are centered:

1. Build on new approaches to recovering stolen loot

Donor agencies like USAID and DfID, as well as private donors and NGOs, should explore ways of helping countries fund and staff asset recoveries, using capabilities from other governments or the private sector. The U.S. Department of Justice should explore new targets for its Kleptocracy Initiative, and the U.K. should consider following suit. And both countries should help map out the ways that civil society, NGOs and victim groups can bring cases against corrupt officials and their assets, surface information, and create pressure for prosecution and recovery. Major donors (private and public, like USAID and DfID) should expand funding for media and NGOs that have pursued corruption, including Global Witness as well as smaller and more locally-based organizations, and help them train in investigations: it isn’t magic. The investigation and punishment of corruption needs to be more prominent in national strategies, alongside prevention.

2. Fix the problems with global financial intelligence

The problems with the integrity of the global financial system are too well known to ignore. The U.S. and U.K. Treasuries and Justice Departments need to fix due diligence, which has serious gaps in identifying and scrutinizing Politically Exposed Persons. It’s a major failing. They need to work with banks, risk consultants and information companies to make the global financial information system function better, with DDs and PEPs just one part of this. Financial agencies including Fincen in the U.S. and the UKFIU should consider cross-posting and cross-training with the private sector, and better sharing of information with the private sector and globally. Making beneficial ownership more transparent would help asset recovery, and dissuade corruption in the first place.

⁵⁹ (Restituer les avoirs détournés aux Etats spoliés)

3. Get tougher with corrupt politicians and countries that won't cooperate

Pursuing corrupt politicians is important, and there should be a more open discussion of this hitherto taboo subject and more tools to make it happen. Dirty laundry should be washed in public. The State Department, USAID, Foreign Office and DfID should consider policy interventions around transitions, as with the Arab Spring. The decision to use the refusal of visas against the corrupt has been useful and should be encouraged – and publicized. The U.S. should also look at sharing of information with the private sector on individuals regarded as corrupt, complicit or non-co-operative. In general, all the government departments (financial, justice, foreign policy, development) should coordinate more closely to develop sticks and carrots.

4. Build global support for recovering the proceeds of corruption

The U.S. and U.K. Governments should consider how to advance asset recovery by building a broader base of global support, especially if (potentially) controversial techniques like the Kleptocracy Initiative are to become common. Asset recovery cannot be seen as a US-UK state interest alone: others need to be persuaded and included. NGOs and civil society organizations should be brought closer to the key groups that are discussing asset recovery, like the G20 Anti-Corruption Working Group, and the UNCAC Conference of States Parties. USAID and other donor organizations should continue to support NGOs that focus on corruption, in particular Transparency International, the International Center for Asset Recovery in Basel and Global Witness, but that money should be spread into developing countries. The State Department, U.K. Foreign Office, Justice Departments and Treasuries should build support and find allies for recovery in emerging financial and political powers: especially China, India and Russia: financial integrity and transparency aren't just western values.

It's important for all concerned to start to reach out beyond their traditional networks and assumptions. Development professionals need to get more comfortable with the enforcement and investigations agenda: otherwise, there is a risk that the accountability side of "transparency and accountability" will be neglected, and all we will have is a lot of open data. Investigators and prosecutors need to understand the explosion in open data, media and its possibilities: not all information has to have a government classification. Media and NGOs have to realize that it isn't enough to publicize and talk about an issue: without a legal strategy, recovery options, prosecutions, nothing concrete will happen.

The impetus behind the spread of asset recovery in anti-corruption cases comes from broader changes in the world in the last two decades: political changes after the Cold War, an increased focus on the integrity of governments and markets, a willingness to make financial assets part of a war on transnational crime. The spread of openness and transparency looks to be a strong driver of change in society, technology and economics in the next decade: it should also provide one element of a renewed focus on punishing the guilty, and recovering money they have stolen for better use.

Let's take a concrete example. In Afghanistan, billions have been looted by corrupt politicians from the aid delivered over the past decade. Who will prosecute the people who did that? We have a pretty good idea who they are. Who will get the money back? The Afghan government? Western governments? NGOs? Private companies? Private investigators? The answer "no-one" should be unacceptable. It cannot be the case that billions of dollars go to the benefit of privileged private individuals, while their country remains poor, its children die, and they remain immune and wealthy.

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