

CHAPTER IX

RECOVERY AND RETURN OF PROCEEDS OF CORRUPTION

INTRODUCTION

As concern about corruption has increased, many established tools already known to criminal justice systems have been brought to bear against it. These tools include measures to identify and confiscate financial and other proceeds of corruption. In different legal systems this is seen as a form of punishment, a means of ensuring that the incentive to commit corruption in the first place is eliminated, and a means of depriving offenders of financial resources which might well be used to destabilize governments or commit further acts of corruption or other crimes. In major, or “grand” corruption cases, further impetus has recently been added by the fact that, once a corrupt regime has been removed, its successor generally seeks to recover proceeds on the basis that these have, in effect, been stolen from the people, and that they would provide badly-needed resources to the new government and State impoverished by past corruption.⁵⁵³

Pressure to develop effective measures for asset recovery was increased by the efforts of some States to recover proceeds during the 1990s, and the obstacles faced by these States in doing so. In “grand” corruption cases, key machinery of the State, and in many cases the very State itself, are controlled by corrupt officials, which makes accurate information about the amounts looted from State treasuries and revenues difficult to obtain, but the sums are clearly very large. In three of the largest cases of the 1990s, those of the Philippines, Haiti, and Nigeria, estimates range from \$500 million to as high as \$5 billion.⁵⁵⁴ The fact that assets have usually been well-hidden by experts with adequate time and control of State machinery during corrupt regimes usually makes accurate assessment of total proceeds impossible.

Recent experience suggests that countries seeking to recover such proceeds face a number of major obstacles, including the following.

⁵⁵³ A series of United Nations reports and other documents deal with Asset Recovery. See in particular General Assembly resolutions 54/206, 55/188 and 56/186 dealing expressly with illicit transfers and recovery of assets, and resolutions 54/128, 55/61 and 56/260 dealing with recovery in the context of more general anti-corruption measures. During the same period Reports to the General Assembly A/55/405, A/56/403 and A/57/158 also deal expressly with this issue, as do a number of reports to the Commission on Crime Prevention and Criminal Justice. Asset recovery was expressly included in the terms of reference for the open-ended intergovernmental Ad Hoc Committee which drafted the United Nations Convention against Corruption in GA/RES/56/260, and to assist delegations unfamiliar with the issues involved a technical workshop was held in conjunction with the second session of the committee, on 21 June 2002. See: A/AC.261/6/Add.1 and A/AC.261/7, Annex I.

⁵⁵⁴ Other prominent cases have involved Iran, Peru, Pakistan and the Ukraine, most still ongoing. As the second edition of the *Tool Kit* was written, in early 2004, changes of government appeared likely to lead to recovery operations in Iraq and Georgia as well.

- “Grand” corruption usually weakens many of the domestic institutions which are required to successfully seek assistance from other countries. Law enforcement agencies and court systems damaged by corruption may have difficulty assembling evidence and presenting it to a foreign State in a way which satisfies that State’s evidentiary requirements. Also, the degree of individual expertise in areas such as financial investigation and litigation, is often absent in such States. If it is absent, it cannot quickly be created, forcing the State to turn to outside experts.
- “Grand” corruption damages domestic institutions to the point where they are not safe as a repository of stolen assets for the offenders. In an environment where assets may be stolen by other corrupt officials or confiscated when a new government takes power, almost all corrupt officials choose to transfer large amounts of corruption proceeds abroad. Often they seek to conceal and defeat tracing by transferring assets to many different jurisdictions, further complicating efforts to trace and seize them.
- “Grand” corruption impoverishes States to the point where they often lack the resources needed to mount an international legal recovery operation. Major costs, such as the retention of foreign legal counsel and the posting of financial securities needed to compensate defendants in the event of an unsuccessful civil action, are difficult for such States to meet.
- During the period when the corruption is occurring and proceeds are being exported, senior corrupt officials control key State agencies and functions, usually including law-enforcement agencies, banks and other financial institutions. Regulation is either non-existent or unenforced. This means that there are usually few records and little or no evidence or information left behind which can be used to trace transferred assets and establish ownership.
- Countries seeking to recover assets often face reluctance in the countries from whom they seek assistance until the *bona fides* of a new regime become clear, which may take some time. Responding States are reluctant to return assets to a new regime if there is a perceived risk that they will simply be looted again by officials of that regime.
- Global financial systems and information technologies have created new opportunities for transferring and concealing proceeds of crime of all kinds using high-speed and complex transfers to elude tracing. Considerable expertise has been developed in money-laundering and the very large amounts involved in grand corruption cases make it possible for offenders to hire skilled money-launderers to conceal their assets.
- The process of requesting and obtaining foreign legal assistance is time-consuming, and in some cases this allows offenders to further transfer assets before a request to seize them can be acted upon. The international community has responded with fast-acting “freeze” measures, which block transfers pending further action, but the basic problem still remains.

- Meeting the legal burdens established by States in whom assets are found can pose a problem. While some countries allow for “*in rem*” forfeiture, many still cannot obtain forfeiture unless someone has been convicted of an offence which generated the original proceeds.⁵⁵⁵ In some cases, this may be completely impossible because the person who looted the assets is dead or cannot be located, or because he or she has obtained some guarantee of immunity (often in exchange for relinquishing power). In other cases it may be possible but very difficult for the same reason other tracing, freezing and seizure actions are difficult: there may be little admissible evidence because the agencies which would normally have created and kept records of the transfers or underlying offences were corrupt themselves.
- In some cases, criminal prosecutions may be delayed or dropped pending civil measures to recover the assets. This entails a lower evidentiary standard, but also can trigger other problems. Most legal systems will not allow a foreign State to bring a civil action, if at all, without posting a financial bond which can be sued to compensate defendants if the plaintiff State drops or loses the lawsuit. Also, as a general rule, the legal cooperation which is extended between States in criminal matters is not extended to civil matters.⁵⁵⁶ Further, States seeking recovery may be forced to choose between seeking justice and the punishment of corrupt officials and successful recovery of assets.
- In some cases there may be more than one claim against the assets. Generally, new governments of countries previously victimized by grand corruption take the position that the whole country has been victimized *en masse*, and that funds should be paid back to the government for use to the State’s benefit. Individual victims may dispute this, however, and seek payment directly to them. Holders of debts incurred by corrupt regimes may also seek to recover from identified proceeds. Further, the legislation of the requested State, if drafted in terms of recovering the proceeds of more conventional types of crime, may not recognize a State as a possible crime victim for purposes of return or compensation.

⁵⁵⁵ See United Nations Convention against Corruption, Article 54, subparagraph 1(c) which calls on States Parties to adopt laws allowing forfeiture in cases where a criminal conviction cannot be obtained.

⁵⁵⁶ See, however, United Nations Convention against Corruption, Article 43, paragraph 1. This requires mandatory assistance in criminal matters, but also calls upon States to render some assistance in civil and administrative proceedings as well.

TOOL #44

Recovery of illegal funds using The United Nations Convention against Corruption
As noted, laws providing for the confiscation of proceeds of crime have been in effect in many countries for some time. Confiscation was a relatively recent innovation during the 1980's and found its way into the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁵⁵⁷ Following a decade of developments in national law and international agreements and arrangements, a more elaborate scheme was incorporated into the 2000 United Nations Convention against Transnational Organized Crime, which applies to a much wider range of criminal offences, and hence to the proceeds of such offences.⁵⁵⁸ Questions of scope aside, however, the 1988 and 2000 confiscation schemes are broadly similar. The experiences of attempts to recover proceeds of "grand" corruption cases, the complexity of the cases, and the dispersion and sheer magnitude of the assets involved generated pressure to develop more powerful tools in the Convention against Corruption, however.

Further pressure was added by the nature of the offences themselves. Where a range of plausible claims from governments and private claimants might be advanced against proceeds of drug-trafficking or organized crime offences, the claim of a replacement government, on behalf of a renewed State and its people, is more difficult to resist in major corruption cases. This is true both for arguments based on title and victimization. States pursuing assets argue that the proceeds are property which the State actually owned or in respect of which it was entitled to claim ownership (e.g., lost fees, royalties and other revenues), and have been deprived of by crimes such as theft, fraud or embezzlement. They also argue that the general interests of the State and its population have been harmed by public maladministration, and should therefore be able to claim the illicit proceeds of that maladministration as compensation for damage and in an attempt to restore quality of life and the State's ability to function.

As a result, the forfeiture provisions of the 2003 Convention against Corruption include a number of further enhancements on the earlier treaty provisions. A change in tone is immediately signalled by the fact that a separate Chapter of the Corruption Convention has been reserved for asset recovery, and that its first provision, Article 51, provides as follows:

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.⁵⁵⁹

⁵⁵⁷ See Article 5 of that Convention. See also Commentary on the Convention, E/CN.7/590, paragraphs 5.1-5.3.

⁵⁵⁸ Convention against Transnational Organized Crime, Articles 12-14.

⁵⁵⁹ The agreed notes for the *travaux préparatoires* specify that this does not have legal consequences for the more specific provisions dealing with recovery. See: A/58/422/Add.1, paragraph 48.

TOOL #44A - PREVENTION OF ILLICIT TRANSFERS

A major lesson of past recovery efforts is that they are difficult, time-consuming, expensive, and all-too-often unsuccessful or only marginally successful. It was recognized by experts and negotiators alike that it was clearly desirable to prevent corrupt officials from exporting their assets in the first place rather than having to pursue them many years later. This was complicated by the fact that, in most “grand” corruption cases, senior corrupt officials are able to co-opt and corrupt elements of State machinery, including financial institutions and law-enforcement agencies, which would normally be used within a country to prevent illicit transfers. The result is a series of measures focused on the role that foreign agencies and institutions, in countries of transit or destination of corruption proceeds, can play in prevention. While the international community may not be able to prevent major corruption within a State, it can take action to make it difficult for corrupt officials to export their proceeds to other countries for safe keeping, and when transfers do occur, it can ensure that accurate records are created and kept to prevent proceeds from being concealed and to make it much easier to trace and locate them and to establish ownership or entitlement later on.

In Chapter, II, which deals with general prevention, most of the measures assume functional institutions within a State to take the prescribed actions and safeguards to protect the institutions and measures from interference. However, the measures in Article 14, which contains general measures to prevent money-laundering, require only functional institutions in the State where the money-laundering, and not the corruption, occurs. The same measures, such as the reporting of suspicious transactions and gathering and retention of information by financial intelligence units⁵⁶⁰ or similar bodies, can create important records that prevent successful laundering of grand corruption proceeds and ensure that they can still be traced when the victim State requests this. Moreover, the comprehensive gathering and long-term analysis of information should show patterns indicative of grand corruption because of the enormous proceeds and the large numbers of transactions needed to conceal them and break links that could be used to trace them.

Chapter V, which deals specifically with asset recovery, then adds more specific preventive measures. Article 52, paragraph 1, in particular, calls for basic “know your customer” policies in banks and other financial institutions, but then goes on to call for “...enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates...” and specifies that such enhanced scrutiny should be reasonably intended to detect suspicious

⁵⁶⁰ Regarding financial intelligence units, see Convention against Corruption, Article 58. This only calls on States Parties to “consider” establishing such units because of the difficulty faced by some developing countries in doing so.

transactions.⁵⁶¹ The agreed notes for the *travaux préparatoires* make it clear that this applies to public officials not just of the government(s) of the jurisdiction where the surveillance takes place, but of other countries as well.⁵⁶² This means that, while it may not be possible or desirable to report the transactions back to the official's own government, the information would still be gathered and retained for later use. Alternatively, if the official is aware of the surveillance and its implications, he or she is effectively denied a safe location to conceal illicit proceeds.

Article 52, paragraph 2 provides for notification of the financial institutions involved with respect to customers or accounts to be watched, and paragraph 3 requires States Parties to ensure that the institutions maintain adequate records over "...an appropriate period of time..." No guidance is given with respect to the length of time records should be kept, but States Parties implementing this requirement may wish to take into consideration the very long periods over which "grand" corruption has been known to take place, and the long and complex process of tracing the proceeds. Article 52, paragraphs 5 and 6 call for additional financial disclosure requirements for "appropriate public officials", but these assume that the requirements would be imposed by the official's own jurisdiction. This may be a control or deterrent in some high-level corruption cases, but would probably not affect the most serious "grand corruption" cases, since the disclosure would not be required, not be enforced, or any records created would be tampered with before they could be of use to a subsequent government pursuing the assets.

TOOL #44B – DIRECT (CIVIL) RECOVERY OF ASSETS

Another lesson of past recovery efforts has been that civil litigation has some significant advantages in some cases and should be considered as an option. Civil recovery requires some form of legal basis for a civil claim, usually either in property or tort law. In property-based actions, the plaintiff State is effectively claiming that it is either the rightful owner of the assets or in some cases that it claims on behalf of the rightful owners, its population, and that the assets have been taken by theft, fraud or embezzlement. In tort-based actions the claim is that the defendant has caused harm through corruption or maladministration and has profited as a result, and that compensation should be paid as a result.

The major advantages of civil claims are that a lower burden of proof is usually required, and in States which do not allow criminal confiscation *in rem*,⁵⁶³ a civil case does not require a prosecution or criminal conviction to obtain a remedy. The most common reasons cases cannot be prosecuted, the death or absence of

⁵⁶¹ Regarding the meaning of "close associates", see agreed notes for the *travaux préparatoires*, A/58/422/Add.1, paragraph 50.

⁵⁶² A/58/422/Add.1, paragraph 49.

⁵⁶³ See United Nations Convention against Corruption, Article 54, subparagraph 1(c), calling on States Parties which do not already permit *in rem* confiscation to do so, in cases where the offender cannot be prosecuted "...by reason of death, flight or absence, or in other appropriate cases..."

a criminal accused or defendant, effectively blocks further criminal proceedings in some countries, but it does not usually affect civil litigation, and may even make it easier. In civil proceedings in some countries, default judgments may be issued in cases where the defendant does not appear, and if he or she has fled criminal proceedings, the result is a choice between losing the civil action by default, or appearing to defend it and being arrested and prosecuted for one or more criminal offences. One major disadvantage is that civil actions are costly and complex, with the differences in local law making the retention of local legal counsel essential. In some cases it is also legally impossible for a State to bring a civil action in another country because it would enjoy sovereign immunity from any order judgment issued against it. Further, the assistance and cooperation normally provided by one State to another in criminal cases is generally not provided in civil ones.

The Convention against Corruption seeks to address some of these problems, thereby increasing the utility of civil proceedings as a means of recovery. Article 43, paragraph 1, in the chapter dealing with international cooperation generally, provides that States Parties shall cooperate in criminal matters, but then goes on to call on them also to "...consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption." Article 53, in the chapter dealing with asset recovery in particular then goes on to address some of the other concerns. Article 53, subparagraph (a) requires each state Party to take necessary measures to ensure that other States may make civil claims in its courts to establish ownership of property acquired through an offence established in accordance with the Convention. Subparagraph (b) requires measures to ensure that courts have the power to order the payment of damages to another State Party, and subparagraph (c) requires measures to ensure that courts considering criminal confiscation also take into consideration the civil claims of other countries.

TOOL #44C – RECOVERY THROUGH CRIMINAL CONFISCATION

The Convention also seeks to address at least some of the long-standing concerns with respect to criminal confiscation. As with the 1988 Narcotic Drugs Convention and the 2000 Convention against Transnational Organized Crime,⁵⁶⁴ the 2003 Convention against Corruption provides for both the enforcement of a foreign confiscation order and for allowing other States Parties to seek a confiscation order in a domestic court.⁵⁶⁵ Parallel provisions deal with foreign and domestic orders for the freezing and seizure of property, an expansion of the freezing and seizure provision of the earlier Convention.⁵⁶⁶

⁵⁶⁴ The relevant provisions, Articles 54-55 of the Convention against Corruption, are substantially similar to Articles 12-13 of the Convention against Transnational Organized Crime.

⁵⁶⁵ Article 54, paragraph 1.

⁵⁶⁶ Compare Convention against Transnational Organized Crime, Article 12, paragraph 2, and Convention Against Corruption, Article 54, paragraph 2. The latter provides greater detail about how freezing or seizure for the purposes of confiscation should be sought and obtained. Subparagraph 2(c) also introduces the concept of preservation of property for the first time.

While major corruption cases usually involve mostly the pursuit of proceeds or other assets derived from proceeds, both the 2000 and 2003 Conventions also provide for the confiscation of other offence-related property. The 2000 text speaks of “proceeds of crime derived from offences covered by this Convention...” and “...property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention...”. The 2003 text is slightly different, extending to “...property acquired through or involved in the commission of an offence established in accordance with this Convention...” The major reason for the differences is that the range of criminal offences in the two instruments is different, with some of the offences in the Convention against Corruption being optional. As worded, the latter Convention only obliges countries to provide for domestic criminal confiscation and assistance to other States Parties seeking domestic criminal confiscation, in respect of those optional offences they actually adopt in domestic law.

As with the earlier Conventions, the Convention against Corruption establishes a basic regime for domestic freezing, seizure and confiscation in one article, and then goes on to create a parallel provision calling for international cooperation in such cases. The cooperation provision, Article 55, calls for cooperation “to the greatest extent possible” within domestic law, either in submitting a foreign confiscation order for enforcement in the requested State Party, or in bringing a foreign application for a domestic order before the competent authorities. In either case, once an order is issued or ratified, the requested State Party must take measures to “...identify, trace and freeze or seize...” targeted proceeds or other property for purposes of confiscation. Other provisions include requirements for the contents of the various applications, a requirement to deposit copies of relevant laws and regulations with the Secretary General,⁵⁶⁷ and provisions for the refusal or suspension of orders.

A further addition to the precedents of the 1988 and 2000 Conventions is Article 56, which requires States Parties to endeavour to take measures which would permit the spontaneous or proactive disclosure of information about proceeds, if they consider that such information might be useful to another State Party in any investigation, prosecution, or judicial proceeding, or in preparing a request relating to asset recovery. The principle of spontaneous information-sharing is found in the mutual legal assistance provisions of the 2000 Convention,⁵⁶⁸ and has now been extended specifically to asset-recovery.

⁵⁶⁷ In practice these are submitted to the U.N. Office for Treaty Affairs, usually through the Permanent Mission of the State Party in New York. In most such reporting requirements, the obligation takes effect at the time an instrument of ratification, acceptance, approval or accession is deposited, as is the case with notification concerning a new State Party’s central authority for mutual legal assistance purposes under Article 46, paragraph 13. In this case, however, no specific time is set, so the obligation would take effect when the treaty becomes applicable to the State Party concerned, in this case either on its initial coming into force or on the 30th day after the State Party files its own instrument, whichever is the later (Article 68, paragraph 2).

⁵⁶⁸ Convention against Transnational Organized Crime, Article 18, paragraphs 4 and 5.

TOOL #44D – CLAIMS TO AND DISPOSAL OF RECOVERED ASSETS

While the provisions of the Convention against Corruption governing domestic freezing, seizure and confiscation can be seen as an expansion of those in the 1988 and 2000 Conventions, Article 57, dealing with the return and disposal of assets, represents a major change. Much of the discussion surrounding the disposal of confiscated corruption proceeds involved the question of whether basic ownership rights vested in the confiscating State by virtue of the confiscation itself, or if the assets were actually the property of the State seeking their return, on the basis either of a surviving property right or of compensation for malfeasance or maladministration. The claim of a surviving property right is stronger in some cases than others. A senior official who simply steals money from the national bank or re-directs profits from natural resources, other exports or domestic tax revenues to his own bank account, for example, can be said to have in his possession funds which clearly belong to the State. Proceeds from bribes, extortion, bid-rigging and similar transgressions involve criminal harm caused to the State, but the proceeds are not funds to which the State was ever entitled, and any claim to them is more in the nature of compensation for the harm caused than pre-existing property ownership.

Chapter V of the Convention, and in particular, Articles 51 and 57, deal with this in two ways. Article 51 makes return of assets a “fundamental principle”, without any consideration of the legal basis for the return. Article 57, paragraph 3, then sets out a series of provisions governing return of confiscated proceeds and other property which generally prefers return to the requesting State Party, but sets stronger rules in cases where the property interest of that State Party is the strongest. In cases where the property is embezzled funds or laundered embezzled funds, it is to be returned to the requesting State Party from whom the funds were embezzled.⁵⁶⁹ In cases where the funds are proceeds or other property related to other Convention offences, they are to be returned to the requesting State Party, but only when it reasonably establishes prior ownership, or the requested State Party recognizes compensation for damage as a basis for the return.⁵⁷⁰ In all other cases, property is to be returned to the requesting State Party, but can also be returned to another prior legitimate owner or used to compensate victims of the crimes from which it originated.⁵⁷¹ This breakdown, which will require the return of assets in many corruption-related cases, represents a significant change from the earlier instruments, where the principle that the confiscating State had exclusive property in the proceeds, sometimes referred to as: “he who confiscates, disposes”, was dominant.⁵⁷² One further consequence of this change, and a lesson learned from some of the more major and costly recovery operations of the previous decade, is Article 57, paragraph 4,

⁵⁶⁹ Article 57, subparagraph 3(a).

⁵⁷⁰ Article 57, subparagraph 3(b).

⁵⁷¹ Article 57, subparagraph 3(c).

⁵⁷² See Convention against Transnational Crime, Article 14, paragraph 1. That provision calls on the confiscating State Party to consider return or other forms of disposal, but any such consideration is entirely discretionary.

which allows the confiscating State Party to deduct “reasonable costs” from the proceeds or other property before it is returned.

PRECONDITIONS AND RISKS

The problems hindering the recovery and return of assets may vary depending on the countries involved. Nevertheless, current and past cases seem to share some similarities. For example, the following factors hinder the successful recovery of assets or render it impossible:

- The absence or weakness of the political will within the victim country as well as within those countries to which the assets have been diverted;
- The lack of an adequate legal framework allowing for necessary actions in an efficient and effective manner; and
- Insufficient technical expertise within the victim country to prepare the groundwork at the national level, such as filing charges against the offenders, and at the international level to prepare the mutual legal assistance request;

Specialized technical expertise is extremely limited and mainly provided by private lawyers whose services are very expensive and who normally do not have any interest in building the necessary capacities at the national level; and

The reluctance of victim States to improve their national institutional and legal anti-corruption framework, a deficiency that may not only lead to the further looting of the country, but also be seriously damaging to the credibility of the country when requesting mutual legal assistance.

LACK OF POLITICAL WILL

A strong and committed political will in both the requesting as well as the requested State or States is essential for the successful outcome of the recovery effort. Direct involvement in the diversion of State funds by high-level Government officials, and all too often the leaders of the country themselves, can impede any action that could be taken. Once a new Government comes into power, its credibility depends largely on how willing and capable it will prove to deal with the "grand corruption" that took place under its predecessor. Successful recovery of what has been looted from a country can be more important to the public than sanctioning and imprisonment of the offenders. The repatriation of stolen funds can not only confirm to the public a return of the rule of law, but can also provide the Government with the necessary resources to implement the reforms promised during the crucial initial phase of coming into power.

Even where a Government decides to embark on a recovery effort, however, internal political conditions may not allow an unrestricted effort. Such a condition not only affects the credibility of the recovery initiative, but also of the new Government in general. For example, restricting recovery efforts to certain persons or circle of people may lead to difficulties in the process of gathering evidence since such evidence may help uncover assets that have been diverted by people other than those targeted. In some instances, the lack of unconditional political will to recover all funds that have been diverted may hinder the recovery effort and can lead to criticism both at the national and international level. That could eventually lead to the reluctance of some parties involved to provide their full support and collaboration.

Another common feature of many cases is that the victim States often concentrate exclusively on extraterritorial investigations while they neglect the basic preparatory work at the national level. In most jurisdictions, there is little hope of recovering assets unless a conviction is obtained for the crimes committed in the course of the looting and the connection between those crimes and the assets abroad has been established. (185)

A lack of political will on the part of the requested country is also a common barrier to successful recovery of stolen assets. Authorities may be reluctant to move against powerful interest groups, such as banks. That seems particularly obvious where the banks are not only holding the assets but were also involved in facilitating their transfer in the first place. (186) Wherever the political will is weak, there is little chance that the complex legal and factual problems typically occurring in cases of asset recovery will be overcome.

LACK OF A LEGAL FRAMEWORK

Recent examples of recovery efforts show that there is no legal framework providing a sufficiently practicable basis for the recovery of assets diverted through corrupt practices. Multilateral and bilateral mutual legal assistance treaties are too limited in their substantial and geographical scope and are therefore often not applicable except in the context of the specific case from which they originated. As a consequence, no standard procedure is applied. Recovery strategies vary from civil recovery to criminal recovery to a mix of both. Each method has its advantages and disadvantages and the final choice seems to depend exclusively on what is expected to work best in the jurisdiction where the assets are located. Selection of the appropriate strategy, therefore, requires specialized legal expertise that is typically very costly, if available at all. The United Nations Convention against Transnational Organized Crime provides a response to some of the problems but, mainly because of its limited scope, it will be applicable only in some specific cases.

LEGAL PROBLEMS ENCOUNTERED

During the initial phase of a recovery effort, the main challenge lies in the tracing of the assets, the identification of the various players involved in the process of the looting of the assets and the determination of their potential criminal or civil liabilities. Often, the exchange of information between various jurisdictions as well as the public and the private sphere is extremely cumbersome, if impossible.

In such an environment, most efforts fail in the initial phase or are not even undertaken because of the difficulties envisaged. The central legal problems are related to jurisdiction and territoriality. Where legal systems are incompatible, particularly when cases involve cooperation between continental and common law systems, cooperation is difficult. Mutual legal assistance treaties (MLATs) have proven cumbersome and ineffective when the object is to trace and freeze assets as quickly as possible. Overcoming jurisdictional problems slows down investigations, often fatally. By the time investigators get access to documents in another jurisdiction, the funds have moved elsewhere.

Legal problems encountered differ significantly depending on the jurisdiction in which the recovery effort is pursued (common/continental law) and the approach chosen (civil/ criminal recovery). Each approach and jurisdiction has its advantages and disadvantages. Civil law, allowing for confiscation and recovery based on the balance of probabilities, has the clear advantage since the evidentiary threshold is typically lower than with criminal actions. Conversely, access to information as well as investigative powers in the civil process is limited and, apart from some common law countries, the freezing of the assets can be difficult. Civil recovery, however, also opens alternative approaches as far as the civil action against third parties is concerned. For example, in some common law countries where compensation goes beyond simple economic damage and where moral and punitive damage compensation is possible, actions against the facilitators of the looting may be considered. Another advantage of civil recovery consists in the free choice of the jurisdiction in which the recovery of the proceeds of corruption is pursued. In the case of criminal recovery, prosecution must follow preset jurisdictional conditions while civil recovery can be pursued almost anywhere in the world and perhaps even more importantly, in several jurisdictions at once. That can be particularly important where there is the risk that the offender might transfer his or her loot to a "non-freezing-friendly" jurisdiction.

The criminal law approach generally provides the investigators with privileged access to information, both at the national and international level. The investigative powers of a prosecutorial office make it easier to overcome bank secrecy and to obtain freezing orders. At the same time, however, the actual confiscation and refunding to the victim may prove more complex since most legal systems still require that the illicit origin of the proceeds be established beyond any reasonable doubt. In the civil proceedings, the link between the assets and the criminal acts at their origin must be established only on the grounds of balanced probabilities, also known as a preponderance of the evidence.

Another clear advantage of criminal recovery is the cost factor. Criminal recovery requires fewer financial resources on the part of the requesting State since most of the investigative work is undertaken by law enforcement agencies of the requested country. A clear disadvantage of criminal recovery arises from the dependency on the sometimes strict requirements needing to be met under the national law of the requested countries to obtain the collaboration of its authorities. Courts in requested countries often set preconditions to file charges or to bring forfeiture proceedings against individuals prior to agreeing to freeze

assets or to keep them frozen. Repatriation in most cases can be granted only after a final decision is made on criminal prosecution or forfeiture to permit repatriation. Those proceedings must comply with the procedural requirements of due process of the requested State.. The courts might also want to establish that the proceedings in the requesting countries satisfy human rights principles. Many requesting countries have found some or all of these requirements difficult to fulfill.

Other aspects are linked to the legal tradition of the jurisdictions involved. For example, a clear advantage within many continental law jurisdictions is the possibility for the victim to participate in the criminal proceeding as a *partie civile*. Such status enables the victim to have access to all the data available to the prosecution and reliance on the criminal court to decide on the (civil) compensation to the victim.

In common law systems, the wide discretionary powers of the prosecution to engage in plea-bargaining has proved to be an effective tool in asset recovery cases. In particular, where the main objective is not obtaining conviction for all the single criminal acts involved but to recover the largest amounts of assets possible, offenders may be offered immunity from prosecution in exchange for their fullest collaboration in the location of the diverted assets. The impediments mentioned above, however, touch only upon a few of the most obvious problems involved. A complete inventory of all the possible scenarios is beyond the scope of the Toolkit.

TECHNICAL CAPACITIES

One of the most important obstacles to seeking out illegal funds and securing their repatriation is lack of capacity in the requesting and in the requested country. The recovery of assets that have been diverted through corrupt practices is extremely complex and consequently requires top-level technical capacities. Tasks necessary to successfully mount a repatriation effort include the conducting of financial investigations, forensic accounting, requests for mutual legal assistance and a solid understanding of the legal requirements of the States where the assets have been located. There are few practitioners in either public or private practice with experience in this type of work, and in many jurisdictions, there are none at all.

In States where corruption is rampant, such capacities are often not available and it is probable that a lack of State capacity helped create the conditions that facilitated the corruption in the first place. Shortcomings in judicial, administrative and/or investigative capacity, however, seriously impede the degree to which a country can undertake such a case successfully. Necessary technical expertise is available at very high costs. Countries that have been looted by their former leaders are typically finding themselves in substantial budgetary crisis. Spending money on private lawyers based on the uncertain hope of actually being able to recover the costs may often not be an option. The private sector generally has no interest in educating the national authorities so that they will be able to conduct future recovery efforts without the help from outsiders. Consequently the lack of expertise remains unchanged.

RESOURCES

The recovery of assets can be costly. Much of what can be done in relation to the repatriation of assets depends on the resources available to fund the case. Cases will almost certainly last for several years, and parties to the action are likely to be determined by their ability to fund litigation. In the case of criminal recovery, that might less be an obstacle. Offenders that have been looting their respective countries over a long period of time do not face the same resource problems as the victims trying to recover the assets. They can employ armies of lawyers ready to jeopardize and delay the successful recovery with all legal means available. The issue of justice being done becomes a question of how long offenders and victims are able to sustain the battle.

PREVENTION OF FUTURE VICTIMIZATION

States that have been victimized often do too little to prevent future diversion of assets. That leads not only to repeated victimization, but also negatively affects the repatriation of funds that have already been diverted. It is understandable that some countries may be hesitant to collaborate in the repatriation of assets if they must fear that the assets returned most likely will become prey to corrupt practices again. Therefore, countries embarking on a recovery effort should consider committing a certain percentage of the assets recovered in form of a "Governance Premium" to the strengthening of the national institutional and legal anti-corruption framework.