



Kodjo Attisso
International Centre for Asset Recovery

**The Recovery of Stolen Assets:
Seeking to balance fundamental human
rights at stake**

GOVERNANCE

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Basel Institute on Governance

International Centre for Asset Recovery

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Abstract

The recovery of stolen assets is a fundamental principle of the UN Convention against Corruption (UNCAC). By including this element in the said Convention, the international community recognizes the negative impacts on countries and populations deprived of the billions of dollars that are diverted each year by their corrupt leaders and public officials.

The confiscation and restitution of these illicitly acquired funds may benefit affected, generally poor, countries in urgent need of resources to finance, for example, social programs or infrastructural projects. As these assets are essential for the well-being of the population, their repatriation can thus contribute to repairing the damage caused by the embezzlement.

This paper intends to analyze the way in which fundamental human rights are susceptible to being violated by the illegal acquisition of personal wealth; these are essentially economic, social and cultural rights. Furthermore, the paper tries to identify who the victims are. It shows not only the necessity of punishing the perpetrators of corrupt practices but also underlines the need to guarantee that their fundamental rights, such as the presumption of innocence and the guarantee of property rights, are respected in the process of asset recovery.

Approaching the issue of asset recovery with a human rights perspective it becomes clear that asset recovery is a process whereby it is essential to respect not only the victims' interests but also to preserve the rights of all persons concerned.

About the author

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Preface

For several decades, it was nearly impossible for countries that had been plundered by their corrupt rulers to take effective action to recover their assets that had been stolen or concealed abroad. The majority of countries that were the recipients of these illicit funds had no established structures to enable their restitution to the countries from which they had been looted. However, Switzerland, recognized internationally as a pioneer in the restitution of such funds, has already been extending its judicial cooperation to these countries since the 1980s. Specifically, in 1986, the Swiss Confederation offered judicial cooperation to the Philippines, and then the Republic of Haiti, with a view to recovering assets from their respective dictators, Marcos and Duvalier. Since then, it has renewed its cooperation in various other cases, such as the funds embezzled by Montesinos (Peru), Abacha (Nigeria) and Mobutu (Democratic Republic of Congo).

It was finally in 2003, with the adoption of the United Nations Convention against Corruption (UNCAC) at Mérida (Mexico), which came into effect in 2005, that a legally-binding international judicial instrument brought a solution to the problem. The States Parties recognized that the illicit acquisition of personal wealth can be particularly harmful to democratic institutions, to national economies and to the rule of law. For this reason, they resolved to prevent, detect and discourage, using the most efficacious means, the international transfer of illicitly-acquired assets, and to strengthen international cooperation in the recovery of such funds.

The UNCAC is innovative in that, for the first time in an international judicial instrument, it includes the concept, the description and the procedures of international cooperation for the recovery of stolen assets (Chapter V). Article 51 states that the restitution of assets is a fundamental principle of the Convention, and that the States Parties agree to provide the most far-reaching mutual assistance in this respect. It promotes the return of the funds stemming from corruption and transferred abroad by political rulers or officials to the plundered countries. Moreover, it also establishes that persons who suffered harm due to corruption have the right to initiate legal proceedings against those responsible. But concerned also with the fact that the recovery of stolen assets may infringe on the rights of those persons targeted, the States Parties expressly recognized the fundamental principles of respecting the guarantees provided by criminal law and civil or administrative procedures concerning the presumption of innocence and the recognition of property rights.

Before establishing the link between the recovery of stolen assets and human rights, this document gives a general overview of the rights violated as a result of the diversion of assets by corrupt dictators or officials. It then elucidates the guarantees of fundamental human rights of the persons accused, which must be considered during the recovery proceedings. Finally this document attempts to present a way of guaranteeing the rights of the various parties during the recovery proceedings.

Kodjo Attisso

1. Introduction

Following the adoption of the United Nations Convention Against Corruption (UNCAC), a number of initiatives were put in place for the recovery of stolen assets. The International Center for Asset Recovery (ICAR) at the Basel Institute on Governance, established in 2007, plays an important role in current initiatives for the recovery of stolen assets.

In 2007, the World Bank and the United Nations Office on Drugs and Crime (UNODC), launched the StAR [Stolen Asset Recovery Initiative] initiative to assist developing countries in recovering assets stolen by corrupt rulers, to invest recovered funds in effective development programs, and to combat the existence of international safe havens.

In their joint report published in June 2007¹, the two bodies said that the cross-border movement, on a worldwide scale, of the proceeds of criminal activities, acts of corruption and fiscal fraud represented between 1,000 and 1,600 billion dollars annually.

Each year, corrupt rulers from impoverished countries divert up to 40 billion dollars and secure these stolen assets in international financial institutions or foreign countries. Once they have left their countries of origin, these funds are extremely difficult to recover, as may be seen from the recovery proceedings in Switzerland for the assets of the former dictators Mobutu Sese Seko of the former Zaïre, now the Democratic Republic of Congo – DRC, or those of Jean-Claude Duvalier of Haiti. Detailed information on these proceedings is available on the ICAR website www.assetrecovery.org.

According to the UNODC/World Bank report, the recovery of even a part of these assets could provide essential resources for the financing of social programs or infrastructure services that are sorely lacking. The recovery of \$100 million would allow the financing of a complete program for: the vaccination of 4 million children, providing running water to some 250,000 households, or a full year of treatment for over 600,000 people with HIV/AIDS.

¹ Stolen Asset Recovery Initiative (StAR): Challenges, Opportunities, and Action Plan, available at www.unodc.org/pdf/Star_Report.pdf

2. The stakes for human rights

The confiscation and restitution of diverted assets makes possible the repatriation to the frequently poor countries and populations from which they have been plundered the funds that are legally theirs, and guarantee that their dishonest rulers cannot profit from their crimes with impunity.

Thus, on the one hand, corrupt practices (diversion of public funds or of aid from development funds, funds acquired through plunder, and wealth that is secretly accumulated abroad...) present a grave threat to the enjoyment of all kinds of rights, particularly economic, social and cultural rights, or civil and political rights.

On the other hand, in practice, the recovery of illicitly-acquired assets is not an easy task. Such a process is faced with several challenges. In fact, the restraining measures (freezing, seizure, confiscation and restitution) may sometimes create conflicts with international standards for human rights.

Therefore, the States must guarantee that the investigative means applied or the decisions taken during the criminal proceedings to seek, seize, freeze, confiscate and return the stolen assets do not in turn violate other fundamental human rights that are guaranteed to the persons being prosecuted. A balance must be found between the need to curb corruption-related crimes, and that of respecting the fundamental rights of the individuals accused.

3. How illicitly-acquired assets violate the rights of people

Simply in terms of their magnitude, diversion of public funds probably constitutes the most widespread and devastating form of corruption in developing countries, particularly in Africa. They enrich a few individuals and impoverish a far greater number. These corrupt practices, which have the effect of subtracting billions of dollars each year from an economy, jeopardize good governance and the rule of law.

3.1. Diversion of assets and development

The flight abroad of illicitly obtained assets abroad leads to a reduction in investment, i.e. disinvestment, with the various consequences that this brings in the long term, including the social polarization.

When the meager resources of a country are reduced by corrupt politicians, officials, and military officers, the capacity of governments to provide basic services to their citizens and to promote economic, social and political development is correspondingly reduced. This may also jeopardize the health and safety of the population, i.e. through the poor design of infrastructure projects and the scarcity or outdated state of medical care and equipment.

These practices, which consist of diverting public funds to the pockets of private individuals or to bank accounts (foreign or local) have the effect of nullifying certain rights, more specifically economic, social and cultural rights. The State must, in principle, respect one of its principal obligation in the area of human rights, which is that of ‘using the maximum of its available resources to realize social, economic and cultural rights’ (art. 2.1 International Covenant on Economic, Social and Cultural Rights)

ICESCR).

The lack of resources that results from the diversion of assets or the plundering of the public treasury prevents the realization of this mission.”

Moreover, it creates a lack of respect for the rule of law and for human rights. The funds that are intended for development and for essential services are often diverted from their original intentions within these countries.

3.2. Some of the principal rights that are frequently violated

- **The right to adequate food** has been recognized since the adoption of the Universal Declaration of Human Rights in 1948 and the ICESCR. Under international law, each human being has the right to adequate food and the fundamental right to be free from hunger. The United Nations Food and Agriculture Organization (FAO) estimates that about 1 billion persons in the world suffer from hunger. The majority of them live in underdeveloped countries of the south. The plundering of resources and the diversion of public funds prevents the realization of this right.
- **The right to health** set forth in articles 11 and 12 of the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) extends generally to the availability, accessibility, acceptability and quality of health-related facilities, goods and services for everyone. In principle, the States must take appropriate measures to assure that these rights are realized for their peoples. The diversion of public funds deprives and depletes health services.
- **The right to education** is a fundamental human right (articles 26 UDHR, 2, 13 and 14 ICESCR), one that is indispensable to the exercise of all the other human rights. The United Nations and UNESCO instruments establish legal obligations concerning the right to education. Education is a powerful tool that enables adults and children who are economically and socially marginalized to lift themselves out of poverty and to become fully-participating citizens. Stolen assets that could have been invested in education, for example, by financing the purchase of educational tools and materials or paying salaries to teachers, clearly represent an obstacle to the realization of this right.
- **The right to due process**; illicitly acquired assets affect the effective recourse to justice (articles 14 and 2.3 International Convention on Civil and Political Rights – ICCPR-). They deprive the judicial system of resources and this can affect its quality and its efficacy. The same lack of resources may lead to insufficient staffing, which, in turn leads to delays and the slow pace of judicial proceedings, infringing the right to be tried without excessive delay provided in article 14 par. 3.c of the ICCPR. The right to due process and effective recourse to the courts is thus also violated.

3.3. The victims

The identification of victims in the battle against corruption is ambiguous, particularly when tackling the question of the restitution of funds diverted by unscrupulous rulers.

First of all, one must take into account that it is the plundered countries themselves, including their institutions meant to create order in society, and their populations, that make up the victims of the diversion of funds. These peoples are deprived of their rights, and, as enunciated by the International Bill of Rights, they may be justly

seen as the victims of the official plundering carried out by their rulers.

But most of the time, these practices inflict greater harm on the poor, who make up the largest and most vulnerable population group within a country.

Since 1991, following a resolution by the United Nations Economic and Social Council, the diversion of public funds has been considered a violation of human rights.

4. Links between the return of illicitly-acquired assets and the defence of victims' rights

Effective mechanisms for the recovery of stolen assets support the actions taken by the States to reverse the worst effects of corruption, while at the same time warning corrupt officials that they will have no place to hide the diverted funds.

The commitment made by the signatory states to the UNCAC to return illicitly-acquired money to its country of origin constitutes a guarantee that corrupt rulers will not escape the law. It makes this type of offense less attractive and brings home the old adage that 'crime does not pay'. In this way, it interferes with the enjoyment of the proceeds of the crime by those who often headed the most reprehensible régimes.

According to statements made by the President of the World Bank, Robert B. Zoellick, 'there must be no refuge for those who rob the poor', and 'helping developing countries to recover the money stolen from them is essential to be able to finance social programs and to prevent corrupt rulers from escaping the law.'

The recovery of assets helps to some extent to restore the rights that were violated by the diversion of public funds. Thus, in the cases of repatriation of assets that have occurred, Switzerland and the countries of origin have, for example, made the following provisions:

Philippines (Marcos funds): The assets returned have been set aside to finance agricultural reform for the most deprived, and to set up compensation measures to benefit the victims of human rights violations under Marcos' dictatorship.

Nigeria (Abacha funds): The funds must be used for programs to combat poverty, create employment, promote health and education, agriculture, build roads, and in general improve the living conditions of the Nigerian people.

In other cases, such as that of Kazakhstan, projects to educate underprivileged children have been planned, or, as in Angola, the money is to go to projects intended to help the most vulnerable members of society, with priority given to reconstruction, construction medical infrastructure and equipment, basic professional training and the promotion of local capacities, particularly the reintegration into society of displaced populations.

5. Procedures for stolen assets and respect for human rights

The confiscation and restitution of stolen assets involve fundamental rights defined on the international level by the International Covenant on Civil and Political Rights (UN Convention II), the European Convention on Human Rights (ECHR) or other regional conventions.

5.1. Guarantee and respect the principle of fair trial

A decision freezing funds is equivalent to their seizure, and directly affects the person concerned to the extent that his civil rights are impacted. He thus has the right to access to the courts (art. 14 ICCPR, art. 6 ch. 1 ECHR).

Any person who is the subject of prosecution must in principle be guaranteed fair treatment at all stages of the procedure, including benefiting from all of the rights and guarantees provided by the domestic law of the State Party in whose territory he/she is located.

At the same time, the confiscation proceedings must offer the guarantee of fair trial, and the case must be heard without unreasonable delay by an independent and impartial tribunal.

5.2. Guarantee the right to property

The protection of ownership is inscribed in the basic laws of most States or recognized in international instruments (art. 1 Additional Protocol ECHR).

The seizure and confiscation of stolen assets deprives individuals temporarily or permanently of their right to their property. This gives rise to a number of concerns in that under a state of law, laws protect and guarantee the right of individual ownership. In principle no one may be arbitrarily deprived of this right.

The States where the public assets were transferred after having been removed or laundered have the obligation to return them to the requesting State based on a final judgment rendered in the latter State. They may confiscate individual items, but only under certain well-defined and restrictive conditions. In general, a serious presumption of the illicit origin of the assets is required.

Normal proceedings for the recovery of diverted funds take place in four stages: location of the assets, freezing and seizure, final confiscation, and then restitution of the assets to the lawful owners. It is the confiscation that presents the greatest threat to a person's right to his/her property.

5.3. The presumption of innocence

The guarantee of the right to the presumption of innocence (art. 11 ICCPR, art. 6 § 2 ECHR) applies only to persons who are subjects of criminal proceedings. Any person accused of a criminal offense is presumed innocent until proven guilty in a legal proceeding. Conflicts between the recovery of stolen assets and the principle of the presumption of innocence may arise in two situations:

1. if the decision on confiscation precedes even the conviction of the perpetrator of the crime, and if it is based on the argument of guilt

2. if the burden of proof is not met

The confiscation of assets before the conviction of those holding them may violate the principle of the presumption of innocence in that it rests on the anticipation of the person's guilt. It assumes without establishing guilt that the accused committed a crime.

The States may nevertheless require that the perpetrator of an offense establish the legal origin of the presumed proceeds of the crime or other property subject to confiscation if such requirement is in conformance with the principles of their domestic laws and judicial procedures.

In the case of illicit enrichment (art. 20 UNCAC), i.e. a substantial increase in the property of a public official, which the latter cannot reasonably justify in relation to his revenues, the burden of proof is on him/her.

According to the same logic, the owner of stolen assets may be asked to prove the lawful origin of his property, which would mean the reversal of the burden of proof, as in the case of illicit enrichment.

In both of these situations, conflicts with human rights arise more within the scope of a criminal prosecution than in a civil action. That is why, in situations where it is possible, it is recommended that the rules of civil procedure be applied if the criminal route cannot justifiably be followed. Thus, the decision on confiscation may be taken without prejudice after the conviction of the perpetrators of the offenses.

5.4. Third-party rights

The decision on confiscation or restitution impacts items of property in dispute, and thus the right to own property. In a case in which a third party acquired these in good faith, the decision to confiscate may impact their rights as well. Consequently, the States should not extend confiscation measures to third-party acquirers who acted in good faith.

On the other hand, confiscation could justifiably be applied against a third party in possession of the asset, if it has been established that the latter was complicit in the crime or was aware that the asset is a proceed of a crime. In any case, measures directed at third parties must guarantee their basic rights (right to a defense, right to be heard, as well as the right to appeal a conviction).

5.5. The protection of victims, witnesses, experts and whistleblowers

The UNCAC recognizes the protection of witnesses, experts and victims (art. 32) as well as of those who give information about cases of corruption (art. 33).

The States Parties must take appropriate measures to ensure effective protection against any acts of reprisal, intimidation or any unjustified treatment of persons who facilitate the launching of an investigation or who are involved in the proceedings *per se*. Otherwise, such persons will be discouraged from cooperating in an investigation.

5.6. Special investigative techniques as opposed to individual rights and freedoms

Within the scope of the recovery proceedings (particularly the identification and location of the assets), the authorities may need to have recourse to special investigative techniques, such as electronic surveillance or other forms of surveillance (art. 50 UNCAC).

Since these may violate a person's right to privacy, they must be submitted to strict control by the courts, and to various legal guarantees, in order to prevent any abuse.

6. Finding a balance

Between the duty of providing justice to countries and populations that have been plundered, and guaranteeing the respect of the rights of the accused

In the end, whatever procedure is chosen to recover stolen assets (mutual legal assistance, criminal, civil or administrative proceedings...), it appears of paramount importance to guarantee the interests of victims while at the same time respecting the standards of the fundamental rights of the persons involved.

The solution that would appear to deal most effectively with the human rights problems would be to conduct the recovery proceedings before civil courts. Civil actions may take place either jointly within the criminal proceedings, or independently, as long as clear rules of procedure are respected in each case.

Article 54.1(c) of the UNCAC recommends that States Parties set up non-criminal systems to handle confiscation, which presents several advantages for recovery proceedings: the requirement of proof is less restrictive ('preponderance of the evidence' rather than 'beyond any reasonable doubt'); they are not subject to certain safeguards that are the most stringent within the realm of international cooperation (such as double incrimination, in which the offense with which the defendant is charged must be considered a criminal act in the destination country); and there are also other options involving negotiations and settlements. The action *in rem* of civil confiscation based on the Anglo-Saxon model of 'civil forfeiture' or 'civil recovery' already exists in certain countries such as South Africa, Canada, Colombia, the United States, Ireland, Italy, Slovenia and the United Kingdom. For its part, Switzerland is considering the drafting of an administrative law allowing the authorities to confiscate and return stolen assets.

- Art. 53 UNCAC: civil action (civil forfeiture, action *in rem*): taking the necessary measures to allow another country to initiate a civil action before its own courts to have a right of ownership over the stolen assets recognized. Ordering the perpetrators to pay reparations or compensation to another State Party having suffered injury.
- Art. 54 UNCAC: taking the necessary measures to allow *the* confiscation of stolen assets in the absence of a criminal conviction when the perpetrator of the offense cannot be prosecuted, by reason of death, flight or in other suitable cases.

In all cases, the concerns of victims must be taken into account at the various stages of the criminal, civil or other proceedings conducted against the perpetrators of the offenses being prosecuted in such a way that they do not prejudice the right to a defense.

Direct technical assistance to the developing countries to strengthen the criminal justice system (for example, the application of the law, prosecution and judicial authority) can help in effectively preventing the theft of assets and the recovery of proceeds of criminal activity in accordance with judicial standards accepted throughout the world.

The Recovery of Stolen Assets: Seeking to balance fundamental human rights at stake

Resources

Corruption and Human Rights: Making the Connection, http://www.ichrp.org/files/reports/40/131_web.pdf

Corruption: Glossaries of international criminal standards <http://www.oecd.org/dataoecd/59/40/41194464.pdf>

International Center for Asset Recovery, <http://www.assetrecovery.org>

The Recovery of Stolen Assets: A Fundamental Principle of the United Nations Convention against Corruption <http://www.cmi.no/publications/file/2751-the-recovery-of-stolen-assets.pdf>

Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, http://www.unodc.org/pdf/Star_Report.pdf