

ANTI-CORRUPTION HELPDESK

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LESSONS LEARNT IN RECOVERING ASSETS FROM EGYPT, LIBYA AND TUNISIA

QUERY

What are some of the lessons learnt in recovering assets from Egypt, Libya and Tunisia? Particularly, what are the barriers that have prevented the recovery of assets from both the asset sending states and the asset receiving states? For example, is it mostly due to a lack of political will, procedural error, or lack of expertise?

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SUMMARY

More than three years after the Arab Spring, the success of Egypt, Libya and Tunisia in recovering assets has been limited. The process of recovering the proceeds of corruption offers many challenges. Assets are often hidden through the use of shell companies and in countries with strong bank secrecy provisions. In addition, the difference in legal systems, ambiguity in legislation, complexity and costs involved, weak investigative capacity, as well as a lack of political will can pose even greater challenges for the effective recovery of assets.

In particular, an analysis of asset recovery efforts in the region shows that the identification, freeze, confiscation and repatriation of stolen assets is hindered by the indiscriminate use of mutual legal assistance requests and the insufficient use of informal channels for requesting assistance.

Countries in the region have complained of demanding evidentiary standards and the lack of clarity regarding mutual legal assistance requirements. A better use of informal channels, such as communication among financial integrity units and available international mechanisms like the Interpol/StAR focal points, could facilitate the collection of intelligence and evidence that in turn would help to build more substantiated formal requests for assistance. At the same time, requested countries need to be more pro-active in supporting the tracing and repatriation of assets, for instance, by sharing information on company registries and properties and allowing non-criminal based forfeitures.

1. CHALLENGES AND LESSONS LEARNT IN RECOVERING ASSETS FROM EGYPT, LIBYA AND TUNISIA

Overview

Asset recovery refers to “the legal process of a country, government and/or its citizens to recover state resources stolen through corruption by current and past regimes, their families and political allies, or foreign actors” (Transparency International 2009).

Stolen asset recovery serves three purposes: “(i) recovering monies to fund governments programs and initiatives that help their people, (ii) providing some level of justice for victims while often challenging a political culture of impunity, and (iii) deterring officials from engaging in future corruption” (Pieth 2007).

Countries across the world have demonstrated their commitment to tracing and recovering stolen assets. Chapter 5 of the United Nations Convention against Corruption (UNCAC) is dedicated to this issue and requires state parties to establish “the widest measure of cooperation and assistance” relating to the return of assets acquired through criminal offences covered by the convention.

Despite that, the percentage of assets identified and repatriated is still very small. In the past 15 years, the Stolen Assets Recovery Initiative (StAR) estimates that only US\$5 billion in illegally held assets were returned. A survey conducted by the OECD shows that between 2010 and 2012, a total of approximately US\$1.4 billion of corruption-related assets had been frozen in OECD countries, and only US\$147 million were returned to a foreign jurisdiction (OECD 2014).

The process of recovering assets is rather complex and challenging. While the process needs to happen swiftly to avoid the assets from being moved elsewhere, the necessity of respecting individuals’ rights and the due process while navigating through diverse legal requirements and systems has proven to be lengthy and extremely demanding (Marshall 2013).

Recovering stolen assets from Egypt, Libya and Tunisia

The Arab Spring has helped shed light on stolen assets and the importance of identifying and repatriating these assets to their country of origin. Mubarak, Gaddafi and Ben Ali, former heads of state of Egypt, Libya and Tunisia respectively, have been accused of corruption and embezzlement of public money. They have allegedly owned properties, luxurious assets and secreted money to several jurisdictions across the world, including Belgium, Canada, France, Germany, Italy, Lebanon, Spain, Switzerland, the UK and the US, among others (Marshall 2013).

Global Financial Integrity estimates that more than US\$132 billion had been transferred out of Egypt due to corruption and trade mispricing during Mubarak’s regime. In Tunisia, more than US\$1.16 billion per year, between 2000 and 2008, was lost to corruption, bribery, trade mispricing, and criminal activity (Financial Transparency Coalition 2011), and in Libya, Gaddafi allegedly held between US\$33 to US\$60 billion in financial centres across the globe in what are likely the proceeds of corruption (IISD 2013).

In the aftermath of the Arab Spring, moneys and properties from politically exposed persons (PEPs) from these countries have been rapidly frozen. Nevertheless, the process of confiscating and repatriating these assets has been overall slow and cumbersome (OECD 2014) and with little variation across countries. Some experts state that, in comparison, Tunisia has been more successful in its asset recovery efforts, but significant challenges remain, as discussed in the next section (Brun 2014).

The literature still does not provide detailed information on asset recovery cases in these countries¹ and it is difficult to assess the very specific challenges and impediments. However, it seems that the effective tracing, confiscation and recovery of stolen assets is hindered by insufficient information about informal assistance, applicable laws and procedures, as well as too demanding evidentiary standards and unclear mutual legal assistance (MLA)

¹ The literature highlights the challenges and lessons learnt in recovering assets from developing countries more generally and the experience so far has helped to put forward new rules and recommendations and have also served to establish new commitments when dealing with countries in the MENA region, such as the ones put forward as part of the [Deauville Partnership with Arab Countries in Transition](#), where member countries of the G8 commit to concrete measures to promote cooperation and case assistance, capacity building efforts and technical assistance as well as the establishment of the Arab Forum on Asset Recovery to foster discussion and cooperation.

requirements. This, combined with the lack of resources (technical and financial) in these countries to effectively collect the necessary evidence and pursue the prosecution of those involved, makes the recovery of assets unlikely to succeed.

The lack of political will from both requesting (countries where the assets originated from) and requested (countries where the assets are hidden) has also been raised as one of the impediments in some of the cases.

The process of asset recovery of the proceeds of corruption can be divided in three main stages (i) identification and tracing of assets; (ii) freezing; and (iii) confiscation and repatriation.

The next sections analyse the steps taken by Egypt, Libya and Tunisia as well as requested countries in each of these stages, highlighting the challenges and the main lessons learnt.

2. IDENTIFYING AND TRACING ASSETS AFTER THE ARAB SPRING

Overview

The initial step of any asset recovery process aims to locate the assets and collect the necessary evidence that would link the assets to an individual's criminal activity. It should be led by the country from where the assets originated, with support from jurisdictions where the assets are thought to be hidden. This includes all assets under their control and through third parties (private individuals and legal entities/shell companies) (CEART Project 2009). It is also necessary to determine the location of the assets, providing sufficient information to enable the requested state to target its research (Pieth 2007).

Lessons learnt from Egypt, Libya and Tunisia

In Egypt, Libya and Tunisia, as it is the case with other prominent cases across the world, asset recovery cases have taken place following the collapse of a kleptocratic regime to pursue the proceeds of corruption held by the former head of state, their relatives and associates (StAR 2010). In some of the cases, the corrupt activities were common knowledge, justifying the temporary freeze

of assets prior to launching investigations.

In the case of Libya, for example, a United Nations Security Council Resolution passed in 2011 ordered the freezing of the Gaddafi regime's internationally held assets; the freeze covered 13 individuals related to the regime and six entities, including accounts held abroad in the name of the Libyan Central Bank. After that, Switzerland, the UK, the US and the European Union also ordered the freezing of assets held by several individuals and entities connected to Gaddafi (OECD 2014).

Resolutions concerning leaders from Egypt and Tunisia were also passed by the EU and member states, as well as by the US and Canada, among others. These resolutions have been important for ensuring that assets that are obviously linked to allegedly corrupt authorities were prevented from being transferred. But this is just an initial step and law enforcement authorities in the countries where the assets came from still have to "get back" to stage one of the process and conduct investigations to provide evidence that the assets were indeed illegally acquired.

Furthermore, in what concerns the more routine asset recovery work, including assets owned by the above mentioned authorities but hidden behind shell companies, significant challenges remain to identify leads that can provide sufficient information to pursue further investigations. For instance, in the case of Tunisia, assets registered in the name of relatives of the former president have been found and frozen in several countries. However, experience has shown that finding assets that have been hidden under complex structures has been much more complex and costly (Brun 2014).

While there is limited information regarding specific asset recovery cases from Egypt, Libya and Tunisia, and while the process to recover assets varies significantly across these countries, it seems that a common mistake in this initial phase relates to the fact that requests for mutual legal assistance have been submitted too early in the process and prior to more in-depth investigations to collect the necessary evidence to build the cases (Arab Forum on Asset Recovery 2013).

Within this framework, a common and underlying challenge in the process of recovering assets seems to be the limited attention given to collect the necessary intelligence and evidence to build the case. This could be related to a series of factors that

are also considered as impediments to the successful recovery of assets, including:

(i) Lack of technical capacity

Asset recovery requires skilled professionals and access to special investigative techniques to follow the money trail (Arab Forum on Asset Recovery 2013). Egypt, Tunisia and Libya face several challenges to undertake corruption investigations and are even more constrained when it comes to pursuing asset recovery.

They lack professionals with expertise in this type of investigation and with knowledge of asset recovery processes or the legal systems of the requested countries. The international community has made significant efforts in providing training and technical assistance to these countries. Requested countries have also sent experts to work in the region in an attempt to facilitate the process and share expertise (OECD 2014). For instance, in 2013, the UK posted a Regional Asset Recovery Advisor to Egypt to provide technical and legal assistance to countries in the region (G8 2013).

In addition, asset recovery processes also require a great deal of diplomatic skills in communicating and requesting assistance from different countries.

(ii) Lack of coordination

Egypt and Libya lack a coherent asset recovery policy. Additionally, the multitude of bodies responsible for the investigation and prosecution of corruption in these countries pose significant coordination challenges to the effective investigation and prosecution of corruption and consequently for the recovery of stolen assets (Kettis and Hakala 2013; Cadigan and Prieston 2011).

In Tunisia, on the other hand, with the support of the Stolen Assets Recovery (StAR) initiative, a special committee for the recovery of assets was established with the aim of putting in place strategic planning and to coordinate the work in this area. Despite several challenges and problems, such as political influence in some cases (Suarez-Martines & Gow 2013), the committee has been relatively successful in ensuring the recovery of part of funds hidden abroad (Brun 2014).

(iii) Limited use of informal channels for investigations

As previously mentioned, countries in the region have made extensive use of formal mutual legal assistance (MLA) requests when first launching an asset recovery process. An MLA is not necessarily the best tool to use during an initial investigation unless there is sufficient evidence of where the assets are hidden and how there are connected to the allegedly corrupt individual (Arab Forum on Asset Recovery 2013).

Indeed, a significant amount of information needed to build a case for confiscating and repatriating assets is held by countries where the assets are located, but requesting countries should make use of informal channels to collect as much evidence as possible before submitting a formal request for assistance. The sharing of information before the mutual legal assistance stage is considered instrumental for successful asset recovery (Conference of the States Parties to the UNCAC 2013).

Within this framework, requests that do not require the use of coercive powers by the requested state should follow a more informal path, for instance, through police-to-police communication, financial intelligence experts or international organisations (Economist 2013; Conference of the States Parties to the UNCAC 2013).

For instance, in countries where the resources and technical capacity to conduct investigations are limited, better use could be made of the information held by financial integrity units (FIUs) through, for example, the framework of the Egmont Group, which is an informal network of more than 131 FIUs (Arab Forum on Asset Recovery 2013). Most FIUs across the globe have freezing powers and are able to temporarily freeze assets while investigations are being conducted. This power however has been under-utilised by countries in the MENA region.²

Other international frameworks can be used at this stage, including for example the StAR/Interpol Focal Point Network that offers secure message systems allowing for the exchange of sensitive and confidential information and the possibility of storing documents (Conference of the States Parties to the UNCAC 2013).

² For more information on the role of FIU in the recovery of assets please see: <http://www.egmontgroup.org/news-and-events/news/2012/10/03/the-role-of-fius-in-fighting-corruption-and-recovering>

Tunisia is a good example of how the existing channels can support the asset recovery process. With the support of the StAR Initiative, the Tunisian Financial Intelligence Unit gained access to global financial networks. This in turn helped solve several problems that had been identified as an impediment to accessing information, such as the lack of a secure information sharing mechanism and the establishment of a financial analysis system that allows for more effective financial investigations (Arab Forum on Asset Recovery 2013). Support has also been provided to Tunisian authorities to develop bilateral conversations with counterparts, which helped in the identification of assets hidden in several jurisdictions and led to the freeze of properties and funds hidden in Switzerland, Italy, France, Belgium and Lebanon (Brun 2014).

(iv) Difficulties to identify the beneficial owner of the assets to be seized

The existence of bank accounts and other assets in off-shore territories makes it extremely difficult to investigate criminal assets due to the challenge in obtaining information from those territories. Usually the owner of the assets is hidden behind a complex chain, including companies established in tax havens. Authorities in requesting countries may request information regarding the ultimate beneficial owner of companies registered in off-shore jurisdictions. A proper response however will depend on the tax haven's willingness to cooperate (Egyptian Initiative for Personal Rights 2013).

Investigations under Mubarak's assets have shown that one of the easiest ways to transfer money abroad without raising suspicion is in the form of corporate profits owned from stakes held in Egyptian companies. For instance, Gamal Mubarak owns a British investment company with only £50,000 (US\$84,600) in capital but with control and shares in several Egyptian companies which are related through a complex network with companies registered in Cyprus, Mauritius, the UK and Egypt, making it extremely difficult to identify the ultimate owner or to trace his assets and profits, particularly because these countries are usually unwilling to disclose information (Egyptian Initiative for Personal Rights 2013).

When facing challenges to obtain information on beneficial ownership in one jurisdiction, countries should consider looking at the structure of the company and its connections to other jurisdictions and try to access this information from a better

regulated (and more transparent) jurisdiction (Arab Forum on Asset Recovery 2013).

(v) Difficulties in establishing an evidential link between assets capable of being confiscated and the crimes

Considering that corruption usually occurs behind closed doors, it is extremely difficult to find evidence of wrongdoings. In addition, in Egypt, Libya and Tunisia, the individuals now investigated have been in power for an extensive period of time and with little or no oversight from other state institutions, making the collection of evidence an even more daunting task.

Additionally, in many of these countries, the separation between the public and private behaviour of ruling elites is often blurred.

In the case of Egypt, for example, Mubarak and his ruling elite's corruption primarily stemmed from their control of state apparatuses and laws. They made use of their power and influence to pass laws and grant tax exemptions, among others, favouring themselves and their businesses and guaranteeing enormous financial returns (Egyptian Initiative for Personal Rights 2013). While corruption is defined as the abuse of power for personal gain, proving this connection is a real challenge.

(vi) Lack of independence of law enforcement bodies

In many of these countries, law enforcement agencies and judges suffer from undue influence and do not have the necessary levels of autonomy to conduct investigations and punish corrupt officials or simply provide the cooperation that is necessary for the confiscation and the return of assets obtained by criminal means.

Egypt for instance has been heavily criticised by its failure to ensure the independence of the asset recovery committee and its subordination to the Executive, which have substantially slowed the asset recovery process (Egyptian Initiative for Human Rights 2013).

Political turmoil, instability and risks of political influence have also been used as grounds for developed countries to refuse to cooperate with Arab countries. In Egypt, the new government's close ties with the former regime made Switzerland's court

decide to deny Egyptian's authorities access to information (The Economist 2013).

(vii) *Limited pro-active role of requested countries*

Countries where the assets are hidden can play a more prominent role in launching investigations in their own jurisdictions, based on suspicious transactions or media reports. In fact, according to the OECD, countries with general success in asset recovery cases have law enforcement agencies that have been proactive, launching their own prosecutions for foreign corruption or money laundering (OECD 2014).

Nevertheless, the recipient country will need proof of the predicate offence of money laundering and will have to rely on the country where the assets originated to prove that corruption (potential underlying offence) involving that individual took place. The UK, for instance, announced in 2014 that as part of its efforts to repatriate Egypt's stolen assets it has opened domestic money laundering investigations into individuals with significant assets in the UK (Maton and Suarez-Martinez 2014).

3. CHALLENGES AND LESSONS LEARNT IN ASSET FREEZING

Overview

The second stage of the asset recovery process involves the freezing of assets. The immediate freezing of assets is instrumental to prevent capital flight and to facilitate confiscation and repatriation when there is enough evidence proving the involvement of the asset's owner in criminal activities.

In the great majority of cases, a court order is required to freeze assets. The request to freeze assets can come from the countries where the assets were stolen or from the country where the assets are located following sufficient evidence that the assets have been illegally acquired. It is important that laws allow for the freeze for an extended period of time, taking into consideration the various evidentiary and procedural requirements.

Lessons learnt from Egypt, Libya and Tunisia

In the case of Egypt, Tunisia, and Libya several

countries have unilaterally ordered the temporary freeze of assets of politically exposed persons (PEPs), but the channels used to freeze the assets vary. They may include: provisional measures, administrative action and formal mutual legal assistance.

Provisional measures

Following the Arab Spring, several countries took specific measures to prevent allegedly corrupt leaders from moving illegal assets secreted in developed countries and offshore centres. The European Union adopted a specific regulation (204/2011) prior the fall of Gaddafi's regime allowing member states to freeze assets belonging to the Libyan state, Gaddafi and other PEPs. Based on this regulation, the UK, for example, froze £2 billion (US\$3.36 billion) in funds. The United Nations Security Council also adopted a resolution on Libya, as previously mentioned.

In the case of Egypt, similar procedures only took place two months after the fall of the regime which, according to some experts, have allowed PEPs to move their assets to avoid confiscation in the future. Some organisations have criticised the international community's response to asset recovery in the case of Egypt. According to some experts, the close ties of Mubarak with business elites in several countries could have been a reason for the slowness in freezing his assets (Egyptian Institute for Personal Rights 2013). The UK has been particularly criticised for failing to freeze Mubarak's assets in the country (Fenner 2012; BBC Arabic 2012).

In any case, these restrictive measures only apply to a limited number of individuals and are time limited (Arab Forum on Asset Recovery 2013). The effective confiscation and repatriation of assets will still depend on the support and cooperation from the country where the assets were stolen through mutual legal assistance. Here, many of the challenges identified in the first stage and below in the section discussing mutual legal assistance also apply.

Administrative measures

Some countries have made use of administrative procedures to temporarily freeze assets of individuals suspected of being involved in corruption schemes in Egypt, Libya and Tunisia.

In France, for instance, FIUs are allowed to request

the freezing of assets via administrative mechanisms if suspicious activity is reported by financial institutions (Jorge et al. 2007). In Switzerland, authorities relied on an old framework aimed at combating illegal activities of the mafia. They categorised Mubarak's regime figures as part of an organised criminal network as there was a clear presence of a hierarchical structure and a degree of secrecy in their dealings, which in turn empowered Swiss authorities to implement the so-called reverse burden of proof and temporarily freeze the assets (Egyptian Initiative for Personal Rights 2013). This measure requires the individuals involved to prove that the assets they own in Switzerland were legally acquired.

Formal MLA requests

Requests to freeze assets have also been submitted by the governments of Egypt, Libya and Tunisia through mutual legal assistance requests.

Mutual legal assistance (MLA) is the provision of assistance on a "formal legal basis, usually in the gathering and transmission of evidence, by an authority of one country to an authority in another" (Basel Institute on Governance). Usually, MLA is required whenever coercive powers are involved, such as search and seizure, information from financial institutions, the formal taking of evidence from a suspect or witness or for the freezing and confiscation of assets. As such, MLA requests can be submitted in the different stages of the process, although experience has shown that the use of informal methods may be more efficient in the investigation phase.

Requested states may also submit mutual legal assistance requests to, for example, ask states for support in locating/identifying persons and documents, and take statements or testimony (Monteith 2012).

In order to be accepted, it is instrumental that these requests contain a description of the factual background including information connecting the individual under investigation to the facts/evidence and the criminal activity. The request should also explicitly state the connection between the relevant fact and the requesting jurisdiction and what type of assistance is sought (for example, access to the number of a bank account).

In the region, the following challenges have been

underscored as an impediment to the recovery of stolen assets:

(i) Lack of knowledge regarding legal requirements and processes when seeking mutual legal assistance

Countries in the region, and particularly representatives from Egypt and Tunisia, have underscored the challenges in assessing information regarding the processes and requirements to request mutual legal assistance in different jurisdictions (Kettis and Hakala 2013). More clarity regarding what type of information should be obtained through informational or formal channels or who are the focal points in each country could facilitate and optimise the process.

In addition, experience shows that MLA requests were often submitted without any previous contact with the requested countries. Experts strongly encourage countries to communicate first; prior dialogue and personal meetings are considered important for receiving assistance (Conference of the States Parties of the UNCAC 2013b).

Responding to these complaints, several countries published [guidelines](#) on how to obtain assistance in their jurisdiction. Members of the G20 also publish [step-by-step guides](#) for asset recovery.

(ii) Procedural challenges

Some procedural challenges related to the translation of requests, order of applications and annexes, as well as spelling variations of Arab names were identified by Egypt as some of the problems delaying the process (Permanent Mission of Egypt to the United Nations 2011). Other technical challenges identified as common motives for the refusal of MLA include sending the request to the wrong authority, or the failure to abide to the general principles applied to MLA, such as dual criminality (when the request for assistance will only be accepted if the offence is an offence in both requesting and requested state), reciprocity and statute of limitation.

(iii) Delays in responding to requests

Countries in the region have complained about delays in responding to requests or the lack of positive or negative responses from requested countries, which significantly hamper investigation and prosecution in the requesting country (Arab

Forum on Asset Recovery 2013).

There is very little information regarding the number of requests received and the time required to process them. In the United States, for instance, there is a backlog of 4,500 requests from a wide variety of countries awaiting response (Messick 2014).

Best practice in this area suggests that countries should follow up on answered requests using appropriate government-to-government channels, but also explore informal channels of communication to try to find out the reasons for the lack of response. For instance, the [StAR/INTERPOL Global Asset Recovery Focal Point initiative](#) has proven useful in facilitating informal contact between focal points (Arab Forum on Asset Recovery 2013).

In addition, experts have argued that there is a need to streamline MLA processes in order to reduce the number of requests to only those that are strictly necessary. Messick (2014) for instance suggests that courts in several countries should admit public records from another country showing ownership of land and vehicles without the need to submit a mutual legal assistance request for a staff member from the public registry to testify to the authenticity of the documents.

(iv) *Lack of clear rules for denying mutual legal assistance*

Overall, MLA policy is very weak and there is a lack of guidelines and clear procedures which leads to countries providing insufficient or no response to asset recovery requests or enjoying broad discretion when deciding whether or not to accept a MLA request.

Representatives of countries in the region have complained about the lack of support and political will demonstrated by requested countries. According to them, countries have, on several occasions, failed to respond to mutual legal assistance requests in a timely manner or assistance requests have been denied based on unfounded reasons. For instance, a representative from Egypt reported that some countries have failed to recognise the UNCAC as a sufficient basis for mutual legal assistance requests and that, several times, the failure to provide detailed evidence on the case was the reason for not accepting the request for assistance (Arab Forum on Asset Recovery 2013).

(v) *Content of MLA request*

Additionally, countries have complained of the level of detail/evidence required by requesting countries in order to accept the request for assistance. On several occasions, requesting countries have difficulties in assessing the information, particularly due to bank secrecy laws. Representatives from Tunisia have emphasised the need for requested countries to cooperate and share information related to bank accounts and real estate held by corrupt leaders and their associates, as well as to share a list of companies owned or shared by Libyan nationals (Arab Forum on Asset Recovery 2013).

Egypt has reported substantial difficulties in determining the location of funds in the requested state and has on several occasions asked the requested state for information to help tracing the assets. These requests have been consistently refused (Permanent Mission of Egypt to the United Nations 2011). According to Egypt, as of February 2014, the UK had refused 15 of 25 requests for assistance. British officials say they were merely asked for more information (The Economist 2013).

On the other hand, requested countries have complained about the quality of evidence provided in MLA requests. According to them, MLA requests have to be refused if there is no substantial evidence of the criminal activity. On several occasions, requests have been made covering a large number of individuals and with limited information related to the basis of suspicion and the location of the assets (Arab Forum on Asset Recovery 2013; Conference of the States Parties of the UNCAC 2013b). The fact is that requesting countries rely to a great extent on the cooperation of these states to gather information and proceed with investigations, particularly if the assets are hidden in financial jurisdictions. Also, considering that requested countries are often developed countries, they have more resources to conduct investigations and other necessary activities

In March 2013, the Egyptian government sued the British Treasury to try to force the latter to provide information on the restitution of \$135 million in bank accounts belonging to 19 individuals said to belong to the core group around former Egyptian President Hosni Mubarak. But British officials said that according to UK law, they needed Egypt to take the first step by providing exact information concerning crimes that may have been undertaken (Wei 2013).

Other challenges in this phase of the asset recovery process include:

(vi) *Lack of trust*

In the requested states, uncertainty and a lack of trust in the requesting country's system is also a challenge. Many countries are reluctant to share information or order the repatriation of assets due to the lack of trust in the investigative and judicial system in the country of origin (for example, will the information be used to effectively punish the corrupt or just help the PEP to move their assets whenever possible?)

Requesting countries in the region have complained about the fact that requested countries do not share the findings of their investigations and do not notify them when initiating money laundering investigations involving individuals from their country (Permanent Egyptian Mission to the United Nations 2011). In addition, Egyptian officials highlighted that on the occasions when requested countries need their assistance, they also fail to provide information on the amount of suspected funds detected, making it difficult for law enforcement authorities in Egypt to prioritise their work and assess the urgency of each request (Permanent Egyptian Mission to the United Nations 2011).

(vii) *Lack of political will and/or political influence*

The issue of political will and legitimate commitment on the part of originating jurisdictions often represents an important challenge to overcome. In many cases, in response to international or domestic pressure, countries end up submitting MLA requests without having the intention to seriously prosecute the officials involved and no further steps are taken to ensure the freezing and subsequent confiscation of illegal assets.

The lack of political will or commitment can also be identified in cases where governments in countries where assets have been stolen refuse to take action even when the authorities in requesting countries have identified, traced and frozen suspicious assets. In these cases, further information and the prolonged freezing of the assets will depend on the country of origin demonstrating interest in pursuing

investigations. The requesting country thus has to formally request MLA and prove that investigations are underway (Lasich 2009). But in many cases, investigatory units and the judiciary failed to demonstrate a legitimate interest in punishing the officials involved and recover the assets stolen, the temporary freezing of assets have to be lifted and the allegedly corrupt official can move them freely (Pavletic 2009).

For instance, following the freeze of assets from certain Tunisian individuals by Switzerland, the Tunisian government requested the freeze to be lifted despite evidence that those individuals had connections with the previous regime. In Egypt, non-governmental organisations have raised the same concern as figures from the old regime are now part of the Justice Ministry (Egyptian Initiative for Personal Rights 2013).

(viii) *Requirement of prosecution at the country of origin*

In some jurisdictions, even the request for mutual legal assistance and subsequent actions to temporarily freeze the assets and share information will only be provided if criminal charges have already been initiated in the country of origin. Many jurisdictions, nevertheless, permit MLA during the investigation stages or once there is reason to believe that a proceeding is about to be instituted against the alleged offender (Stephenson et al. 2011).

Particularly in countries where corruption is widespread and the judicial system is weak, such requirements will offer real impediments to the confiscation and recovery of assets, and this is certainly the case in Egypt, Tunisia and Libya as highlighted in the first section.

In 2013, the European Union General Court decided against freezing assets of three relatives of former Tunisian President Ben Ali. According to the ruling, the assets could not be frozen because the underlying offence which the council defined as subject to an asset freeze was "misappropriation of public funds". In those specific cases being judged, assets had been frozen on the basis that they were subject to "judicial investigation by the Tunisian authorities in respect to the acquisition of movable and immovable property, the opening of bank accounts and the holding of financial assets in several countries as part of money

laundering operations. Since the misappropriation of funds did not encompass money laundering under Tunisian law, the freeze was illegitimate (Suarez-Martines and Gow 2013).

(ix) Numerous opportunities to appeal against asset-freeze decisions

Some countries have also complained about the numerous opportunities for individuals under investigation to appeal asset-freeze decisions, which significantly delays the process of confiscation and repatriation of assets (Permanent Mission of Egypt to the United Nations 2011). There is a need to strike a balance between dual process and the abuse of the rights to appeal with the sole purpose of delaying the process.

4. THE CHALLENGES OF CONFISCATING AND REPATRIATING STOLEN ASSETS AFTER THE ARAB SPRING

Overview

Once the assets have been identified and frozen, the next step is confiscation or forfeiture, which is a fundamental step to the repatriation of assets. There are different legal avenues for confiscating the proceeds of corruption depending on the country's legal framework. They usually include (StAR 2010)

- Domestic criminal prosecution and confiscation, followed by an MLA request to enforce orders in foreign jurisdictions
- Non-conviction based (NCB) confiscation/forfeiture, followed by an MLA request or other forms of cooperation to enforce orders in foreign jurisdictions
- Private civil actions, through which victims can ask for the recovery of assets as well as compensation and damages
- Criminal prosecutions and confiscation or NCB confiscation initiated by a foreign jurisdiction
- Administrative confiscation, through a non-judicial mechanism for confiscating assets by an authorised agency (police or law enforcement agency).

Domestic criminal prosecution and confiscation is the most common approach used in asset recovery so far. However, given the challenges discussed above in collecting the necessary evidence to prosecute corruption, the use of alternative methods to confiscation based on criminal prosecution has been

highly encouraged (Cadigan and Prieston 2011).

Furthermore, once confiscated, assets must be transferred back to their country of origin. This raises a number of issues, such as costs to other jurisdictions, compensation to those who may have lost out in other ways, and ensuring that the proceeds go to the right place and are not subjected to corruption again (Marshall 2013).

Lessons learnt from Egypt, Libya and Tunisia

Criminal prosecution and confiscation

As it is the case in other places, the recovery of assets from Egypt, Libya and Tunisia also depend on convictions for the underlying offence in the country of origin. Within this framework, the burden of proof lies on the party reclaiming the funds which also has to justify its rights. As countries in transition are struggling to rebuild state structures and guarantee the independence of the judiciary, questions are raised about the capacity and accountability of institutions requesting the return of assets (Kettis and Hakala 2013).

For instance, in the case of Egypt, the lack of convictions has been an impediment to the confiscation and repatriation of assets. In 2012, Mubarak and his sons were acquitted of corruption by an Egyptian court and while some of the cases are now being retried, it is likely that judgments rendered in absentia will be challenged in the European Court of Human Rights and the decision will most probably not be applicable abroad (The Economist 2013).

There are very few successful examples in the region. In the past year, Tunisia managed to recover US\$28.8 million held by the former president's wife in a Lebanese bank account. The effective repatriation of the money was possible following judicial procedures in both countries for the return of the funds. The international community played a key role throughout the process, facilitating bilateral meetings between Tunisian and Lebanese authorities as well as providing technical assistance (Brun and Miron 2013).

Non-conviction based forfeiture

Non-conviction based forfeiture "enables states to

recover illegally obtained assets from an offender via a direct action against his or her property without the requirement of a criminal conviction". It can be established on a lower standard of proof, helping to ease the burden on enforcing authorities (Basel Institute on Governance).

To date, few countries allow for non-conviction based confiscations, but several countries have committed, for instance through the Deauville Partnership, to adopt mechanisms to allow confiscation and the repatriation of assets without a criminal conviction. The UK and the US (through its Kleptocracy Asset Recovery Initiative), are among the countries that allow the recovering of assets laundered through their jurisdictions using civil forfeiture proceedings (StAR 2010).

Private civil action

Private civil proceedings are an alternative route available to victim states in some countries to recover assets acquired illegally and to seek damages based on breach of contract or illicit enrichment. The UNCAC requires signatory countries to permit other states to initiate a civil action for corruption (Article 53, UNCAC). States act as private litigants and therefore have to hire lawyers and entail significant costs. The advantage is that in these types of law suits evidence from ongoing criminal investigations may be used and a lower burden of proof ("balance of probabilities") is required (StAR 2010).

For instance, the Libyan government recently recovered a £10 million (US\$16.8 million) property through a civil law suit brought to the English High Court. The property was held in the name of a shell company, but the Libyan government proved that it was in fact owned by Gaddafi's son (Peters & Peters Solicitors LLP 2014).

Administrative confiscation

In an attempt to address some of the challenges mentioned above, Switzerland passed a law in 2011 (Federal Act on the Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means, known as *lex Duvalier*) stating that in cases where the state is incapable of cooperating fully in the asset recovery process, due to the collapse or non-availability of the judicial system, the burden of proof will be reversed, meaning that politically exposed

persons have to prove that the assets identified were acquired by legal means. If the PEP fails to provide proof, the assets can be repatriated without a criminal conviction in the country of origin (The Economist 2013). However, the law does not apply to Egypt, Libya and Tunisia as the judiciary in these countries are considered able to judge the cases.

Against this backdrop, the Swiss government is considering the adoption of a new law that would make it easier for Switzerland to engage in the recovery of assets from countries undergoing conflict, such as countries in the MENA region. The new draft law proposed in 2013 provides for the preventive freezing, as a precautionary measure, of assets of politically exposed persons. In addition, it establishes procedures for the administrative confiscation and restitution of potentates' assets. Lastly, it provides for targeted measures that make it possible to support the state of origin in its efforts to obtain the restitution of assets of criminal origin transferred abroad (Edwards Wildman Palmer 2013).

5. REFERENCES

Arab Forum on Asset Recovery. 2013. *Report of the Arab Forum on Asset Recovery*.

Basel Institute on Governance. 2011. Development Assistance, Asset Recovery and Money Laundering: Making the connection. International Centre for Asset Recovery.

Basel Institute on Governance. No year. *Non-Conviction Based Forfeiture*
<http://www.assetrecovery.org/kc/node/c40081eb-7805-11dd-9c9d-d9fcb408dfee.0>

Basel Institute on Governance. No year. *Mutual Legal Assistance*.
<http://www.assetrecovery.org/kc/node/772d1eae-7808-11dd-9c9d-d9fcb408dfee.4>

BBC Arabic, 2012. *Egypt's Stolen Billions*. Documentary.
http://www.bbc.co.uk/arabic/m.ultimedia/2014/02/140214_egypt_stolen_billions_eng_close_up.shtml

Brun, J. 2014. *Tracking Tunisia's Stolen Assets: The Balance Sheet Three Years on*.
<http://star.worldbank.org/star/content/tracking-tunisias-stolen-assets-balance-sheet-three-years>

Brun, J.; Miron, J. 2013. *Tunisia's cash-back. The Start of More to Come*.
<http://star.worldbank.org/star/news/tunisia%E2%80%99s-cash-back>

Cadigan, L.; Prieston, L. 2011. *Returning Libya's Wealth*. <http://fletcher.tufts.edu/SWFI-OLD/~media/Fletcher/Microsites/swfi/pdfs/Libya.pdf>

CEART Project. 2009. *White Paper on Best Practices in Asset Recovery*. http://www.academia.edu/5920092/White_Book_on_Best_Practices_in_Asset_Recovery

Conference of the States Parties to the UNCAC. 2013. *Progress Made in the Implementation of the Open-ended Intergovernmental Working Group on Asset Recovery: Selected Highlights from Two Years of Asset Recovery under the Convention*.

Conference of the States Parties of the UNCAC 2013b. *Report on the Meeting of the Open-ended Intergovernmental Working Group on Asset Recovery*.

Edwards Wildman Palmer. 2013. *Switzerland Wishing to Lead by Example: Anti-Corruption and Asset Recovery Laws to Broaden*. <http://www.lexology.com/library/detail.aspx?g=f0bf6a1e-611b-4ee2-85e8-7b89dfb8a071>

Egyptian Initiative for Personal Rights. 2013. *Can We Recover Our Stolen Assets?* http://eipr.org/sites/default/files/pressreleases/pdf/can_we_recover_our_stolen_assets_web.pdf

Fenner, G. 2012. *Corruption Kills, Yet the UK Is Turning a Blind Eye to Dictators' Stolen Assets*. <http://www.theguardian.com/commentisfree/2012/sep/07/corruption-uk-blind-eye-dictators-stolen-assets>

Financial Transparency Coalition. 2011. *President of Tunisia Flees Country, Just Like All the Illegal Capital*. <http://www.financialtransparency.org/2011/01/15/president-of-tunisia-flees-country-just-like-all-the-illegal-capital/>

G8. 2013. *The Deauville Partnership with Arab Countries in Transition: Progress Report 2013*. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248907/130925_DP_progress_rpt.pdf

IISD. 2013. *Panel Discusses Illicit Financial Flows from Africa during US Visit*. <http://post2015.iisd.org/news/panel-discusses-illicit-financial-flows-from-africa-during-us-visit/>

Jorge, G. et al. 2007. *The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention against Corruption*. <http://www.u4.no/publications/the-recovery-of-stolen-assets-a-fundamental-principle-of-the-un-convention-against-corruption/#sthash.hxHgFRWl.dpuf>

Lasich, T. 2009. *The investigate Process: A Practical Approach*, in "Tracing Stolen Assets: A Practitioner's Handbook". International Centre for Asset Recovery, Basel Institute of Governance.

Kettis, A.; Hakala, P. 2013. *Recovering Tunisian and Egyptian Assets. Legal Complexity Challenges States in Need*. European Parliament.

Maton, J; Suarez-Martinez 2014. UK Launches Money-Laundering Investigations in Relation to Stolen Egyptian Assets. <http://www.lexology.com/library/detail.aspx?g=f738eb6b-c6b3-462a-a54f-260daaf9499d>

Marshall, A. 2013. *What's Yours Is Mine New Actors and New Approaches to Asset Recovery in Global Corruption Cases*. Center for Global Development. http://international.cgdev.org/sites/default/files/whats-yours-is-mine_0.pdf

Messick, R. 2014. *Fixing the Mutual Legal Assistance Regime: Some Thoughts on Reforms*. Global Anti-Corruption Blog. <http://globalanticorruptionblog.com/2014/07/16/fixing-the-mutual-legal-assistance-regime-some-initial-reforms/>

Monteith, C. 2012. *Mutual Legal Assistance*. Centre for Asset Recovery. Basel Institute on Governance.

OECD. 2014. *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*. http://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf

Pavletic, I. 2009. *The Political Economy of Asset Recovery Processes*. International Centre for Asset Recovery Working Paper 7, Basel Institute on Governance.

Permanent Mission of Egypt to the United Nations, 2011. *Note verbale dated 7 October 2011 from the Permanent Mission of Egypt to the United Nations Office on Drugs and Crime, Corruption and Economic Crime Branch*.

Peters & Peters Solicitors LLP. 2014. *Asset Recovery Global Overview in Getting the Deal Through*. <http://gettingthedealthrough.com/books/53/article/28666/global-overview/>

Pieth, M (Ed). 2007. *Recovering Stolen Assets*. Basel Institute on Governance.

StAR Initiative. 2007. *Stolen Assets Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*.

StAR Initiative. 2010. *Towards a Global Architecture for Asset Recovery*. <http://star.worldbank.org/star/publication/towards-global-architecture-asset-recovery>

Stephenson, K. et al. 2011. *Barriers to Asset Recovery: An analysis of the key barriers and recommendations for action*. <http://star.worldbank.org/star/publication/barriers-asset-recovery>

Suarez-Martines & Gow. 2013. *Tunisian asset recovery efforts: one step forward and two steps back?* Edward Wildman Palmer LLP.

The Economist. 2013. *Recovering Stolen Assets: Making a Hash of Finding the Cash*. <http://www.economist.com/news/international/21577368-why-have-arab-countries-recovered-so-little-money-thought-have-been-nabbed>

Transparency International. 2009. *Anti-Corruption Plain Language Guide*.

Wei. 2013. *Global Crime, Illicit Funds and Nowhere to Hide*.
<http://star.worldbank.org/star/news/global-crime-illicit-funds-and-nowhere-hide>

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