

Recovering the proceeds of corruption
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INTRODUCTION

On 18th April, 2002, The Times reported that the family of General Sani Abacha, the former Nigerian President who plundered more than US\$3bn of state cash in the 1990s has agreed to return about \$1bn in an out-of-court settlement. Swiss banks, which held the bulk of General Abacha's plundered loot, will return \$535m to the Nigerian government. Banks in Jersey are expected to return some \$200m, and banks in Luxembourg and Liechtenstein a total of \$300m. No money was found in Britain, although an investigation involving the Serious Fraud Office (SFO), the Metropolitan Police, the Home Office and the Financial Services Authority found traces of \$1.3bn that had passed through the City of London. As part of the settlement it was reported that more than \$100m will be returned to the Abacha family by the banks in Switzerland because it can be proved that the money was removed from Nigeria before General Abacha came to power. The settlement leaves more than \$2bn of Abacha's loot unaccounted for. It was also reported that the SFO and the Home Office helped to gather a huge body of evidence to support the Nigerian Government's legal action.

The Abacha case highlights the difficulties that countries such as Nigeria face in seeking to recover assets that are the proceeds of grand corruption perpetrated by politicians and officials who have held, or hold, high office in the countries whose assets they have looted. The purpose of this paper, which is largely based on a report the author was commissioned to do for the Department for International Development (DFID) last year, is to look at the procedures available in this country to enable countries, particularly developing countries, to locate and seek the return of their looted assets. The paper also looks at some of the important changes that have been introduced in this area by the Proceeds of Crime Act 2002, which recently received Royal Assent.

Although the title of this paper refers to the proceeds of 'corruption', I did not intend to confine corruption to its technical sense of giving and receiving of bribes. In the context of this paper the term embraces a whole range of criminal activity that would normally be regarded as 'corrupt', such as theft, fraud, false accounting, tax evasion etc. Nor are activities that are 'corrupt' confined to activities that are criminal in nature. As will be apparent when considering possible civil remedies, 'corrupt' activities would include activities for which a liability may lie in tort such as conversion or breach of trust. My use of the term 'corrupt' should therefore be interpreted as covering a range of activities to which either a civil or criminal liability may attach. Furthermore the focus of this paper is those activities, whether carried out by corrupt politicians, officials, or others where the 'victim' is the state. A distinction is sometimes made between 'grand' and other forms of corruption. In my view this distinction is a somewhat artificial one. All corruption when carried out by politicians or officials of a state where the state has been defrauded has a corrosive influence if left unchecked. It is frequently indicative of wider-scale corruption. And corruption is frequently associated with other forms of criminal activity such as offences connected with drugs. Nor is corruption a phenomenon necessarily associated with developing countries. Both the UK and our European partners have had their fair share of corruption scandals. What is important is the ability of a country to cope with instances of corruption by having adequate systems

in place to detect and punish such corruption. It is when a country does not have such adequate systems in place, or those systems themselves are corrupted, that corruption is liable to get out of hand. This paper is concerned with those cases where corruption has reached a scale that the perpetrators of such corruption have a need to take steps to ensure that their ill-gotten gains are placed out of reach of the jurisdiction of the 'victim' country and laundered to disguise their illicit origins. In such cases, usually following a change of government in the 'victim' country, there is a need for international cooperation to assist that country bring the offenders to justice and obtain the return of its looted assets.

There are a number of mechanisms under English law as it exists at present to enable action to be taken with regard to assets in this country that are the proceeds of corruption. The process of Mutual Legal Assistance (MLA) exists to assist one country in its investigation and prosecution of crime, where evidence may exist in another country. One aspect of the assistance available is the ability to restrain assets located in one country that are relevant to criminal investigation or proceedings in another so as to prevent their dissipation or removal out of the jurisdiction. This process will also enable effect to be given to any confiscation order made by a foreign court following a conviction or a successful action for civil recovery. Letters of Request can be sent by the competent authorities of one country to the UK Central Authority (UKCA) - a unit operating within the Home Office - requesting assistance in obtaining evidence for the purposes of a criminal prosecution that may be contemplated. Requests for restraint orders against assets can be executed, and external confiscation orders enforced.

Normally it is not possible to bring a prosecution in this country for criminal activity that has taken place abroad. There are a number of exceptions to this, two of which are relevant in the present context. First, under ss. 108-110 of the Anti-terrorism, Crime and Security Act 2001 the scope of the common law and statutory offences of bribery has been extended to cover bribery abroad by UK nationals and UK registered companies. This change in the law will enable the UK to implement fully the OECD Bribery Convention. Second, a prosecution for money laundering may be brought against persons in this country who handle the proceeds of criminal activity taking place abroad. Furthermore, there is no requirement in a prosecution for money laundering for double criminality. Provided the acts that make up the predicate offence would be an offence if they had taken place in the UK, they do not have also to constitute an offence under the law of the country where they had taken place.

The above mechanisms (MLA, prosecutions in the UK for bribery, money laundering etc) can be characterised by the term 'the criminal route'. In addition, it would be possible to bring civil proceedings in this country to recover illicitly acquired assets. Such proceedings may take a variety of forms. They could be brought against the corrupt politician or official concerned on the basis of the tort of conversion, or breach of fiduciary duty, or against a bank or other institution that has handled the proceeds of the crime on grounds of breach of constructive trust. In addition a freezing order can be obtained at short notice to prevent assets moving out of the country. Civil proceedings of this kind can be characterised by the term 'the civil route'.

In considering whether to pursue the criminal or civil route it would be important for a country to be clear as to its objectives. Is the principal objective to punish the wrongdoer, or is it to gain control of the assets? If it is the former then the criminal

route would be the correct option. As part of that route it may be possible in the event of a conviction to secure a confiscation order to ensure that the offender does not profit from the proceeds of the crime. Given a number of pitfalls that may need to be overcome, the criminal route should not be used if the primary aim is to secure return of the assets. Where the primary aim is to secure the return of assets then civil proceedings brought by the claimant state would be the more effective course. However, where a country has in place legislation providing for civil recovery or forfeiture of the proceeds of crime, then MLA will now be available to give effect to requests by claimant states to restrain assets or enforce orders made by their courts for civil recovery or forfeiture as a possible cost-free alternative to bringing civil proceedings. It is also necessary to be aware of the danger in trying to run the criminal and civil routes simultaneously. Once criminal proceedings are commenced a civil court would be reluctant to proceed with a civil case involving broadly the same issues since this could prejudice the criminal case. Difficulties might also be encountered in using evidence obtained in the criminal proceedings for use in the civil proceedings. Before embarking on the criminal or civil route it is important that the country concerned has in place a strategic plan. It must also be borne in mind that the looted assets are likely to be located in more than one jurisdiction and any strategic plan would also need to consider how legal proceedings (whether criminal or civil) can best be coordinated.

MUTUAL LEGAL ASSISTANCE (MLA)

Requests for evidence

In this connection a distinction should be drawn between a formal request for evidence for the purposes of a contemplated prosecution and a request for police assistance for the purposes of investigating crime. The former would include the following: serving a summons requiring a person to give evidence before a judicial authority in the requesting country; obtaining sworn evidence for use in criminal proceedings in the requesting country; authenticating or certifying evidence for use in the requesting country; and the exercise of search and seizure powers for use in criminal proceedings or investigations in the requesting country. A formal Letter of Request has to be sent to the UKCA for requests of this kind to be executed. Requests for police assistance would include interviewing witnesses where the person to be interviewed is willing to cooperate without appearing before a judicial authority in the UK, tracing assets in investigations preliminary to a prosecution, sharing with the requesting country information about investigations into offences which have been committed in the UK, and obtaining medical or dental records where the patient has given written consent. Requests of this nature can be sent directly by the competent authorities of the requesting country to the UK Central Bureau of Interpol at NCIS.'

Section 4 of the Criminal Justice (International Cooperation) Act 1990 covers the application by authorities abroad for evidence to be obtained in the UK in connection with criminal proceedings or investigations. To be acted upon a request must emanate from a court or tribunal exercising criminal jurisdiction in the requesting state, or from a prosecuting authority in that state, or from any other authority that has the function of making requests of this kind. Furthermore, an offence under the law of the requesting state must have been committed, or there are reasonable grounds for suspecting that such offence has been committed, and proceedings in respect of the offence have been either instituted in the requesting state, or an investigation into the offence is being carried on there. If the Secretary of State is

satisfied that these conditions have been fulfilled (and a certificate issued by the requesting state as to these facts would be conclusive) he may then nominate a court in England, Wales or Northern Ireland (the Lord Advocate in the case of Scotland) to give effect to the request. If the case concerns serious or complex fraud he may refer the request in whole or in part to the Director of the Serious Fraud Office (SFO)² and the SFO's enhanced powers of investigation under s. 2 of the Criminal Justice Act 1987 may then be used. These powers, which include a compulsory disclosure power, enable the SFO to have access to confidential information in the hands of banks, financial institutions, accountants and other professionals.

It should be noted that to be acted upon a request for assistance under s. 4 of the 1990 Act does not require the existence of a bilateral agreement between the requesting country and the UK. Nor is dual criminality required except in cases where the SFO's special investigation powers are used in cases of serious or complex fraud. Requests for fiscal offences can also be executed in cases where criminal proceedings have been instituted, or where the requesting state is a Commonwealth country or party to an international agreement, or where the offence would be the same or of a similar nature if committed within the UK.

The Secretary of State has an overriding discretion as to whether to provide assistance under s. 4. However, the Home Office say in their Guidelines that requests for assistance are rarely declined. The UK would normally decline a request where execution of the request would impede UK investigations, or be contrary to national security, or where the trial in the requesting country would involve double jeopardy. Furthermore, the Secretary of State in exercise of his discretion must do so consistently with the UK's international obligations. A number of international conventions such as the European Convention on Mutual Assistance in Criminal Matters as well as the Commonwealth Scheme 4 give the requested state discretion to refuse assistance for 'political' offences.⁵

A Letter of Request cannot be acted upon unless it contains all necessary information to enable the UKCA to act upon it. In particular, it must contain the details and address of the judicial or prosecuting authority conducting the proceedings or investigation, a summary of the facts of the offence and details of the offence that has been committed or is being investigated, and a precise description of the evidence that is being requested and its relevance to the case.⁶ A too broad or vague description of the evidence requested is liable to be rejected as a 'fishing expedition'. Where a request is rejected the Home Office practice is to give reasons for the rejection and where appropriate give the requesting state informal advice as to how the request could be framed so that it could be acted upon.

Search and seizure

Section 7 of the Criminal Justice (International Cooperation) Act 1990 gives power to give effect to requests for search and seizure for the purpose of investigations or proceedings abroad. Section 7(1) provides for Part II of the Police and Criminal Evidence Act 1984 (PACE) (powers of entry search and seizure) to have effect as if references to serious arrestable offences included conduct which is an offence under the law of any country or territory outside the UK and would constitute a serious arrestable offence if it had occurred in any part of the UK. Section 7(2) gives power to a magistrate to issue a warrant for search and seizure where: (i) criminal proceedings have been instituted against a person abroad, or a person has been arrested for an offence; (ii) the conduct constituting the offence would have

constituted an 'arrestable offence' if it had occurred here; and (iii) there are reasonable grounds for suspecting that there is on premises in the UK occupied or controlled by that person evidence relating to that offence (other than items subject to legal privilege). The powers of search and seizure may only be exercised in performance of a direction given by the Secretary of State in response to a request from a court or tribunal exercising criminal jurisdiction in the requesting state, or a prosecuting authority, or any other authority that appears to the Secretary of State to have the function of making requests for the purposes of s. 7. It should be noted, however, that dual criminality is a requirement for requests for search and seizure under s. 7(2).

Investigations into the proceeds of crime

Part 8 of the Proceeds of Crime Act confers new powers to assist investigations into the proceeds of criminal conduct. The powers include a compulsory disclosure power, which is modelled on the compulsory disclosure powers available to the SFO and the Financial Services Authority, as well as powers to obtain customer information orders and account monitoring orders. Provision is made for these powers to be extended by Order in Council to include 'external investigations'. Once the Order in Council has been made, which is likely to be early in 2003, these powers will be available to assist foreign jurisdictions investigating the proceeds of criminal conduct committed abroad. These powers will be of particular use to developing countries to enable them to trace their looted assets prior to them obtaining a restraint order.

Restraint and confiscation

Once illicit assets have been traced there arises the need for adequate mechanisms to be in place to give effect to requests from foreign jurisdictions to restrain (or freeze) such assets to ensure that they remain in the UK and are not dissipated. There is also the need for mechanisms to be available to give effect to any external confiscation orders that may be issued by foreign courts and tribunals with regard to such assets. Prior to the Proceeds of Crime Act UK law and practice had a number of shortcomings. In the first place, a restraint order could only be applied for at the stage that criminal proceedings had been instituted, or were on the point of being instituted. In most cases, therefore, the accused would have had ample warning of the intention to prosecute and thus time to move his assets to a safer jurisdiction. Second, the enforcement of an external confiscation order required a conviction for a criminal offence and for the overseas court to be persuaded to make a confiscation order. There may be a number of reasons why a criminal conviction may not be possible, not least because of the stricter standards of proof that most countries require for the purposes of obtaining a criminal conviction. Finally, to obtain a restraint order or to enforce an external confiscation order a country must have been designated on an 'all crimes' basis by Order in Council under Part VI of the Criminal Justice Act 1988, as amended. To qualify for designation a country had to be a party to a multilateral or bilateral treaty providing for confiscation. So far only 34 countries had been so designated, the majority of whom were not developing countries. The situation has been improved considerably by Part II of the Proceeds of Crime Act. The Act gives power by Order in Council to provide for the restraint of property that is the subject of an 'external request' and for the realisation of property for the purpose of giving effect to an 'external order'. For assistance to be given there will no longer be any requirement for a country to be 'designated': assistance can be granted to any country or territory outside the UK that requests it. A request for restraining property can be made by an overseas government at a very early stage in an investigation, i.e. before proceedings have been instituted. The only

requirement is for there to be reasonable grounds to believe that the property to be restrained will be needed to satisfy an external order that may be made. An 'external order' is defined as an order made by an overseas court in relation to the recovery of specific property which is found or believed to have been obtained as a result of or in connection with criminal conduct. It does not matter what form the external order takes: it could be an order made against a person (an 'in personam' order) or an order made against property (an 'in rem' order, as in civil forfeiture proceedings in the USA). Nor does the order have to be made only in criminal proceedings, or following a criminal conviction. The order could be made in civil proceedings or some other court proceedings.

The above provision will need to be 'fleshed out' through the implementing Order in Council. Once the Order in Council has been made (probably early 2003), the UK will then be in a position to respond to a request by any country to restrain its looted assets and to enforce any orders that may be made by its courts for the recovery of such assets. It will be for potential requesting countries to ensure that they have the necessary up-to-date legislation to enable them to make such requests and orders. Use of the MLA procedures has the great advantage from the requesting country's point of view that it is cost-free. The cost of executing Letters of Request, whether for seeking evidence, obtaining a restraint order or enforcement of an external confiscation order, is borne by the UKCA.

Difficult issues can arise where evidence is obtained through MLA. In particular, can evidence received for the purposes of a criminal investigation be used in subsequent or parallel civil proceedings? What if a requesting state has no real intention of instituting criminal proceedings but uses the MLA route for the primary purpose of obtaining evidence for use in civil proceedings? In principle, evidence obtained for use in criminal proceedings can be used only for the purpose of those proceedings. The SFO would normally ask for an undertaking to this effect where assistance is provided using their compulsory powers. But should this apply once the criminal proceedings are over, or where the requesting state decides in good faith not to proceed with the investigation? Whatever may be the legal position it is a fact that once evidence has been handed over to an overseas authority there is no practical way that that authority can be prevented from using the evidence for other purposes, although the courts in the overseas jurisdiction may have a discretion to exclude such evidence. At the very least such evidence would enable the authority concerned to formulate a more focused request for discovery in any civil proceedings.

A further problem with using MLA is that the situation regarding the return of assets that are the subject of restraint and confiscation orders to the country from where such assets have been looted, remains for the moment unclear. At present such assets, or the proceeds of such assets, go into the Consolidated Fund, ie they are retained by the government. The rationale behind this is that the purpose of confiscation orders is to deprive the criminal of the benefits of his or her criminal conduct, rather than to compensate the victim of the crime. However, in cases where there is an identifiable 'victim', such as a country whose assets have been looted as a result of corruption, there is no moral justification for the government to hang on to such assets. The current government policy is to allow up to 50 per cent of such assets to be returned in 'deserving' cases. In the context of the negotiations on the forthcoming UN Convention Against Corruption, an international consensus appears to be emerging that, in principle, all looted assets should be returned to the 'victim' country (less costs incurred by the requested country in enforcing the confiscation

order). It is therefore likely that the obligations of the UN Convention will require the government to re-think its policy.

MONEY LAUNDERING

Although a prosecution for money laundering should not be considered as the most efficient vehicle to recover assets that are the proceeds of overseas criminal activity, there can be little doubt that a strengthening and clarification of the law relating to money laundering would act as a deterrent to banks and other financial institutions that may be tempted to handle the proceeds of corrupt activities by politicians and officials overseas. A strengthening of the law in this area should therefore be regarded as part of the weaponry in the fight against corruption.

Historically there have been very few prosecutions and convictions for money laundering in England and Wales. In the period 1987 to 1998 there were only 357 prosecutions and 136 convictions and the conviction rate was only 44 per cent compared to the average Crown Court conviction rate of 76 per cent.⁹

Part of the difficulty may lie in the fact that up to now different rules and standards of proof apply depending on whether the money laundering concerns drugs, terrorism or 'all crimes'. In the case of 'all crimes' money laundering it is necessary to prove that the defendant knew or suspected that the assets were the proceeds of criminal conduct. This is hard to prove in the absence of an admission of guilt and requires inferences to be made as to the state of the defendant's mind and demonstrating to a jury that a transaction or a series of transactions appeared suspicious. This contrasts with money laundering in relation to drug-related crime, which requires proof that a person 'knew or had reasonable grounds to suspect' that the property represented the proceeds of drug trafficking, ie it is not necessary to show actual knowledge or suspicion.

Difficulties in proving the requisite 'mental element' are exacerbated where an international element is involved. Laundering the proceeds of drug trafficking is one thing, but merely assisting a leader of a country to retain his wealth on a confidential basis outside his country may be a different issue. It does not follow in the latter case that a bank or other institution handling such money must be taken to have known that it represents the proceeds of crime.

A further difficulty lies in proving the predicate offence where there is a foreign element. Although dual criminality is not a requirement to establish the offence, the facts to show that the offence would be an offence if committed here still need to be proved. This would require evidence to be obtained from the country where the offence or offences took place. For this purpose the UK may need to seek MLA from the country concerned. And that country may be unable or unwilling to provide assistance.

Part 7 of the Proceeds of Crime Act has introduced a number of important improvements in this area. In the first place the Act removes the distinction between drugs-related money laundering and 'all crimes' money laundering. The definition of what constitutes money laundering has been tightened up (although the 'mental element' that the respondent 'knows or suspects' that the property constitutes or represents the benefit of criminal conduct remains). The scope of the offence of failure to report knowledge or suspicion of money laundering has been widened to include what amounts to a negligence test. The offence will apply not just in cases where the prosecution can prove beyond reasonable doubt that a person knew or suspected that another person was engaged in money laundering but also where the respondent can be shown to have had reasonable grounds for knowing or suspecting

that another person was engaged in money laundering. In this connection in determining whether a person has committed an offence the court is required to consider whether the respondent complied with any guidance that has been issued by a supervising authority, or any other relevant body, the content and publication of which has been approved by the Treasury. However, the offence will apply only to information and other matters that come to persons in the course of business in the regulated sector. Nevertheless the introduction of what amounts to a negligence test as part of the failure to report the offence will no doubt act as a powerful deterrent to banks and other financial institutions in this country not to accept money from 'politically exposed persons' without first making rigorous enquiries as to the source of such money.

CIVIL PROCEEDINGS

In considering possible civil proceedings there are a number of actors who may incur potential civil liability. There are the principal actors, ie those who use their public position to misappropriate assets that are the property of the state, there are third parties such as banks, other financial institutions, and professionals (eg lawyers and accountants) that handle the assets, and there are those who receive and give bribes.

The liability of the principal actors is usually clear. In most cases a liability in tort will arise on the basis of conversion or constructive trust. The problem, however, is that in many cases the English courts would not have jurisdiction because the defendant was not resident here and none of the acts giving rise to the claim had taken place here. However, it may still be possible to sue the principal actors as being 'necessary and proper parties' to actions brought against banks or intermediaries who are properly sued in the English courts.

Claims against third parties, such as banks, financial institutions and professionals can arise mainly in the following ways:

- (a) as persons named in a court order freezing assets of which they have custody for a person against which an allegation of misappropriation is made;
- (b) as defendants to a claim for restitution of assets they have received from a person against whom an allegation of misappropriation is made; or
- (c) as defendants to a claim for compensation for their own wrongdoing in assisting in or advising on the disposal of proceeds of misappropriation.

Typically a claim in category (b) will arise where a bank or other agent has received assets and holds them in good faith as trustee. The bank or agent may have little interest in the outcome of the dispute. So long as the receiver of the assets holds them, liability depends on the claimant asserting his rights to the assets in the defendant's custody, and not on any wrongdoing or knowledge on the part of the defendant. Normally the defendant claims no interest or title to the assets. The claim (and the liability of the bank) would be limited to the amount received.

As regards claims in category (c), a typical claim would be one for breach of fiduciary duty. Liability would depend inter alia on being able to prove, on a balance of probabilities, that the bank or agent knew, or should reasonably have known, that the assets in question were obtained in breach of fiduciary duty or by fraudulent means. And it should be noted that making a report of a suspicious transaction to the appropriate authorities, while a defence to a prosecution for money laundering, would not provide a defence to civil proceedings. Other possible claims would be for wrongful interference with goods or negligence.¹⁰

Both those who give and those who receive bribes, in addition to any criminal liability,¹¹ may also be civilly liable. Accordingly, a government employee who receives a bribe acts in breach of duty owed to his government for the amount of the bribe, which is held on constructive trust for the government. Any increase in the value of any asset acquired from the proceeds of the bribe is enjoyed by the government and the recipient of the bribe must also account to the government for any decrease in value. ¹² Thus a contractor that paid a bribe to a foreign government employee for the purpose of obtaining a contract would incur liability to the government concerned for the amount of the bribe and the government would have a corresponding right of civil action against the contractor.¹³

In addition to substantive causes of action, there are various forms of interim relief that an English court can grant to prevent assets being dissipated in advance of any action. The most useful of these is a freezing order and accompanying disclosure order. The freezing order restrains a party from removing assets from the jurisdiction or from dealing with any assets whether located within the jurisdiction or not. The power has been used by the English court in a corruption case - see *Republic of Haiti v Duvalier* ¹⁴ where English proceedings were taken in support of French proceedings against Baby Doc Duvalier and others. In that case the court granted a freezing and disclosure order in respect of the Duvalier assets worldwide. In addition a search order can be obtained to allow the claimant to enter premises for the purpose of inspecting or taking possession of documents or other articles. The purpose of this order is to preserve evidence that might otherwise be removed, destroyed or concealed.

It would be beyond the scope of this paper to go into further detail about the various kinds of civil relief that a 'victim' claimant state would be able to pursue in the English courts. What perhaps characterises the civil route is its flexibility, not only with regard to the remedies that are available but also with regard to the potential defendants that can be targeted. Furthermore, interim relief in the form of freezing and search orders can be obtained rapidly to prevent assets and evidence being dissipated. Civil action is not dependent on the institution of criminal proceedings, or on the securing of a conviction and the obtaining of a confiscation order. The civil standard of proof (balance of probabilities) only is required and the requirement for disclosure of all relevant evidence to assist the claimant to bring his case is far more extensive than the disclosure requirements in criminal proceedings.

While the civil law in general offers adequate remedies and procedures to assist countries to recover illicitly acquired assets, there remains the major problem of funding what could be potentially very expensive litigation, often involving actions in a number of different jurisdictions. Included in the costs are pre-litigation costs such as the employment of private investigators, forensic accountants etc. In many cases the cost of funding such litigation would be beyond the resources of developing countries. However, it should be pointed out that the proceeds of corruption on a grand scale frequently run into many hundreds of millions of pounds. The cost of litigation becomes less significant when compared with the amount of money at stake. A number of suggestions have been made for the funding of such litigation. An increasing number of solicitors are now prepared to act on a conditional fee basis. Some accountants and barristers are also willing to provide their services on this basis, but private investigators are not normally willing to act on this basis. However, conditional fee arrangements are only really viable in cases where solicitors estimate that the chances of success are high. And cases of this kind are inherently risky. Nor would conditional fees necessarily provide the funding for litigation in other

jurisdictions. Agencies responsible for development assistance have so far been reluctant to provide assistance to fund litigation of this kind. One way forward might be for litigation initially to target assets where there was a good chance of recovery - such litigation being funded on a conditional fee basis. If successful the assets recovered could then provide a 'war chest' for further litigation to be funded on a normal basis.

While MLA does enable the government to have control of the proceedings, this is not the case in civil proceedings where the outcome is largely in the hands of the parties. This could mean that the 'wrong' claimants could bring proceedings with the result that illicitly acquired assets could end up in the hands of the same corrupt regime, or a successor regime that was no better than the regime it replaced. There may also be difficulties in obtaining evidence from foreign jurisdictions. Bank secrecy may still be a barrier to obtaining evidence since any 'gateways' through mutual legal assistance could be granted would only be open to the competent authorities in criminal matters. Other potential obstacles include the inability of civil parties to offer protection to witnesses or collaborators. And claimants run the risk of counterclaims, whether vexatious or not, and actions for defamation. Dealing with these claims is likely to involve a serious diversion of management and financial resources.

Finally, in cases where the claimant is a state, the potential loss of sovereign immunity needs to be taken into consideration. By bringing proceedings the state would be deemed to have submitted to the jurisdiction of the courts, thus rendering itself liable to any counterclaims that may be brought arising out of the same action.

CONCLUSION

Although the civil route remains the most effective way by which a country can regain control of its looted assets, the route does contain a number of drawbacks. Furthermore, most developing countries retain an instinctive preference for using the criminal route to retrieve their looted assets. The Proceeds of Crime Act, in particular the new powers that will be available to assist overseas jurisdictions to locate, restrain and confiscate assets that are the proceeds of crime, means that the criminal route becomes a more attractive option, assuming, that the problem of returning assets to the 'victim' country can be resolved.

However, it is no good for the UK to improve its procedures if other countries are not in a position to take advantage of those procedures. A brief examination of the legislation of Commonwealth countries shows that there are disparities in the degree of mutual legal assistance that Commonwealth countries can provide, and consequently request from other states. While in general Commonwealth countries are able to provide assistance with regard to obtaining evidence, examination of witnesses, search and seizure etc, the assistance in the area of seizing and confiscating the proceeds of crime varies between those countries who are unable to provide any assistance in this area, those who can provide assistance only in the area of drugs-related crime, and those who can provide assistance on an 'all crimes' basis. In some cases the ability of the Commonwealth country concerned to act is further limited by the requirement for reciprocity or the existence of a mutual legal assistance treaty between the requesting and requested states.

In the USA, the Department of Justice (DOJ) has a fairly broad authority to provide assistance to trace assets and obtain evidence to assist a foreign country in the

investigation of crime without the need for a treaty or agreement to be in force between the USA and the requesting state. However, the DOJ say that they have significantly more authority to help if such a treaty or agreement is in place. The ability of the DOJ to help to restrain assets or enforce a foreign confiscation order is much narrower. Where there has been a violation of US law then either civil or criminal forfeiture action can be taken in respect of the proceeds of the crime. Although no existing statute provides that foreign corruption is per se a predicate offence for money laundering, there are a number of other statutes that provide a basis for the US to pursue misappropriated foreign assets. For example, it is an offence knowingly to transmit or receive the proceeds of foreign theft, fraud or conversion: the US mail fraud and wire fraud statutes prohibit the use of US mails or wires in interstate or foreign commerce to transmit the proceeds of fraud. Where no offence under US law has been committed the ability of the USA to restrain assets or enforce a foreign confiscation order is limited to drugs offences and certain other specified offences, namely, murder, kidnapping, robbery, extortion, destruction of property by explosives or fire, and fraud by or against a foreign bank. Assistance is also dependent on a foreign criminal conviction and confiscation order being obtained.

There is therefore a pressing need for all countries seeking assistance from the UK in the areas of restraint and enforcement of confiscation or civil recovery orders, to examine, and where necessary amend, their legislation to ensure that they have the ability to make requests for assistance for all crimes, not just drugs-related crimes. In the case of restraint orders, their legislation should enable assistance to be requested at the earliest possible stage to ensure that assets are not dissipated. If a country wishes to follow the UK example and enact legislation equivalent to the provisions on civil recovery in the Proceeds of Crime Act then the UK will be able to respond through the new powers that will enable external orders for civil recovery to be enforced in the UK.

[Reference]

REFERENCES

[Reference]

(1) Annex A of the Home Office's Guidelines 'Seeking Assistance in Criminal Matters from the UK', 2nd edn, October 1999.

(2) The factors that would determine whether a case was suitable for the SFO to take on include: (i) the sum at risk is estimated to be at least 1m (the 1m figure being intended as a signpost of the seriousness of the case rather than the main indicator of suitability); (ii) the case is likely to give rise to widespread public concern, eg where government departments, public bodies, or the governments of other countries are involved; (iii) the investigation requires highly specialised knowledge, eg of financial markets; (iv) the case has a significant international dimension; (v) there is a need for legal, accountancy and investigative skills to be brought together as a combined operation; (vi) the suspected fraud appears to be complex and one in which the use of s. 2 investigative powers might be appropriate.

[Reference]

(3) R. v Secretary of State for the Home Department ex parte Finninvest SpA [1997] 1 All ER 942.

(4) Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme) as amended in 1999.

(5) There are a number of key cases in English law as to what constitutes a 'political' offence and they were referred to extensively in the Finninvest case. That case is instructive in that it involved illicit political donations. The court had no

[Reference]

difficulty in holding that this factor did not thereby render the offences 'political'.

(6) See pp. 10-14 of the Home Office's Guidelines, ref. 1 above, for a fuller statement of the information that a Letter of Request should contain.

(7) See s. 116 and Schedule 5 of PACE for a definition of 'serious arrestable offence'.

(8) See s. 24 PACE for a definition of 'arrestable offence'. Any offence carrying a penalty of five years' imprisonment or more would constitute an 'arrestable offence' as well as certain other offences.

(9) See 'Recovering the Proceeds of Crime' a Performance and Innovation Unit Report, June 2000, published by the Cabinet Office, pp. 75-76.

(10) For a fuller discussion of these issues the reader is referred to Chapter 3 of the Report 'Banking on Corruption - the Legal Responsibilities of those who Handle the Proceeds of Corruption', February 2000, published by the Anti-Corruption Working Group of the Society for Advanced Legal Studies.

[Reference]

(11) The UK is a party to the OECD Bribery Convention that requires contracting parties inter alia to make the bribery of foreign public officials a criminal offence. However, the OECD's peer review process to assess compliance with the convention concluded that (i) there is some doubt as to whether existing legislation applies to the bribery of foreign officials and (ii) existing laws do not expressly cover corrupt acts taking place outside the UK. As mentioned above, the position has now been rectified by ss. 108-110 of the Anti-terrorism, Crime and Security Act 2001, which extended the scope of the common law and statutory offences of bribery to cover bribery abroad by UK nationals and UK registered companies.

(12) See the case of Attorney-General for Hong Kong v Reid [1993] 1 AC 324.

(13) See Mahasan v Malaysia Housing Association [1979] AC 374 and Arab Monetary Fund v Hashim [1993] Lloyd's Law Reports 543.

(14) [1989] 1 All ER 456.

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