

4.5.3 Stolen assets

97 One specific problem affecting Africa particularly severely is the illicit acquisition of public assets. The scale of the problem is huge: an EC report estimates that stolen African assets equivalent to more than half of the continent's external debt are held in foreign bank accounts⁸⁵. In the most egregious cases, amounts held in individual foreign accounts run into billions of dollars. Rich countries have recognised the importance of the issue, and have made commitments, such as that made by G8 countries at Kananaskis in June 2002; but the amount of stolen money returned to African countries is still relatively small. Recommendation: Countries and territories with significant financial centres should take, as a matter of urgency, all necessary legal and administrative measures to repatriate illicitly acquired state funds and assets. We call on G8 countries to make specific commitments in 2005 and to report back on progress, including sums repatriated, in 2006. We now turn our attention to the obstacles that are usually raised to meeting this responsibility.

98 The underlying difficulty is that the legal systems to effect recovery and repatriation are essentially designed to deal with claims from one developed country to another. African judicial systems are often unable to meet the requirements for the amount and quality of evidence. The challenge is for developed nations to help African countries develop the capacity, and show the political will, to overcome the blockages.

99 Good progress has been made recently through the work of international bodies and regulators, particularly after the recognition that some laundered money was being used to finance terrorist activities, such as those of 11 September 2001. Many countries now have controls built into their legal systems. But implementation is not always effective, especially where many different parts of the administration – finance and justice ministries, financial regulators, law enforcement agencies etc. are involved. The same vigour as was exercised in developing controls against terrorist financing – which resulted in the preparation of international guidelines⁸⁷, model legislation, and technical assistance programmes – should be applied to tracking and returning stolen state assets. The theft of billions of dollars from an African country undermines standards and leads to a collapse of public services that can have as devastating an effect as a terrorist incident there.

100 Positive action would not only ensure that significant sums were returned to the budgets of several African countries, but would also send a strong deterrent signal to potential corrupt figures that crime does not pay. The action is needed in a series of linked areas: introducing measures to *prevent* the theft of assets at source; improving systems to *identify* funds that have been acquired illicitly; facilitating the authorities' power to *freeze and confiscate* assets while further investigations are carried out; and creating instruments to *hand back* funds to the jurisdiction from which they were looted. Failure by African governments to recover stolen assets has resulted from obstacles in each of these areas, so all need to be addressed. There are actions here both for countries where the financial centres are located and African countries, which must be able to assist in identifying the theft.

Prevention

101 A recent report estimates around US\$18 billion was laundered in eastern and southern Africa in 1999 alone.⁸⁸ This figure covers the laundered proceeds of drug trafficking and other crime, not just corruption. Some could have been linked to

financing terrorism. To combat this, and to respond to requests for financial intelligence about stolen assets, African states need appropriate legislation and robust financial institutions. The international community should give priority to helping build these, by providing expert advice. This could include training courses for financial investigators, providing mentors, and strengthening or creating African regional bodies associated with the

Financial Action Task Force.

Freezing and Confiscation

102 Most large financial centres have appropriate legislation and regulations to permit freezing and confiscation of assets in criminal investigations, but often assets cannot be frozen until criminal proceedings are well advanced, allowing time for corrupt individuals to move stolen money. To reduce this risk, amendments to legislation should be made to allow assets to be frozen at a much earlier stage in a criminal investigation⁹

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103 It is also likely that states with advanced money laundering controls will notice financial irregularities in a foreign customer's account that the home country might have failed to recognise. All countries should exchange information with African state authorities on suspicious transactions in bank accounts of African individuals (and their family members and close associates) who are, or have been, entrusted with prominent public functions. They should assist them to put together a Mutual Legal Assistance request, which is usually needed before further legal progress can be made.

104 The need to rely on criminal proceedings is a further major obstacle. Most developed countries apply the principle of Dual Criminality, which means they can only investigate activities that are recognised as a crime in both countries. Also, no conviction can be brought if the accused is dead (often the case with African leaders in these situations). One way to address this problem is to take action against the proceeds of crime rather than the individual (non-conviction based forfeiture). Some countries have recently passed legislation making this possible, and have used it successfully to recover stolen assets. All financial centres that have not done so should introduce and implement legislation to allow confiscation without needing a criminal conviction.

105 Family members of the accused frequently appeal against confiscation and repatriation of illicitly acquired funds. This can severely hold up the process, and is sometimes used as a deliberate delaying tactic. It is of course important to ensure a citizen's right to appeal against a conviction. However, there are rights to consider on both sides; and the existing balance is so distorted as to be ineffective. Developed states should consider ways to reduce the number of appeals allowed in a given case. Another serious obstacle is the application of political immunity for serving leaders and their families. African states should restrict the application of immunity, and pursue criminal cases against those shown to be corrupt.

Repatriation

106 There is a distinction to be drawn between embezzled funds and the proceeds of other crime (including corruption). Embezzled funds must be repatriated to the state of origin, as maintained in the UN Convention Against Corruption. In other cases, it is difficult to establish to whom funds should be returned, as the crime is often regarded as 'victimless'. Concerns therefore exist about how funds are utilised: several mechanisms have been used to ensure transparency in the deployment of returned funds. These include a mutually agreed contract and a designated trust fund⁹⁵. A further possibility is to establish a fund managed by a third party. The most suitable mechanism will vary from case to case; the key point is to reach mutual agreement before funds are repatriated. Financial centres should agree a mutually acceptable mechanism for returning and monitoring the use of funds.

107 Momentum is building to address these problems. But the first step is to ratify the UN Convention Against Corruption (UNCAC). Signed in December 2003 this is the first international legal instrument to recognise the need for all states to commit to asset repatriation (see Article 57). For UNCAC to come into force 30 states must ratify it. By the end of 2004, only one OECD state had ratified the Convention. Recommendation: All states should ratify and implement the UN Convention Against Corruption during 2005⁹⁷.