



# How to Best Utilize our Stolen Assets?

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Best Practices for the Management of Recovered Assets

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## **Best Practices for the Management of Recovered Assets**

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Designed by: Mohamed Gaber

### **Egyptian Initiative for Personal Rights**

6 Dar Al Shifa (formerly Abdel Latif Bolteya) St., Garden City, Cairo,

Telephone & fax: +(202) 27960158 / 27960197

[www.eipr.org](http://www.eipr.org) - [info@eipr.org](mailto:info@eipr.org)



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This report was written by researchers at the Egyptian Initiative for Personal Rights:

Osama Diab, Researcher with the Economic and Social Justice Unit,  
Mohamed El Shewy, Researcher with the Transitional Justice Program, and Yara Sallam \*, Officer of the Transitional Justice Program.

The report was revised by Ashraf Hussien, Director of the Social and Economic Justice Unit.

Ahmad Al Shibini proofread the report.

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\*Yara Sallam, a lawyer and the officer of the Transitional Justice Program at the Egyptian Initiative for Personal Rights (EIPR) has been detained since the 21st of June, 2014. She is currently awaiting trial after being arrested by Egyptian security forces near a protest march in Cairo. An award-winning rights defender, Ms. Sallam has since been in pre-trial detention at Al Qanater Prison near Cairo and the authorities consistently denied all requests for her release. Her first substantial court hearing is scheduled for the 13th of September, 2014. Ms. Sallam has contributed to the writing of this report before her arrest.

## Introduction

The issue of Asset Recovery (AR) was at the heart of the 18-day revolution which led to the overthrow of former president Hosni Mubarak in 2011. Chants like “Mubarak, how did a pilot make \$70 billion?” after the Guardian published an article estimating Mubarak’s wealth at \$70 billion<sup>1</sup> is evident that issues of corruption helped deepen the opposition against him in January/February 2011. The Mubarak regime’s corruption was well known, but putting a figure on it (even if overstated) had nevertheless allowed people to start calculating every citizen’s share if the stolen money (assets) was given back to them (recovered). However, the reality has proven to be crueler and more difficult than such simple calculations. Time has proven that recovering the Mubarak regime assets was not a trouble-free task.

The reality is that Egypt has around a billion dollars (over seven billion Egyptian pounds) in frozen assets around the world that are suspected to be the proceeds of corruption belonging to the Mubarak regime, including Switzerland, the United Kingdom, Spain, Hong Kong, and France. Canada also said that it froze \$4.3 billion of assets belonging to the dictatorships of Egypt, Tunisia, Libya and Syria without providing a country breakdown.<sup>2</sup> The figure is expected to be much larger if assets frozen here at home are included, but the largest figure of all might be the proceeds of corruption that have already “returned to the public funds prosecutor”<sup>3</sup>

Additionally, reconciliation deals with members of the Mubarak regime have been providing the economy with much needed cash. A few charges of corruption have ended up with reconciliation and financial settlements<sup>4</sup>.

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1- Inman, P. (2011). Mubarak family fortune could reach \$70bn, says expert. Available: <http://www.theguardian.com/world/2011/feb/04/hosni-mubarak-family-fortune>. Last accessed 19th Feb 2014.

2- The Canadian Press. (2012). Canada froze \$4.3B in assets to support Arab Spring. Available: <http://www.cbc.ca/news/canada/canada-froze-4-3b-in-assets-to-support-arab-spring-1.1175811>. Last accessed 16th Feb 2014.

3- . Abdelaty, S. (2012). النيابة تسترد 9,6 مليار جنيه استولي عليها كبار رجال الاعمال . Available: <http://www.ahram.org.eg/Archive/1080/2012/11/11/25/182528.aspx>. Last accessed 31st Mar 2014.

4- Ahram Online. (2013). Egypt receives \$174 mln on reconciliation with Mubarak figures. Available: <http://english.ahram.org.eg/NewsContent/3/12/64940/Business/Economy/Egypt-receives--mln-on-reconciliation-with-Mubarak.aspx>. Last accessed 16th Feb 2014.

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However, despite the numerous deals and the enormous sums of money, there has been a lack of transparency regarding how the reconciliation deals have taken place, their constitutionality and legitimacy, and their economic impact.<sup>5</sup>

There is little information on how the deals were struck and how the money was used. Reconciliation in Egypt was rushed and provided little more than dropping charges in return for cash without carefully thinking of ways to maximize their social and economic benefits. However, it is important to note that most of the stolen assets are yet to be recovered, which means there is still an opportunity for corrective measures provided that the political will to do so exists.

Needless to say, corruption has drastic repercussions on society. Among its many negative results are: enhancing inflation, depreciating national currency, distorting markets and the allocation of resources, increasing income inequality and poverty, reducing tax revenues, and most importantly distorting the fundamental role of the government and undermining the legitimacy of governments.<sup>6</sup> It should only make sense, therefore, to use the recovered proceeds of corruption to manage the damage caused by corrupt practices.

Recovered proceeds of corruption—if utilized properly— could be a powerful anti-corruption and developmental tool. Both development and corruption have a multiplier effect on society. Therefore, the real economic and social costs of corruption go beyond the value of stolen money. Accordingly, assets from a developmental point of view hold a larger value than simply its numerical value.

‘We find that assets do not merely represent static, monetary amounts, inert numbers. Assets contain rather a potential for work. A potential that does not become realised until unleashed by wise investment. Thus assets represent the potential to create prosperity.’<sup>7</sup>

There have been numerous debates on how the recovered proceeds of corruption should be managed to maximize their developmental value. But one of the major obstacles around the repatriation of proceeds of corruption is the “sovereignty of the receiving state” when the state is instructed on how and what it should spend the recovered assets on—it holds the risk of being perceived as meddling in the state’s local affairs.<sup>8</sup>

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5- Little to no information has been made public by the government about these reconciliation deals. The Egyptian Initiative for Personal Rights filed case number 59439 before the Administrative Court demanding better transparency and disclosure of reconciliation deals from the government.

6- Ignacio Jimu. (2009). *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan*. Available: [http://www.baseligovernance.org/fileadmin/docs/publications/working\\_papers/Managing\\_Proceeds\\_of\\_AR\\_Final.pdf](http://www.baseligovernance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf). Last accessed 16th Feb 2014.

7- Report by Ugolor, D., Nwafor, A. and Nardine, J.H. on behalf of the Nigerian Network on Stolen Assets, ‘Shadow Report on the PEMFAR Monitoring Exercise’ (2006) (page 4), available at [http://www.evb.ch/cm\\_data/Report\\_Abacha.pdf](http://www.evb.ch/cm_data/Report_Abacha.pdf).

8- The researcher attended the third session of the Arab Asset Recovery Forum in London in September 2013. One of the debates that arose in the working group on Management of Recovered Assets was how “sovereignty of the states” has always been used as excuse to avoid monitoring in elections, monitoring on the spending of recovered assets, etc.

But the question of sovereignty poses another challenge. The risks are high if the government is corrupt or is weak in its fight against corruption, which puts the restituted money at risk of being wasted and lost again in the same corruption channels without victims of corruption benefiting from it. The funds could easily return to the pockets of those who stole it in the first place, or their family or associates, or be diverted in any other way that would make it lose its potential multiplier effect with no guarantee that the proceeds of corruption will be used to benefit the victims of corruption.

In Peru, for example, recovered funds were spent on new police uniforms and life insurances for police officers. At least \$400,000 in legal fees were paid towards the repatriation of former president Alberto Fujimori from Chile. The Interior Ministry has also received over \$9 million for the payment of vacations for both active and retired police personnel<sup>9</sup>

In Nigeria, the recovered assets of the deceased dictator Sani Abacha faced difficulties from being transformed into development projects benefiting those who are in most need of it. There were many delayed and abandoned projects, but even completed projects manifested “poor workmanship, outputs requiring major refurbishment shortly after the completion of construction”. Moreover, civil society was unable to have a close scrutiny of the projects because a list of projects funded using the recovered assets was not given or made available by the government.<sup>10</sup> In order to avoid such scenarios, many experts and civil society groups are calling for stricter monitoring on the spending process to make sure that the recovered proceeds of corruption go to its victims and benefit vulnerable individuals and communities.

It is also crucially important to note that the simple calculation of distributing the money equally to every citizen means that a person share in every billion pound in a nation of 90 million will be 11 Egyptian pounds. This is why we argue that no matter how large the recovered assets are, simply giving it back to the treasury, to be used in personal compensations, would minimize its impact and deprive us from achieving a degree of justice by spending it on those who were most harmed by corruption.

Another important question when it comes to reparations is how to define “victims”. Do you strictly think of victims of physical violations with a physical nature such as torture, rape, killing, etc., or do you also include the economically, socially and culturally marginalized? And are they even different?

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9- Jimu, I. (2009). *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan*. Available: [http://www.basel-governance.org/fileadmin/docs/publications/working\\_papers/Managing\\_Proceeds\\_of\\_AR\\_Final.pdf](http://www.basel-governance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf).

10- Ibid



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Economic, social and cultural (ESC) rights are generally often viewed as effectively “«second-class rights»-unenforceable, non-justiciable, only to be fulfilled «progressively» over time.”<sup>11</sup> Furthermore, despite the ‘official’ equal recognition in international human rights law between the ESC rights from one side and civil and political rights from the other, there exists a practical hierarchy that cannot be denied. Both sets of rights are said to be ‘universal, indivisible and interdependent and interrelated’<sup>12</sup>. However, there seems to be a practical focus on violations of civil and political rights, putting it at the top of the hierarchy of rights.

According to UN documents, the division between the two sets of rights in two different covenants was due to political negotiation in the drafting process related mainly to questions of implementation.<sup>13</sup> The drafting process resulted in several differences between the two covenants; terminology is an important one to note; the obligation of states parties in article 2(1) of the International Covenant for Economic, Social and Cultural Rights (ICESCR) is recognized to be subject to the availability of resources, and it is an obligation to be “achieved progressively”. On the other hand, state obligation in the International Covenant on Civil and Political Rights (ICCPR) is stated differently; where state parties “undertakes to respect and ensure”.

Some argue, as the American human rights activist Aryeh Neier puts it, that civil and political rights “have to mean exactly the same thing every place in the world” while with economic and social rights “it is inevitable that they are going to be applied differently in different places” due to resource availability.<sup>14</sup>

The 25 January revolution had both economic and civil and political rights at heart. While one can link it directly to the momentum buildup that happened in protest of Khaled Said’s death by police officers after being tortured, the 6 April 2008 strike of workers in El-Mahala El-Kubra over low wages and rising food costs is also considered a milestone leading to the 2011 revolution. Neither of these violations has ended with the consecutive regimes. During the rule of the Supreme Council of the Armed Forces (SCAF), Morsi, and the current regime, labor rights protests were still taking place, and many torture cases were still being exposed. Nevertheless, the only reparation mechanism established by the government, the National Council for Care of the Martyrs’ Families and Injured of the Revolution, was dedicated to those who were ‘killed’ or ‘injured’ during –

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11- Fact Sheet No.16 (Rev.1), The Committee on Economic, Social and Cultural Rights

12- The Vienna Declaration and Program of Action, the World Conference on Human Rights, 25 June 1993 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

13- Annotations on the text of the draft International Covenants on Human Rights, Document A/2929 [http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/docs/A-2929.pdf](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf) p.8

14- Social and Economic Rights: A Critique, Aryeh Neier, The Human Rights Brief, the American University Washington College of Law. Link to the article: <http://www.wcl.american.edu/hrbrief/13/2neier.pdf>

only - some of the events of the revolution.<sup>15</sup> The government did not sponsor any reparation mechanisms that address economic, social or cultural rights violations. Post-revolution governments also distinguished between crimes that are physical in nature and those that are economic. Successive Egyptian governments asserted that “reconciliation” will only be allowed with cases that did not involve the killing of protesters, more specifically cases of corruption and embezzlement of public funds, are subject to “reconciliation”.

Finally, one last important debate is the destiny and the destination of the recovered assets and whether it should just go back to the treasury, be spent on individual reparations or community reparations which will be discussed later in detail. Chapter 1 of this research paper also aims at exploring how other countries used the recovered assets, and how communities mobilized for the assets repatriation. This section will not only cover reparations for state violations, but also that of non-state actors. This was done to add a different perspective to the debate and to highlight the impact of state and non-state actors' decisions have on communities. Chapter 2 will focus on the local context in Egypt; the status of frozen assets, how can community mobilization help pressure foreign governments to send back the assets to be used in funding for reparation programs of economic and social rights violations

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15- The Council is mandated to care for those who were killed or injured during the following events: 25 January-24 March 2011, and the clashes in the events of 9 April in Tahrir, Maspuro in October, Mohamed Mahmoud in November, the dispersal of the Cabinet sit-in in December 2011.



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## Chapter I:

# Reparations funded by recovered proceeds of corruption: International experiences

This chapter of the research paper looks at examples from other countries which used the assets they recovered from foreign countries for victims' reparations, and how communities mobilized for the assets repatriation. There are several countries where successful repatriation of assets was used to fund reparation programs, other countries are yet in the process but have already set the grounds for the utilization of the funds when it is repatriated. The following countries are the few that we can use as examples of how that was achieved:

## 1.1 Country-specific examples:

### Libya

With the start of the Libyan revolution in 15 February 2011, international concerns grew due to the escalation of violence. On 26 February 2011, the UN Security Council issued "Resolution 1970 (2011)"<sup>16</sup> which referred the situation in Libya to the International Criminal Court (ICC), imposed an arms embargo, a travel ban on 16 persons<sup>17</sup>, and an asset freeze on six individuals occupying senior positions in the Libyan government and in its security forces as well as on persons closely connected with the ruling regime.<sup>18</sup>

Paragraph 17 of the resolution states that "all Member States shall freeze without delay *all funds, other finan-*

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16- UN Security Council Resolution 1970 (2011), 26 February 2011, S/RES/1970 (2011), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1970(2011)) .

17- Annex I of the UN SC Resolution 1970 (2011)

18- Annex II of the UN SC Resolution 1970 (2011)

*cial assets and economic resources* which are on their territories, which are *owned or controlled, directly or indirectly, by the individuals or entities* listed in annex II of this resolution ... [emphasis added by the author].”

Paragraph 18 indicates that the assets frozen pursuant to paragraph 17 “shall at a later stage be made *available to and for the benefit of the people of the Libyan Arab Jamahiriya* [emphasis added by the author].”

Up until the beginning of 2012, the UN Security Council (SC) Sanctions Committee has authorized the release of approximately \$19 billion.<sup>19</sup> According to a UN SC report, on 2 June 2012, the Libyan government created an asset recovery committee<sup>20</sup> to coordinate the national effort to locate, identify and seek to recover Libyan assets illegally held by designated persons and other Libyan nationals abroad; whether frozen by UN member states or hidden by Libyan nationals and entities.<sup>21</sup> On 24 November 2013, the Libyan government issued a decision (No. 403/2013)<sup>22</sup> creating another committee to coordinate the procedures of delivery and receipt of the repatriated assets.

There is a lack of information on the total amount of money that was repatriated, or how it was used. However, according to news in September 2011, the UK transferred cash worth of \$1.55bn that was said to be used to pay many public sector workers, including nurses, doctors, teachers and police officers, and also to be used to provide aid for refugees displaced by the conflict and to pay for medicine and food supplies.<sup>23</sup> News reports also mentioned that Germany has also asked for agreement to release about €1bn in seized assets, while France intends to unfreeze about €5bn to help pay for humanitarian aid and keep essential services going in Libya.<sup>24</sup>

## Philippines

In February 2004, the Philippines was able to receive at least \$624 million from Switzerland belonging to the country’s long-serving dictator Ferdinand Marcos, after a long and daunting legal process.<sup>25</sup> The Swiss author-

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19- UN Security Council, S/2012/163, 20 March 2012, para. 196 [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2012/163](http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/163)

20- Decision No. 34/2012 of th Libyan Council of Ministers

21- UN Security Council, S/2013/99, 9 March 2013, [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2013/99](http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/99)

22- See Annex \*\*

23- RAF flies £140m unfrozen cash assets to Libya, BBC News, 1 September 2011, <http://www.bbc.co.uk/news/uk-14734420>

24- Ibid.

25- For more information on the chronology of events leading to eventual repatriation in the Philippines, check UNODC and the World Bank “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan” (June 2007) p.21 <https://www.unodc.org/unodc/en/frontpage/world-bank-and-unodc-to-pursue-stolen-asset-recovery.html>

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ities oversaw the choice of investments made from the money, and a Swiss court issued a decision<sup>26</sup> in relation to Marcos case requiring that one third of the returned monies should be distributed “to the thousands of Philipinos [sic] who have suffered during the martial law system as victims of human rights violations committed by the security forces of the dictator.”<sup>27</sup>

On 28 January 2013, the Philippine Congress passed the “Human Rights Victims Reparation and Recognition Act of 2013” (the Philippine president brought it into force by signing it on 25 February 2013).<sup>28</sup> The Act compensates persons “whose human rights were violated by persons acting in an official capacity and/or agents of the State”, and the violation must have been committed during the period from 21 September 1972 to 25 February 1986 (since Marcos declared martial law until he was ousted).<sup>29</sup> The violations covered by the Act include; arbitrary arrests and/or detention, physical injury, torture, killing, or violation of other human rights, of any person exercising civil or political rights by a person acting in an official capacity and/or an agent of the State, enforced or involuntary disappearance, any force or intimidation causing the involuntary exile of a person from the Philippines, **any act of force, intimidation or deceit causing unjust or illegal takeover of a business, confiscation of property, detention of owner/s and or their families, deprivation of livelihood of a person by agents of the State** [emphasis added by the author], and any act or series of acts causing, committing and/or conducting the following:

kidnapping or exploiting children of persons suspected of committing acts against the Marcos regime; committing sexual offenses against human rights victims who are detained and/or in the course of conducting military and/or police operations; and other violations and/or abuses similar or analogous to the above, including those recognized by international law.<sup>30</sup>

In this list of violations covered by the Act, there is only one explicit mention for violations of economic and social rights, which is the “takeover of a business, confiscation of property, detention of owner/s and or their

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26- ATF 123 II 595, cons. 7 c.

27- Working Paper No 6: “Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan”, Ignasio Jimu, International Center for Asset Recovery, [http://www.baselgovernance.org/fileadmin/docs/publications/working\\_papers/Managing\\_Proceeds\\_of\\_AR\\_Final.pdf](http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf), p. 13

28- Congress of the Philippines, Fifteenth Congress, Second Regular Session, House of Representatives, H. No. 5990, “An Act Providing Compensation to Victims of Human Rights Violations During the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes”. <http://www.gov.ph/2013/02/25/republic-act-no-10368/>.

29- Ibid., Section 3. Definition of Terms (c).

30- Ibid., Section 3. Definition of Terms (b).

families, deprivation of livelihood of a person by agents of the State”. The Act covers mostly civil and political rights violations, which implies a certain hierarchy of grievances among victims and survivors that should not exist. However, there is an open door at the last set of violations because it mentions “violations and/or abuses... including those recognized by international law”, which we can argue that it can include economic and social violations.

Section 7 of the Act addresses the source of the reparation: “The amount of ten billion pesos (P10,000,000,000.00) plus accrued interest which form part of the funds transferred to the government of the Republic of the Philippines by virtue of the December 10, 1997 Order of the Swiss Federal Supreme Court, adjudged by the Supreme Court of the Philippines as final and executory in Republic vs. Sandiganbayan on July 15, 2003 (G.R. No. 152154) as Marcos ill-gotten wealth and forfeited in favor of the Republic of the Philippines, shall be the principal source funds for the implementation of this Act.”

## Peru

A special fund was created to govern the use of assets confiscated<sup>31</sup> from Fujimori and his close associates, Fondo Especial de Administración del Dinero Obtenido Ilícitamente en Perjuicio del Estado (FEDADOI)<sup>32</sup>, which amounted for approximately \$180 million over a five-year period beginning in 2011.<sup>33</sup> Under the law regulating the fund “recovered assets have been used for both anti-corruption and transitional justice measures, including truth seeking and reparations”.<sup>34</sup>

The spending of the recovered assets in Peru superficially adhered to standard budgetary procedure, however “the allocation was decided not by Congress, but by a five-member board susceptible to special interest.”<sup>35</sup> With no clear set of spending items in advance, the funds were used to “supplement the annual fiscal budget

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31- For more information on the chronology of events leading to eventual repatriation in Peru, check UNODC and the World Bank “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan” (June 2007) p.20 <https://www.unodc.org/unodc/en/frontpage/world-bank-and-unodc-to-pursue-stolen-asset-recovery.html>

32- The fund’s name in English: “The Fund for Special Administration of Money Obtained Illicitly to the Detriment of the State”.

33- UNODC and the World Bank “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan” (June 2007) p.25

34- “Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?”, Ruben Carranza, The International Journal of Transitional Justice, Vol. 2, 2008, 310-330, p. 324 <http://ictj.org/plunder-pain-should-transitional-justice-engage-with-corruption-and-economic-crimes>

35- UNODC and the World Bank “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan” (June 2007) p.24

of agencies that had an appointed member on the FEDADOI board.”<sup>36</sup> For example, the Interior Ministry received over \$9 million in 2004 that were used for the payment of vacations for both active and retired police personnel outstanding from fiscal years 1995 and 1996.<sup>37</sup>

## Nigeria

After the death of General Sani Abacha (president from 1993 to 1998), his successors ordered investigations that resulted in recovering<sup>38</sup> some of the assets he looted from public money. A total amount of \$800 million in cash from members of the Abacha family and his associates was used by the government in housing projects and education in all of the 36 states of Nigeria, another amount, \$505.5 million was successfully repatriated by Switzerland to Nigeria.<sup>39</sup> The negotiation between Switzerland and Nigeria resulted in an agreement so that the repatriated funds should go into pro-poor projects; which resulted in the allocation to the education, health, and basic infrastructure (power, roads and water) sectors.<sup>40</sup> Civil society organizations monitored selected projects, and they mentioned in their report several factors that prevented funds from being translated into infrastructure development benefiting communities, such as lack of good faith, corruption, lack of good will, and ghost projects.<sup>41</sup> However, the review process by the NGOs was partial because a full physical inspection was not made possible by the government due to a lack of access to the full list of the projects funded by the repatriated assets.<sup>42</sup>

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36- UNODC and the World Bank “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan” (June 2007) p.25

37- Ibid.

38- For more information on the chronology of events leading to eventual repatriation in Nigeria, check UNODC and the World Bank “Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan” (June 2007) p.19 <https://www.unodc.org/unodc/en/frontpage/world-bank-and-unodc-to-pursue-stolen-asset-recovery.html>

39- Working Paper No 6: “Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan”, Ignacio Jimu, International Center for Asset Recovery, [http://www.baselgovernance.org/fileadmin/docs/publications/working\\_papers/Managing\\_Proceeds\\_of\\_AR\\_Final.pdf](http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Managing_Proceeds_of_AR_Final.pdf), p.7

40- Ibid.

41- Ibid, p.9

42- Ibid.

## 1.2 Community Mobilisation and Reparations:

Looking at the above examples, it becomes clear that local mobilisation and activism around the issue of reparations for past abuses have not often been able to use asset recovery (AR) as the basis for their campaigns. Aside from a few examples, the two movements do not intersect by default. This is, in part, due to the parallel tracks taken by the human rights and anti-corruption movements, with the former tending to privilege physical integrity rights and the latter focusing largely on issues of good governance. Linking AR with reparation programmes for victims of human rights abuses remains an under-explored avenue for countries emerging out of conflict or repressive situations.

Transitional justice mechanisms are well placed to improve on the shortcomings of the human rights movement. As an endeavour to uncover the criminal nature of past regimes, transitional justice initiatives must “necessarily reckon with the broader context”<sup>43</sup> of abuses that caused the repression or conflict to occur. To this end, accessing ex-dictators’ stolen assets should be seen as an important method to bring together two overlapping efforts: reparations programmes and development initiatives. Historically, however, the examples of community mobilisation directed at accessing assets for reparations have not always been able to be fully part of the AR process, which is often highly technical and dependant on foreign-based litigation. There have, however, been some notable examples of community or grass-roots mobilisation with the specific aim of obtaining reparations.

### ExxonMobil in Aceh

In 2001, the International Labour Rights Fund filed a suit against US oil company ExxonMobil on behalf of eleven Indonesian villagers from the province of Aceh. The suit was filed in a US federal court and alleged that the company was complicit in serious human rights abuses related to the use of Indonesian military personnel in the Arun natural gas pipeline and processing facility.<sup>44</sup> While the allegations were focused on violations of physical integrity, the case is significant because it involved Western-held corporate assets. It further brings to attention the role of international actors in human rights violations and the difficulty in holding them to account.

43- Albin-Lackey, C. (2013). Corruption, Human Rights, and Activism: Useful Connections and their Limits in “Justice and Economic Violence in Transition”, ed. Dustin Sharp: Springer, New York, pp 139-163

44- Schonhardt, S. (2013), Indonesians sue ExxonMobil in US court. Available: <<http://www.globalpost.com/dispatch/news/regions/asia-pacific/indonesia/130424/aceh-exxonmobil-us-court-human-rights-abuses> > Last accessed: 18 March 2014



The allegations brought against ExxonMobil had to do with the company's decision to hire Indonesian military officers as security personnel. The plaintiffs maintained that ExxonMobil "knew or should have known about the Indonesian military's human rights violations against the people of Aceh".<sup>45</sup> The Arun region where the operation was located was severely affected by the separatist conflict led by the Free Aceh Movement (GAM) against the Indonesian military. The victims argued that ExxonMobil's actions exacerbated the conflict and caused significant environmental damage, failed to reduce poverty in the region and that the land was expropriated without proper compensation<sup>46</sup>. ExxonMobil's operations in Aceh "justified extensive militarisation in North Aceh"<sup>47</sup> and therefore aided and abetted human rights violations committed by the Indonesian military in the region.

Plaintiffs sought three avenues as a legal basis for the case in the US: the Alien Torts Court; the Torture Victims' Protection Act; as well as common law tort for wrongful death and assault, among others<sup>48</sup>. The Federal District court ruled that no claims under the first two laws could not proceed, mostly due to political pressure from the US government, who were reluctant to lose an important ally in the region; the court ruling that such a judgement would be an intrusion into Indonesian sovereignty<sup>49</sup>. The common tort claim was, however, allowed to proceed. Following appeals and much legal wrangling, the case is now pending in a Washington D.C circuit court to "determine what next steps should be taken"<sup>50</sup>. Furthermore, in 2011, the D.C Court of Appeals reinstated the plaintiffs' claims under the Alien Torts Act and the Torture Victims' Protection Act.

The significance of the ExxonMobil case in Aceh is that it provided a strong contribution to transitional justice processes in Indonesia. The post-conflict reconstruction process in Aceh has mostly focused on the reintegration of former combatants, but little attention has been paid to conflict victims. There has been a lack of political will and a limited judicial accountability for crimes committed by the military in post-Suharto

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45- Business & Human Rights Resource Centre , n.d., Case profile: ExxonMobil lawsuit (re Aceh). Available: <[http://www.business-human-rights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ExxonMobillawsuitreAceh?sort\\_on=effective](http://www.business-human-rights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ExxonMobillawsuitreAceh?sort_on=effective)> Last accessed: 20 March 2014

46- International Centre for Transitional Justice et.al. (2008). A Matter of Complicity?ExxonMobil on Trial for its Role in Human Rights Violations in Aceh. Available <<http://ictj.org/publication/matter-complicity-exxon-mobil-trial-its-role-human-rights-violations-aceh#.UyrjWr-5AzY>> Last accessed: 20 March 2014

47- Ibid, p.11

48- Ibid, p.12

49- Doe v ExxonMobil Corp., 393 F. Supp. 2d. 20 (D.D.C. 2005)

50- International Rights Advocates, n.d., John Doe v. ExxonMobil Corp, et.al. Available: <<http://www.iradvocates.org/case/asia-indonesia/john-doe-v-exxon-mobil-corp-et-al>> Last accessed: 20 March 2014

Indonesia. The ExxonMobil case represents the biggest opportunity to investigate the conflict in Aceh and to give acknowledgement to the victims of the Indonesian military and, indirectly, the actions of multinational corporations in situations of grave human rights violations. This gives victim-led efforts to have their grievances aired in contexts where, locally, there is a lack of political will to combat impunity. Furthermore, the ExxonMobil case allows for a serious examination into the links between socio-economic factors and violations of physical integrity.

## The Philippines and the Marcos Assets

Philippine ex-President Ferdinand Marcos and his wife Imelda Marcos' infamous plundering and brutal rule of the country made them the subject of litigation to retrieve looted billions in order for them to be used for victim compensation. In 1986, with the collapse of his rule, Marcos fled to Hawaii and remained there until his death in 1989. During his rule, Marcos had deposited \$2 million in a Merrill Lynch account in New York; by the time of his death, the account had swelled to nearly \$35 million<sup>51</sup>.

In April 1986, a court proceeding was raised against Marcos by a group of nearly 10,000 Philippine citizens in a class action suit.<sup>52</sup> The claims were filed in the Hawaii Federal Court under the Alien Torts Act for torture, summary execution and forced disappearances between 1972 and 1986<sup>53</sup> and identified the Merrill Lynch account as an asset to be used in the case. The Marcos estate was substituted as a defendant upon Ferdinand's death in 1989. The new Philippine government led by Corazon Aquino had at this point been supportive of the victims' efforts.

After trials held over a number of years, the Hawaii Federal Court ruled in favour of the victims in different rulings in 1994 and 1995, awarding damages of nearly \$2 billion in damages<sup>54</sup>. It was after this that the Philippine government declared the Merrill Lynch assets were not part of Marcos' assets and therefore belonged to the republic. The plaintiffs, however, argued the opposite, opening the debate as to who has the right to the

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51- Samaha, A. (2013). The Fight for Ferdinand Marcos's Cash. Available: <<http://www.villagevoice.com/2013-08-21/news/ferdinand-marcos-cash/>> Last accessed: 20 March 2014

52- The case was filed by US attorney, Robert Swift, who had gathered signatures for the class action suit against Marcos in the Philippines in 1986.

53- Hilao v. Estate of Marcos, 103 F. 3d 767, 776 to 778 (9th Cir. 1996)

54- Basel Institute on Governance (2007). Chronology: Efforts to Recover Assets Looted by Ferdinand Marcos of the Philippines. Available: <<http://www.assetrecovery.org/kc/node/609c7c27-a33e-11dc-bf1b-335d0754ba85.html.1>> Last access: 20 March 2014

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stolen assets of ex-dictators: the treasury, and thereby the government, or the victims of human rights abuses? This dilemma is summed up by Robert Swift, a lawyer representing the victims: if a government is able to successfully claim that all of a former dictator's assets belong to the government, then "human rights victims would never be able to get compensation"<sup>55</sup>.

The case of Marcos's assets represent the difficulties inherent in retrieving and using dictators's stolen assets for causes of reparations, even when a clear link between the two is discernible. Competing claims and interests are issues that any attempts at mobilisation should take into consideration on the issue of AR for reparations.

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55- Samaha, *Supra* note 9

## Chapter II

# It all starts at home – The Egypt case

This chapter will focus on the local context in Egypt; the status of frozen assets and how community mobilization can help pressure foreign governments to send back assets for the purpose of funding reparation programs of economic and social rights violations. It will deal specifically with community mobilization, and involving the community in the process of AR as means to exerting continuous and ample pressure on policy makers to act more effectively and efficiently. This could eventually give the government a good image, and help it raise money for social programs aimed at alleviating poverty.

Ruben Carranza, the director of the Reparative Justice Program at the International Centre for Transitional Justice, argues that if it is announced that the recovered stolen assets will go to pro-poor projects or to victims of corruption and human rights abuses beforehand, this will not only encourage whistle blowers to come forward with testimonies that might be key to fact-finding in anti-corruption investigations<sup>56</sup>, but would also put more moral and public pressure on the requested state to take action.

The political will of all involved parties is a key determinant in any process of AR and is a prerequisite to its success. Experts argue that the progress of AR is slow in developing and developed countries alike. The problem is often attributed to or blamed on capacity problems, but now more studies are highlighting the lack of political will to set up an effective legal framework for finding, freezing, forfeiting and repatriating stolen assets as the key factor as to why AR remains an extremely slow process with very few success stories.<sup>57</sup>

It might be useful to look at the lack of political will to deal with AR by contextualizing the institutions and

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56- Diab, O & El-Shewy, M. (2013). An Interview with Ruben Carranza. Available: <http://eipr.org/en/blog/post/2013/06/20/1738>. Last accessed 31st Mar 2014.

57- Pavletic, I. (2009). The Political Economy of Asset Recovery Processes . Available: [http://www.baselgovernance.org/fileadmin/docs/publications/working\\_papers/Political\\_Economy\\_Final.pdf](http://www.baselgovernance.org/fileadmin/docs/publications/working_papers/Political_Economy_Final.pdf). Last accessed 23rd Feb 2014.

public officials who are in charge of it, as Ivan Pavletic notes<sup>58</sup>:

Those who might have the power to bring about institutional

changes, may lack the willingness to do so. If corrupt government officials were to increase the capacity and autonomy of investigative, prosecutorial, and adjudicative authorities to fight corruption and delve into ARP, they would not only relinquish political power and influence, they would also risk losing their income sources and wealth. Put differently, they would become the victims of their own achievements.

This chapter will deal with the gap between rhetorical commitments of different governments to AR, and a real and genuine will to make it happen. It will discuss the possibility of bridging this gap while providing incentives to public officials and institutions by maximizing the society's government's stake in initiating an effective AR process.

## 2.1 How much money is at stake?

There cannot be an accurate numerical answer to that question. But we can indubitably say that there are billions of Egyptian pounds at stake; Egypt has at least a billion dollars frozen in several countries around the world of which about \$750 million are frozen in Switzerland alone<sup>59</sup>, and some 85 million pounds frozen in the UK in addition to undeclared amounts in Spain, Cyprus, Hong Kong, Canada, and France. There is also the potential of freezing more money if political will manifested itself in international cooperation and serious investigations into illicitly-gained money.

The Public Prosecutor's Office announced in November 2012 that it had received a total of over 9 billion EGP in fines and financial settlements in Public Funds cases from February 2011 to July 2013, according to al-Ahram state-run newspaper.<sup>60</sup> However, most of this money went back to the same government authorities of which the money was first embezzled subjecting it to similar risks of being lost.

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58- Ibid

59- Swissinfo.ch and agencies (2013). Swiss hold on to Egyptian and Tunisian funds. Available: [http://www.swissinfo.ch/eng/politics/Swiss\\_hold\\_on\\_to\\_Egyptian\\_and\\_Tunisian\\_funds.html?cid=37573730](http://www.swissinfo.ch/eng/politics/Swiss_hold_on_to_Egyptian_and_Tunisian_funds.html?cid=37573730). Last accessed 24th Feb 2014.

60- Abdelaty, S. (2012). بينهم عز والمغربي ورشيد وكامل وجرانة .. النيابة تسترد 9,6 مليار جنيه استولي عليها كبار رجال الاعمال. Available: <http://www.ahram.org.eg/Archive/1080/2012/11/11/25/182528.aspx>. Last accessed 31st Mar 2014.

Additionally, riches collected from reconciliation deals with Mubarak-era figures could provide for an immense amount of money. There are a few billion Egyptian pounds that are still up for grabs; Hussien Salem, the businessman and Mubarak associate, offered half of his estimated 11 billion Egyptian pound wealth in order to drop 22 years of two prison sentences against him and \$4 billion in fines and restitution last year. On 4 September 2012, Hussein Salem has been added to the Swiss freezing list (the Ordinance of 11 February 2011 concerning restrictive measures against certain individuals from the Arab Republic of Egypt<sup>61</sup>) and is believed to have millions of dollars frozen in Switzerland, Hong Kong and Spain.<sup>62</sup>

However, it is the role of civil society groups and media to involve themselves and the wider community in the process; instead of the current situation where the fate of these billions of Egyptian pounds are being discussed in complete isolation of the people that they supposedly belong to.

Ambassador Valentin Zellweger, the head of the directorate of public international law at the Swiss Foreign Ministry, asserts that by raising awareness of the destructive effects of corruption, the media puts authorities under pressure to act.<sup>63</sup> Alongside the media, civil society can also play a crucial role in raising awareness about the process of AR to achieve the same goal of putting authorities under pressure to act, and better its performance.

A BBC investigation film produced in September 2012<sup>64</sup> is believed to have mobilized the UK government to take more concrete steps relating to the recovery of the Mubarak regime assets. The Frontline Club, the esteemed London media club, wrote in the description of the media screening of the BBC's Egypt's Stolen Billions: "The story reached the UN General Assembly where David Cameron announced the creation of a new UK Asset Recovery Task force for Egypt and the Arab Spring countries.)"<sup>65</sup>

Within weeks after the film was aired for the first time exposing the British Government's ineptitude in identifying Mubarak's assets hidden in the UK, the British Prime Minister announced the appointment of a task force and resident prosecutor to work with the Egyptian authorities to collect evidence and trace the assets and follow up on legal cases.

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61- <https://www.news.admin.ch/message/index.html?lang=en&msg-id=51477>

62- Trew, B & Diab, O. (2014). The Crooks Return to Cairo. Available: [http://www.foreignpolicy.com/articles/2014/02/07/the\\_crooks\\_return\\_to\\_cairo\\_hussein\\_salem\\_egypt](http://www.foreignpolicy.com/articles/2014/02/07/the_crooks_return_to_cairo_hussein_salem_egypt). Last accessed 24th Feb 2014.

63- Zellweger, V. (2011). Introduction. In: Thelesklaf, D. & Pereira P. G. Non-state actors in asset recovery. Bern: Peter Lang AG. xxvi.

64- <https://www.youtube.com/watch?v=QJgH411ALxc>

65- <http://www.frontlineclub.com/bbc-arabic-screening-egypt-stolen-billions/>



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Cameron said in September 2012:

And while I'm on the subject of stolen assets, we also have a responsibility to help these countries get back the stolen assets that are rightfully theirs, just as we have returned billions of dollars of assets to Libya. It is simply not good enough that the Egyptian people continue to be denied these assets long after Mubarak has gone.

Today I am announcing a new British Task Force to work with the Egyptian government to gather evidence, trace assets, work to change EU law and pursue the legal cases that will return this stolen money to its rightful owners the Egyptian people.

But 18 months after this speech, and 40 months after Mubarak has gone, the pressure is now waning, and the Egyptian people continue to be denied these assets.

## Maintaining sustainable pressure

The pressing question here is how to maintain pressure in a prolonged and sustainable manner beyond patchy public anger caused by episodic media investigations?

Ruben Carranza, the director of the Reparative Justice Program at the International Centre for Transitional Justice, told EIPR that a link that is being discussed in Tunisia right now is the possibility of using assets that are recovered from Ben Ali and his family to fund reparations for communities in the interior regions that have been targeted for repression and marginalization in the past. Carranza stated that: «The point is that once you specify how assets that are recovered will be spent and the public understands that they will be specifically spent for victims of human rights violations, I think you can generate enough backing and enough public support for that objective than if you just say those assets will just go back to the treasury or go back to the government, because then everyone will be concerned about how those assets could be lost again through corruption.»<sup>66</sup>

However, although community reparation can sustain a certain level of pressure over the medium and long term, and makes a stronger case of linking poverty to corruption, there are still a few points that need to be taken into consideration before getting to the topic.

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66- Diab, O & El-Sheway, M. (2013). An Interview with Ruben Carranza. Available: <http://eipr.org/en/blog/post/2013/06/20/1738>. Last accessed 31st Mar 2014.

Firstly, one of the biggest challenges about reparations is to successfully involve individual victims and/or communities without giving them false or unrealistic promises. One of the worst things that could be done to victims of economic crimes and human rights violations and to vulnerable communities is getting them too hopeful by exaggerating the potential simply to mobilize them against the government. In this case, a noble cause should not justify such means, and all victims and vulnerable communities should be given as much levelheaded assessment of the situation as possible.

Secondly, criteria and method of selection of individuals and communities worthy of the reparation programs needs to be thorough and careful. The ranking of the poorest regions could significantly vary with any slight change in indicators. In Ivory Coast for example, over eighty percent of the ranked poor districts were unable to maintain the same rank when indicators used in building a poverty map in 1990 were changed.

Thirdly, it should be guaranteed that money is not spent on basic social services that should have been provided by the state anyway, or worse, if spent on other government expenditure that does not benefit the poor in any possible way. In Peru, it was found that some of the recovered proceeds of corruption were spent on police uniforms and holidays and life insurance for police officers. Recovered funds were also used to pay about \$400,000 of legal fees towards the repatriation of former president Alberto Fujimori from Chile.

Egypt has flirted before with geographical targeting of poverty. In 2001, the Egyptian government then started a plan to combat community-related poverty through geographical targeting. Although the programme was deemed unsuccessful by many experts, it provided good data on human development in Egypt's 451 districts<sup>67</sup>. Out of the 451 districts, 58 were selected as poorest according to the HDI <markaz> poverty of map. This also became the basis for the government's programme to develop the 1000 poorest villages in 2009.

If identified by the government in the period before successfully recovering any of the stolen assets, it would keep interest in the topic, which is an issue integral to its success. More importantly, it will also put moral pressure on authorities of foreign governments if it is known that the money will be used in a pro-poor manner and for developmental goals, especially if guarantees of monitoring by third parties are provided. Based on data from the World Bank, every billion dollar could provide water connections for 250,000 households or build 2500 kilometers of two-lane paved roads. While just a million dollar can provide for DPT immunization for two million children, or HIV/AIDS treatment for over 6500 patients per year.

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67- For geographical targeting, having smaller geographical units better the quality of targeting.

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## Conclusion

Surveys taken in various settings, such as Uganda and Cambodia, tell us that among victims there is a strong desire to see transitional justice measures taken that will address issues of poverty<sup>68</sup>. Despite this, the overarching framework for reparations in transitional justice literature focuses on compensation given to those victims who suffered violations of their physical integrity rights while little attention is given to those who were put in situations of poverty due to repression or conflict. This presents a problem to states emerging from conflict or repression, as there is a separation between transitional justice (focusing on reparations for violations of physical integrity rights) and a state's expected responsibilities towards lifting its citizens out of poverty resulting from its failure to fulfil their duties towards those citizens.

Reparations and ESC rights intersect strongly. The material elements of reparations programmes- compensation, restitution, rehabilitation- are all aimed at righting past wrongs and contributing to future livelihoods. While reparations are not aimed specifically at violations of ESC rights, the reasoning is that by giving reparations there is “recognition that ESC rights were violated concomitantly with the basic civil rights that are being compensated”<sup>69</sup>. Therefore, for example, families are compensated both for the loss of an individual, as well as the loss of a breadwinner. These payments are normally directed at individuals and are executed in the form of a one-time lump-sum payment.

The benefits of the lump-sum system lie in its relative speed, both for the victims and for the government<sup>70</sup>. For the latter, the process requires little in the way of bureaucratic mechanisms and only temporary funds can be used. Meanwhile, the victims benefit from having quick access to much-needed money. However, they are a short-term solution and cannot be considered a policy that will have a great impact on the livelihoods of families and communities affected by poverty or violence.

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68- Carranza, R. (2009), *The Right to Reparations in Situations of Poverty*, ICTJ Briefing. Available: <<http://ictj.org/publication/right-reparations-situations-poverty#.Uyrhpl-5AzY>> Last accessed: 20 March 2014

69- Roht-Arriaza, *supra* note 14, p.115.

70- *Ibid.*

The focus on individual reparations can be problematic, however. The process of identifying certain individuals, or of allocating resources to pay compensation to them, runs the risk of creating or entrenching victimhood. Instead of using the transitional period to investigate how certain policies- economic and otherwise- can lead to marginalisation and repression, the focus turns to the question of naming victims and deciding what amount to pay in compensation<sup>71</sup>. Individualising reparations in such a way means that “only certain victims became fully part of the narrative of reconciliation. The suffering of many living victims is denied recognition or relegated to a lesser level of significance because their suffering is seen as politically problematic or ambiguous.”<sup>72</sup>

Furthermore, individual reparations can suffer from problems that eventually render them the “antithesis of reparatory”; lump-sum payments in particular require the creation of victim databases, which can be problematic for families with no records of their loved ones. Individual reparations, in particular lump-sum payments, also carry the additional risk of leaving the corruption and clientelism unexamined or unchecked. By paying a one-off fee to individuals, there is less space to investigate how certain communities were marginalised, either intentionally or as a side effect of development initiatives.

Collective reparations programmes can, therefore, complement individual reparations by providing an opportunity to restructure the ways in which entire communities are affected by repressive policies. Collective reparations can therefore allow for greater acknowledgement of suffering by those who were not necessarily direct targets of violence or conflict. When particular regions are named by a truth commission's report, collective reparations can provide benefit to all members of a community, rather than only victims. This was the approach taken in Morocco. The truth commission there was intended to identify those regions which were victims of gross violations, were not able to access development projects and played host to illegal detention centres.<sup>73</sup> The commission eventually identified 11 out of 16 regions, which were then asked to propose development projects for the state to approve. The latter is a further positive aspect of collective reparations, as they encourage victim participation in the development and implementation of reparations programmes, and getting involved in issues related to corruption and AR thus strengthening community empowerment. Victims and community members are given the opportunity to play their role as citizens and that the reparations programmes undertaken will respond to the needs of those who will receive them.

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71- Miller, Z. (2008), *Effects of Invisibility: In Search of the <Economic> in Transitional Justice*, *International Journal of Transitional Justice*, Vol. 2, 2008, pp. 266-291

72- Humphrey, M. (2002), *The Politics of Atrocity and Reconciliation: From Terror to Trauma*. London: Routledge Press, p.121

73- Carranza, R. n.d., *Comparing community reparations in Morocco, Peru and Indonesia (Draft)*. Available: <<http://goo.gl/i0pUuf>> Last accessed: 20 March 2014

