

**Corruption, Asset Recovery, and the Protection of Property in
Public International Law: The Human Rights of Bad Guys
Dr Radha Ivory**

Book Launch

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Hon Peter Costello AC

Many of you will be wondering why I am here today, so let me explain.

For the last 6 years, I was a member, and then Chairman of the Independent Advisory Board to the World Bank. The Board advised the Bank on dealing with fraud and corruption issues. The World Bank has become an international leader amongst the Multilateral Banks and International Organizations in this area.

This might sound strange-after all the World Bank was set up to lend to Governments to finance projects to build infrastructure, and improve health, education and social outcomes in poor and developing countries. It is a Development Bank.

But over a long period of time the Bank found that, despite its best intentions, its loans could just as easily end up with the rich in these countries as end up with the poor. In fact, without very careful supervision funds were much more likely to end up with the rich than the poor. In some developing countries, being in Government and administering contracts means being able to help yourself, your family, and your cronies, to lucrative contracts. It is one of the spoils of Office. In fact it is the reason to go into public office.

And in my experience the poorer the country, generally speaking the richer the rulers.

As Australia's Treasurer I was a Governor of the World Bank for nearly 12 years. I remember going to my first Governor's meeting where I was seated next to the Minister of one of the poorest countries in the world. His hands glittered with gold and diamond rings. I brought a delegation of two staff, he had brought a delegation close to thirty. I was jetlagged from flying 24 hours direct to the meeting. He and his delegation had broken their journey with a stopover in Paris for some shopping on the way. They had shopped well.

What I realised was that in rich countries Ministers were comparatively poor, but in poor countries Ministers were extremely rich. I formulated Costello's law: - "the poorer the country the richer the Minister". It is invariably the case.

The World Bank realised there was no point lending to countries to make rich Government officials richer still. So it developed an Investigative Unit to investigate fraud and corruption on World Bank projects. Where it was found, the contractors involved were sanctioned, the loan could be cancelled, and if there was criminal conduct involved it would be referred to the anti-corruption authorities in the country concerned. Our Board assisted this on an advisory basis and spent a lot of time working on the legal process to support and enforce such decisions.

One of the members of our Board was Professor Mark Pieth of the Basel Institute on Governance. Our paths intersected at a number of points over the years. Mark was a member of the U.N. Panel that investigated AWB over the oil-for-food program under Sadaam Hussein. When Australian authorities were looking for the mysterious owners of a parcel of shares in Alpine Offset that lead to numbered Bank Accounts in Zurich Mark gave expert evidence on the effect of Swiss Bank secrecy laws. And, of course, it was at Mark's Institute where Radha Ivory, the author of this book, did much of her work as a Fellow.

The U.S. first passed a Foreign Corrupt Practices Act (FCPA) during the Carter Administration. When it was the only major Western country with such laws, U.S. business felt they were penalised when competing against European and other rivals for business in developing countries. As a result the U.S. put great effort into internationalising their law. In 1997 the OECD Convention on Combatting Bribery of Foreign Public Officials was adopted. It required member states to introduce measures against foreign corruption into their domestic law. I was responsible for doing that here in Australia through amendments to the Criminal Code in 1999 which criminalize bribery of foreign public officials.

Proceedings under this Act were taken-unsuccessfully- in the AWB case. Prosecutions have been brought against various people associated with Note-Printing Australia (a company owned by the Reserve Bank of Australia which prints Australia's currency) in relation to a number of contracts it procured to print currency for foreign Governments.

The liability of Australian companies doing business outside Australia to trigger the anti-bribery provisions of the Australian Criminal Code Act in this country is extremely wide but poorly understood.

Further, it is poorly understood by most Australian lawyers.

The Australian Government is full of encouragement to Australian business to develop exports by obtaining contracts in developing markets. It is pleased to trumpet their successes. Entering a foreign market is plagued with challenges however. Businesses that get local partners to smooth the way or innocently pay for what they believe are regulatory approvals can find they are on the wrong side of Australian law.

When this happens they will not find the Australian Government or its Embassy in the local country to be nearly so friendly. They will be on their own. A transaction that is made under pressure in a difficult overseas business environment can look very different when it is examined back in Australia with the wisdom of hind sight.

It is not just the investment that is at risk, it is credibility and reputation of the company, its executives and Directors.

In my work for the World Bank, I saw Australian companies that had been inadvertently - mostly but not always - caught up in bad practice on World Bank financed projects. They were facing bans and debarment in proceedings against them in Washington. In more egregious cases there were facing possible criminal proceedings. I am sure they had no intention of breaking the law. It was a combination of ignorance and lack of preparation that had landed them in difficult circumstances.

It was sad to see their fate held in the hands of Washington lawyers. They were paying exorbitant fees. The Italian poet Dante Alighieri thought there were nine circles of Hell. One of them, surely, must be having one's business and reputation in the hands of a Washington Lawyer.

I would recommend that companies thinking of doing business in developing countries first do a risk assessment. This means getting advice from someone who has done business in that country or has done business through a multilateral agency active in that county, and someone who knows the FCPA or its Australian equivalent. I would recommend probity advisers. I would also recommend a compliance plan and an independent person to monitor that compliance plan.

Some of the largest corporations in Australia have been caught up in the FCPA. Complying with it is a cost of doing business. Trying short cuts to save money generally increases the eventual cost to the business not to mention the cost of reputational damage.

The subtitle of this book is - The Human Rights of Bad Guys.

Who cares about the bad guys? Who cares about their rights? Why bother to write a book about that?

The answer is that the law, especially the law in countries that follow a Constitutional Bill of Rights (USA), or a supra-national Convention on Human Rights (Europe) worries about human rights – everyone’s human rights – including the rights of bad guys.

If law enforcement is to be successful it has to be on a secure legal basis, and it has to be consistent with the constitutional requirements in the country where it takes place.

This is something that took a lot of complicated effort when I was advising the World Bank. As an International Organisation it has immunity from local and national law so long as it does not infringe human rights. In its investigatory and sanctions proceeding, this means observing “due process”. In effect it means setting up quasi-judicial procedures. Balancing these requirements against administrative requirements for efficient disbursement of funds for development outcome was a delicate business. Protecting human rights usually impedes the effectiveness of preventing criminal behaviour.

In the fight against terrorism, organised crime and corruption, using the financial system to trace transactions, to freeze assets and to confiscate

proceeds is absolutely critical. The use of those tools must be balanced against the rights to property and privacy.

This is what this book is about. For better or worse many important countries have enshrined human rights guarantees in National or Supra National Constitutions. They have guaranteed property rights. They have also entered treaties pledging to confiscate the proceeds of corruption. How do you resolve the conflict between the two?

It's a complicated issue. There will be many legal challenges along the way. Putting the fight against corruption and asset recovery on a sustainable legal basis is essential if it is to be effective.