GOVERNANCE
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International Centre for Asset Recovery

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NON-STATE ACTORS EXPERTS' MEETING

The United Nations Convention Against Corruption (UNCAC) is the most comprehensive international instrument to date for the fight against corruption and for the recovery of stolen assets. As a fundamental principle to the Convention, asset recovery is thus a major step for the international community in preventing and combating corruption.

The UNCAC calls for the involvement of civil society in its article 13. The Report on the Experts' meeting of State Parties (CoSP) to the UNCAC, held in November 2009 in Doha, highlighted the role of civil society in the prevention of corruption and applicability of Chapter II (Prevention) of the UNCAC:

> (…) [P]reventive measures set forth by the Convention concerned both the public and the private sectors and underscored the role of other parts of society, such as non- governmental organizations, the media and community-based initiatives. That set of measures constituted recognition that each member of society, individually and collectively, had a contribution to make to a culture of integrity and that preventing and fighting corruption was a shared responsibility."
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> "Speakers also stressed the need to encourage the involvement of civil society and the media in preventing corruption at the national level. A number of speakers argued in favour of promoting public-private partnerships to prevent corruption."

Said report concludes that there are three basic conditions for the successful implementation of the UNCAC: political will, sufficient resources and the active involvement of civil society. Concerning the latter, it is composed of voluntary civic and social organisations and institutions that form the basis of a functioning society as opposed to structures of the state.

On the other hand, non-state actors have a much wider definition, which encompasses civil society. Non-state actors are thus neither states nor inter-governmental organisations: they include, but are not limited to non-governmental organisations, the academia, the media, and the private sector that play an important role in the asset recovery process. This in turn is reflected in international documents and treaties, such as article 39 (cooperation between national authorities and the private sector) of the UNCAC, and Annex II (Good Practice Guidance on Internal Controls, Ethics, and Compliance) of the 9 December 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

Non-state actors help generate the impetus for reforms that might otherwise be unpopular with political actors. They are responsible for monitoring and actively reporting state activities, ensuring that the rule of law is upheld, and strengthening democracy, democratic institution and the overall democratic processes. They are also businesses whose activities overlap and converge with the areas that fall under the processes of asset recovery: there are good examples of initiatives of the private sector (e.g. the Wolfsberg Group) that enable higher success rates in the prevention and combating of corruption.

Understanding asset recovery and the asset recovery process is paramount in order to identify the role non-state actors are to play a part. Asset recovery requires the interaction of both state and non-state actors in order to pursue the most effective policies to address said agenda.

The asset recovery process encompasses procedures that vary from tracing proceeds of corruption, conducting complex financial investigations, mutual legal assistance, seizing of assets – often found in both the victim and recipient jurisdictions of the stolen assets –, confiscation and repatriation. Monitoring of the returned assets may also be considered an additional step. The success of the process also depends of specific knowledge areas that must communicate and intertwine to produce a comprehensive strategy on a case-by-case basis.

The brief overview above shows that the asset recovery processes requires a multi-faceted approach and response from the non-state actors. On one side, there are financial institutions, which play their part in the process, as the proceeds of crime will make their way – whether voluntarily or involuntarily – through the financial sector. Auditing firms likewise are pivotal to the success of asset recovery initiative, as external auditing, financial investigation and forensic auditing may show any wrongdoing from the private and public sectors, triggering the appropriate response. Service providers too play an important role, whether providing lists of publicly exposed persons (PEPs) or other forms of information and communication technologies (ICTs) to allow for a more efficient control of the flow of information and allow for more effective preventive measures. The legal sector also plays an important role both in the prevention – by providing correct information to their clients, so as to prevent unlawfulness of their actions – and in litigation, by ensuring that the rule of law is upheld and criminals are brought to justice and held accountable for their actions.

On the other side of the spectrum, there are the non-governmental organisations, which monitor the state and international initiatives and actions to ensure the democratic processes. They assist in ensuring checks and balances with the asset recovery process. These either act on a policy-making level, or seek a more hands-on approach, often partnering with law firms to litigate for the rights of the victim country. They also play an important role in ensuring greater transparency in monitoring the assets returned to victim countries.

Bearing this in mind, the Basel Institute on Governance (in co-organisation with the International Anti-Corruption Agency) hosted and experts' meeting in September 2010 with non-state actors that play an important role in the asset recovery processes. Attendance to the meeting included prominent non-state actors from both developing and developed countries that play and important and active role in the asset recovery processes. During the meeting a diverse group of non-state actors discussed their experiences and initiatives in the asset recovery process and drew several conclusions on how they could better assist.

1. The Non-State Actors Experts' Meeting

The meeting was divided into five main theme groups: academia, civil society, private sector, service providers and media, as each of these groups of non-state actors play a specific but equally important role within asset recovery. The meeting sought to clarify the roles of the non-state actors in their respective fields, identify potential overlaps, and draw up areas in which these areas could drive the asset recovery agenda in co-ordination.

The participants discussed important themes linked to asset recovery such as the advocacy work by civil-society organisations in recovering stolen assets, the need to conduct thorough research and to collect reliable data in the fields related to asset recovery, as well as the use of civil litigation and public interest litigation in the asset recovery process and the monitoring of returned assets to ensure their appropriate utilisation. The meeting further discussed the role of the financial and insurance industries, and the private

sector, in the asset recovery processes. The need to engage in collaborative strategies that take the asset recovery efforts one step further was discussed throughout the experts' meeting by all the theme groups.

1.1. Keynote Presentation: Andrew Feinstein, Corruption Watch

Mr. Feinstein's presentation focused on non-state actors in asset recovery, touching upon corruption and its impact on the victims. Several key asset recovery angles to corporate bribery were mentioned, including the fact that:

- Bribes are often held and paid offshore or in developed countries' banking systems. Identifying and confiscating such bribes, as well as slush funds used to pay bribes, is crucial to fighting corruption.
- There will increasingly be a question of what corporate sanctions should be imposed and how much of the sanction should be paid as reparation to the countries concerned.

Mr. Feinstein mentioned that reparations have recently started to become a feature of plea agreements in the United Kingdom with companies admitting guilt to paying bribes in foreign countries. In the first of such cases, Mabey and Johnson agreed to pay, in addition to fines, costs and confiscation, reparations to the governments of Jamaica and Ghana.

However, despite admitting to paying bribes in four other countries and confessing to a culture of bribery in the company, the plea agreement was structured in such a way that reparations were paid only to Jamaica and Ghana due to the fact details of the bribes and the names of those who they were paid out to were provided to the English court. Furthermore, Mr. Feinstein pointed out that there was an initial reluctance on the part of the governments of Jamaica and Ghana to accept the reparation payments (GBP 139,000 to Jamaica and GBP 658,000 to Ghana).

Despite of this novel approach in including reparation payments, Mr. Feinstein highlighted that the reparation approach of the UK Serious Fraud Office (SFO) was called into question by a high court judge at the end of March 2010 in another bribery case involving Innospec. The High Court questioned the authority the SFO had to channel confiscated funds to foreign governments and raised concerns about the money being recycled through corruption.

Mr. Feinstein argued that ensuring that reparations are part of any sanction against companies found guilty of paying bribes is a highly laudable and principled approach, as it focuses public attention to the fact that bribery is a form of theft from developing countries (although whether from the state or its citizens is obviously a contentious point in certain circumstances). It does establish the principle that there is no reason why developed countries that fine the companies involved should be the sole financial beneficiaries of the sanctions on criminal activity whose victims are often in developing countries. However, Mr. Feinstein noted that these reparations seem to be a part of a trade-off with the companies concerned for not pursuing other allegations against them in other countries.

Another issue brought forth by Mr. Feinstein related to the reparation sums. The keynote speaker informed that, in the Mabey case, the reparation sums lead to complaints from citizens in the countries

concerned. Mr. Feinstein concluded that, if authorities in the United Kingdom, and possibly other jurisdictions, continue to fine companies only a tiny percentage of the profits made on the corrupt deals, the reparations approach might only further antagonize people in the victim countries.

Mr. Feinstein concluded that the reparations approach needs proper international and institutional framework so that (i) there are clear rules and guidelines for how this money should be spent, and (ii) other developed countries prosecuting companies for foreign bribery can follow suit.

1.2. Civil Society Panel

The civil-society panel was comprised of **Maud Perdriel-Vaissière** of Sherpa (France); **Ernest Mpararo**, of the *Ligue Congolaise contre la Corruption* – LICOCO (Democratic Republic of Congo); and **Max Mader**, of the *Aktion Finanzplatz Schweiz* (Switzerland). **Gillian Dell**, from Transparency International, moderated the panel.

The panel focused on the importance of civil society in the asset recovery processes and in anti-money laundering initiatives through litigation and victim representation. It was pointed out that that civil society organisations (CSOs) are in need for clearer rules on their participation in court proceedings, in order to be able to push cases forward and bring corrupt officials to justice. One of the reasons is the fact that UNCAC is centred on state actors.

As an example of such initiatives, Ms. Perdriel-Vaissière brought forward the recent case Sherpa and Transparency International France brought to French courts against heads of state of African countries. Ms. Perdriel-Vaissière touched upon the issue that there is currently no clear international framework to ensure access to justice in the recipient state when victim states are unwilling or cannot initiate asset recovery proceedings. Another issue is the fact that in this scenario there may be no safeguards when mutual legal assistance proceedings fail. For this reason, third party litigation and public interest litigation[1] should be incorporated in the international legal framework to act as a subsidiary measure to ensure access to justice.

Ms. Perdriel-Vaissière explained that Sherpa and two other non-governmental organisations filed a legal complaint before the French public prosecutor's office against the ruling families of several African states, alleging they owned millions of Euros worth of properties in France that could not be the fruits of their official salaries. It was argued that the properties would have likely required the use of stolen public assets. The subsequent police investigation confirmed most of the allegations and further uncovered more assets in French territory. Despite the findings, the investigation was closed after the Public Prosecution ruled that the crimes were "insufficiently characterised".

[1] As defined by Black's Law Dictionary, public interest litigation is "a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

The plaintiffs then requested the investigating magistrate to resume the investigations that had been closed by the prosecutor. The case is currently pending a decision[2] by the *Cour de Cassation* following the claim by the representatives of an African leader that "Transparency International had no right to act as plaintiffs against heads of state." In that regard, Ms. Perdriel-Vaissière raised the argument that, if a civil-society organisation which had such a direct link to fighting corruption as Transparency International was not successful in bringing claims, who else would have such capacity? Ms. Perdriel-Vaissière concluded that this is an important question as it is difficult to precise and single out the direct victims of corruption.

The importance of civil society in advocacy and monitoring of returned asset was brought to discussion. Mr. Mpararo discussed this as the main role that civil society is playing in the DRC, and its importance for the cause of asset recovery. Mr. Mpararo mentioned that some of the problematic that civil society is currently facing in the DRC, such as the fact that the donor community is not sponsoring anti-corruption activities in the DRC, and the perception seems to be that they are more concerned with doing business rather that with corruption.

Mr. Mpararo brought forth the challenges faced by civil society in developing countries. One of the elements he touched upon was the fact that the DRC had not yet ratified the UNCAC and that there is currently no internal legislation in place that enables Congolese authorities to recover stolen assets. Thus, Mr. Mpararo envisages that one of the roles that civil society could play in such circumstances would be to push for legal reforms that would enable anti-corruption policies and asset recovery initiatives.

Another challenge that is faced in developing countries includes the lack of capacities in the judiciary, when dealing with the asset recovery processes. Furthermore, Mr. Mpararo indicated an additional challenge, which is the fact that stolen assets seem to be going to more to less conventional jurisdictions such as Dubai, Singapore and China, and less to traditional European jurisdictions, as a consequence to tighter regulation within Europe on money laundering and corruption.

Mr. Mader presented the new Swiss Law on Return of Illicit Assets, making it easier for assets to be repatriated in the future. However, it also became clear that this was only the case if the states involved fell under the definition of "failed states". Should the victim country not initiate legal proceedings the newly introduced legislation in Switzerland would not be applicable. As a result, the Swiss law should only be seen as subsidiary measure that comes to play should international co-operation turn out unsuccessful.

Mr. Mader also presented measures that are important for the recovery of stolen assets, such as monitoring the use of such assets. As such, civil society and non-governmental organisations outside the jurisdiction of the victim country can facilitate the asset recovery processes, arbitrate with donors and do advocacy work at the international level. This is turn would result in the shift of balance in political interests; enable the negotiation of independent monitoring of returned assets, and the development of policy recommendations.

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[2] The Cour de Cassation has, in November 2010, decided on the matter, granting legal standing on the case and the continuance of the investigation.

1. The importance of furthering research into what CSOs have done and should be doing, including monitoring of returned assets.
2. The need for training of CSOs in topics that are dealt within the asset recovery processes.
3. Increase advocacy efforts on changes in the legal frameworks in combating corruption and in asset recovery. This would include work on questions such as sharing damages and returned funds with the victim countries, creation of model legislation and disclosure requirements.
4. The investigative side of the work of CSOs was also re-emphasised, as the powers that CSOs have in publishing information cannot be underestimated.
5. In an effort to take this investigative role one step further, the panel also advocated for stronger efforts to promote CSOs becoming involved in litigation as third parties. The importance of working closely together with a network of lawyers and to further expand such a network was also discussed.

1.3. Academia

The Academia Panel consisted of **Melvin Ayogu** from *Standard Bank Global Leadership Centre*, **Denise Umuhoza**, *University of Tecnology Sydney* (Australia), **Guillermo Jorge** from the *University of San Andreas* (Argentina), and **Michael Levi** from the *University of Cardiff* (United Kingdom). **Pedro Gomes Pereira**, from the Basel Institute on Governance, moderated the session.

The panel dealt with the contributions academia can make to the asset recovery process. One important point that was raised was the research contributions that academia provides to other non-state and state actors, especially because some advocacy campaigns and investigations had been triggered by academic research in the past. Members of the academia panel also made it clear that corruption and asset recovery are not stand-alone topics but have to be put into context. Amongst the connected issues are organised crime and money laundering. It also became clear that a purely analytical approach might not always yield the desired or appropriate results.

Academia must not, for this reason, loose touch with the central question of how to actually change things. As a result, the panel concluded that there is a strong need for studies on impacts of the interventions within the asset recovery process. The panellists agreed that a basic study resulting in a list of countries where civil society can actually bring cases and would have a standing before court would be beneficial.

More specifically, Mr. Ayogu and Ms. Umuhoza emphasised on the need of supporting research that would in turn encourage appropriate action in the asset recovery process. Areas that could be of interest include financial transparency, mutual legal assistance and extraterritorial application of the law, co-operation between public and private sectors, and increased financial and technical assistance to developing countries.

Mr. Jorge touched upon the issue that corruption is not the same everywhere, and as such there is a need to understand where the money is coming from and where it is going to in the corruption cycle. Such knowledge would allow tackling the problem and guide action and reform within countries.

Finally, Prof. Levi alerted to the fact that in the world of criminology people seem to be obsessed with metrics – research demonstrated through statistical evidence. However, science hardly helps the efforts against corruption or the advocacy role. Thus, Prof. Levi advocated that data must be used in a pragmatic way, e.g., number of cases, amount of recovered assets every year and realistic figures of asset recovery. This way, it would be able to assess the harm that corruption and organised crime is doing to a country.

1. List and study of countries where civil society could bring cases/would have standing
2. More reliable studies on impacts of asset recovery
3. What is the cost of organised crime vs. asset recovery figures: what is the criminal asset gap?

1.4. Private Sector

The Private Sector Panel consisted of **Otmar Hasler**, former Prime Minister of Lichtenstein, KRP Group, **Juanita Olaya**, Director of the Basel Institute on Governance (Switzerland) and **Markus Schulz** from Zurich Insurance (Switzerland). **Juanita Olaya** also moderated the session.

Discussions centred on questions of responsibilities of the private sector and due diligence. Mr Hasler emphasised that Lichtenstein already at an early stage showed is commitment to anti-money laundering. Moreover, he explained that there was also a need to focus on education of private sector clients. He pointed out there are currently two problems: (i) tax evasion, and (ii) assets stolen by politically exposed persons (PEPs).

Mr. Schulz pointed out that the corruption agenda became important only just recently on the agenda of insurance companies. One of the challenges that this insurance sector faces is the need for self-regulation, as they are concerned about smaller, day-to-day transactions. The challenge for Mr. Schulz, however, it the loss in competitive power, as not all insurance companies are worried about corruption. Finally, Mr. Schulz emphasised a need to define PEPs, as it is not know who they should be, and during which period.

All of the panellists agreed that in a complex and rapidly changing world, all the drivers of the asset recovery process are interlinked and therefore, the private industry has to come on board in co-ordination. During the discussions, the panellists expressed a need to co-operate with other non-state actors, especially in order to obtain information on new trends in corruption and asset recovery, and to exchange data and knowledge. Informal networks were mentioned as one possible option to drive the agenda further.

1. Need for collaboration and dialogue with other non-state actors
2. Harmonisation between data protection regulations and anti-money laundering obligations

1.5. Service Providers

The Service Providers Panel consisted of **Edward Davis Jr**, Astigarraga Davis (United States), **Christol Correira**, Dow Jones Factiva (United Kingdom) and **Klaus Fischer**, Deloitte & Touche GmbH (Germany) and **Dimitri Vlassis**, UNDOC.

Right from the start, Mr. Vlassis made the point that asset recovery is an obligation much more than something that should be investigated according to a cost/benefit analysis. As a result, assisting in the recovery of stolen assets is much more a duty than something that can be chosen to do out of good will and when there is time and resources available. Mr. Vlassis pointed out that partnership opportunities between the public and private sectors – multi-stakeholder initiatives must be sought. Members of the panel welcomed the fact that civil routes of recovering assets were becoming more popular. It was however pointed out that corruption remained a crime and should therefore be prosecuted criminally.

Mr. Davis pointed out the importance of having the victim country wants to get out of the case, defining the "win" from the beginning. Furthermore, there is a need to make use of civil asset recovery teams, comprised of lawyers, forensic accountants and investigators. Furthermore, asset recovery should focus on the values and not solely on the assets.

Mr. Correia informed how data providers assist in identifying PEPs. The challenge, however, is the fact that there is no definition of PEPs, while there is a need for regular screening, increasing the regulatory requirements and thus the operational impact of filtering PEP lists. Another challenge is the fact that there are difficulties associated with the transliteration of names between different alphabets, making it more difficult to locate PEPs.

Mr. Fischer pointed out that practitioners in the asset recovery field should understand the different legal avenues available to recover assets, and structure an investigation team accordingly. Mr. Fischer emphasised the need to have a good mix of legal and investigative skills in the investigation team.

Regarding PEPs, different non-state actors during the meeting expressed that PEP screening is an extremely useful contribution to recovering assets, while others tended towards the fact the PEP screening was resource intensive and did not produce meaningful results. In the end, the panel agreed that follow-on cooperation between the different actors was crucial and that further ideas on data creation should be discussed.

1. Need for clearer definition of PEPs that can be used reliably by the service providers.
2. Need to establish clear goals when initiating the asset recovery processes to obtain maximum results.

1.6. Media

The media panel consisted of **Michael Peel**, Financial Times (United Kingdom), **Omoyele Sowore**, Sahara Reporters (untied States), **Laeticia Luvuezo**, Canal Tin Television (DRC) and **Alan Bacarese**, Basel Institute on Governance, Switzerland).

In this panel, it very quickly became clear how the different groups can actually benefit from each other. Journalists made it clear that often, their stories are based on initial information they received from CSOs or individuals. Journalists are also interested in the expert knowledge lawyers possess, in order to be able to explain corruption investigations from a legal point of view. Nevertheless, it was shown that the media's role in asset recovery has to take into account the wider public interests: Media will only report about cases of corruption and asset recovery if people are interested in hearing about them. As a result, an element of entertainment cannot be ignored, even in the most serious cases.

Mr. Peel informed that a good story comprises of (i) large sums; (ii) interesting spending habits; (iii) tells us something bigger about how the world and corruption works; and (iv) have an international political dimension. However, Mr. Peel questioned what is the role of the journalist beyond this should be.

Mr. Sowore spoke about the *Sahara Reporters*, which takes the approach of the citizen reporter. The *Sahara reporter* focuses on property of Nigerian public officials, publishing public records, parties and Nigerian students which attend expensive schools abroad, among others. *Sahara Reporters* has the collaboration of the population in general, civil society and other media sources to public raw information. It has combined the power of the people and the internet – and has been able to transform the access to information in Nigeria.

Ms. Luvuezo informed that investigating corruption in the DRC has many challenges, as it costs too much, there is lack of access to information, lack of capacity and no partnership with other media sources throughout the world. Most of the investigated cases suffer from lack of freedom of information. She thus informed that the way forward would be to establish co-operation mechanisms to help manage restrictions on access to information. In such a way, the media can help investigators in publishing information they don't have a lead for; and (ii) in assisting tracing assets, as the media could publish publicly available information in order to obtain further collaboration for the investigation.

The media panel came up with several suggestions for ways forward. They discussed building networks between the victim and recipient countries. Such a co-operation between the media in each of these countries would enable a closer and more efficient monitoring process. Also ties between journalists would allow for an informal exchange of information, which might be especially valuable for countries in which there is only limited freedom of the press and certain things cannot be published. It was also examined how Anti- corruption Lawyers and journalist could work together more closely. The panelists were convinced that this cooperation would be valuable for both sides. Therefore, they advocated for an institutionalization of such kind of networks to make exchange more efficient and targeted.

1. Setting up informal networks to further exchange information to help the flow of information amongst journalists
2. Increase the collaboration between the media and non-state actors to ensure accountability.