

Testimony of John Conyngham Esq
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Recovering Dictator's Plunder

Mr Chairman

My name is John Conyngham. I am the Global Director of Investigations for the Control Risks Group Limited, a global business risk and corporate investigation consultancy headquartered in London, England. As such, I manage our 150 strong investigative team operating out of 12 of our 18 worldwide offices. I am honored to appear today before the Financial Institutions and Consumer Credit Subcommittee of the Committee on Financial Services and thank the Subcommittee for its most kind invitation.

The discussion today about what has become known as *grand corruption* and, in particular, the recovery of monies illegally obtained by high ranking government ministers and officials in worldwide jurisdictions through the abuse of public position for private gain. As this Subcommittee is aware, *grand corruption* typically consists of the payments of large bribes – often in millions of dollars – to secure commercial contracts or other business advantage. In its most extreme form *grand corruption* can amount to *state capture* where corrupt interests control the state itself and manipulate the machinery of government to serve their private interests. Former President Mobutu's kleptocracy in Zaire, where his 'salary' was reported at one point as equalling 17% of the national budget and his 'personal allowance' exceeded the combined expenditure on education, health and social services and Former President Slobodan Milosevic's actions in Serbia are widely perceived to be classic examples of this phenomenon. Indeed, as far back as 1995 Mr Dinkic, then Governor of the Central Bank in Yugoslavia, had the courage to state that Yugoslavia:

'was a nation where paranormal economic phenomena are an everyday phenomena'.

Mobutu and Milosevic, in public perception, joined forerunners such as the late Ferdinand Marcos of the Philippines, 'Papa Doc' Duvalier of Haiti and Former President Suharto of Indonesia to name but a few.

Since this phenomenon undoubtedly exists, what has the developed world done to identify and return such plunder to its rightful ownership? Or is such a thought simply a pipe dream?

In appearing before this distinguished committee today I must immediately state that I do so as an investigator. Within the worldwide team that I have the privilege to lead,

our number includes lawyers but we are not a law firm, we include accountants but we are not an accountancy firm, we include former police officers but we are not law enforcement. Rather, as commercial investigators, we see our function to be that of finders of facts, gatherers of intelligence and evaluators of evidence.

In starting from that premise today I would not dare to seek to answer the questions that I have posed. What I would feel comfortable to provide would be a brief outline of our approach to asset identification, a short mention of successes to-date, an indication as to the nature of difficulties typically met along the trail and a progression onto a possible route map forward that includes practical issues, generic political issues and perceived legal difficulties. In conclusion, I shall have the temerity to suggest the need for a public and private sector *partnership* in this arena that could assist in the overall development of a coherent methodology that would more readily facilitate the recovery of the proceeds of *grand corruption*.

The Investigator's Perspective

The investigator's aim in large-scale asset tracing exercises is to achieve asset identification, proof of ownership and clear linkage to originating criminal acts. To ensure that such aim maintains focus in scope and direction investigators generally work in *partnership* with law firms and, as required, accountancy firms. Our methodology is one whereby known information is Collated, Additional information accessed, intelligence Gathered and Evidence evaluated.

Under this *CAGE* approach, known information may range from the relative simplicity of known addresses, travel patterns and favored jurisdictions to corporate structures often utilised and personal interests. A simple underlying presumption is made that those who divert state funds will wish to utilise such funds for their own or their family's benefit. As such, there must be linkage, however camouflaged, between the individual and the asset. All facts will be cross-referenced and charted in conjunction with the results of worldwide database and public record research and the scouring of corporate filings. This large base of initial information will then be used to suggest further lines of enquiry.

A second presumption will also be made; namely that third parties will be utilised in the concealment process. When the balloon goes up and it is known that the hunt is on, these third parties will often become susceptible to approach. Alongside targeting of such individuals, the jurisdictions in which the search should be continued will be assessed. This latter point is important; a Pyrrhic victory is achieved if an asset is identified in a jurisdiction that does not allow for meaningful recovery action through its legal system.

Concurrent to this research and interviewing process, the investigator will be seeking to develop relevant intelligence sources that could be expected to add to the knowledge base and ensure the correct targeting of resources, investigative or legal. Finally, at appropriate points on the investigative route these elements will be tested for evidential merit.

Whilst the methodology is clear, the hurdles along the route are significant. The investigator will meet the *secrecy* of people, of companies, financial institutions and

of jurisdictions together with the *complexity* of offshore corporate structures, of politics and of laws. How does the international investigator address such issues? The brief answer is ‘with great difficulty’. These issues present great challenges and, on a regular basis, great frustrations.

In a world that even before 11 September 2001 was calling for higher standards of corporate governance and transparency, that was insisting on far greater uniformity in anti-corruption measures and the belated mirroring of the US Foreign Corrupt Practices Act in Europe through the initiatives of the Organisation for Economic Co-operation and Development (OECD) and the Organisation of American States (OAS) is it a satisfactory conclusion that an inability to pierce corporate veils, a party’s refusal on secrecy grounds to identify the beneficial ownership of an offshore account or a failure to unearth the true ownership of an International Business Corporation can mean that funds that would otherwise have been available for return to an emerging country remain in the possession of a deposed dictator or his heirs? As was pointed out in a 1998 United Nations Office for Drug Control and Crime Prevention Report:

‘The offshore financial world is appropriately described as a “Bermuda Triangle” for investigations of money-laundering, complex financial fraud and tax evasion. Money trails disappear, connections are obscured and investigations encounter so many obstacles that they are often abandoned’.

But, perhaps, there is some light on the horizon? The tragic events of 9/11 have led to the advent of The Patriot Act and emerging regulations in the USA that are being partially followed in the United Kingdom and other jurisdictions and we may be witnessing a redressing of the balance that still firmly recognises the right to privacy of the individual but gives significant weight to the needs of justice. With greater openness and the availability of crucial information, crime could be made to pay rather than seen, itself, to pay. As investigators we would welcome such an approach and States that have suffered the indignity of *grand corruption* would benefit.

In the light of some of these difficulties luck will also play its role in the investigative scenario. In one matter, our work took us to the doorway of corporate nominees and that could have been the end of a trail as far as identification of beneficial ownership was concerned. In fact, on that particular day in that particular jurisdiction the nominees, themselves disturbed as to the nature of certain recent events, decided to show documentation that declared the beneficial ownership of the assets under enquiry. It was a matter of good initial research, skilled intelligence as to possible states of mind, timing and persistence.

In another matter, my company worked in partnership in the Far East with some 75 accountants from a Big 5 accountancy firm and 30 lawyers from an international law firm. Many billions of dollars were suspected of having been improperly removed by a senior official from a government fund. At the outset a strategy was set that recognised that prosecution action was unlikely, on political grounds, and that settlement was the preferred result. This lack of intent to prosecute in of itself potentially cut off certain legal recovery avenues. In November 2000, Lorna Harris, the then Head of the Home Office Judicial Cooperation Unit in the United Kingdom had said, whilst providing testimony to the House of Commons International

Development Committee that was enquiring into the United Kingdom's role in attacking corruption in developing countries:

'most applications made by overseas governments for the confiscation of assets were turned down because they failed to meet the conditions for the United Kingdom to act, in particular by providing evidence of a criminal prosecution in the country making the request'.

Within these parameters purchases by this fund over a 10 year period were examined; overpayment for assets was determined to have been the norm and assets 'owned' by a defined grouping of associates were suspected as being the proceeds of the gross misuse of funds. This network of associates was identified, publicly declared properties were analysed and an intelligence operation was designed to provide forewarning of any attempts to liquidate goods. One simple piece of intelligence led to the seizing of artwork worth in excess of US\$10 million.

The *partnership* of the three components to the overall recovery team – the investigators, the lawyers and the accountants - led to the easy transfer of accumulated knowledge including a wide base of experience of the applicable laws in the multiple jurisdictions that the asset trail encompassed. It also allowed for a co-ordinated asset recovery *strategy*.

If this private *partnership* could succeed - and a settlement running to many billions of dollars was achieved – what could a real and wide public *partnership*, a combination of governments, business in the form of professional advisors and civil society achieve on the multi-jurisdictional public platform that is the stage for the war against *grand corruption*? Consideration of this question raises generic political issues, legal difficulties and other practical issues.

Political issues

Whilst broad generalisations are often to be avoided, it is our experience that the nature of acts that found the basis for allegations of grand corruption are usually uncomplicated in nature. In the recent *Abacha* matter investigators were faced, in the main, with what any prosecutor would term a simple over-invoicing scam. Party A, an arm of the Nigerian government, would contract with Party B for the supply of goods or services. Goods would be delivered by Party B but their value would be at a great undervalue to the sum set out on the accompanying invoice. The full amount of the invoice would be remitted to Party B which would, in turn, remit the excess to Party C, an entity under the control of friends/associates of the late and Former President *Abacha*.

If the dishonest acts were clear, proof of complicity by the main actor was more opaque and formal identification of ownership of the proceeds of such dishonesty, including beneficial ownership of bank accounts, was far less transparent. The real assistance of governments, regulators and financial institutions was required if success was to be achieved.

Such assistance was, in fact, slow in coming. In the United Kingdom, in their early stages, approaches from the Nigerian government fell victim to the criminal

prosecution prerequisite (dual criminality) not least because the principal actor had died but also because of the climate of fear and the tribal associations and influences that dominated. Admissible evidence that could be produced in a manner acceptable to our courts was absent. At governmental levels in other relevant jurisdictions there remained concerns as to whether the new government of President Olusegun Obasanjo was taking real steps to confront corruption and whether previous recipients of proceeds of *grand corruption* were being tackled.

In other *grand corruption* cases, new governments have been unable to prioritise the need to meet international standards for mutual legal assistance or have continued to fall foul of human rights concerns. Such failures can lead to efforts to recoup the proceeds of large-scale corruption failing to secure real momentum and inter-governmental co-operation.

Legal Issues

The sub-committee has requested consideration of the differences in applicable laws between jurisdictions as they apply to the recovery of assets. Proper consideration of such matters would require the knowledge of an international jurist and I am not such an animal. The international laws are complex and there are a multiplicity of treaties and agreements, the details of which must fall outside my scope today. However, some big picture issues can be relatively easily headlined:

The primary issue is the significant substantive and procedural differences between civil law and common law jurisdictions. Legal asymmetries can cause difficulties even between the same legal tradition especially with respect to definitions of offences and corporate liability; when transposed to different systems of law, the gulf can become much greater. Some countries, Germany, for example, allow for the import of foreign law whilst others, including Switzerland, send delegations into foreign countries in which, if allowed in the host country, they can apply their own laws.

The concept of civil forfeiture in criminal matters, available in civil law jurisdictions, is alien to a vast majority of national legal systems but through the lesser standard of proof that civil proceedings carry with them offers real advantages when proof of ownership of entities or accounts that are held behind secrecy provisions is required. In addition, it side-steps the dual criminality provisions required under international criminal procedures.

In seeking to pierce a corporate veil or define beneficial ownership of an account held offshore – so badly needed to allow for access to records of transactions or proof of the further movement of funds – the investigator will have pursued the field interviews with third parties, analysed the usage of, say, a Caribbean address and will be seeking to collect, at the lowest, sufficient circumstantial evidence that will convince the advising legal team that, at least as far as the civil standard of proof, the balance of probabilities test, is concerned, the evidence is such as to found the clear inference that the beneficial ownership of an account or entity is Mr X or Miss Y. And yet it will only be later this year in the United Kingdom, through the passage of the Proceeds of Crime Act in our legislature, that a civil forfeiture mechanism for recovering the proceeds of crime will become available in our courts. Part IX of the

Act also contains specific provisions that will enable the United Kingdom to carry out requests on behalf of overseas governments for asset freezing and the enforcement of confiscation orders. The need for dual criminality will be replaced by a mechanism that allows for Orders in Council to be made by the Sovereign at a speed that will far outstrip the implementation of treaty requirements. While the United Kingdom may be slowly catching up, other jurisdictions remain behind.

Secondly, the ability to take steps to stop the dissipation of assets once identified is crucial in large-scale asset investigations. The development of case law in the United States and the United Kingdom has perhaps taken different routes to achieve the same end. In the USA it would appear that the development of 'discovery' procedures leading to the right to demand the production of evidence of ownership has taken precedence over what, in the United Kingdom, over the past 25 years, has been the development of effective interim remedies.

These interim remedies include orders for the freezing of assets on either a domestic or world-wide basis, the tracing of assets into the hands of third parties and the freezing thereof pending judgement, the seizure of documents in the hands of prospective defendants alleged to be relevant to proving anticipated claims, orders for the disclosure of information and 'gagging' orders on third parties preventing them from disclosing to defendants or prospective defendants the fact that they have been ordered to disclose information. These are powerful judicial orders that can bring parties to the negotiating table far earlier than might otherwise be the case. Freezing Orders do not have direct counterparts under US law. It may thus be necessary in a matter that involved identified assets in both the United Kingdom and the United States to obtain a Freezing Order in London that could also be implemented in New York.

There are then Treaty agreements, Conventions and procedures which, whilst clearly of great assistance, could also be thought to occasionally give with one hand whilst taking with the other. Mutual Legal Assistance Treaties (MLATS) and Letters Rogatory provide clear avenues for the cross-jurisdictional exchange of evidence. However, first and foremost, the requisite arrangements must be actually in existence at the relevant time of need and, secondly, evidence furnished under these instruments cannot be shared with third countries. In the United States evidence provided before Grand Juries is confidential and can only be shared elsewhere under tight requirements and restrictions.

The question of evidence brings in the status of witnesses and their compellability as witnesses in both their home jurisdictions and overseas. Different rules apply as to their availability with a lowest common denominator of cost and who will pay. A related issue is the reluctance of key witnesses in *grand corruption* cases to appear at all unless under the protection of an immunity from prosecution. This, in turn, raises the differing forms of immunity that exist in both common law and civil law jurisdictions. In short, the production of oral evidence in itself produces difficulties and cross-jurisdictional differences.

Finally, by way of headline issues, it is worth noting that many corrupt leaders will have so dominated and shaped the legislative and executive functions of their former states for such periods as to have allowed for protections from future legal action

against them to have been built in behind issues of State sovereignty, enacted laws and immunity doctrines.

An action that is, perhaps, demonstrative of this theme is the fact that the Milosevic government apparently classified all gold production as a military secret. This is a convenient tool if huge corrupt payments are being received in relation to such a commodity by the highest government officials. Succeeding governments may seek to make changes which carry with them retrospective effect but the enforceability of retrospective laws in the international arena will be fraught with difficulties.

If these are but a small sampler of legal issues, what steps could be taken to overall to aid the recovery of Dictator's plunder?

Practical steps

a) Definitional issues

There is a need for clarity as to the nature of offences that adequately capture the nature of the criminality that is encompassed within the concept of *grand corruption*. If an all-embracing charge of, say, patrimonicide is deemed unworkable then the practices that comprise its essence must be agreed; descriptions of particular acts or economic behaviours may be preferable to widely spread definitions of corruption.

b) Preventative issues

Due Diligence

In May 2001, the United Kingdom's Financial Services Authority ('FSA') announced that it had discovered some 42 accounts linked to Abacha family members in 23 banks. Turnover in such accounts was estimated to have amounted to approximately US\$ 1.3 billion between 1996 and 2000. The FSA went on to find that of the 23 banks, 15 had 'significant control weaknesses' in respect of its 'know your customer' procedures and 7 were given strict deadlines for the imposition of additional controls. Significantly, the FSA did not then and has not since, actually publicly named the relevant financial institutions, a surprising stance for a regulator that might be thought to have deterrence in mind. Again, Lorna Harris, the then Head of the United Kingdom's Home Office Judicial Cooperation Unit, stated in November 2000:

'the [UK] government had done little to stop money-launderers using British national Institutions to conceal the proceeds of corruption'.

The United Kingdom and its financial institutions, I venture to suggest, was scarcely alone in such failure. This raises the question as to whether even now the 'enhanced due diligence' requirements established in the Patriot Act are adequate in the circumstances of the most senior government officials. There is a real need to ensure that the financial bona fides, business and familial relationships and known sources of income of senior government officials are adequately disclosed to financial institutions on entering high office. The concept of 'Know Your Customer' programs based on the perceived risks associated with various types of customers and the types of transactions expected of customers is not new.

Interestingly, as the committee will recall, the United States has again stolen a lead in this area through the issuance by the US Treasury Department in January 2001 of its '*Guidance on Enhanced Scrutiny for Transactions That May Involve the Proceeds of Foreign Official Corruption*'. Switzerland has also issued guidance on relationships with Foreign Potentates in the last year but, I am sorry to report, the United Kingdom appears to be dragging its feet. Oliver Page, Director, Complex Groups, FSA intimated, in January 2001, that the FSA would consider whether specific guidance in relation to foreign potentates was required. I do not believe that it has arrived.

Strongly enhanced due diligence requirements, on a worldwide basis, relative to Foreign Potentates would be a serious weapon in the fight against *grand corruption*, creating, as is the case with the US Patriot Act, longer and more detailed paper trails which are the lifeblood of the investigative process. A distinctive bank liability for failures in due diligence that lead to the facilitation of corrupt payments and the harbouring of corrupt funds would provide both an additional line of defence and a 'deep pocket' in the event of failure. The Subcommittee will recall that in October 2000, 11 of the world's leading banks put together a document that became known as the Wolfsberg Principles in which they pledged:

'to endeavour to accept only those clients whose source of wealth and funds can be reasonably established to be legitimate'.

Two years later, as perhaps an overly cynical investigator, I wonder whether such words have been put into active practice in every jurisdiction in which those participating banks offer their services.

Banking Secrecy

Following on from this concept, whilst the diminution of an individual or corporation's right to privacy is a matter that rightly attracts close scrutiny, should provisions be considered that would enable banking secrecy to be deemed waived in financial matters that touch, or are prima facie believed to touch, Heads of States and their senior officials? In carefully defined circumstances this would obviate the need for recourse to MLATS or other conventions.

For this to occur, I suggest, there would need to be a significant sea change in the thinking of private banking, a business that we are told manages some US\$16 trillion in assets on a world-wide basis. As in many areas of change management, there would need to be buy-in from the very top of such organisations that led to acceptance of a cultural change whereby issues of competition and client-led demands for privacy took second place to the manner and type of business that an institution is prepared to conduct.

A further step along this route could be the reversal of the burden of proof in relation to the assets of a Head of State. At the start of a period of tenure a Head of State could tender a net worth statement. Thereafter, the apparent existence of personal assets well in excess of such statements could lead, in criminal contexts, to the raising of a presumption that such goods assets were the fruits of corrupt acts unless the contrary were proved on a balance of probabilities.

The thought is not new, it has been enacted in jurisdictions such as Hong Kong in the past but if its target ‘audience’ were wide it would be seen as anti-democratic and draconian. The role of a Head of State, however, is so fundamental a position of trust that encroachment on the ordinary rights of the citizen could, perhaps, be contemplated. The Head of State holds the assets of the country in the widest sense ‘in trust’ for its citizenry.

Corporate Secrecy

As Investigators we are often charged with the task of ensuring that a company’s assets, both physical and intellectual, are secure. As such, we readily recognise the rights of companies to hold those assets away from competitors and in a tax efficient manner.

What is less acceptable to us as investigators is the concept that obfuscation of lawful ownership should be an end in itself that will be forever acceptable. In a post 9/11, post Enron world there must be, I suggest, less readiness to accept the need for corporate anonymity. In addition, the professional advisers that assist in the establishment of complex structures must, I also suggest, be made to feel the weight of responsibility for the legitimacy of their actions. In 2000, some 18,000 suspicious transactions were reported to the United Kingdom’s National Criminal Intelligence Service. Of such number only 170 were lodged by law firms. At a meeting of the International Bar Association in Mexico in October 2001 leading law firms debated their responsibilities in this area and, in effect, voted for no change. As with the private banking sector, cultural change is required; the comment made recently by Elise Bean, deputy legal Counsel to the Senate’s Permanent Subcommittee on Investigations in relation to private banking should be extended, in my opinion, to the professional advisers:

‘the kind of secrecy that some people want is way beyond what is legitimate and way beyond what any [private bank] should be providing’.

The Way Forward

On 23 April 2002 the world’s press announced what appeared to be a stunning success in the *Abacha* matter. A settlement had apparently been reached whereby the *Abacha* family agreed to return US\$1 billion to the Nigerian government. Of such sum, US\$535 million will be released from Swiss banks, US\$200 million from banks in Jersey, and US\$300 million from banks in Luxembourg and Liechtenstein. In return for such action all overseas legal actions against family members would be halted. However, no comment was made as to whether there would be any further search for the remaining US\$3 billion that would remain outstanding. This settlement was the work of a Swiss law firm working on a contingency fee basis. The law firm must be congratulated and the people of Nigeria will benefit in due course from this substantial inflow of state funds.

The question, however, remains as to whether even greater success could have been achieved if there had been, from day 1 of the world-wide asset recovery exercise, a public *partnership* of governments, of specialist private sector professionals and the

garnered will of a global anti-corruption fight that carried with it full understanding of the relevant legal weapons that could be used on sight in a coherent world-wide asset recovery strategy? If such a *partnership* had a formalised setting from which to operate it could ensure:

- that an overall strategy for the world-wide asset search was determined and agreed to at the outset of the process;
- that the complexity of issues, some of which I have touched on in this testimony, could be addressed at the very beginning of that process. This would ensure that the victim state had immediate access to 'state of the art' knowledge of laws, of treaties and of procedures;
- that efforts were clearly focussed in litigation-friendly jurisdictions;
- that breaches of anti-money laundering laws and regulations and anti-corruption measures were publicised in relevant jurisdictions and co-ordinated pressure brought to bear on jurisdictions that were failing to match the new standards of governance measures;
- that the pressures that an incoming administration faces in a formerly corrupt state could be alleviated by the unequivocal and practical support of this international body.

The time, I submit, is right for this to happen. On the near horizon do we not have the possibility of world-wide concern as to the personal financial interests of the highest members of the governments of Iraq, Zimbabwe, Angola, Equatorial Guinea to name but some? The United States, perhaps leading the way as it did in 1976 with the Foreign Corrupt Practices Act, has the opportunity to build on the work that has been commenced with the Patriot Act of 2001 with a view to ensuring that the citizens of those emerging and developed countries that have suffered the tyrannies of despots have a far better chance to see the return of monies owing to them. With these monies they can build a far better future.