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the coalition against corruption

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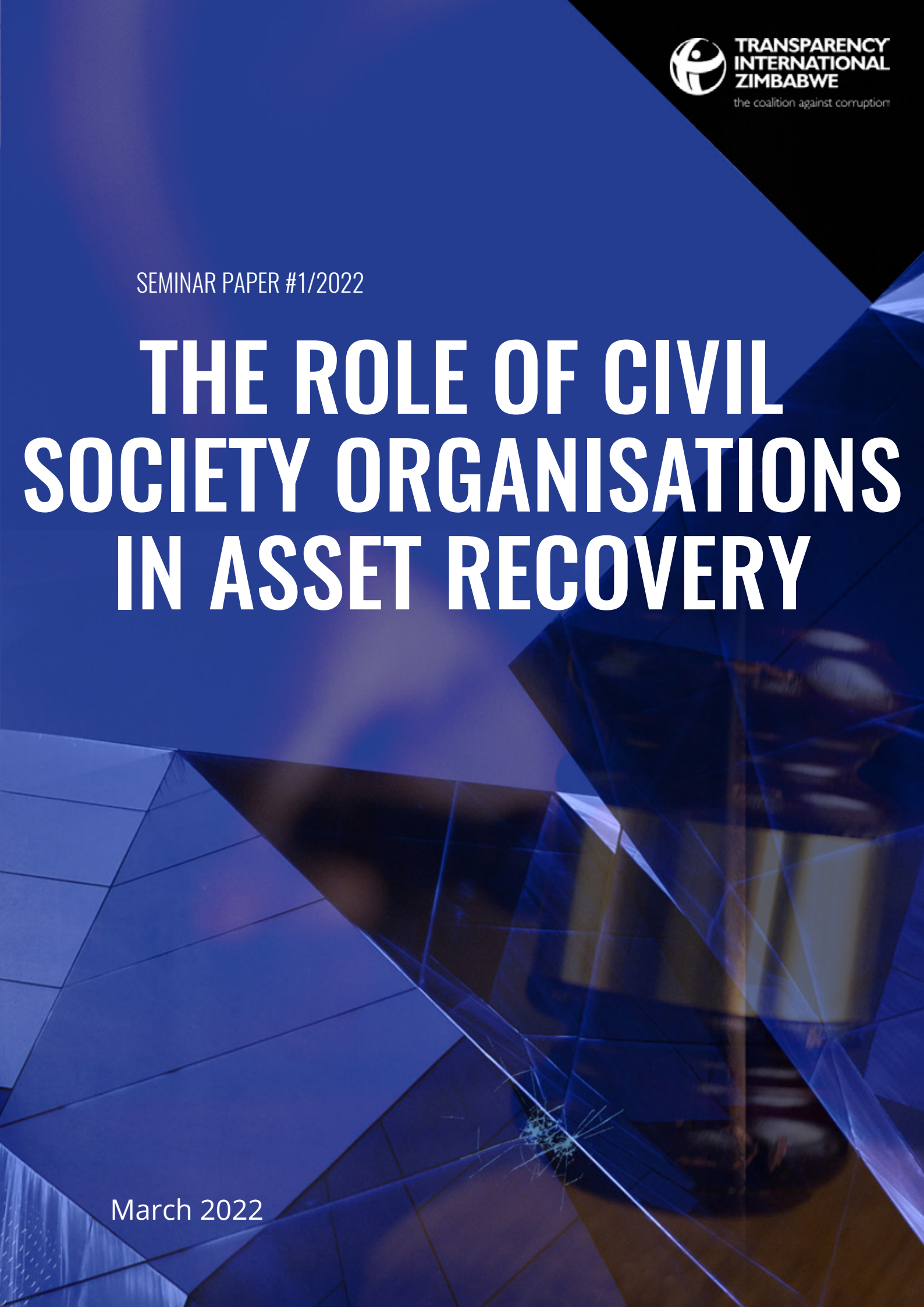
THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN ASSET RECOVERY



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Transparency International Zimbabwe (TI Z) is a non-profit, non-partisan, systems-oriented local chapter of the international movement against corruption. Its broad mandate is to fight corruption and promote transparency, accountability, and integrity at all levels and across all sectors of society. TI Z believes corruption can only be sufficiently tackled by all citizens including people at grass root level.

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THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN ASSET RECOVERY

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PROJECT LEAD
Nqobani Tshabangu

LEAD AUTHORS
Dr. Prosper S. Maguchu

EDITING
Dakarayi Matanga

EXTERNAL REVIEW
Dr. Andrew Godfrey

DESIGN AND LAYOUT
Cybil Maradza

LIST OF ACRONYMS

AFAR	Arab Forum on Asset Recovery
ANEEJ	Africa Network for Environment and Economic Justice
ARU	Asset Recovery Unit
AU	African Union
CCFD	Comité Catholique contre la Faim et pour le Développement
CoSP	Conference of States Parties
CSOs	Civil society organisations
DOJ	The Department of Justice
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
MANTRA	Monitoring Transparency and Accountability in the Management of Returned Assets
MCDI	Medical Care Development International
NPA	National Prosecuting Authority
OPC	Office of the President and Cabinet
PRAZ	Procurement Regulatory Authority
PSC	Public Service Commission
TI Z	Transparency International Zimbabwe
UFAR	Ukraine Forum on Asset Recovery
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UWOs	Unexplained wealth orders
ZACC	Zimbabwe Anti-Corruption Commission
ZIMRA	Zimbabwe Revenue Authority
ZRP	Zimbabwe Republic Police

ABSTRACT

In Zimbabwe, civil society organisations (CSOs) have played a significant role in documenting cases of corruption and mismanagement that have deprived Zimbabweans of their basic human rights. This work can facilitate asset recovery efforts, which is a high priority for the Government of Zimbabwe. The country continues to face enormous challenges despite the political changes that have occurred in recent years. This makes the contribution of civil society even more important. In particular, CSOs can play a role in raising public awareness, research, advocacy, case management and monitoring returned assets. Hence, CSOs should not only be encouraged but also equipped to work with government and state institutions: providing information, increasing accountability, and building political will.

The government and third sector can achieve far more working cooperatively than either could alone. To that end, Transparency International Zimbabwe (TI Z) seeks to provide CSOs with a platform to effectively engage with and support the recovery of stolen assets within and beyond Zimbabwe's borders. This paper will encourage CSOs to explore opportunities to effectively engage in the asset recovery process, including in partnership with other actors, so that they can work towards returning the assets to Zimbabweans in desperate need. As the first of its kind, this paper is not intended to be exhaustive, but rather provides an introductory overview to CSOs' engagement with asset recovery and identifies their specific strengths. It also analyses CSOs' asset recovery networks, which will allow TI Z to understand who is already working with whom so that it can build on this knowledge for future collaborations.

In terms of scope, this paper discusses asset recovery in the context of corruption-related offences, with an emphasis on cases involving senior public officials.

The government and third sector can achieve far more working cooperatively than either could alone

This paper provides identifies the specific strengths of the CSOs' engagement

1 INTRODUCTION AND BACKGROUND

The Zimbabwe Anti-Corruption Commission (ZACC) estimates that US$7 billion is illegally held in foreign bank accounts.[1] This is equivalent to the country's principal external debt.[2] If this money were returned, the potential economic impact for Zimbabwe would be considerable. Consequently, asset recovery has been high on the government agenda. Soon after unexpectedly coming to power in November 2017, President Emmerson Mnangagwa began pursuing assets stolen by officials, mainly members of the previous regime. His first action was to pass a three-month general amnesty for individuals and companies to surrender public funds illegally stashed abroad.[3]

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1 ZACC Chairperson Justice Loice Matanda-Moyo, quoted in 'Asset Recovery: ZACC Identifies $70bn Cash, Properties', *The Herald,* 25 February 2020 <https://www.herald.co.zw/asset-recovery-zacc-identifies-7bn-cash-properties/>.

2 Zimbabwe's debt is estimated to be US$13.7 billion. Some US$7 billion of the total is payments that are in arrears. See the 2022 National Budget Speech by Hon. Prof. Mthuli Ncube, Minister of Finance and Economic Development, delivered to the Parliament of Zimbabwe on 25 November 2021. <http://www.zimtreasury.gov.zw/index.php?option=com_phocadownload&view=category&id=67&Itemid=793>

3 The following statement was issued by President Mnangagwa, advising those that were involved in illegal activities to bring back any funds they may have sent out of Zimbabwe:

> *"Activities linked to Operation Restore Legacy have, among other issues, helped to uncover cases where huge sums of money and other assets were illegally externalised by certain individuals and corporates. Needless to say, such malpractices constitute a very serious economic crime against the People of Zimbabwe which the Government of Zimbabwe will never condone.*
>
> *As a first step towards the recovery of the illegally externalised funds and assets, the Government of Zimbabwe is gazetting a three-month moratorium within which those involved in the malpractice can bring back the funds and assets, with no questions being asked or charges preferred against them. The period of this amnesty stretches from 1 December 2017 to the end of February 2018. Affected persons who wish to comply with this directive should liaise with the Reserve Bank of Zimbabwe for necessary facilitation and accounting.*
>
> *Upon the expiry of the three-month window, Government will proceed to effect arrest of all those who would not have complied with this directive and will ensure that they are prosecuted in terms of the country's laws. Those affected are thus encouraged to take advantage of the three-month moratorium to return the illegally externalised funds and assets to avoid the pain and ignominy of being visited by the long arm of the law."*
>
> *Emmerson Mnangagwa*
> *President of Zimbabwe*
> *28 November 2017*

However, the amnesty could not compel them to do so, merely encourage it. The President passed legislation on unexplained wealth orders (UWOs) to impose stronger obligations, based on the directives of the Presidential Powers Act which allowed the government to recover unexplained wealth.[4] UWOs are a tool for recovering ill-gotten assets, which shifts the responsibility to the respondent and makes it a requirement under civil law to explain the source of their wealth.[5] On 5 July 2019, the Zimbabwean government gazetted a bill (H.B. 14) to amend the Money Laundering and Proceeds of Crime Act. The amendment was welcomed by the public with a few reservations and was later adopted by Parliament with the support of lawmakers from across the political divide.[6] Zimbabwe became one of three countries in the world to adopt full UWOs and the first in Africa.[7]

Furthermore, the ZACC, which under the previous regime was facing enormous operational challenges, has been restructured. The new ZACC has established an Asset Recovery Unit (ARU), the main such body in the country.[8] Asset recovery ranks next to prosecutions in terms of priority in the ZACC anti-corruption strategy, as explained in its Strategic Plan (2020–2024).[9] The ZACC has an ambitious plan to increase asset recovery to US$1 billion by 2024.[10] Since its inception, the ARU has launched investigations into 43 cases, with the value of assets that have been identified and seized amounting to US$24.7 million.[11] Recently, the ZACC made headlines when it successfully recovered assets from Douglas Tapfuma, Principal Director in the Office of the President and Cabinet (State Residence), Samuel Undenge, former Minister of Energy and Power Development, David Murangari, former CEO of the Zimbabwe Mining Development Corporation, Moses Juma, former acting CEO of the Zimbabwe National Road Administration, Luke Akino and Paddington Kadzangura.[12]

43 CASES

Have been investigated since the launch of the ARU, with the value of assets that have been identified and seized amounting to

US$24.7 MILLION

4 The president made temporary provision for such orders in the Presidential Powers (Temporary Measures) (Amendment of Money Laundering and Proceeds of Crime Act and Exchange Control Act) Regulations, 2018, gazetted in SI 246/2018 of 9 November 2018 and made under the Presidential Powers (Temporary Measures) Act.

5 See Rachel Davies, 'Unexplained Wealth Orders: A Brief Guide', Transparency International, 30 May 2017, <https://www.transparency.org.uk/unexplained-wealth-orders-brief-guide>.

6 Veritas, 'Progress on Bills, but Not on Budget', Bill Watch 65/2019, 1 December 2019 <https://www.veritaszim.net/node/3840>.

7 Andrew Dornbierer, 'Annex I: A Compilation of Illicit Enrichment Legislation and Other Relevant Legislation' in *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth,* Basel: Basel Institute on Governance, 2021, <illicitenrichment.baselgovernance.org>.

8 The key authorities involved in corruption prevention and asset recovery include the ZACC, the Office of the President and Cabinet (OPC), the Public Service Commission (PSC), the Office of the Auditor General, the Corporate Governance Unit in the OPC, the Procurement Regulatory Authority (PRAZ), the Financial Intelligence Unit (FIU), the National Prosecuting Authority (NPA), the National Prosecuting Authority (NPA), the Zimbabwe Republic Police (ZRP) and the Zimbabwe Revenue Authority (ZIMRA).

9 On file with the author.

10 ZACC strategic plan

11 See ZACC Commissioner John Makamure, quoted in 'ZACC Guns for US$7bn Assets Illicitly Siphoned out of the Country', *Sunday Mail,* 25 July 2021 <https://www.sundaymail.co.zw/zacc-guns-for-us7bn-assets-illicitly-siphoned-out-of-the-country>.

12 Ibid.

Yet despite these developments, the ZACC has recently called for another amnesty for the return of assets. The commission's chair renewed the call for amnesty at a conference in Victoria Falls in October 2021: 'Citizens who acquired the assets through corruption should bring them back. They are not going to be arrested. We will give them amnesty.'[13] It seems the drastic measures have not yielded the desired results and the war on corruption is being lost. However, this paper is not claiming that asset recovery has become a binary issue of victory or defeat; rather, it argues that the speed of travel on asset recovery remains painfully slow.

This paper is primarily intended to support the anti-corruption and asset recovery efforts, with a particular focus on actions that CSOs can take. It advocates a shift of focus from national authorities to the role that civil society can play on this issue. CSOs in Zimbabwe have already played a significant role in documenting cases, which can facilitate the asset recovery effort; several local NGOs have produced their own documented accounts of corruption in Zimbabwe. However, there is a dearth of literature on CSOs' engagement with asset recovery.

Moreover, asset recovery plays a critical role in strengthening some of the key foundations of sustainable development, such as the rule of law and strong, transparent, and accountable institutions.

Mike Pfister - Head of Programmes at the International Centre for Asset Recovery (ICAR) at the Basel Institute on Governance

As Mike Pfister has argued, CSOs can provide a powerful foundation for sustainable development by combining 'hard assets', that is to say the actual assets recovered, and 'soft assets', which are the conditions needed to recover assets effectively, ranging from the capacity of law enforcement institutions to the political will to fight criminal networks.[14]

[13] ZACC Chairperson, quoted in 'Bring Back Ill-Gotten Wealth to Get Amnesty', *The Chronicle,* 27 September 2021, <https://www.chronicle.co.zw/bring-back-ill-gotten-wealth-to-get-amnesty/>.

[14] Mike Pfister, 'Recovering Assets in Support of the SDGs: From Soft to Hard Assets for Development', Basel Institute on Governance, Working Paper Series No. 29, p. 2 <https://baselgovernance.org/sites/default/files/2019-05/WP29_AssetRecovery_SDGs.pdf>.

2 METHODOLOGY

This seminar paper has been compiled using desk review methodology. It reviews publicly available documents and policy documents as well as legislation on asset recovery. It also utilises 'grey literature' – documents that have not been formally published in academic sources (books or journals) – and includes items such as:-

- REPORTS
- THESES
- CONFERENCE PROCEEDINGS
- NEWSPAPERS
- FACT SHEETS
- WEBSITES
- POLICY DOCUMENTS

These items have been obtained by requesting information from organisations dealing with asset recovery and corruption in Zimbabwe, or by using customised search engines/searching specific websites. Reports on asset recovery implementation by member states of the United Nations Convention against Corruption (UNCAC) and CSOs have also been reviewed. These documents inform this paper and, in some cases, have been directly incorporated into it.

3 STATE-OF-THE-ART AND OBJECTIVES

Generally speaking, the process of recovering stolen assets is led by states. In addition to the ZACC, other key authorities involved in corruption prevention and asset recovery in Zimbabwe are the Office of the President and Cabinet (OPC), the Public Service Commission (PSC), the Office of the Auditor General, the Corporate Governance Unit in the OPC, the Procurement Regulatory Authority of Zimbabwe (PRAZ), the Financial Intelligence Unit (FIU), the National Prosecuting Authority (NPA), the National Prosecuting Authority (NPA), the Zimbabwe Republic Police (ZRP) and the Zimbabwe Revenue Authority (ZIMRA). On paper, most of these institutions have powers that in some ways outstrip those of the ZACC. Unfortunately, they have been ineffectual relative to their size and statutory power and have displayed little appetite for asset recovery.

CSOs can also play a decisive role in various stages of the asset recovery process.[15] Their importance in this process has been enshrined in the UNCAC, whose article 13 calls on states parties to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental and community-based organisations, in preventing and combating corruption.[16] Similarly, the African Union (AU) – based on its 2018 annual theme 'Winning the fight against corruption: A sustainable path to Africa's transformation', developed the Common African Position on Asset Recovery – highlighted the critical role of civil society, and called on states to ensure greater civil society involvement in asset recovery.[17]

Broadly, the term 'asset recovery' is used to describe a series of actions undertaken in order to trace, seize, confiscate and return stolen assets.[18] The most commonly cited definition is the World Bank's, according to which 'asset recovery' includes preventing and detecting corruption, tracing the proceeds of corruption, preserving and confiscating these proceeds and then allocating and returning them.[19] This is also in agreement with the UNCAC, which defines 'asset recovery' as relating specifically to the proceeds of corruption, as opposed to broader terms such as 'asset confiscation' or 'asset forfeiture' which refer to recovering the proceeds or instrumentalities of crime in general.[20]

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15 Ibid.

16 Ukraine Forum on Asset Recovery (UFAR), 'Guide to the Role of Civil Society Organizations in Asset Recovery', p. 6 <https://star.worldbank.org/sites/star/files/cso_user_guide_ukraine_-_english_final.pdf>.

17 See the 33rd AU Assembly of Heads of State and Government, held in Addis Ababa in February 2020, Common African Position on Asset Recovery, paras 12 and 23.

18 Basel Institute on Governance, 'Guide to the Role of Civil Society Organisations in Asset Recovery' <https://learn.baselgovernance.org/mod/page/view.php?id=452&lang=de>.

19 See Jean-Pierre Brun et al., *Asset Recovery Handbook: A Guide for Practitioners,* 2nd ed., Washington DC: World Bank, 2020.

20 See UNCAC articles 51–59.

The four main stages of asset recovery can be summarised as follows.

1. ASSET TRACING

The process by which investigators examine revenues generated by criminal activity and follow the trail of illegally acquired proceeds.[21]

2. ASSET FREEZING

Temporarily retaining property pending a final decision in a criminal case, thereby preventing assets from being destroyed, transformed, removed, transferred or disposed of before the case is closed.[22]

3. ASSET CONFISCATION

Intended to stop criminals from accessing the property by permanently taking it away.[23]

4. ASSET DISPOSAL

The actual recovery of criminal assets, after which the assets either revert to the relevant state, are shared among several states or are returned to the victim.[24]

Each of the above-mentioned steps – tracing, freezing, confiscation and disposal – presents its own unique challenges. Managing the stages of an asset recovery investigation can be extremely time-consuming and complex, and requires a lot of resources, expertise, and political will. Commentators have described asset recovery as the most complicated area of law.[25] As shall be seen below, asset recovery cases can take many years and sometimes decades.

The UNCAC explicitly makes asset recovery one of its fundamental principles (article 51, UNCAC) and dedicates an entire chapter to asset recovery (chapter V).[26] In addition, the Conference of States Parties (CoSP), the UNCAC's main decision-making body (all states that have ratified the UNCAC are automatically part of the CoSP), established the Working Group on Asset Recovery, an open-ended intergovernmental group that has met regularly since 2007.[27] The working group is responsible for assisting and advising the CoSP with regard to implementing its mandate to secure the

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21 See Brun et al., *Asset Recovery Handbook.*

22 Ibid.

23 Ibid.

24 Ibid.

25 Jack Smith, Mark Pieth and Guillermo Jorge, 'The Recovery of Stolen Assets: A Fundamental Principle of the UN Convention against Corruption', U4 Brief 2007:2.

26 Adopted by the General Assembly by Resolution 58/4 of 31 October 2003. In accordance with article 68(1) of the resolution, the UNCAC entered into force on 14 December 2005.

27 See UNODC, 'Open-Ended Intergovernmental Working Group on Asset Recovery'

return of proceeds of corruption. In accordance with UNCAC article 13, which makes it explicit that civil society should be involved in national and international anti-corruption efforts, and article 63, civil society should be involved in UNCAC review processes.

In 2009, the CoSP adopted the resolution establishing the UNCAC review mechanism.[28] The review process comprises two five-year cycles: the first cycle (2010–2015) covers chapters III (criminalisation and law enforcement) and IV (international cooperation). The second cycle (initially 2015–2020, extended to 2024) covers chapters II (preventive measures) and V (asset recovery). A country review process is conducted in three phases. Phase I: self-assessment: the states party identifies a focal point to coordinate the country's participation in the review and then fills out a standardised self-assessment checklist. Phase II: peer review: two reviewer countries provide experts to form an expert review team. The team conducts a desk review of the completed self-assessment checklist. Phase III: country review report and executive summary: with the assistance of the UNODC, the expert review team prepares a country review report and an executive summary of this report. Civil society plays an important role as an independent observer of governments' implementation of the UNCAC and the transparency of the review process.

The most recent phase of the UNCAC review process found that Zimbabwe has made significant progress towards developing normative legal frameworks for the implementation of chapter V (asset recovery) of the UNCAC. Although the UNCAC country review of Zimbabwe has been completed, only the executive summary has been published on the UNODC country profiles page; the government's self-assessment checklist and the full country report have not been publicly released (it is only mandatory to publish the executive summary).[29] The summary of the report notes under 'successes and good practices' that Zimbabwe's legislative framework includes a 'prohibition for any person on entering into or continuing any business relations with a shell bank or a respondent financial institution in a foreign country that permits any of its account to be used by a shell bank'.[30] (A 'shell bank' means a bank that has no physical presence in the country in which it is incorporated and licensed, and which is unaffiliated with a regulated financial group that is subject to effective consolidated supervision).[31] However, Zimbabwe has not been able to stop individuals and companies members from abusing shell companies. The Pandora Papers and Panama Papers have shown that shell companies are used to launder cash outside Zimbabwe.[32]

The Anti-Corruption Trust of Southern Africa (ACT-SA) authored a civil society report with support from the UNCAC Coalition and information supplied by other CSOs.[33] (This report is also available in Shona and Ndebele.) Given that the government has not made its full report public, the parallel report by the ACT-SA is a vital source of information.[34] The section below addresses ways in which CSOs can be involved in asset recovery processes and mechanisms.

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28 At its third session, held in Doha, Qatar, from 9 to 13 November 2009, the Conference of the States Parties to the United Nations Convention against Corruption adopted Resolution 3/1 – Review Mechanism. See <https://www.unodc.org/unodc/en/corruption/COSP/session3-resolutions.html>.

29 See CoSP Implementation Review Group, 'Executive Summary: Zimbabwe', CAC/COSP/IRG/II/2/1/Add.15 <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V2003385e.pdf>.

30 Section 14(3) of the Money Laundering Act (art. 52, para. 4).

31 See FATF, 'Glossary of the FATF Recommendations', 2012 <https://www.fatf-gafi.org/glossary/s-t/>.

32 See Will Fitzgibbon, 'Zimbabwe's List of Alleged Offshore Offenders Includes Panama Papers Shell Companies', ICIJ, 26 March 2018 <https://www.icij.org/investigations/panama-papers/zimbabwes-list-of-alleged-offshore-offenders-includes-panama-papers-shell-companies/>.

33 Available at <https://uncaccoalition.org/wp-content/uploads/Final-Civil-Society-Report-on-Zimbabwe-ACT-SA-UNCAC-Coalition-8.3.2021.pdf>.

34 See Marijana Trivunovic et al., 'The Role of Civil Society in the UNCAC Review Process: Moving beyond compliance?', CMI/U4, 2013 <https://www.u4.no/publications/the-role-of-civil-society-in-the-uncac-review-process-moving-beyond-compliance>.

4 METHODS OF CSO ENGAGEMENT WITH ASSET RECOVERY

The following sections set out pragmatic steps that CSOs can take to enhance the effectiveness and performance of the ZACC asset recovery processes. They are based on a summary of the Arab Forum on Asset Recovery (AFAR) Guide to the Role of Civil Society Organisations in Asset Recovery, which was developed by the Basel Institute on Governance's International Centre for Asset Recovery. Although the guide was developed in the specific context of the AFAR, its content is applicable at a global level and can provide useful guidance to CSOs from other regions as well. For instance, the AFAR Guide has been recontextualised in the Ukraine Forum on Asset Recovery (UFAR) Guide to the Role of Civil Society Organizations in Asset Recovery.[35] The latter is also referred to in the sections below.

4.1 Awareness raising and research

Awareness raising in the context of asset recovery is defined in the AFAR Guide as campaigns that can be undertaken by CSOs to raise awareness about the significance of asset recovery and its role in the fight against corruption and in development efforts; to create demand for asset recovery; and to raise awareness about the roles and responsibilities of concerned stakeholders.[36]

The introductory section of the present paper discussed how CSOs have been involved in researching and documenting corruption cases. Research and awareness are often intrinsically linked – research projects uncover issues and formulate ideas backed by established evidence, and awareness campaigns communicate these ideas and issues to a wide audience. The aforementioned article 13 of the UNCAC seeks to promote the participation of CSOs in preventing and combating corruption, including through public information activities.[37] But Zimbabwean CSOs' potential role in documenting corruption has been underutilised, despite several previous examples of them doing so.

Many of the sources used for this paper show that there is a lack of awareness about asset recovery. As the AFAR Guide recommends, CSOs should undertake awareness campaigns and research efforts

35 UFAR, 'Guide'.

36 Basel Institute on Governance, 'Guide', p. 11.

37 UNCAC article 13.

should aim to inform citizens about asset recovery.[38] Examples of campaigns include informing the public about the importance of asset recovery and systemic weaknesses that cause assets to be stolen.[39] CSOs can also help other CSOs and key non-CSO stakeholders to better understand their roles and responsibilities in asset recovery.[40]

4.2 Advocacy

The UFAR Guide defines advocacy in the context of asset recovery as work by CSOs to influence political will, promote reform in public policy, strengthen government accountability with regards to asset recovery and related issues and demand stronger prevention mechanisms, including from the private sector.[41] Advocacy strategies are more targeted than the awareness-raising activities discussed above. Examples include campaigning and lobbying government for asset recovery-related legislative, institutional and policy reform.[42] Zimbabwean CSOs have frequently been able to persuade undecided sections of the public to undertake specific actions, and they can do the same in regard to asset recovery.[43] The UFAR Guide therefore stresses the importance of CSOs having a clearly defined and realistically achievable objective when launching advocacy campaigns.[44]

4.3 Casework and legal analysis

The UFAR Guide defines casework and legal analysis in the context of asset recovery as activities CSOs can undertake to generate useful information and intelligence that can be used by relevant government authorities such as financial intelligence units and investigative and prosecutorial authorities.[45] As shall be seen in the examples below, some CSOs can assist the government with the task of identifying and exposing criminal assets acquired by corrupt officials and enablers (e.g. by tracing such assets through financial investigations or forensic auditing) and enable investigations and prosecutions to be initiated that seek to recover the stolen assets and bring perpetrators of corruption to justice.[46]

Furthermore, casework and legal analysis may in some instances allow CSOs to initiate their own legal proceedings in relation to stolen assets and those who have stolen them.[47] In Zimbabwe this may seem impossible, and no one has attempted it, but perhaps CSOs should consider private litigation or the use of whistle-blowers to reveal stolen assets.[48]

RAISING AWARENESS
Informing the public about the importance of asset recovery and systemic weaknesses that cause assets to be stolen.

ADVOCACY
Campaigning and lobbying government for asset recovery-related legislative, institutional and policy reform.

LEGAL ANALYSIS
Some CSOs can assist the government with the task of identifying and exposing criminal assets acquired by corrupt officials and enablers.

38 Basel Institute on Governance, 'Guide'.
39 Ibid., p. 11.
40 Ibid., p. 13.
41 UFAR, 'Guide', pp. 8, 16.
42 Basel Institute on Governance, 'Guide', pp. 16, 19.
43 For instance, in 2000 the National Constitutional Assembly campaigned against the government-sponsored constitution and won the referendum.
44 UFAR, 'Guide'.
45 Ibid., p. 12.
46 Ibid.
47 Ibid., p. 13.
48 Ibid., p. 14.

4.4 Return of confiscated assets

There is no universal agreement on the principle that confiscated funds originating from corruption should be returned, as enshrined in article 51 of the UNCAC.[49] The UNCAC provides that where appropriate, countries involved in returning stolen assets may conclude agreements for the final disposal of confiscated property.[50] Consequently, there is a high degree of convergence on the need to put returned assets to a good end use and ensure that they are not stolen again. The AFAR Guide recommends that CSOs play a role in the stages immediately before and during the return of confiscated assets originating from corruption and related crimes. Generally, this includes providing input to the decision-making process over end use.[51] CSOs are well placed to represent the voice of potential victims of corruption; they can initiate and contribute to a national dialogue on the potential end use of returned assets.[52] Objectives may include the returned assets being used in a targeted and/or transparent way.[53]

CSOs can initiate and contribute to a national dialogue on the potential end use of returned assets.

49 Basel Institute on Governance, 'Guide', p. 24.

50 UNCAC article XX.

51 Basel Institute on Governance, 'Guide', p. 27.

52 Ibid.

53 Ibid., p. 30.

5 COMPARATIVE EXAMPLES

General Sani Abacha

5.1 Nigeria

General Sani Abacha, who governed Nigeria from 1993 to 1998, died on 8 June 1998 from a reported heart attack.[54] Transparency International estimates he looted as much as US$5 billion over the five years of his rule.[55] Soon after his death, investigations were launched into Abacha's criminal dealings, first by General Abdulsalami Abubakar and subsequently by President Olusegun Obasanjo (then Chair of the Advisory Board of Transparency International). These investigations culminated in campaigns, including some by civil society groups, to recover the assets stolen by Abacha and his associates, most of which were hidden outside Nigeria.

It took Nigeria five years to obtain a repatriation decision from the Swiss authorities due to numerous appeals brought by the Abacha family, who employed large numbers of lawyers to block or frustrate the case.[56] After a series of negotiations, which led to the World Bank being selected as a neutral party to monitor recovered assets, a total of US$505.5 million of assets were finally repatriated between September 2005 and early 2006.[57] In 2008, Enrico Monfrini, the Swiss lawyer representing Nigeria, reported that US$508 million found in the Abacha family's many Swiss bank accounts was sent from Switzerland to Nigeria between 2005 and 2007. By 2018, the amount Switzerland had returned to Nigeria had reached more than US$1 billion.[58]

Other countries were hesitant to return the assets to Nigeria, which is still perceived as very corrupt. Recovering money from Liechtenstein was challenging, for instance, although in June 2014 the country did eventually return US$277 million to Nigeria.[59] Recently, US$308 million held in accounts based on the Channel Island of Jersey was also returned to Nigeria.[60] This only came about

54 BBC World Service, 'The Death of General Sani Abacha', 11 July 2015 <https://www.bbc.co.uk/programmes/p02vyxqq>.

55 Transparency International, '25 Corruption Scandals That Shook the World: Draining Nigeria of Its Assets', 5 July 2019 <https://www.transparency.org/en/news/25-corruption-scandals#Nigeria>.

56 See Clare Spencer, 'Sani Abacha – the Hunt for the Billions Stolen by Nigeria's Ex-Leader', BBC, 28 January 2021 <https://www.bbc.com/news/world-africa-54929254>.

57 Ibid.

58 Ibid.

59 Ibid.

60 See Rachael Hanna, 'The Trilateral Nigeria-US-Jersey Agreement to Return Nigerian Dictator Abacha's Assets: A Preliminary Assessment', *Global Anti-Corruption Blog,* 24 April 2020 <https://globalanticorruptionblog.com/2020/04/24/the-trilateral-nigeria-us-jersey-agreement-to-return-nigerian-dictator-abachas-assets-a-preliminary-assessment/ https://globalanticorruptionblog.com/2020/04/24/the-trilateral-nigeria-us-jersey-agreement-to-return-nigerian-dictator-abachas-assets-a-preliminary-assessment/>.

after the Nigerian authorities agreed that the money would specifically be used to help finance infrastructure projects in the country.[61] Some countries are yet to return the loot. To recover the Nigerian assets, the Swiss government designated the Abacha family a 'criminal organisation', allowing it to bypass the need for a conviction.[62]

In 2017, the Swiss government returned about US$322.5 million of money stolen by Abacha to Nigeria on the condition that the World Bank be involved alongside civil society groups in monitoring its use, so as to prevent the money being stolen again.[63] Monitoring Transparency and Accountability in the Management of Returned Assets (MANTRA), a loose coalition of CSOs, was established to monitor the disbursement of the recovered funds, which was coordinated by another Nigerian NGO, the Africa Network for Environment and Economic Justice (ANEEJ). In 2018, the Government of Nigeria signed a memorandum of understanding (MOU) with the ANEEJ to monitor the distribution of the money. The Nigerian government chose to use the recovered money to fund its social investment programme to support poor and vulnerable Nigerians during the Covid-19 pandemic. MANTRA helps to ensure transparent use of the recovered Abacha funds in line with its stated purpose, so that the recovered money is not looted again. ANEEJ has deployed 1,456 monitors across Nigeria and hired an audit firm to monitor the nationwide disbursements of recovered Abacha loot as part of the federal government response to the Covid-19 pandemic.[64]

Nigeria came up with the innovative idea of signing MOUs on the return of assets with governments of other countries where Abacha's money is hidden. For instance, in 2016 it signed an agreement with the British government to facilitate the return of stolen funds recovered by UK agencies back to Nigeria.[65] The first return of assets under this MOU totalled US$5.83 million, which represents the funds recovered from the associates and family of James Ibori, the former governor of Nigeria's Delta State.[66] The MOU includes a detailed budget plan, including a work and expenditure schedule for each project that the returned funds will contribute to.[67] More importantly, the MOU stipulates that CSOs should be involved in the monitoring of returned funds.[68]

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61 See 'MoU between UK and Nigeria on the Modalities for Return of Stolen Assets Confiscated by the UK: Annex 1', UK Government policy paper, 19 March 2021 <https://www.gov.uk/government/publications/return-of-stolen-assets-confiscated-by-the-uk-agreement-between-the-uk-and-nigeria/mou-between-uk-and-nigeria-on-the-modalities-for-return-of-stolen-assets-confiscated-by-the-uk-annex-1>.

62 Article 260(1) of the Swiss Penal Code defines a criminal organisation as 'an organisation that keeps its structure and personal composition secret and pursues the purpose of committing violent crimes or enriching itself by criminal means' (cited by Enrico Monfrini in Recovering Stolen Assets, ed. Mark Pieth, Berne: Peter Lang, 2008, p. 48). Monfrini (ibid., pp. 48–49) notes: 'Although there was no precedent in qualifying a head of state, their family and members of their government as a criminal organisation, this qualification was essential to the success of the Swiss criminal and mutual assistance proceedings, for two reasons. Firstly, pursuant to Article 260ter Paragraph 3 of the Swiss Penal Code, the Swiss authorities had jurisdiction to investigate and prosecute all members of the Abacha criminal organisation, even if they had not set foot in the country, on the sole basis that the organisation's criminal activity had partially taken place in Switzerland. Secondly, and more importantly, pursuant to Article 59 cipher 3 of the Swiss Penal Code, the qualification as a criminal organisation would result, for the persons who has participated in or supported it, in reversing the burden of the proof, as they would have the onus of proving the lack of connection between the assets subject to confiscation and the criminal organisation, as was confirmed by the Swiss Supreme Court on 7 February 2005.'

63 Daniel Finnan, 'Swiss Make Deal with Nigeria on Final Payout for Abacha Loot', interview with Roberto Balzaretti, Swiss Federal Department of Foreign Affairs, RFI, 6 December 2017 <https://www.rfi.fr/en/africa/20171206-swiss-make-deal-nigeria-final-payout-abacha-loot>.

64 Bassey Udo, 'N23.7 Billion of Abacha Loot Paid to Poor Nigerians, Civil Society Group Says', Premium Times, April 24 2020 <https://www.premiumtimesng.com/news/top-news/389627-n23-7-billion-of-abacha-loot-paid-to-poor-nigerians-civil-society-group-says.html>.

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66 Elfredah Kevin-Alerechi, 'The Ibori Loot: The Controversy Surrounding the Destination of the Returned Money', Civil Forum for Asset Recovery, 15 June 2021 <https://cifar.eu/ibori-loot-the-controversy-surrounding-the-destination-of-the-returned-money/>.

67 See 'Return of Stolen Assets Confiscated by the UK: Agreement between the UK and Nigeria', UK Government policy paper, 19 March 2021 <https://www.gov.uk/government/publications/return-of-stolen-assets-confiscated-by-the-uk-agreement-between-the-uk-and-nigeria>.

68 Paras 28–33 and schedule 5 of the agreement.

5.2 Equatorial Guinea

The involvement of CSOs in international asset recovery perhaps really started in 2007 when the French chapter of Transparency International and another NGO, Sherpa, attained legal standing in asset recovery cases. This was the first time CSOs had initiated a case of asset recovery. The *biens mal acquis* ('ill-gotten gains') affair had its origins in a 2007 report published by a French NGO, the Comité Catholique contre la Faim et pour le Développement (CCFD) or the Catholic Committee against Hunger and for Development, which set out to assess the value of the accumulated assets of 23 current and former African heads of state and their families held in Western countries.[69] As it was based only on public sources of information, the study was necessarily non-exhaustive, but its findings were still startling: by CCFD's estimates, the value of foreign assets accumulated by the 23 leading families covered in the report totalled some 200 billion US dollars.[70] But as detailed below, this may be a highly conservative figure.

In March 2007, Sherpa, together with two other associations, Survie and Fédération des Congolais de la Diaspora (Federation of the Congolese in the Diaspora), filed a criminal complaint against the presidents of the Republic of the Congo (Denis Sassou Nguesso), Gabon (Omar Bongo Ondimba, now deceased) and Equatorial Guinea (Teodoro Obiang Mbasogo), as well as members of their entourages (family members and close associates).[71] The complaint was based on CCFD's research showing that these individuals held considerable real estate assets in France that could not plausibly have been acquired through their known salaries and emoluments alone.[72] The examining magistrates quickly focused on the lifestyle of Teodoro 'Teodorin' Nguema Obiang Mangue, the son of Teodoro Obiang Mbasogo, among other reasons because, unlike the other public officials that were targeted, he did not at that time hold any official position likely to confer personal immunity from criminal prosecution by the French courts (Teodorin was then Minister of Agriculture and Forestry in the Equatoguinean government).[73]

The investigation into Teodorin advanced quickly, and in response he and his lawyers launched a

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69 The report was updated in June 2009. See Antoine Dulin and Jean Merckaert, 'Biens mal acquis : à qui profite le crime?', CCFD, June 2009 <http://ccfd-terresolidaire.org/IMG/pdf/BMA_totalBD.pdf>.

70 Ibid.

71 In an ordinary complaint lodged with the Paris Public Prosecutor's Office in March 2007. It is worth noting, however, that in the Duvalier case, the First Civil Chamber of the French Court of Cassation (the highest court of justice in France) dismissed the restitution claim made by Haiti on the basis that French courts had no jurisdiction to rule on acts committed by a former foreign president and pertaining to the exercise of power (decision of 29 May 1990). Even though there is no other case precedent and French judges would likely rule otherwise today (precisely because of the UNCAC provisions), it illustrates the situation that prevailed in France back in the 1990s.

72 Unfortunately, the court record is not publicly available; details can only be found in reports and the media.

73 Maud Perdriel-Vaissière, 'France's *Biens Mal Acquis* Affair: Lessons from a Decade of Legal Struggle', May 2017 <https://www.justiceinitiative.org/publications/france-s-biens-mal-acquis-affair-lessons-decade-legal-struggle>. This paper is part of a series that was developed from a day of discussions on the worldwide legal fight against high-level corruption organised by the Open Society Justice Initiative and Oxford University's Institute for Ethics, Law and Armed Conflict in June 2014.

Teodoro Nguema Obiang Mangue

Swiss prosecutors confiscated and auctioned off a collection of

25 SUPERCARS WORTH **US$27** MILLION

which belonged to Teodorin

series of appeals and other blocking manoeuvres.[74] In 2021, after 14 years, France's highest court, the Court of Cassation, upheld Teodorin's conviction, as well as a ruling concerning the confiscation of his assets located in France.[75] More importantly, the appeal court confirmed the confiscation of all his seized assets, amounting to approximately 150 million euros. By way of comparison, 150 million euros was the budget the Equatoguinean government allocated to health in 2011 (the most recent year for which figures are available).[76]

Responsibly returning assets is especially challenging when the corrupt person from whom they were seized remains in power. For example, in September 2019, Swiss prosecutors confiscated and auctioned off a collection of 25 supercars worth nearly US$27 million that belonged to Teodorin (who is now the Vice-President of Equatorial Guinea).[77] According to the NGO Human Rights Watch, an anonymous buyer bought 13 of the cars and the collection, including a *Koenigsegg One:1* worth $4.6 million, later turned up back in Nguema's hands.[78] Clearly, when governments repatriate the proceeds with the aim of benefiting the countries to which they are returned, they need to carefully design a way to do this that ensures the assets do not end up in the hands of corrupt officials.

There is currently no standard system to guide asset recovery in situations where the victim country is still perceived to be highly corrupt. One increasingly popular method is to use the money to fund charitable activities in the country where the public funds were stolen, on the logic that doing so does return the money to the 'victim country' but not to that country's government.[79] This mechanism was employed in the 2014 settlement between the US Department of Justice and Teodorin. With regards to civil forfeiture, the United States alleged that Teodorin, who in 2011 was Minister of Agriculture and Forestry and received an official salary of less than US$100,000, used his position and influence to amass more than US$300 million worth of assets through corruption and money laundering, in violation of both US and Equatoguinean law.[80]

According to the settlement agreement, the proceeds from the sale of the illicit assets the US had seized would go to a charity that would use the funds to benefit the

74 Ibid.

75 Transparency International France, 'Definitive Conviction of Teodorin Obiang in France Sends Strong Message, Allows Asset Restitution to Equatorial Guinea', 30 July 2021 <https://www.transparency.org/en/press/teodorin-obiang-conviction-asset-recovery-equatorial-guinea-france#>.

76 Sara Brimbeuf, '150 Million Euros Confiscated Following Vice-President Obiang's Conviction in France', CHR Michelsen Institute, 2020 <https://www.cmi.no/publications/7248-150-million-euros-confiscated-following-vice-president-obiangs-conviction-in-france>.

77 Lucinda Pearson, 'Ferraris with Matching Socks; Tales of Corruption from Equatorial Guinea', Transparency International Europe, 10 December 2020 <https://transparency.eu/ferraris-with-matching-socks/#_ftn2>.

78 See Sarah Saadoun, 'How to Return Stolen Assets Responsibly', Human Rights Watch, 10 November 2020 <https://www.hrw.org/news/2020/11/10/how-return-stolen-assets-responsibly>.

79 See for instance the agreement between the US and Nigeria.

80 United States v. One Michael Jackson Signed Thriller Jacket, Other Michael Jackson Memorabilia; Real Property Located on Sweetwater Mesa Road in Malibu, California; One 2011 Ferrari 599 GTO, United States District Court for the Central District of California No. CV 13-9169-GW-SS.

people of Equatorial Guinea.[81]The charity was to be jointly selected by the US and Teodorin, or, if they could not agree on a charity within 180 days of the sale of the assets, the proceeds would be controlled and disbursed by a three-person panel, rather than an existing charity.[82] That panel would consist of one member selected by the US Government, one member selected by the Government of Equatorial Guinea and a chair jointly selected by the US and Teodorin.[83] As a backstop, the settlement authorised the court that approved the settlement to force the parties to enter mediation, or to simply appoint a panel chair itself, if the US and Teodorin could not agree on a chair 220 days after the sale of the assets.[84]

The charity was never selected, and a panel was formed. The panellists are Susan Stevenson and Miguel Ntutumu Evuna (ambassadors for the US and Equatorial Guinea respectively) and Alberto Fernandez (former US ambassador to Equatorial Guinea), who serves as the court-selected chair.[85] Recently, the panel agreed a proposal to pay the money to COVAX, a global vaccine procurement mechanism, via a US NGO, Medical Care Development International (MCDI). On 8 July 2021, US prosecutors approached the US courts to enforce the proposed settlement to fund COVAX, citing 'repeated actions' by Teodorin to 'thwart multiple desirable programs'. The Department of Justice (DOJ) announced that it had entered into agreements to distribute US$19.25 million to the United Nations for the purchase and distribution of Covid-19 vaccines and US$6.35 million to MCDI for the purchase and distribution of medicines and medical supplies throughout Equatorial Guinea as part of the implementation of a civil forfeiture settlement resolving the disposition of certain assets previously allegedly purchased by Teodorin with the proceeds of corruption.[86]

As set forth in a donor agreement with the UN, the UN will use US$19.25 million of settlement funds to purchase, store, distribute and administer Covid-19 vaccines to at least 600,000 people in Equatorial Guinea. The DOJ transferred US$19.3 million to the UN, to pay for 1.2 million doses of the Moderna vaccine for Equatoguineans via COVAX.[87] In addition, MCDI, a charitable organisation based in Silver Spring, Maryland, with an established track record of administering programmes in Equatorial Guinea, will receive US$6.35 million to manage the purchase, storage, distribution and delivery of additional medicines and medical supplies throughout Equatorial Guinea.[88]

The Department of Justice (DOJ) announced that it had entered into agreements to distribute

US$6.35 MILLION

to the United Nations for the purchase and distribution of Covid-19 vaccines

81 Paras 27(c) and 28. See also United States v. One Michael Jackson Signed Thriller Jacket, No. 2:11-CV-03582, part IV: Distribution of the Settlement Fund, para. 26, p. 18.

82 Ibid.

83 Ibid.

84 Ibid.

85 See Julian Pecquet, 'US Seeks to Force Equatorial Guinea to Take Covid Vaccine Deal as Biden Steps Up Anti-Kleptocracy Fight', *The Africa Report,* August 23 2021 <https://www.theafricareport.com/118817/usa-equatorial-guinea-forced-to-take-covid-vaccine-deal-as-biden-steps-up-anti-kleptocracy-fight/>.

86 US Department of Justice, '$26.6 Million in Allegedly Illicit Proceeds to Be Used to Fight COVID-19 and Address Medical Needs in Equatorial Guinea', 20 September 2021 <https://www.justice.gov/opa/pr/266-million-allegedly-illicit-proceeds-be-used-fight-covid-19-and-address-medical-needs>.

87 Ibid.

88 bid.

6 CLOSING REMARKS

Despite the potential rewards that make asset recovery a highly attractive undertaking,[89] private law firms in Zimbabwe lack the capacity to deal with asset recovery, and international law firms are too costly. This leaves room for CSOs. Legal precedents, increasing international cooperation and enhanced capacities mean there is now more potential than ever for CSOs to play a role in asset recovery. As noted above, asset recovery is an important development issue. Helping a country recover stolen assets, as enshrined in target 16.4 of the SDGs, presents an opportunity to mobilise important resources for financial development or poverty reduction efforts. Moreover, asset recovery goes beyond returning stolen funds. It helps to improve the governance of countries, enhances responsible public financial management, contributes to more accountability and transparency, strengthens the rule of law, builds capacity in the judiciary, and restores confidence in public institutions and government. The government should harness the skills that can be found in the third sector and put them to the service of the public sector. In particular, ensuring greater collaboration between CSOs and the constitutionally sanctioned bodies that deal with corruption would go a long way to solving many of the present system's shortcomings. The public sector may have the right to claim and recover assets under the UNCAC[90] but countries may be hesitant to return them given that Zimbabwe still faces challenges with corruption and money laundering. Greater collaboration with CSOs could therefore hold the key.

POTENTIAL
Legal precedents, increasing international cooperation and enhanced capacities mean there is now more potential than ever for CSOs to play a role in asset recovery.

OPPORTUNITY
There is opportunity to mobilise important resources for financial development or poverty reduction efforts.

BEYOND ASSET RECOVERY
Asset recovery contributes to more accountability and restores confidence in public institutions and government.

89 Daniel Scher, 'Asset Recovery', *African Security Review* 14:4, 2005, p. 17 <https://doi.org/10.1080/10246029.2005.9627584>.

90 See articles 35 and 53.

7 KEY CHALLENGES

The following points describe what the author believes to be the most important impediments to the ZACC's asset recovery work:

Lack of funding

Lack of sufficient information

Slow response/reluctance from requested countries

Lack of technical capacity

Lack of remedial procedures

8 POINTS FOR FURTHER DISCUSSION

What role can civil society play in enhancing asset recovery processes in Zimbabwe?

Members of the UNCAC Coalition's Civil Society Working Group on Accountable Asset Return, who come both from countries where stolen assets have been found and ones that have requested the return of assets, wrote a letter to an UNCAC conference on asset recovery (held in Addis Ababa in February 2017) in which they stated that where a victim country's government is highly corrupt, it should be bypassed: 'Returning and receiving countries should in consultation with a broad spectrum of relevant experts and non-state actors find alternative means of managing the stolen assets.'

2

How can the human rights-based approach to asset recovery (chapter V) be integrated into the Government of Zimbabwe's current processes?

The Human Rights Council has been considering the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation in this matter. The council 'invited the Conference of the States Parties to the UNCA to consider ways of adopting a human rights-based approach in the implementation of the Convention, including when dealing with the return of the proceeds of crime' (OP 14 HRC/ 40/4 of 21 March 2019).

3

Should CSOs in Zimbabwe develop a set of principles on asset recovery?

Several CSOs have developed national principles on asset recovery. Based on these principles, some states, both receiving countries and ones where assets have been stolen, have stepped up efforts to involve CSOs in asset recovery processes. Should CSOs in Zimbabwe develop a set of principles on asset recovery?

4

To what extent can this provision support CSOs claims seeking the recovery of assets allegedly misappropriated thorough corruption?

According to Article 35 of the UNCAC, any person or entity having suffered damage 'as a result of an act of corruption [should] have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation'.

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ABOUT TRANSPARENCY INTERNATIONAL ZIMBABWE (TI Z)

Transparency International Zimbabwe (TI Z) is a non- profit, non- partisan, systems-oriented local chapter of the international movement against corruption. Its broad mandate is to fight corruption and related vices through networks of integrity in line with the Global Strategy. TI Z believes corruption can only be sufficiently tackled by all citizens including people at grass root level.

VISION

A Zimbabwean society free from all forms of corruption and practices.

MISSION

We exist to be a knowledge-driven and evidence-based anti-corruption civil society organization that practices and promotes transparency, accountability, and integrity in all sectors to achieve good governance.

TRANSPARENCY INTERNATIONAL ZIMBABWE
the coalition against corruption

info@tizim.org
96 Central Avenue P O Box CY 434,
Causeway Harare
Tel: +263 242 793 246/7,
+263 242 793 277, +263 242 797 288
VOIP CALL: 08677004072

TIZim_info
Transparency International Zimbabwe
transparencyintzim

Bulawayo Office
Suite 211, Masiye Pambili Business Centre
Fort Ave, Btwn 8th/9th Avenue
Bulawayo CBD
Phone: +263 292 881397, 08 6770 04073

Mutare Office
4 Carlos Flats
Cr D Avenue/4th Street Mutare
Phone: +263 020 60030, 08 6770 04073

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