Short Session Report

Session Title: Banking on Impunity: Why the Private Sector Resists Accountability in the Private Sector
Date & Time: Friday 2 December, 9:00am
Report prepared by: Michael Marchant, Research Associate, Institute for Justice and Reconciliation.

Experts:

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Juanita Olaya, Independent Expert
Leigh Payne, Professor of Sociology, University of Oxford
Andrew Feinstein, Director, Corruption Watch UK

Moderated by: Hennie van Vuuren, Senior Research Associate, Institute for Justice and Reconciliaton.
Session coordinated by: Hennie van Vuuren, Senior Research Associate, Institute for Justice and Reconciliaton.

Main issues raised in kick off remarks. What’s the focus of the session?

The focus of the session was how to challenge the impunity of private sector actors for their role in both economic crimes, and as actively complicit in the commission of other human rights violations.

The session started from the position that the anti-corruption discourse has not done enough to consider elite private sector networks and their roll in corruption and economic crime. The focus on state actors and governments has often shielded powerful forces in the private sector from scrutiny.
Given these concerns, the session aimed to ask the following questions:

Why is accountability for private sector economic crimes difficult to achieve?

What are the consequences of impunity for economic crimes by the private sector?

What are the remedies for this problem, both technical and otherwise?

What can we as the anti-corruption community proactively do to address these concerns?

What initiatives have been showcased? Briefly describe the Game Changing strategies/ ideas (if applicable)

Though not an existing initiative, the sessions came to the conclusion that the only genuine game changing strategy in the area of private sector actors and economic crimes will be to advocate for a focus on prosecution and sanction of corporations and their senior leadership for all crimes and complicity in other crimes. The only way to change the conduct of the banks and other corporations in their role in facilitating economic crimes and human rights violations is to prosecute senior chief executive officers for the criminal activity that those corporations are involved in. We as the anti-corruption community must take leadership in this regard and put such an approach on the international agenda.

In Argentina, civil society using labour law and civil litigation in creative ways to tackling the role of corporations in forced disappearances and other human rights violations. This use of the domestic civil law system is something that can be a strategy implemented in different contexts elsewhere.

Juanita Olaya introduced the quantifying the harm of economic crimes through the lens of “social damage” – the idea that society as a whole is harmed, even in indirect ways, by economic crimes. The idea of social damage goes beyond the often narrow idea of accountability.
from a legal sense. It is something that can be addressed while other processes (legal and otherwise) are ongoing.

Briefly describe the highlights including the thematically interesting questions and ideas that were generated from the discussion or from the floor, and session quotes.

**The problem:**
The panellists and speakers from the floor fully agreed that banks, financial institutions and other corporations often play an essential role in facilitating both economic crimes and other human rights violations. Financial institutions are particularly crucial actors as they knowingly launder funds and set up secret structures (including shell companies) to assist with the flow of stolen and illicit money. Corruption, particularly in notorious industries such as the arms trade, fundamentally requires a money laundering system to facilitate bribery, and therefore require banks and networks to move money. Unfortunately, regulation has not caught up with the role that these institutions play in these crimes. They are also powerful and well-resourced actors that use their power and influence to enmesh themselves with political elites and avoid investigations and accountability. Settlement agreements and deferred prosecution agreements have become a standard way of avoiding accountability and shielding corporations from proper inquiry. The balance has shifted away from effective accountability, and there is currently insufficient deterrence as a result. Currently, private sector actors are able to consider any potential fines as a ‘cost of doing business’.

The session agreed that currently, not enough has been done to put this problem at the forefront of the anti-corruption agenda.

**The remedy:**
Countries, including cases like Argentina, have shown that civil society and the courts have used innovative domestic law processes to tackle corporate complicity in economic crimes and other human rights violations. In these cases, it is vital to have both and independent and competent judiciary, as well as a vibrant civil society. Learning from approaches to challenging impunity in different contexts will be important in informing strategies elsewhere.
At the heart of the sessions was the agreement that the current model of dealing with corporate complicity in economic crimes and other violations is heavily weighted towards impunity. Hence, a new focus must be on prosecuting those responsible for these crimes wherever possible, in order to build in adequate deterrent for these actors. This was summed up from the floor by Frank Vogel who said; “The only possible way to change the culture and values of the big banks is to prosecute senior chief executive officers of the banks for the criminal activity that those banks are involved in. The anti-corruption community has to take the responsibility of pushing for this, for no-one else will do it.”

The second issue raised was that, in addition to pursuing accountability, our focus must always have victims and potential remedy and restitution at the forefront of our minds. Juanita Olaya introduced the idea of ‘social damage’ as a way of considering the harm that economic crimes have on society as a whole.

Discussion from the floor:
Frank Vogel of Transparency International suggested that the ability to absorb mammoth fines compromises attempts to deter malfeasance through fines on banks. He argued that “The only possible way to change the culture and values of the big banks is to prosecute senior chief executive officers of the banks for the criminal activity that those banks are involved in.” Those in the session agreed that this kind of change in

‘Connecting the dots’: Discussion in the floor raised the concern that the complicity of banks and corporations in human rights violations is not a “white collar crime”, it is part and parcel of heinous crimes. The perception that separates economic crimes from violent human rights violations harms attempts to hold people accountable. Thus, connecting the dots between private sector actors and human rights violations is essential.

The Head of the Tunisian Truth Commission was in the session and spoke to the fact that the Tunisian Commission model explicitly connects corruption, economic crime and other violations by the Tunisian regime. It also focuses on systemic corruption, and goes beyond the notion of individual victims. However the challenge to
those working on the commission is the fact that the criminal networks are inherently international in nature, and this makes it difficult to both track the crimes, their proceeds, and then to hold actors accountable.

Other challenges raised from the floor included that:

A nexus of corporations (international and local) and politicians step in to prevent investigation and accountability of private sector actors - they rely on a pittance as a settlement to avoid any further scrutiny.

Many governments in poorer and developing countries feel that they have “neither the carrot nor the stick to address corporations on an equal footing”. Grand corruption is an international crime and should be viewed as such. However, domestic limitations, including that the complexity of these cases makes it very difficult for most judiciaries to deal with are a challenge. International cooperation in the return of funds is essential.

Session Quotes:

Frank Vogel: “The only possible way to change the culture and values of the big banks is to prosecute senior chief executive officers of the banks for the criminal activity that those banks are involved in. The anti-corruption community has to take the responsibility of pushing for this, for no-one else will do it.”

Juanita Olaya: “The insistence on separating the issues of economic crimes and human rights violations hinders our ability to demand corporate accountability.”

Juanita Olaya: “Any focus on economic crimes needs to have remedy and repair at the centre of the approach.”

Leigh Payne: “Civil society is essential in tackling corporate complicity in human rights violations”.

Leigh Payne: “A cost must be attached to behaviour for deterrence to work”.

Andrew Feinstein: “The regulation of the financial sector is appalling”.
Andrew Feinstein: “The intersection of money and politics is to the disadvantage of all citizens”.

Andrew Feinstein: “We cannot treat corporations and governments like they are sacred, they must be challenged on the crimes that they commit.”

What are the key recommendations, follow-up Actions (200 words narrative form)

The central recommendation and follow up action from the session is that prosecution of financial institutions and other corporations for complicity in grand corruption and other human rights violations is essential to prevent complicity in such crimes. The only way to challenge impunity and the repetition of grand corruption and other rights violations is through accountability and sanction that acts as an adequate deterrent. The anti-corruption community must take a proactive stance in challenging entrenched powerful networks that act to avoid accountability for their role in facilitating these crimes.

The international anti-corruption community must take a lead role in advocating a focus on accountability in this regard as the only adequate deterrent to the repetition of these crimes. Work in this area must consider the ability of private sector actors to leverage their influence to avoid responsibility and accountability for these crimes. As part of this discussion, the intersection of money and politics needs to be put at the forefront of discussions around how private sector actors avoid accountability for economic crimes and their complicity in other human rights violations.

Up to now, the anti-corruption community have relied, for various reasons, on keeping discourses on corruption and human rights violations separate – this hinders efforts to achieve accountability and a new approach is required. Connecting these discussions and synchronised action is essential. However, it must be combined with approaches that focus on how the society and communities have been harmed by economic crimes, and the remedies that are available to
repair the social damage caused.

Key Insights that could be included in the IACC Declaration

Accountability first! The only way to change the conduct of the banks and other corporations in their role in facilitating economic crimes and human rights violations is to prosecute senior chief executive officers for the criminal activity that those corporations are involved in. We as the anti-corruption community must take leadership in this regard and put such an approach on the international agenda.

The only way to challenge impunity and the repetition of grand corruption and other rights violations is through accountability and sanction that acts as an adequate deterrent. The anti-corruption community must take a proactive stance in challenging entrenched powerful networks that act to avoid accountability for their role in facilitating these crimes. As part of this approach, the intersection of money and politics needs to be put at the forefront of discussions around how private sector actors avoid accountability for economic crimes and their complicity in other human rights violations.

The anti-corruption community have relied too heavily on keeping discourses on corruption and economic crime on the one hand, and human rights violations on the other, separate. This hinders efforts to achieve accountability. The anti-corruption community must take a leadership role in “connecting the dots” between accountability for economic crimes and for other human rights violations.

Michael Marchant
2 December 2016
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