RECONCILIATION AGREEMENTS & ASSET RECOVERY

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Reconciliation agreements are a way for states to recover assets obtained through corruption by entering into deals with persons involved in corruption, whereby money is given to the state in exchange for amnesty from prosecution for the original crime.

For states involved in long and complex prosecutions and inter-state negotiations over the recovery of corruptly acquired wealth, this kind of an agreement **can represent a quick and easy solution to asset recovery**. They are resource effective through avoiding lengthy and complex law enforcement investigations, they avoid the need for extensive cross-border cooperation with authorities in other jurisdictions, and they sidestep the need for prosecutions across one or more jurisdictions. They can also be concluded relatively quickly and respond to financial or political pressure, in ways that classic asset recovery processes are not designed to do.

Despite this, they **also present numerous challenges**. Not least of these are questions of justice. They risk that persons committing corruption do not pay the price for their actions or promoting the perception that corrupt actors are evading justice. They also risk undermining broader restitution processes. Reconciliation agreements may also not act as a sufficient deterrent to corruption through imposing 'penalties' that are not commensurate with the gravity of the original crime.

Due to their nature of often sitting outside of formal legal structures, they also risk **questions over the independence and impartiality of committees tasked with agreeing to and setting the amounts for reconciliation**, as well as having the potential to be opaque in their decision-making processes and to lack the links to investigative bodies that would enable them to determine whether amounts returned are commensurate with monies stolen. They further risk undermining legal processes taking place abroad, by ending domestic investigations that could channel evidence to foreign investigations.

With these factors in mind, should a jurisdiction decide to introduce a reconciliation agreement framework, **several factors should be taken into account**:

1. Transparency and accountability standards commensurate with international best practice should be included. These should enable the public and interested parties to clearly understand how decisions are reached and why, and to trace the disposition of reconciled funds.

2. Oversight of authorities responsible for reconciliation agreements should be included in any framework. Oversight bodies should be able to review and overturn decisions. The existence of both reconciliation and reconciliation oversight authorities should not preclude the possibility of judicial oversight over both of these authorities.

3. A clear principle in coming to decisions on who to reconcile with and amounts should be individual and societal corruption deterrence.

4. Reconciliation agreements should include obligations to cooperate with law enforcement to expose broader networks and actors involved in the corrupt acts for which immunity is being provided, in order to allow for potential prosecution of other actors.

5. Victims and organisations representing victims should be able to engage with reconciliation authorities to express their opinion on reconciliation, on amounts agreed upon, and on disposition of returned funds. These opinions should be heard and reflected on by authorities.

INTRODUCTION TO RECONCILIATION AGREEMENTS

INTRODUCTION

Reconciliation agreements are a way for states to recover assets obtained through corruption by entering into deals with persons involved in corruption, whereby money is given to the state in exchange for amnesty from prosecution for the original crime.

For states involved in long and complex prosecutions and inter-state negotiations over the recovery of corruptly-acquired wealth, this kind of an agreement can represent a quick and easy solution to asset recovery.

Allowing for reconciliation agreements nevertheless comes with challenges, particularly when not part of a transparent and accountable truth-seeking process, where past-wrongs are addressed and consensus around the need for settlement with members of past regimes are built amongst the public.

This report provides an in-depth look into reconciliation agreements as a facet of the anti-corruption architecture and as a potential tool for asset recovery.

It begins with a discussion in this section of the concept of reconciliation agreements and contrasts these with settlements. It explores in particular the difference in judicial involvement and the more political nature of reconciliation agreements.

Examples of the use of reconciliation agreements are discussed in the following section. Three countries are considered in detail: Angola, Egypt and Tunisia, where this kind of agreement has been used to varying degrees of success. In each example, the scope of the laws allowing for this are discussed and the potential successes and failings in these agreements outlined.

Continuing, the report outlines some of the benefits and challenges in using reconciliation agreements as a tool for asset recovery. Looking at opportunities, it considers how reconcilliation agreements can be resource effective, address multiple jurisdiction criminality and can speed up casework. It then considers the challenges of the use of these agreements, particularly around the issues of justice, investigations, transparency and accountability, and victim redress.

It finally turns to considerations that should be reflected on should a jurisdiction be debating the introduction of reconciliation agreements. Here looking at how frameworks for these agreements should best reflect anti-corruption standards relating to asset recovery, as well as questions of justice.

WHAT ARE RECONCILIATION AGREEMENTS?

Reconciliation agreements are arrangements made through legislation or, when empowered, by governments, to provide immunity from prosecution for acts of corruption in exchange for the restitution of an agreed on amount of assets to a jurisdiction. Under these deals, if persons suspected of corruption have fled the country, they are able to return without the threat of criminal or civil prosecution by public authorities. If they remain in the country, some or all charges against them are dropped. Depending on the relevant rules, these persons may not be required to admit guilt, nor will they legally be treated as if they have pled guilty to a corruption offence.

For governments, they are able to recuperate sums of money believed to have been acquired through corruption without the necessity of extensively investigating and identifying assets held by the suspect, or of prosecuting the suspect and obtaining a confiscation order following a final court judgement.

Important to note is that reconciliation agreements are largely extra-judicial mechanisms. This means that, while provided for by law, they are a type of agreement that does not involve judicial or prosecutorial oversight of the agreement and, in that sense, differ from more traditional non-prosecution arrangements, such as settlements.

Settlements

Settlements are a method to avoid a criminal trial or civil case and are also used in situations where an individual or company is suspected of corruption. Different from reconciliation agreements, settlements involve agreement between the prosecution and defence in criminal cases, or between parties in civil cases, and are most often subject to review by the courts. Settlements have been defined in the literature as "as any procedure short of a full trial."[1]

> *Relatively few lawsuits ever go through the full range of procedures and all the way to trial. Most civil cases are settled by mutual agreement between the parties. A dispute can be settled even before a suit is filed. Once a suit is filed, it can be settled before the trial begins, during the trial, while the jury is deliberating, or even after a verdict is rendered.*
>
> *A settlement doesn't usually state that anyone was right or wrong in the case, nor does it have to settle the whole case. Part of a dispute can be settled, with the remaining issues left to be resolved by the judge or jury.*
>
> *Criminal cases are not settled by the parties in quite the same way civil cases are. However, not every case goes to trial. The government may decide to dismiss a case, or be ordered to do so by a court. The defendant may decide to plead guilty, perhaps as a result of negotiations with the government that result in dismissing some of the charges or recommending leniency in sentencing. Plea bargains are a very important and efficient way to resolve criminal cases.*[2]

The use of settlements tends to differ between 'common law' countries and 'civil law' countries:

- Common law jurisdictions, such as parts of Canada or the United Kingdom, tend to have negotiation processes for corruption-related criminal trials, with the public prosecution and the defendant reaching an agreement on the plea and terms, which is then sent to the court to be confirmed. Newer forms of settlement have included deferred prosecution agreements in the US and restitution out-of-court in Nigeria.[3]

- Civil law jurisdictions, such as France or Germany, tend to have less negotiations, and rather a proposal is made by the prosecution to the defendant. The defendant will usually admit guilt for the corruption offence, has to pay a fine or conduct certain activities, and will avoid a trial.[4]

An example of this exists in the Swiss Criminal Code:

> *According to Section 352 of the Swiss Code of Criminal Procedure (SCCP), under certain conditions the prosecutor may conclude a case without bringing it to court if the prosecutor considers that the charges do not merit a penalty of greater than six months' imprisonment and a fine of Sw F 5 million, with any confiscation component to be unlimited. Another provision, SCCP 358, provides for a negotiated resolution or so called simplified procedure, in which the accused can negotiate the sentence in exchange for recognizing the facts of the offense in documentation approved by the court. The imprisonment penalties can be up to five years, and monetary penalties have no limit.*[5]

A specific form of settlement is a plea bargain, whereby the defendant pleads guilty in court to the crime they committed in exchange for either a reduced sentence or the avoidance of a potentially longer sentence should the case go to trial.[6]

Reconciliation agreements then have overlaps with settlements but are also quite different, in that they do not involve courts or public prosecution authorities. Rather they are an agreement between the suspect and the government to provide total immunity from prosecution, in exchange for the return of assets suspected of having been obtained through corruption.

Table 1: The difference between reconciliation agreements and settlements

RECONCILIATION AGREEMENTS	SETTLEMENTS
Provide immunity from prosecution for corruption committed	End prosecution in a particular case of corruption
Negotiated restitution of assets (up to 100% of stolen funds)	Often a proposal by the prosecution that the defendant can accept or reject
Less involvement of law enforcement	Involves law enforcement
Separate to investigations into stolen wealth	A result of investigations into stolen wealth
Do not involve judicial processess	Often need judicial confirmation

EXAMPLES OF THE USE OF RECONCILIATION AGREEMENTS

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While the previous section has attempted to define what a reconciliation agreement is, there is no clear international legal definition of this form of agreement and little research has been done into where these exist and have been employed in large and cross-border corruption cases. Nevertheless, there are at least three jurisdictions that have employed reconciliation agreements in line with the definition advanced above to address corruption: Angola, Egypt and Tunisia.

In the following section, the scope of the agreements will be outlined and their respective successes and failures identified.

ANGOLA

In 2017 José Eduardo Dos Santos stepped down as the second-longest serving president in Africa, having taken power in 1979. His rule has been identified with "economic crisis, a very poor and unequal society, and entrenched impunity for serious human rights violations, including unlawful killings, politically motivated detentions, and crackdowns on the press."[7]

Following his departure, the new Angolan President Lourenço took steps against the former ruling Dos Santos family. This included promptly investigating the dealings of the former first family, several of whom had been in positions of serious public financial responsibility.[8]

One of the anti-corruption reforms introduced after 2017 was the Law on the Repatriation of Financial Resources (9/2018). This law provided that individual persons and legal entities who voluntarily repatriated their financial resources to a specified bank account in Angola within a period of 180 days following the date of entry into force of this law, would be exempt from tax, foreign exchange or criminal liability for their actions in relation to those financial resources. It provided in addition that, after the expiry of those 180 days, which began on the 26 June 2018, the Angolan state could use coercive repatriation of any funds resulting from unlawful activities.[9] Any funds that were returned through this scheme were to be allocated to fund social projects.[10]

This scheme therefore acted in a similar way to the idea of reconciliation agreements outlined above.

While only for a limited time, persons involved in illicitly acquiring money, including through corruption as well as, for example, tax fraud, were able to exempt themselves from any potential prosecution by returning the money within the window of time provided.

It also included a 'stick' to the amnesty's 'carrot', in that it reminded those potentially addressed by the law that the government would use the possibility of prosecution for those not availing themselves of the amnesty.

Success, however, has been reported as limited, with limited funds apparently being returned during the 180 days of amnesty.[11]

EGYPT

Egypt began asset recovery efforts in 2011 following the revolution that ousted long-time president Hosni Mubarak. It was the anger against the widespread corruption of Mubarak's regime that brought millions of Egyptians on the streets in early 2011. In

the aftermath of the revolution, Egyptians put a lot of hopes that they would get back the billions of Euros alleged to have been stolen by Mubarak and his family to invest them in building a new Egypt.[12]

Shortly after the revolution and until mid-2015, the transitional governments tried to come up with an asset recovery strategy by creating a number of "truth-finding" committees, with the aim to investigate the funds funnelled abroad. Although in some cases some of these bodies were able to obtain the freezing of assets, none of these were confiscated and returned to Egypt. These committees were never independent from the central government and were, as such, influenced by political changes and political interference.[13] Several requests for legal assistance to freeze assets were made to countries such as the UK, the US, Switzerland and Spain, however, research showed that these requests were made in a rush, without the necessary preparation of resources and legal materials requested by the receiving countries, which led to the rejection of most of the asset recovery requests.[14]

Prosecutions for corruption were also a challenge. While some prosecutions took place for various crimes, the cases could not be linked to asset recovery legal assistance requests, since investigations into the origins of and how the wealth of the Mubarak family was funnelled abroad never took place.[15]

In 2015, the Sisi government introduced amendments to the Criminal Procedures Code and the Illicit Gain Law (Law No. 16 of 2015 and Law No. 97 of 2015). These changes allowed any person charged with illicit gains or embezzlement of public funds, including their family and heirs, to request reconciliation during the period of investigations by the Illicit Gains Authority. These reconciliation agreements are set to amount to the total of the funds illicitly obtained and a fine. In exchange for the reconciliation, criminal prosecution is ended.[16] Reconciliation has been a feature of Egyptian law in the past, with Article 18 bis of Law No. 174 of 1998 amending the Criminal Procedures Code allowing for reconciliation for contraventions and misdemeanours.[17] The 2015 reform, however, extended this to crimes with a more substantial potential penalty and related to corruption.

Since being introduced, reconciliation agreements have been used in several high profile cases involving wealthy businesspersons. This includes:

- **Ahmed Ezz**, a former politician and steel tycoon, who was reported to have returned LE 1.7 billion (USD 95,557,000 at the time) as part of a reconciliation deal in 2018.[18]
- **Hussein Salem**, a dual Egyptian-Spanish citizen who was a major shareholder in East Mediterranean Gas (EMG) and was sentenced in absentia to seven years in jail and fines of more than USD 4 billion in 2011 for money laundering and profiteering. Salem and his family returned 5.3 billion Egyptian pounds (USD 596.85 million) in 2016 as part of a reconciliation agreement.[19]
- **Former Trade Minister Rashid Mohamed Rashid**, who fled Egypt during 2011 revolution and was sentenced in absentia to five years in prison for embezzling public funds, and for 15 years for smuggling half a million EGP out of the country, along with his daughter. Both Rashid and his daughter were fined LE 522 million. In a reconciliation agreement signed in 2016, Rashid returned

nearly LE 500 million (USD 27.5 million) in exchange for the dropping of those charges and proceedings looking at the illegal seizure of assets from Egypt's Export Support Fund and into the wasting of public money under the Industrial Modernization Fund.[20]

Because of these reconciliation agreements, Switzerland released around CHF 180 million back to Egypt. Subsequently, Egypt dropped criminal proceedings in the most prominent cases with possible links to assets frozen in Switzerland.[21]

These deals have faced criticism. In particular criticism has focussed on the lack of:

1. A larger transitional justice process, with a focus being on the money rather than a real process of reflection on the past,

2. Leveraging on the agreements to uncover further crimes, through requiring reconciling persons to give details of the schemes they were involved in.

3. Clarity on what basis the total amounts returned where based on – with suspicion that total illicitly acquired wealth amounted to much more than officially declared and returned.[22]

In addition to this, there have been concerns that this approach has fostered impunity for corruption.[23]

TUNISIA

Asset recovery efforts in Tunisia began with the overthrow of Zine El Abidine Ben Ali in 2010-2011. As with the Egyptian revolution, demands for the removal of Ben Ali, who had been in office for 23 years, were rooted in anti-corruption messaging. During his time in power, Ben Ali was suspected of having obtained up to USD 13 billion in corrupt wealth, with more than one-fifth of the Tunisian private sector's profits reportedly going to the family and associates of former dictator Ben Ali. Importantly for reconciliation, these activities were often not overtly illegal, with laws instead being tailored to benefit his family and associates.[24]

Tunisia has introduced laws allowing for reconciliation with persons suspected of having been involved in corruption in two rounds: first in 2017 through a law allowing reconciliation with public officials suspected of corruption and the second in 2022, allowing for reconciliation with private sector actors.

2017 Law

A bill for reconciliation with officials of the former regime of Ben Ali was already proposed in 2015 by then President Beji Caid Essebsi, himself a former Ben Ali official. This bill allowed reconciliation with both former officials and business elites and was stuck in parliament for two years over criticism of reconciling with private sector actors. Persons in the private sector were eventually removed from the bill in order to secure its passage in 2017. Opposition lawmakers, however, boycotted the vote.[25]

The law allows for reconciliation with public sector officials involved in corruption during the dictatorship of Ben Ali who claim not to have personally profited during the dictatorship and were not in a position to disobey orders to commit irregularities.[26]

Its goal, as stated in its first article, is to "support the transitional justice apparatus, to ensure an appropriate investment environment, to develop the national economy, and to boost trust in state

institutions." Although no exact figures exist for the amount of graft during Ben Ali times, officials estimated at the time that up to USD 3 billion could be returned under the law.[27]

The law stipulated the creation of a new committee that would include four representatives of the government and two representatives of the Truth and Dignity Commission, which was created on the basis of the country's transitional justice law, passed in 2013. The committee's role under the law is to examine requests for restitution submitted by these public officials and evaluate the sums of money to be repaid.[28]

Government officials responsible for passing the law argued, however, that it was a necessary step to turn the page from the past, in a similar manner to that undertaken in Rwanda and South Africa.[29] However the law has faced criticism on several fronts, this has included:

1. **Transitional justice**: It was argued that the law was simply an amnesty for criminals and a way to rehabilitate Ben Ali's allies back into Tunisian society, which would harm Tunisia's transition.[30] Further, the fact that it was heavily divisive in its passage was argued as being contrary to its aim as an attempt to heal the wounds of the dictatorship.[31]

2. **Clarity**: It was suggested that the distinction between civil servants who allegedly committed acts of corruption without personally benefiting, and those who embezzled public funds for their own gain was a fiction at best. Both groups would be able to receive an ending of prosecutions and an amnesty for convictions, as well as compensation for any fines paid. Further, this approach was argued as containing no way to further identify or investigate civil servants, with no potential judicial process linked to the law.[32]

3. **Scope**: Indirect gains, including promotions or benefits for a person's family, were not included in the law. This was argued as limiting the potential for addressing corrupt actors.[33]

4. **Accountability**: The law does not require public officials who participated in corruption to receive amnesties to also disclose the facts of corrupt schemes.[34]

5. **Conflict of authority**: The law has been argued as undermining the Truth and Dignity Commission (IVD), which has the mandate to investigate corruption and either arbitrate cases or refer suspects to the justice system. The law has been suggested as rather preventing disclosure about corruption and undermining the transition to a transparent and open society.[35]

2022 Law

In 2022, President Kaïes Saïed introduced a new decree allowing for reconciliation with persons in the private sector for acts of corruption – completing the planned reconciliation architecture envisioned by former President Beji Caid Essebsi.[36]

Over 51 articles, the decree establishes a new commission for criminal reconciliation under the Presidency, which has the power to grant amnesties to business persons who apply for "financial reconciliation."[37] These persons should have a case currently being examined by a court in Tunisia for corruption, bribery, foreign exchange crimes, customs crimes or misappropriation

of public property and are granted amnesty from any prosecution for that crime, in exchange for repaying the stolen amount. This stolen amount is determined by the commission and the funds are used for regional development projects. An interim stop on prosecutions is issued following a first instalment of 50% of the stolen amount and an amnesty issued after full repayment.[38]

Beneficiaries of reconciliation will have to pay 50% of the amount stolen from the state determined by the commission, or 50% of the cost of carrying out a regional development project corresponding to the same amount. Putting up this first instalment will allow each individual to benefit from a so-called provisional reconciliation stopping legal proceedings. The reconciliation will be final only after payment of the full amount within a period not exceeding three months. This will lead to the cancellation of prosecution and any sentences pronounced against the offender. The head of state has the right to dismiss members of the commission.[39]

The 2022 law has also come under criticism along several lines:

- **Legality**: Prior to the promulgation of the decree, the Ministry of Justice referred the draft to the Supreme Council of the Judiciary. The Council refused to validate the degree, arguing that there was a transitional justice law in place, which had established specialized criminal chambers with the mandate of addressing corruption and malpractice. The Council reiterated that a decree could not override this law, which had the status of a parliamentary organic law. The Supreme Council was however disbanded in March 2022.[40]
- **Independence**: Members of the Commission are appointed by, and able to be dismissed at the discretion of, the Head of State. This means that they are not able to be independent in their actions.[41]
- **Transparency**: There is no requirement for transparency in the process and no judicial process for the public and civil society to be able to monitor.[42]
- **Accountability**: There are concerns with the new decree that principles of transitional justice, including truth and reform, will be dropped and there will be the risk of developing a culture of impunity.[43]

BENEFITS AND CHALLENGES IN THE USE OF RECONCILIATION AGREEMENTS

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For states involved in long and complex prosecutions and inter-state negotiations over the recovery of corruptly-acquired wealth, measures such as reconciliation agreements can appear to be a quick and easy solution to asset recovery. The examples listed above however show that while these agreements can result in the return of wealth believed to have been corruptly acquired, allowing for reconciliation agreements also comes with challenges, particularly when not part of a transparent and accountable reconciliation process, where past wrongs are addressed and consensus around the need for reconciliation with members of past regimes are built amongst the public.

The following section explores some of the benefits and challenges inherent in using reconciliation agreements as a tool for asset recovery.

BENEFITS

Resource effectivity

The main benefit in introducing reconciliation agreements to address cross-border corruption is that they are effective in terms of timeframe for returning the money, in the use of personnel and in terms of actual costs.

Traditional asset recovery involves highly complex financial crimes that are difficult to prosecute. Cases often span multiple jurisdictions, involve multiple persons and have taken place over several years. This makes evidence gathering[44] – and ultimately prosecution – difficult. A clear example of the challenges in international asset recovery cases in particular can be seen in the relative rates of assets frozen against those returned to foreign jurisdiction in corruption cases by OECD members. In these cases there is a general drop in value from figures of assets reportedly looted initially to the amounts ultimately returned.[45]

As has been highlighted by the Stolen Asset Recovery Initiative (emphasis added):

> …the practice of recovering stolen assets remains complex. It involves coordination and collaboration with domestic agencies and ministries in multiple jurisdictions with different legal systems and procedures. It requires special investigative techniques and skills to "follow the money" beyond national borders and the ability to act quickly to avoid dissipation of the assets. To ensure effectiveness, the competent authority ("the authority") must have the capacity to launch and conduct legal proceedings in domestic and foreign courts or to provide the authorities in another jurisdiction with evidence or intelligence for investigations (or both). All legal options— whether criminal confiscation, non-conviction based confiscation, civil actions, or other alternatives—must be considered. This process may be overwhelming for even the most experienced practitioners. **It is exceptionally difficult for those working in the context of failed states, widespread corruption, or limited resources.**[46]

Reconciliation agreements, as discussed in the examples above, can provide for asset recovery in a way that minimises these challenges. Through avoiding court proceedings to prosecute a person suspected of corruption or to claim civil damages, authorities may need to gather less evidence, reducing the burdens this entails in complex cases. They may also speed up the process of recovering the money, through avoiding the drawn out nature of trials for financial crime and the time needed to gather the level of evidence needed for a trial. They may also avoid the legal costs involved in bringing cases to trial and the potential costs that may be incurred in unsuccessful cases.

Political and economic benefits

Asset recovery cases are usually of high interest to members of the public. Whether or not they come about after a change in government, pressure for the successful resolution of an asset recovery case and expectations over the return of estimated corruptly acquired wealth are often high.

While there are notable political disadvantages to reconciliation agreements – discussed below – a strong advantage in them is that they have the potential to result in the swift return of large portions of estimated corruptly acquired wealth and thereby have the potential to swiftly satisfy part of public demands.

They also have clear economic benefits. Beyond avoiding the costs of prosecutions, they also have the potential for the swift return of often large sums of money to the public purse. Because crimes of corruption are very hard to prove, only a fraction of high-profile cases are closed successfully with a conviction and asset confiscation.

While it can take several years to return money through traditional asset recovery processes, the use of reconciliation agreements promises swifter returns, meaning that returned funds can be used more quickly for public spending needs, anti-corruption support and compensating the victims of corruption. Especially in situations where governments have changed and/or revolutions have taken place, the swift return of these funds may be of high importance to a new administration.

CHALLENGES

Justice, symbolic justice and transitional justice

As has been seen with the examples listed above, a major challenge when implementing reconciliation agreements are questions of justice – ensuring that persons committing corruption pay the price for their actions - , symbolic justice – presenting the perception that justice is being done - , and, in cases where there has been a change in leadership, transitional justice – aligning reconciliation agreements to broader discussions on historical wrongs, guilt and rehabilitation.

When it comes to justice and symbolic justice, reconciliation agreements are likely to face claims that corrupt officials and business persons are 'buying' justice by returning some or all of the funds they stole in exchange for immunity.[47]

These arguments are well-founded, when considered against the possibility that with a successful prosecution, those involved in corruption could both serve time in prison for their crimes and be forced to return the funds they are stolen. Even in a civil case, where prison time would not be feasible, persons involved in corruption would face not only being forced to return their ill-gotten gains, but information on their involvement in corruption would be publicly aired through the court cases. Even when these cases are resolved through a

settlement, there is usually a requirement for an admission of guilt.[48]

When reconciliation agreements allow negotiating authorities to provide discretion on who they are reconciling with and where there is no requirement for the admission of guilt, this is particularly problematic for symbolic justice and for the broader social penalties that a corrupt person could otherwise face with a conviction.

Transitional justice can also be a concern with reconciliation agreements. As described in the examples, reconciliation agreements when not tied to broader transnational justice processes, may interfere or undermine them. This may involve removing mandates or authority from institutions responsible for transitional justice or may prevent these processes from achieving their desired aim.[49]

Deterrence

Related to justice is the concern that reconciliation agreements do not have the deterrent effect that judicial processes have in preventing future corruption. While there has not been research on whether the use of reconciliation agreements themselves are effective in preventing corruption, either future corruption by the original perpetrator or more broadly in society, concerns have been raised in this regard in relation to settlements.

In particular when settlements lead to sanctions that are low in value, compared to the original offence, and more generally when the only consequence for committing corruption is a fine, settlements have been criticised for having little deterrent effect for future corruption.[50]

While reconciliation agreements may involve large amounts of money and substantial parts – or all – of the corruptly acquired wealth to be returned, as discussed in the examples, they are also susceptible to being seen as the price to pay for corruption. Given that they may also not require disclosure of amounts returned or persons involved, they may result in even less of a deterrent effect than settlements have been criticised for.

Independence of the process

As seen in the examples, reconciliation agreements have at times been established as political processes. This gives a range of concerns in relation to real and symbolic/perceived justice, depending on how the reconciliation process is set up.

At the most straightforward level, it may be difficult for the public to understand why certain decisions to reconcile are taken and others not. This is particularly likely to be the case when not part of a transitional justice process with a clear mandate for addressing reconciliation with powerful individuals associated to a former regime, or when the criteria for reconciliation are broad and responsible institutions are not required to or not allowed to disclose with whom they are entering into and concluding negotiations.

More substantively, there is also the possibility that non-judicial reconciliation processes are more susceptible to influence by political decisions and the opinions of powerful national actors. This can range from the composition of the reconciliation committee and the potential for alignment with certain factions within the country, to the use of appointments and removals as a way to influence reconciliation deals.

Transparency and investigative powers

A further concern with reconciliation agreements is the extent to which the amounts agreed for return can be independently verified. Unlike in court cases where law enforcement authorities attempt to determine the amount of money stolen and the likely location of any assets purchased as a result of this corruption, reconciliation processes may not have the resources or expertise of law enforcement to conduct investigations.

This means that reconciliation agreements are much more likely to be based on a mixture of estimated assets held by the corrupt person and the amount they are willing to disclose, and return, to authorities in exchange for immunity from prosecution. As highlighted above, this risks that only part of the stolen wealth is ever returned.[51]

At the same time, if there are also limited obligations – or even prohibitions – on disclosing who reconciliation agreements are being concluded with and amounts recovered, this risks that there is no independent verification of amounts returned or scrutiny over who is being offered a deal. This is likely to lead to public concern with the use of reconciliation agreements and provide greater potential for politically influenced decision making.

Undermining of legal processes abroad

A final challenge of using reconciliation agreements as a tool for asset recovery is that they risk undermining investigations and legal processes taking place abroad.[52] Asset recovery is a complex process, involving judicial and investigative mechanisms taking place in parallel at times across multiple jurisdictions.

Concluding reconciliation agreements with persons suspected of having hidden their wealth oversees may interfere with investigations taking place in those jurisdictions, through the immunity provisions.

The ending of investigations in one jurisdiction may mean that evidence required for use in another jurisdiction is not gathered or that court decisions needed are not relied upon. This may mean that reconciliation agreements contribute to a broader lack of interest in prosecuting corruption beyond one specific reconciled case in those jurisdictions, as they are no longer able to rely on coordinated law enforcement action across involved jurisdictions.

CONSIDERATIONS IN THE USE OF RECONCILIATION AGREEMENTS

CONSIDERATIONS IN THE USE OF RECONCILIATION AGREEMENTS

With the benefits and challenges of reconciliation agreements in mind, as well as the examples discussed above, there are several aspects that should be reflected on should a jurisdiction wish to go ahead with introducing or implementing a reconciliation system. Similarly, these aspects are important points to consider for civil society interested in advocacy around the use of reconciliation agreements as a tool for asset recovery.

TRANSPARENCY AND ACCOUNTABILITY

Reconciliation agreements should include transparency and accountability provisions commensurate with standards otherwise seen in asset recovery cases. These standards can offer useful guidelines for policy makers and help to mitigate some of the risks associated with reconciliation agreements, especially by enabling the public and interested parties to clearly understand how decisions are reached and why, and to trace the disposition of reconciled funds. The Civil Society Principles for Accountable Asset Return can be of particular use here.[53]

In particular, this includes ensuring that there is transparency in which persons are being negotiated with and who has signed reconciliation agreements, on the basis for reaching these agreements and the criteria for selecting and approving persons for reconciliation.

It should also include the publishing of final agreements, amounts to be returned, and the specific details of the immunities provided in exchange for the return. It should also include ensuring traceability of reconciled funds from receipt by the relevant authority to final disbursement.

Procedures should be put in place to ensure that those involved in the original corruption cannot benefit from the reconciled funds and there should be mechanisms in place to audit the use of those funds. Civil society should be involved in overseeing this process.[54]

OVERSIGHT

As has been highlighted both in the description of reconciliation agreements and in the examples of reconciliation agreements listed above, a key factor distinguishing them from settlements is that they operate outside of the judicial process in terms of decision making over granting the agreement and in terms of the valuation of the amount of money to be returned.

In relation to settlements, where the judiciary is normally involved to some extent – especially for more serious or higher value crimes[55] – research has suggested that the lack of judicial oversight can nevertheless reduce legitimacy[56] and can leave the power of the prosecutor unchecked.[57]

Given that reconciliation agreements typically involve even less or no judicial oversight, there is an even greater risk of both actual and perceived partiality of decision making and claims that processes lack legitimacy, particularly where competent authorities for negotiating and concluding agreements are not subject to oversight.

Any reconciliation agreement framework should therefore include mechanisms for overseeing authorities responsible for reconciliation agreements. This should include the power to review the decision-making process and the decision itself and to overturn a decision concluded improperly. The existence and powers of this oversight mechanism – whether judicial or not – and the decisions it comes to, with its reasons, should be clearly accessible to the public. There should also be the possibility of regular judicial review of decisions of both the responsible and oversight authorities in line with national processes and international standards and best practice.

SUFFICIENT DETERRENT

An important factor in deciding to prosecute an act of large-scale, cross-border corruption is the deterrent factor: both to deter the corrupt actor from repeat corruption and to send a broader message to deter others from engaging in corruption.

Settlements have faced critique for only deterring one actor in the corrupt scheme, in that they often target one actor in a bribery scheme, and for failing to have monetary sanctions at a level whereby actors are deterred, rather than inconvenienced, by the sanction.[58]

Reconciliation agreements are likely to face the same kind of challenges in acting as a substantial deterrent to corruption. As was seen in the case examples, where they have been used, there have been questions over the extent to which the returned funds represent a full or partial repayment of suspect wealth.

While the aim of the agreement is to provide immunity from jail time, this should not mean that the person is able to enjoy the proceeds of their corruption through coming to an agreement with authorities. Reconciliation agreement frameworks should therefore ensure that amounts agreed as part of the deal should act as a deterrent to the person being reconciled with and other actors from engaging in corruption. They should also require authorities to determine whether reconciliation is appropriate with that corrupt actor in the interests of individual and broader deterrence, for example through including a process for reconciliation determining the conditions under which it should be regarded as an appropriate option rather than prosecution.

EXPOSING NETWORKS AND NON-PRECLUSION OF PROSECUTION ELSEWHERE

As highlighted in the case examples above, a challenge in the use of reconciliation agreements has been the lack of use of these agreements to assist law enforcement authorities with their broader anti-corruption investigations. This can mean that only part of those involved in the act of corruption receive some sort of penalty for their actions.[59]

Further, while reconciliation agreements will typically provide immunity from prosecution for corrupt acts committed in the country, this does not mean that prosecutions of the same or other actors cannot take place elsewhere. Where settlements have been used, for example, changing actors and factors in other jurisdictions means that criminal and civil cases can be brought against them.[60]

Reconciliation agreements should therefore ensure the cooperation of reconciling actors with law enforcement authorities to both detail and provide evidence as to the crimes they were involved in and for which they are being provided immunity, as well as on the role of other actors in the crime. This information should be collected in a way that enables it to be shared with law

enforcement in other jurisdictions and in a form that can be used in prosecutions domestically and in other jurisdictions of other persons involved in the corrupt acts.

VICTIMS

Victims often face barriers in obtaining compensation in large-scale corruption cases, particularly where corruption has taken place at such a level that entire communities have been affected. Settlements have been highlighted as particularly challenging when it comes to victim rights, and victim compensation. Due to their nature as being agreed to without trial and conviction, concerns have been raised over the lack of victim representation during settlement negotiations with corrupt actors and the retention of money obtained through settlements by the jurisdiction negotiating the settlement.[61]

While reconciliation agreements have the potential, if concluded by the country of origin, to avoid the problem of non-return, without clear criteria for victim compensation, they may have a similar effect in excluding victims from compensation for the harm caused by the corrupt acts.

Procedures for the involvement of victims and groups representing the views of victims should therefore be included in reconciliation agreement frameworks, to ensure that their voice is heard and reflected in deciding to reconcile with a corrupt actor, in the conditions of reconciliation and in the disbursal of returned funds.

CIVIL SOCIETY PRINCIPLES FOR ACCOUNTABLE ASSET RETURN

1. Asset recovery cases, including settlements, reconciliation agreements and negotiated agreements, should be conducted transparently and accountably from start to end, to the extent compatible with rules on confidentiality of investigation.
2. All recovered assets must be traceable by the general public at all stages of the process of asset recovery, from the confiscation, seizure and sale of assets through to the return and disbursement of assets.
3. Independent civil society organisations, including victims' groups/ representatives, should be able and enabled to participate in the asset recovery process.
4. Multilateral, bilateral and case-specific agreements or arrangements should be made public in a timely fashion and accessible manner, including when recovery is part of reconciliation arrangements, and should involve independent civil society representatives.
5. In no cases should the disposition of the recovered assets benefit directly or indirectly natural or legal persons involved in the commission of the original or on-going offence(s).
6. A process should be in place to monitor the disbursement of funds that includes an independent complaints mechanism.
7. Anti-corruption, rule of law and accountability mechanisms should be in place to provide oversight of recovered assets.
8. Victims should be provided access to justice in domestic and international cases of illicit activities including bribery and money laundering.
9. Without prejudice to the restitution of identified victims and with the understanding that the recovered assets remain the property of the people of the country from which they were stolen, recovered assets should be used to benefit the people of the country from which the assets were stolen.
10. A wide range of stakeholders, including a broad base of representative, independent civil society organizations should be

CONCLUSIONS

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Reconciliation agreements are a recent – and perhaps growing – tool being used to respond to large-scale cases of cross-border corruption. To governments, particularly those in need of financial assistance or dealing with high levels of public pressure to return stolen funds, they may represent a quick and easy solution to recuperating the proceeds of corruption without the need for long-trials and difficult prosecutions.

Indeed, reconciliation agreements do present some advantages in addressing cross-border corruption. They are resource effective in avoiding lengthy and complex law enforcement investigations, they avoid the need for extensive cross-border cooperation with authorities in other jurisdictions, and they sidestep prosecutions across one or more jurisdictions. They can also be concluded relatively quickly, responding to financial or political pressure, in ways that classic asset recovery efforts are not designed to do.

In doing so though, they also present numerous challenges. Not least of these are questions of justice. They risk that persons committing corruption do not pay the price for their actions, and that there is the perception that corrupt actors are evading justice. They also risk undermining broader restitution processes. and not acting as a sufficient deterrent to corruption, through imposing 'penalties' that are not commensurate with the gravity of the original crime.

Due to their nature of often sitting outside of formal legal structures, they also risk questions over the independence and impartiality of committees tasked with agreeing to and setting the amounts for reconciliation, as well as having the potential to be opaque in their decision making and to lack the links to investigative bodies that would enable them to determine whether amounts returned are commensurate with monies stolen. They further risk undermining legal processes taking place abroad, by ending domestic investigations.

With these factors in mind, should a jurisdiction decide to introduce a reconciliation agreement framework, several factors should be taken into account:

1. **Transparency and accountability standards** commensurate with international best practice should be included. These should enable the public and interested parties to clearly understand how decisions are reached and why, and to trace the disposition of reconciled funds.
2. **Oversight of authorities responsible for reconciliation** should be included in any framework. Oversight bodies should be able to review and overturn decisions. The existence of both reconciliation and reconciliation oversight authorities should not preclude the possibility of judicial oversight over these authorities.
3. **Individual and societal corruption deterrence** should be a clear principle in coming to decisions on who to reconcile with and on what proportion of their wealth. .
4. **Reconciliation agreements should include obligations to cooperate** with law enforcement to expose broader networks and actors involved in the corrupt acts for which immunity is being provided, in order to allow for potential prosecution of other actors.

5. **Victims and organisations representing victims should be able to engage** with reconciliation authorities to express their opinion on reconciliation, on amounts agreed upon, and on disposition of returned funds. These opinions should be heard and reflected on by authorities.

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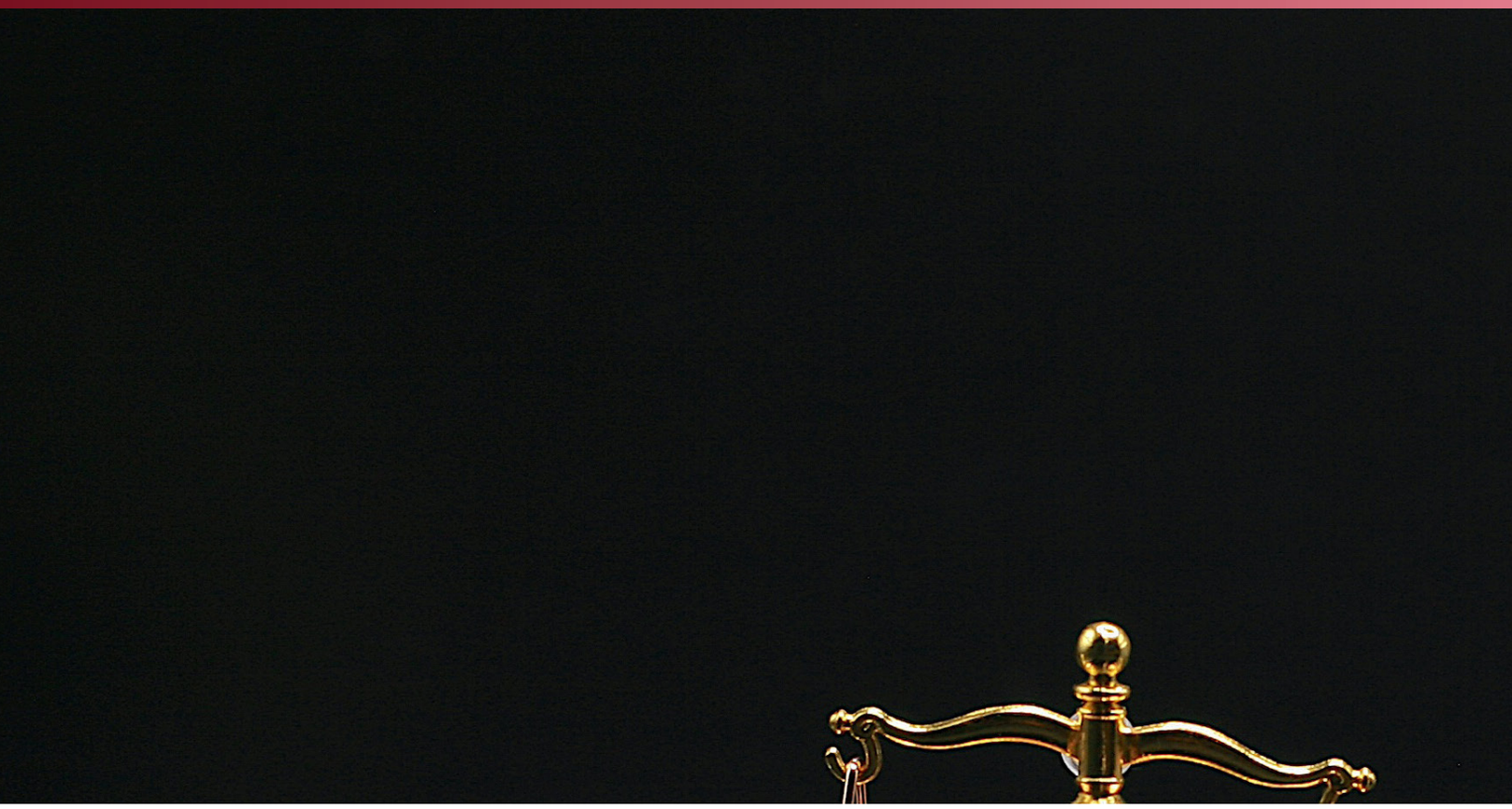

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