

“The New Role of the Public Prosecutor in the Investigation of Corruption and Money Laundering”

As it was previously discussed, the birth of new technologies had a tangible impact in white collar criminality, as it favored the creation of new criminal organizations which emulate the structural organization of business corporations. This means that the subjects with whom public prosecutors and investigators are faced with now a day have a different profile than the traditional thug. The modern white collar criminal is usually highly educated, knowledgeable in economics, finance, IT, etc. He has wide access to technology and specialized information. The means for committing crimes and concealing its proceeds have become more and more complex. As a response, new investigative techniques must be set in practice, making use of new technology and knowledge. Our investigations must be adapted to the kind of crime we are fighting if we ever intend to succeed.

Accordingly, the United Nations Convention against Corruption, UNCAC, provides in its article 50 that in order to combat corruption effectively special techniques should be implemented. The provision specifically mentions the controlled delivery, electronic surveillance, and undercover operations. Some examples of innovative techniques may be:

1. **Electronic Surveillance:** this technique works in two directions. It provides the prosecutors with strong evidence to convict the targets. On the other hand, it enables law enforcers to learn of conspirators' plans beforehand in order to prevent them from happening. Electronic surveillance is limited by constitutional issues, as it is in violation of a person's right to privacy. Most systems only authorize it for the investigation of certain crimes and would always require a court order.
2. **Undercover Operations:** better results are obtained when undercover operations go together with electronic surveillance. They can range from the simple controlled purchase of narcotics, contraband or illegal arms to the operation of an undercover business, such as a pub, where criminals meet and discuss their activities. The range will depend on the legislation, as in common law systems

there is more freedom to what an undercover agent can do, whereas in a civil system there is always the question of the agent provocateur.

3. **The Use of Informants:** these are individuals who are not willing to testify but who provide information or assistance to the authorities in return for a promise that his identity will be kept confidential. Usually, they are motivated to collaborate in exchange for money or lenient treatment regarding charges pending against them. In order to obtain better information from them, sometimes it is necessary to authorize them to participate in forms of non-violent criminal behavior that would otherwise be illegal. For this reason it is recommended to closely monitor their activities to prevent the informant from using his association with law enforcement to shield his own unauthorized criminal activities.
4. **Integrity testing:** This is method is especially helpful in the detection and eradication of public sector corruption. It is worth analyzing it separately.

Integrity testing is divided into two types: The first is sometimes called “random virtue” testing and is used by institutions to highlight the presence of issues or abuses which may not amount to criminal offences but which amount to corporate concern. The second type consists of “intelligence-led” tests which arise when there is information or intelligence that a particular individual or group of individuals is committing criminal or serious disciplinary offences. It is this second type that interests us.

Early legal advice is a necessary component of any properly planned integrity test. In the United Kingdom, for example, it is established as a best practice whereby a written report is submitted to a prosecutor outlining the following: (a) intelligence upon which the need for an integrity test is based, (b) the suggested scenario or scenarios to be utilized and (c) the various authorizations required.

There are a series of considerations to be taken before deciding to carry out an integrity test. First and foremost, there must be a legal basis for it. This must be researched both in the national jurisdiction level and in the international jurisdiction. In the United Kingdom, for instance, there is special consideration to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which refers to the right to privacy. In the Americas, it is article 11 of the Pact of San Jose, or Inter-

American Convention of Human Rights, which refers to the right to privacy. The Universal Declaration of Human Rights establishes it on article 12.

Also, there must be reliable intelligence or information to found the decision. This part is key to avoid the use of entrapment, which eventually, both in civil law and in common law systems, would render useless the evidence obtained. In a civil law system where the theory of the “juridical value” is in place to justify the mere existence of criminal law, this is especially delicate. The subject must be left alone to approach the agent. The “iter criminis” or path of the crime must be respected.

All stages of the testing must be recorded by the best available means. When dealing with a controlled purchase of drugs, for instance, the serial number on the bank notes must be registered by a judge on an official log. The use of photographs, video, recordings, etc. can also be helpful in the preparation.

It is also important that all decisions made as to the nature of the test and its implementation must be recorded in an official log. This is in order to later reconstruct the exercise and review it in every way possible if there is any question about its legality. A trail must be left behind.

The chosen scenario should be feasible and credible. This is, of course, in order not to alert the subject about the exercise and to allow the integrity test to be carried out as closely as possible to the nature of the intelligence. It is important to underline once more that this scenario must not amount to entrapment.

In order to respect basic human rights, the test should only run for as long as necessary to obtain the sought evidence. Also, the involvement of third parties and the risk of collateral intrusion must be kept to a minimum.

In respect to civil law systems, as mentioned before, this subject must be handled with extreme care. As the ruling principle of the classical theory of crime is the “juridical value” that must be safe guarded and which lies behind the wording of every provision in the criminal code, if this value is not put in danger then it is impossible to break the law. This means that if the subject does begin to commit the crime by him/her self, the agent cannot entice or provoke him/her. A perfect example would be the case of the public official who asks for a bribe to a victim. The victim then reports him/her to the authorities who in order to obtain enough evidence for a conviction, decide to conduct a controlled

delivery of the payment, with the help of the victim. In this case, the subject has already manifested his intention to commit the crime, and the exercise is only used to collect the evidence necessary to prove this intention.

On the other hand, in a common law system, such as in Britain, it is possible to create a completely artificial environment in order to obtain evidence of a crime. For instance, the Public Prosecutor's Office receives intelligence that a police officer is involved in stealing drug from the scene of the crime and selling it afterwards. A fake search is then staged keeping the details as closely as possible to the intelligence received and to a real search. The officer is then caught in the act of taking the drugs from the scene.

The broadness of the exercise would depend on a teleological analysis of the criminal law system employed in each country. Therein lays the difference between civil and common law in this respect.

An aspect that is impossible to overlook when analyzing the use of electronic surveillance, informants or integrity testing is the concept of witness protection. If we are to rely on the use of informants or whistleblowers we cannot afford to leave them unprotected before, during or after the trial. This is for a number of reasons. The most important is the respect of human life and integrity. Whistleblowers and certain witnesses take an enormous risk by coming forth. They take a risk for themselves and for their families. As the criminal web becomes more intricate and profits become juicier, criminals themselves tend to become more violent when it comes to protecting the lifestyle that they have achieved. People's lives can be threatened. The second reason is to protect the evidence itself and assure that the process will be taken to a successful ending. It is imperative to protect a statement until it can be used in court.

UNCAC itself provides in article 32 the need for the protection of witnesses, experts and victims. It extends that protection to their families, relatives and other people close to them.

At this point, it is important to clarify that now a day the term witness protection is dealt with as witness support, as it has been accepted that witnesses cannot be fully protected. This has a lot to do with the witnesses' own interest in being protected, since

he/she must understand that if they want to be safe they cannot go back to their respective areas or keeping in touch with their old contacts.

The UNCAC suggests several measures that can be taken by the State Parties in order to assure this, always keeping in mind the right to a due process.

The first of these measures is establishing procedures for the physical protection of witnesses and their loved ones. This includes their location and the protection of the information concerning their identities and whereabouts. This, of course, poses a difficult question regarding the defendant's right to a fair trial. During the process, at any time, the defense might need to interview the witness and this right cannot be denied. The defense has the right to conduct direct interviews of the witness and to know their identity during the process in order to prepare their case. The non-disclosure of the witness' identity can only be possible after the trial is over.

A way to palliate this problem is provided on paragraph two, which states that State Parties must provide evidentiary rules that allow witnesses and experts to give testimony in a manner that ensures the safety of such persons, i.e., by the use of communications technology, such as video.

Paragraph three is particularly interesting for countries with small populations where it is hard to conceal a person's identity. It opens the possibility for State Parties to enter into agreements with other states for the relocation of these key witnesses. As we have mentioned before, if crime transcends borders so must we.

In the subject of transcending borders, it also worth remembering that prosecutors today have an important role not only in their national jurisdictions, but may also play a vital part in other jurisdictions when it comes to asset recovery.

UNCAC establishes that mutual legal assistance can be used, apart from the traditional purposes, for the recovery of assets, in accordance with chapter V of the convention. Asset recovery is in fact one of the key principles of this instrument. On article 54, specifically, it refers to the mechanisms for recovery of property through international cooperation in confiscation. The competent authorities of a requested State Party must be able to give effect to an order of confiscation issued by a court of another state party or to order the confiscation itself. This is done through mutual legal assistance requests or letter rogatories.

The convention establishes the need for a central authority to be set up in every country. However, once the request reaches the central authority it is normally handed to a prosecutor for execution. The prosecutor will send the correspondent requests to the judge with the objective of obtaining the pertinent orders. This would be the prosecutor's first role in enforcing foreign judgments in their national jurisdictions.

The mutual legal assistance request is subject to a series of formalities, according to article 15 of UNCAC. It must clearly establish the identity of the authority making the request and the subject matter and nature of the investigation. It should also contain a summary of the relevant facts and a description of the assistance sought. It must also mention the identity of the people involved. Finally, it should establish the purpose for which the information will be used. The letter of request must be sent in a language acceptable to the authorities of the requested party. The lack of any of these requirements is reason enough to refuse assistance.

The Abacha case is a perfect example of what can be achieved in terms of asset recovery, although it was prior to UNCAC. General Sani Abacha was the military dictator of Nigeria from November 17th 1993, to June 10th 1998, when he died suddenly of a heart attack. After his death, General Abdulsalami Abubakar was appointed head of state and he was responsible of re establishing democracy in Nigeria, arranging for general elections that resulted in Olusegun Obasanjo assuming the presidency as the democratically elected leader of the country, in 1999. According to post Abacha government sources, approximately four billion dollars in foreign assets had been traced to Abacha, his family and representatives. These moneys were said to have been sent to Switzerland and other financial centers. For this reason, Abubakar's government had delivered a clear message to the Abacha clan in the sense that all the moneys that he had looted must be restored to the Nigerian Government.

Aiming to recover these assets, on September 30th, 1999 the government of Nigeria asked Switzerland for mutual legal assistance concerning Sani Abacha and his entourage. A couple of weeks later, on October 13th, the Swiss Federal Department of Justice and Police ordered the blocking of the Abacha accounts. It wasn't until a year later, on September 2000, when the Swiss Federal banking Commission (SFBC) made available the results of an investigation involving 19 banks which had accepted an

approximate total of six hundred million dollars on behalf of Abacha's entourage. As a consequence, the SFBC publicly blamed six of these banks for not handling their customer relationship with the necessary diligence.

By October 2001 the government of the United Kingdom agreed to help Nigeria to trace Abacha's funds, with the approval of the High Court.

On 16 April 2002 an out of court settlement between the Nigerian government and the accused in the Abacha case is announced. The settlement requested one billion dollars blocked in countries such as the UK, Luxemburg, Liechtenstein and Jersey, to be transferred to the Bank for International Settlements in favor of the government of Nigeria. Switzerland alone was to transfer USD \$535 million, which was approved by the attorney general of Geneva. However, on September 19th that same year, the late dictator's son, Mohammed Abacha, rejected the agreement, maintaining that the assets had been legitimately acquired.

Since mutual legal assistance procedures were resumed, on April 23rd, 2003 the Swiss Federal Supreme Court declared that legal assistance could be granted to Nigeria, but the handover of documents was subject to the assurance of trial related guarantees be given to subjects still living in Nigeria.

On October 2003 President Obasanjo announced that an agreement had been reached where Switzerland would repatriate USD \$618 million frozen in Switzerland against assurances from Nigeria that the returned funds would be devoted to improving education, health, agriculture and infrastructure. By December 2003 two hundred million dollars found in Switzerland had been transferred to Nigeria, Britain had returned six million dollars and Jersey had returned USD \$160 million.

There was a new turn of events on March 2004, as the Swiss Federal Office of Justice declared that most of the assets were subject to independent criminal procedures due to money laundering in Geneva. According to the Swiss Anti Money Laundering Act of 1997, RS 955.0, art.9, assets may be returned on the basis of a legal enforceable seizure order from the applicant state. In exceptional cases, when the assets frozen are of a criminal origin, they could even be returned without such order. Since the Abacha money was clearly of illicit origin, the Federal Office of Justice ordered the transfer of these assets to the Bank of International Settlements in favor of the Nigerian government.

Based on the above, on February 7th 2005, the Swiss Supreme Court confirmed the final decision that a substantial part (USD \$458 million) of the money frozen in Switzerland is clearly of criminal origin and could be handed to Nigeria without a confiscation order from them. Finally, on May 27th 2005 Switzerland announced the restitution of USD \$460 million to Nigeria. Approximately three weeks later, on April 15th 2005, Abacha's son was extradited to Switzerland.

This is just an example of how Public Prosecutors are able to make use of foreign judgments in order to trace and recover proceeds of crime. UNCAC aims to simplify the process that the Nigerian government had to go through to recuperate Abacha's ill gotten moneys. Mutual Legal Assistance requests are a key to achieving this goal.

These are only a few examples that illustrate how the Public Prosecutor's role has intensely evolved in the last decade in order to cope with the way criminal activity has incorporated technology. The challenge is to stay one step ahead of delinquency and for that it is vital to be flexible, creative, and reinvent our work on a daily basis.