**MEMORANDUM**

To: Chris Stone and OSF Strategy Unit

CC: Jim Goldston, Rob Varenik

From: Ken Hurwitz, Erica Razook, Stephanie Yung

Subject: Anticorruption Program Portfolio Review Summary and Outcomes

Date: March 11, 2014

The Anticorruption Program portfolio review with Chris Stone, the first presidential-level portfolio review relating to work of the Justice Initiative, was held on February 28, 2014.[[1]](#footnote-1) Chris described the purpose of the review as being to check in on one aspect (Anticorruption) of the Justice Initiative strategy and consider i) what has exceeded our expectations; ii) what remains frustrating, but to which the Program remains committed because of a conviction that it will prove valuable in time; and iii) what should be reconsidered. As this was also the first portfolio review of a program that is not primarily grant-making program, questions regarding the role, identity and voice of advocate are particularly critical to the considerations.

The Program was conceived in 2006-7 with the aim of increasing global law enforcement’s ability and political will to hold accountable perpetrators and facilitators of resource-related grand corruption. The exemplary use of strategic litigation – developing and bringing cases – was to be the main tool, serving this objective by demonstrating that accountability for these kinds of crimes is possible, and that national level law enforcement with jurisdiction over such crimes has the duty and can muster the capacity to prosecute such conduct. In addition, the Program also sought to help establish and strengthen the legal, cultural and political “environment” that cases seeking accountability for high-level natural resource-related corruption require. The portfolio review covered both strands of the Program’s work, currently comprising the concept “Grand Corruption Strategic Litigation” and the fealty “Anticorruption - Building the Field” – loosely corresponding to the division between strategic litigation and supporting advocacy activities.

The portfolio review was an opportunity to examine the strategic focus and makeup of the anticorruption work thus far. Though litigation remains the core of our work, we have come increasingly to recognize, through our case development experience as well as input from colleagues inside and outside of OSF, the equal need to link up our litigations (which have generally been brought in developed country financial centers) to actors in communities most directly affected by the corruption in the places from which the cases arise (to date, mainly sub-Saharan African countries).

Among the questions the Program sought to address during the review were:

* The Justice Initiative has seen itself as uniquely situated to engage in the difficult work of seeking legal accountability for grand corruption. Does this still hold true and need it be modified?
* Is the effort to prosecute kleptocrats and their partners the most effective way to address the problems of grand corruption? Should the Program consider addressing a culture of rampant corruption through bottom-up, largely non-litigational measures?
* Is there a better balance between bringing cases in developed country jurisdictions and in-country cases? Should the Program focus on in-country cases, perhaps targeting lower level officials and accomplices, even where judicial independence is weak?

Chris asked about the Justice Initiative’s case selection criteria, and, in particular, whether, with hindsight, “winnability” was a correct criterion to use. Ken explained that the process of finding cases involves identifying fact patterns that must satisfy numerous conditions (legal and other) even before the Program is in the position to consider “choosing” a case. The Program sees the “winnability” factor as appraising the likelihood that a prosecutor will accept a case: given the challenging nature of our cases, “winnability” may be better described as “survivability” or “triability”.

The countries chosen to date (Democratic Republic of the Congo, Equatorial Guinea, Angola) have been good ones, with our cases telling stark stories of corruption. With regard to the Angola-Russia debt deal case, and the apparent absence of political will to pursue the matter in Switzerland, we are still digesting the impact, future opportunities, and lessons to be learned. The Program was aware of political sensitivities going into the case, but there may have been more at play than we (or our Swiss partners) appreciated. This case may also illustrate the problem of kleptocrats defining kleptocracy as legal – when a corruption system is big enough and deeply enough rooted, high-level corrupt officials can create a legal regime that purports to make their corrupt activities legal and legitimate. The Program sees value in forcing discussion on this issue and, relatedly, in publicly disseminating documentation that shows concretely what the mechanics of corruption look like.

Chris noted the two distinct targets or constituencies the Program has engaged with in its “building the field” work: one, a technically focused audience of legal experts (law enforcement, prosecutors), and the other, including more popular or political interests. He questioned whether the Program engaged the right individuals and used the right tools of engagement. Chris also noted an apparent imbalance in the elements of the portfolio, which lists relatively few litigation elements, with the bulk of the portfolio materials being public communications and advocacy, and he asked whether this disproportion matched with the Program’s strategic aims. Ken responded that the Program remains committed to national prosecutors (and the people/bodies that influence national prosecutors) as our priority target, which is reflected in the portfolio narrative which is mostly devoted to the development and assessment of our litigation efforts. We have, however, also increasingly been assessing our work from the perspective of what we do outside the litigation activities proper that impact *on* our cases, on the one hand, and, on the other, looking at the impact *of* our cases on the world. We seek to induce prosecutors to pursue the cases we and/or other civil society actors bring (and other similar cases initiated by law enforcement), and want to help establish and strengthen a political environment which is supportive to such cases: that is, we want to do advocacy and communications that favorably impact *on* the cases. At the same time, we want to ensure as best we can that the impact *of* our cases is to support and strengthen affected communities in their efforts to achieve meaningful change. Moreover, the litigations themselves are inevitably slow processes, so much of our advocacy work will be to promote the important and relevant policy issues the cases illustrate, even when litigation activities stall. Elias added that with regard to the Angola-Russia debt deal project, the impact of the case and accompanying report, which was distributed in Portuguese in Angola, was palpable – he attributes the government’s approval of a law against money laundering in part to advocacy efforts fed by this work.

Chris emphasized that his understanding was that the Program was not established simply to produce the kind of detailed investigation and vivid reporting that groups like Global Witness do. Ken replied that the reports differ from the more ‘journalistic’ reporting of groups like Global Witness in their effort to outline the legal analysis and in their association with the litigation. They are not just saying “this is bad; someone should do something about it.” They are saying “This is bad, in this way, as a legal matter. And we are trying to do something about it though use of the law.”

Chris closed this part of the portfolio review by re-stating the goal of the anticorruption work: “to change the perceived general impunity for crimes of high-level corruption.” The way to do this is by pursuing the hard difficult cases others cannot pursue, in order to create powerful examples of corrupt actors being held accountable in the legal system and to show the law as an effective agency for accountability and punishment. Achieving this will be a long term process, which is expected, though there should be periodic check-ins to ensure we are on track to achieve our goal and are not distracted by ancillary benefits.

During the open discussion, Chris highlighted, when pursuing strategic litigation, the importance (as one case-selection criterion) of the “vividness” of a wrong perpetrated. The Program felt that often, the facts of a case and stories of the case are quite vivid, but when attempting to translate these into legal facts for dossiers, there is a disconnect. Chris clarified that vividness speaks to the relationship between an image and its intended audience. (Effective images of the impact of global warming when addressing people on the Florida coast will be different from those to be used when addressing people in the Arctic region.)

Elias was asked to clarify the “on the ground” effects of the Angola-Russia debt deal report and case to date– whether any of the recommendations in the report had been taken on and whether the Swiss case and litigational activities had resonance in Angola. Elias said the case filed in Switzerland did generate interest and that our partner in Luanda, Mãos Livres, filed a complaint in Angola concurrent with the Swiss *dénonciation*. The coordination of the cases has been important: when there are developments in Geneva, public statements are issued in Luanda. The report’s recommendations to Angola have not been yet achieved, but the Angolan opposition does try to table the issues – capacity is weak, and political will largely absent, but Mãos Livres, our local partners, continue to advocate on them and the approval of the anti-money laundering law is significant.

Reflecting on the portfolio review discussion, Chris raised the question whether the goals and/or strategy of the Program needed to be adjusted to be more effective, and opined that he was persuaded that the goal and structure of the work is right and we should maintain our focus, that we had decided correctly that we should be aimed at moving the big cases where the filings make sense. He concluded that no major changes to the strategy were needed. Jim does think there is an on-going need periodically to evaluate the Justice Initiative’s investment in anticorruption work, and he also suggested we consider potential synergies from linking the anticorruption work to complementarity work. Lessons learned in how we pursue strategic litigation should also be shared.

Muthoni said one important point about added value that emerged from the discussion is the difference between documentation and evidence that can bear up in court. She feels quite extensively engaged with the team on this particular issue and said that her role in joining the discussion was to see how the portfolio review process will or will not help discussions the team is having about impact (of the cases on affected communities) and how, in the drive for impact, the team may have strayed from its goals. Many of the inputs and lessons learned from the last year have been integrated and the team has made a conscious effort to deliberate on its work.

Over the coming year, the Program hopes to build understanding of crucial links between corruption and human rights. There are many conversations that are already happening within OSF on the issue of anticorruption and this is a critical time for the Program to both trigger discussions (which aligns well with the aims of the Legal Remedies project) as well as to listen and build relationships to discover what our partners and colleagues need and how we can assist. The anticorruption team aims to align the Program’s case work more closely with the anticorruption and similarly-focused work of our African colleagues and partners – both physically, through Erica’s contemplated secondment on the continent, and philosophically, through engaged discussions. Conversation and coordination on anticorruption work within the African foundations, AfRO, and the relevant network programs (including the Justice Initiative’s Anticorruption Program) began in earnest two years ago at the Cape Town meeting and since then, much progress has been made and many lessons learned. The current institutional climate – with enhanced priority to coordination and collaboration among foundation and network entities within OSF, and intensified review of OSF strategies – provides opportunity for increasing the coherence and effectiveness of the Program’s case-building work. The Program stressed, however, that there remains much learning to be done, and that a significant part of the coming year would be devoted to listening to colleagues in the African foundations and related Programs, and their partners.

Chris acknowledged that this work involves a long-term strategy and that the goals should not be changed or abandoned at this point. He affirmed the Program’s strategic litigation focus and choice of jurisdictions and warned against moving cases to places politically or otherwise incapable of bringing about justice. “Large” often complex transnational cases are more likely to generate the momentum for change that we seek, and also represent the kind of work that sets the Justice Initiative apart from most grantees and underlies the choice to fund this work though it rather than by making grants to the field. He also agreed that it would be wise for the Justice Initiative to build closer relationships with the regional foundations and determine the appropriate division of labor and linkages between the strategic litigation by the Justice Initiative and the grant-making by regional foundations. On-going learning with and from each other will be crucial to maximizing effectiveness and potentially replicating good practices.

1. **In person participants:** Chris Stone (President, OSF – moderator), Jim Goldston (Director, OSJI), Rob Varenik (Director of Programs, OSJI), Ken Hurwitz (Senior Legal Officer, OSJI Anticorruption), Erica Razook (Legal Officer, OSJI Anticorruption), Stephanie Yung (Program Coordinator, OSJI Anticorruption), Dan Sershen (Associate Director, Strategy Unit), Daphne Panayotatos (Program Coordinator, Strategy Unit), Matthew Craig (Presidential Fellow), Caitlin Pierce (Presidential Fellow)

   **Phone participants:** Elias Isaac (Angola Country Director, OSISA), Muthoni Wanyeki (Board Chair, OSJI).

   **Video conference and phone observers:** Rupert Skilbeck (Litigation Director, OSJI), Erika Dailey (Senior Officer for Research, OSJI), Sandy Coliver (Senior Legal Officer, OSJI FOIE), Jonathan Horowitz (Legal Officer, OSJI National Security and Counterterrorism), Maxwell Kadiri (Legal Officer, OSJI), Betsy Apple (Policy Officer, OSJI), Jessica Scholes (Litigation Fellow, OSJI), Amrit Singh (Senior Legal Officer, OSJI National Security & Counterterrorism), Jonathan Birchall (Senior Officer for Communications and Publications, OSJI), Emi MacLean (Legal Officer, OSJI FOIE). [↑](#footnote-ref-1)