CENTRO DE INTEGRIDADE PÚBLICA

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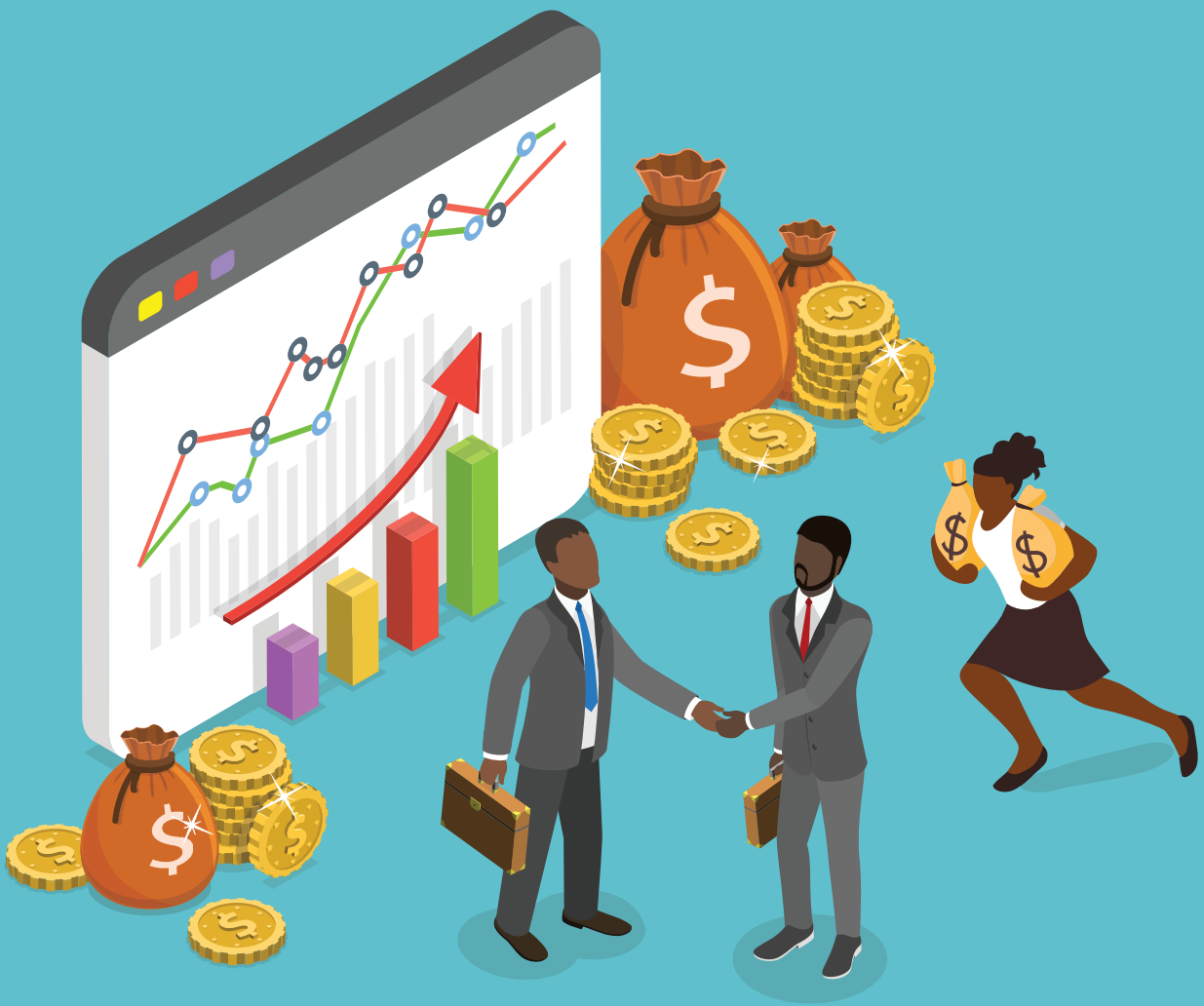
RECOVERY OF ASSETS



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CHAPTER I

The "Hidden Debt" Scandal and the UN Convention Against Corruption:Options Available to Mozambique to Recover Stolen Assets and Damages

RICHARD MESSICK

INTRODUCTION

Mozambique has sustained enormous damage thanks to the "hidden debt" scandal. The revelation the government guaranteed $2.2 billion in loans for questionable projects led donors to freeze disbursements, slowing growth and increasing poverty. Those responsible for the hidden debt scheme should compensate Mozambique for the harm their fraudulent, corrupt dealings caused. The nation's best to chance to recover damages is through judicial proceedings: in its own courts or in those of other nations with jurisdiction over the wrongdoers.

Mozambique is a party to the United Nations Convention Against Corruption. It contains several provisions to facilitate government suits for damages caused by corruption. This paper explains what they are and examines the questions Mozambique should explore in deciding how best to secure a just, timely resolution of its claims.

The analysis is based on what has been disclosed about the hidden debt scheme. These disclosures allege the following individuals and corporations bear principal responsibility for it:

- Privinvest, a shipbuilding company headquartered in Lebanon with operations in France, the United Arab Emirates, and the United Kingdom;
- Jean Boustani, a Lebanese citizen and senior Privinvest executive now in custody in the United States in connection with the hidden debt scheme;
- Swiss banking giant Credit Suisse, whose London branch originated several of the loans;
- three now former CS employees located in the United Kingdom, two of whom are fighting extradition to the United States to answer charges arising from the scheme and one, Detelina Subeva, who pled guilty to one of the charges May 20;
- VTB, a Russian state-owned bank; and
- Manuel Chang, former Minister of Finance, and several other Mozambican officials now in custody or under charge in Mozambique for their role in the scheme.

To illustrate the options available to Mozambique to obtain compensation, this paper will assume the allegations against each are true. This assumption is made purely for discussion purposes and is not to be taken as any belief, claim or assertion that any of these individuals or corporations in fact committed any act of wrongdoing. That can only be established through a judicial proceeding

Under Mozambican law, civil suits for damages or criminal actions with associated damage claims could be brought against these individuals and corporations. Their involvement in the scheme creates a sufficient nexus or tie to Mozambique to require them to appear and defend themselves in a Mozambican court.

It would make sense to file a proceeding against Chang and the other Mozambicans involved in Mozambique. As citizens of Mozambique who are physically present in the country, there is no question Mozambican courts have jurisdiction over them. Moreover, some if not all of their assets are likely located in Mozambique making their confiscation upon defendants' conviction straightforward.

There are drawbacks to seeking judicial relief in Mozambique against the non-Mozambicans: Boustani, the Credit Suisse employees, Privinvest, Credit Suisse, and VTB. One or more of them might refuse to submit to the jurisdiction of the Mozambican courts. They could either mount a long, costly challenge to the courts' jurisdiction or simply ignore any order to appear.

Were a Mozambican court to find an absent defendant liable and award damages, the award would have to be enforced in the courts of another country, either where the defendant was located, or where his or her assets were located. Defendants would certainly challenge the validity of any Mozambican judgement, likely requiring the case be retried from scratch in the courts of the country where the assets are held. That would be a time-consuming and expensive process.

There is too the chance that home-country bias or protectionism might affect the outcome of a proceeding brought to enforce the damage award. That Mozambique's judicial system does not score well on various international measures of quality could provide a foreign court with a convenient excuse for declining to enforce a damage award it had issued.

CIVIL SUITS FOR DAMAGES UNDER UNCAC ARTICLE 53 (a)

One alternative to securing a judgment in Mozambique and then seeking its enforcement in a defendant's home country would be to rely upon Article 53(a) of UNCAC. It requires Convention parties to grant other parties the right to file a civil action in their courts to recover assets acquired and damages suffered from offences defined in the Convention. The Mozambican government could thus file a lawsuit for damages in any country whose domestic law provides for jurisdiction over one or more of the scheme's perpetrators. The

domestic laws of other parties will vary on which of the alleged defendants can be sued in their courts. In some, it will be enough that the defendant is present in the country; in others, jurisdiction may be asserted only if a part of the fraud was committed in the country.

Based on what is known about the hidden debt scheme, France, Lebanon, the Netherlands, Switzerland, the United Kingdom, and the United States are countries where a civil suit against one or more of those allegedly involved in the scheme would be possible. France because that is where the Privinvest plant where the tuna boats and naval craft funded by the loans were built is located. Lebanon because Boustani is a Lebanese citizen and Privinvest is apparently headquartered there. The Netherlands because the bonds that refinanced one of the original loans were issued there. Switzerland because Credit Suisse is headquartered there. The United Kingdom because the London branch of Credit Suisse processed the loan, and the United States because the scheme violated its law against bribing an official of a foreign government.

Mozambique is not limited to suing in one country. Suit could be brought in all six countries or in several, and each could name whatever perpetrators are subject to suit in the country. In some countries, jurisdiction over all potential defendants might be lie whereas in others only some of the potential defendants could be sued. The feasibility of suit in each country and against each individual or firm will need to be examined. What are the chances of success? How long would a proceeding take? Does the law governing damages allow compensation for the types of harm Mozambique suffered? How much would it cost to bring a case? Could private attorneys be hired for little or no immediate payment in return for a share of what is recovered? Has the time limit for bringing a case (the statute of limitations) expired?

One country where Mozambique may find it advantageous to sue is the United Kingdom. In 2005 the Government of Zambia brought a civil suit in the United Kingdom against its former president and his accomplices for fraudulent and corrupt actions that had cost the citizens of Zambia millions of dollars. Many of the transactions had occurred in the United Kingdom, and Chiluba and accomplices had significant assets in the United Kingdom. While Chiluba and other Zambian defendants argued they were not required to appear and answer the Zambian government's claims, the London High Court rejected the arguments, proceeded with the case, and ordered Chiluba and two other Zambian defendants to pay the government $47 million.

The Zambian case established an important precedent in the United Kingdom which other governments have followed. Libya brought a civil suit in U.K. courts against a son of deposed dictator Muammar Gaddafi and was awarded title to a $13 million London property he owned. Nigeria recovered just over $17 million from a former state governor he had stolen through corruption, and Nigeria is currently seeking damages from several individuals and

entities for damages arising from corrupt and fraudulent acts in the award of a petroleum concession. Assuming the information about the hidden debt scandal appearing in press accounts and court filings is correct, several of those involved, notably Credit Suisse, would be amenable to suit in the United Kingdom.

The United States is a second country where a suit against at least some defendants may be advantageous. In 2012, the Bahrain government-owned company Alba brought suit in federal court against Alcoa Aluminum and other defendants for bribing its employees. Alba alleged that the bribe-taking employees had conspired with Alcoa and other defendant bribe-payers to have the company pay above-market prices for their products. Rather than risk an even greater loss at trial, defendants settled before trial for $85 million. In a 2004, the Government of Trinidad and Tobago sued in Florida state court against several firms for bribery and bid rigging in the construction of a new airport for the government. As in the Alba case, defendants opted to settle rather than go to trial.

COMPENSATION UNDER UNCAC ARTICLE 53 (b)

Article 53(b) of UNCAC offers a second way Mozambique could recover damages from one or more of those complicit in the hidden debt scheme. It requires all Convention parties have procedures in place that allow its courts to order those who have committed a corruption offence "to pay compensation or damages to another State Party that has been harmed by such offense." These victim compensation procedures are typically part of the penal code and require prosecutors to ensure a crime victim is compensated for the harm suffered from the offense or give the victim an opportunity to assert a claim for damages at the criminal trial. Indeed, such a provision is found in chapter 2 of Mozambique's penal code.

There are several advantages to invoking article 53(b). The expense of bringing a criminal case is born by the state where defendant is prosecuted. Further, criminal actions often are resolved faster than civil suits, and in a criminal prosecution the state has powers to compel testimony and the production of documents not available to parties in a civil case thus ensuring all the facts are disclosed. Moreover, the injured state party can obtain compensation without having to hire counsel or incur the other expenses associated with a civil suit.

At the same time, relying on article 53(b) would not preclude a civil suit. In fact, in some countries the evidence used to convict a defendant in a criminal case can be used in a civil suit for damages.

For Mozambique the most significant opportunity for immediate recovery is the criminal case in the United States against Boustani, the three Credit Suisse employees, and other alleged perpetrators of the scheme. Under the Mandatory Victim Restitution Act statute, a

defendant in U.S. federal court who is either found guilty or who pleads guilty to a criminal offence must compensate any individual or entity "directly harmed" by the offence. Both the Governments of Haiti and Thailand have been compensated under this provision. In both cases the defendants were found guilty of conspiring to bribe employees of the two governments, and in both the courts ruled the two were "directly harmed" by the bribery and ordered compensation.

The U.S. case alleges the three Credit Suisse employees conspired to bribe Mozambique officials. While Subeva has pled guilty to money laundering in return for the government dropping the bribery and other charges, the bribery charge against the other two remains. If they are convicted or plead guilty to the charge, on the authority of the Thai and Haitian cases Mozambique would be entitled to recover damages.

Prosecutors are required to make "their best efforts" to contact the victims of any crime they are prosecuting, but the Justice Department also encourages victims to contact the individual prosecutor handling their case to ensure their claim for damages is not overlooked. The lead prosecutor in the U.S. case is Mark E. Bini. Subeva's recent plea could mean the case will end soon, and Mozambique would be well advised to immediately contact Bini to ensure he understands the extent and nature of the damage Mozambique suffered so that he can present it to the court when appropriate. He can also advise Mozambique of the resources available to help it frame its claim.

While U.S. law affords a crime victim the right only to claim damages once a judgment has been entered, many countries afford them more rights. Depending on the country, these rights include the right to demand a criminal investigation be opened, to participate in the investigation, and even to be a party to the trial. Four countries with such laws are France, Lebanon, the Netherlands, and Switzerland. All have "civil party" provisions in their criminal codes.

In Lebanon, article 7 of the Penal Code allows a crime victim to recover damages from the defendant and to initiate a prosecution if the prosecutor has yet to bring one ("peut mettre en mouvement l'action publique, si cette action n'est pas déclenchée par le ministère public"). In France, not only can the direct victim of the crime demand an investigation and participate in the proceeding, certain non-governmental organizations have these rights as well. In a precedent-setting case in 2010 France's highest court, the Cour de Cassation, ruled that Transparency International France could demand a corruption investigation be opened and participate as a civil party. It reasoned that:

> "[T]he prevention and fight against corruption, within the meaning of the United Nations Convention against Corruption, ratified by France, constitutes a specific objective that must be borne not only by States but also by the support and participation of non-governmental organizations, which must be translated into

national law with the possibility for legally established associations having such a purpose to become civil parties in proceedings involving the offenses enumerated by this Convention."

Article 118 of the Swiss Criminal Procedure Code gives crime victims the right to participate as a private claimant ("partie plaignante") in the prosecution of a criminal defendant and recover damages if the defendant is convicted. Both the governments of Tunisia and Nigeria have been accorded this status in investigations into corruption by former of officials of their governments. The Netherland also has provisions that would allow Mozambique to be a civil party in a criminal case.

OTHER UNCAC PROVISIONS

Articles 53(a) and 53(b) are not the only UNCAC tools available to Mozambique to help in the recovery of damages suffered from the hidden debt scandal. Where a Mozambique court has issued an order to seize an asset obtained through corruption and that asset is located in another Convention party, article 57 (3) requires the requested party to submit the order to its courts. If its courts give judicial effect to the order, the requested party must return the asset to Mozambique.

Article 57 (3) can be an important complement to recovery under article 53. One example is Nigeria's reliance on it to secure the return of funds stolen by a former state governor. Nigeria obtained a judgement against the former governor in a U.K. civil action. In 2008, Cyprus courts recognized this U.K. judgment and ordered the return to Nigeria of $1.3 million the ex-governor had deposited in a Cyprus bank.

On the other hand, as explained above, this provision can be problematic if the owner of the asset challenges the validity of the Mozambique court order in the requested party's courts. Foreign courts can be reluctant to recognize orders from another nation's court depriving one of their nationals of property. A challenge will be less likely, and less likely to succeed, where the asset belongs to a Mozambican official who has been convicted in Mozambican court of corruption.

A second provision of article 57 (3) Mozambique should take notice of is found in paragraph 3(b). It contemplates the return of assets resulting from a damage award for corruption if the law of the party where the assets are located, the requested party, "recognizes damage" to the requesting State "as a basis for returning the confiscated property." As the Legislative Guide to the Convention explains, this provision was meant to cover cases such as bribery of the requesting party's employee, where the requesting party has been damaged but does not have legal title to the bribe proceeds. Depending upon the requested state party's laws, it might be extended to cover straight out compensation awards. While this offers an additional avenue to recover money, Mozambique would be well-advised to consult with

any state where such a recovery is planned far in advance of proceeding with such a case.

CONCLUSION

Those responsible for the hidden debt scandal should be made to compensate Mozambique for the losses it caused. Those losses include not only what is currently owed to those who lent money to Mozambique, but those caused by the halt in donors' disbursements and the slowdown in growth when the scandal was uncovered. While the judicial process can be cumbersome and slow, fortunately Mozambique is a party to the UN Convention Against Corruption, and the Convention has done much to facilitate the recovery of damages for corruption. Mozambique should take advantage of its provisions to see citizens are made whole for the losses they have suffered from the scandal.

CHAPTER II

Linking asset and damage recovery to not paying the $2 bn odious secret debt

JOSEPH HANLON

INTRODUCTION

Mozambique's $2 bn secret debt was facilitated by bribery and misconduct. Mozambican officials received bribes and bought cars, houses and other equipment. A first step is to confiscate those ill-gotten gains, because no one should benefit from misconduct. Second, the secret debt has caused huge damage: reduced aid and devaluation of the Metical caused an economic crisis which has hit all Mozambicans. Who will pay the costs of that damage? But at the heart of this discussion is a deeper question - must Mozambique pay this $2 bn debt, or is it the responsibility of the corruptors - the global banks Credit Suisse and VTB and the company that actually receive the money, Privinvest.

In this paper we argue that the issues are intimately linked. Asset recovery processes will reveal more information about criminal actions, which in turn will provide evidence showing why the loans should not be paid. And action to declare the loans illegal will provide more evidence for asset and damage recovery.

We start with the history of the loans and their origin not in the needs of Mozambique, but in "loan pushing"[1] by global banks and a major ship-building company. Next we try to unravel the complex package of three different loans. Then we show how the loans are illegal. Only then do we look at asset recovery - taking away assets obtained by bribery. We look briefly at damages and ask who is responsible. Finally, we show how the link between the loans and asset and damage recovery is transparency and exposure of information. Is it possible to challenge people in senior positions who want to enjoy their ill-gotten gains and make the Mozambican people repay the illegal loans?

1. LOAN PUSHING AND EASY MONEY

Mozambique's secret debt is not unique. Over more than two centuries, there have been periods in which there was excess liquidity in the global economy, and banks were under pressure to lend, and they promoted loans to developing countries which the countries did not need. This "loan pushing" occurred in the 1830s (when the United States was a developing country; loans to the state of Mississippi were never repaid), 1870s, 1920s, and 1970s. Sometimes this involved incentives to the borrowing country - not all legal.

1 William A. Darity and Bobbie L. Horn, 1988, The loan pushers: the role of commercial banks in the international debt crisis, Ballinger Pub. Co.

The 1970s lending led to a global debt crisis in the 1990s which triggered the Jubilee 2000 campaign to cancel poor country debt and in 1999 the World Bank's Heavily Indebted Poor Countries (HIPC) Initiative, which eventually cancelled debt in 36 countries, including Mozambique. It also led to rethinking about debt. HIPC was about debt "forgiveness". But the Jubilee 2000 campaign argued that some debt should be cancelled because it was improper -- that banks and multilateral agencies made loans which did not promote development and could not be repaid, often to dictators which backed one side in the Cold War. There was a "moral hazard" that countries were being forced to repay and thus banks could lend to poor countries without worrying about whether loan was wise or useful, which led to loan pushing. There is a need to balance responsibility, and make lenders liable for improper loans.

Two terms are now increasingly used interchangeably. We can consider "that a loan is 'illegitimate' if it would be against national law; is unfair, improper, or objectionable; or infringes public policy."[2] The other is to extend the much older concept of an "odious debt", which is the liability of the lender and not the borrower. A 2019 study argues that a debt is "odious" if "the lender knew or should have known that the debt had not received the general consent of the people and the borrowed funds were contracted and spent contrary to their interests." Three requirements for odiousness are: absence of consent, absence of benefit to the population, and creditor awareness of the facts.[3] We will argue that the secret debt meets these criteria.

Unfortunately, the lessons of past debt crises and loan pushing were not learned. The response to the 2008 global economic crisis was called "quantitative easing" - giving huge amounts of new money to the banks, which they had to lend. This led to a new wave of loan pushing by some of the world's biggest banks.

The ship-building and maintenance company Privinvest teamed up with one of the biggest banks, Credit Suisse, to try to sell coastal protection projects in Africa. Nigeria, Angola, and other coastal states rejected the proposal. But in 2010 one of the largest gasfields in Africa was discovered off the coast of Cabo Delgado. So the loans pushers convinced Mozambican leaders that money from the gas would pay off the loans.

The loan was unusual in two respects. First the lenders said it should be secret, and not even the IMF should be told (because the loan was so large for Mozambique that the IMF would not have approved). Second, all of the money (after large commissions for the bank were deducted) was given, up front, to Privinvest. A later forensic audit by Kroll noted that this was highly unusual - first paying all the money to Privinvest meant Mozambique had no money for its own costs on the project, and second, normally payment is made in tranches when equipment and projects are delivered. Paying all to Privinvest at the start means there is no incentive for Privinvest to do a good job. But as a US indictment in December 2018

2 Joseph Hanlon (2000), How much debt should be cancelled? Journal of International Development 12: 877; and Joseph Hanlon (2006) Defining "Illegitimate Debt": When Creditors Should be Liable for Improper Loans, in Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis, Chris Jochnick and Fraser A. Preston, Oxford University Press, 2006

3 Margot E. Salomon and Robert Howse, Odious Debt, Adverse Creditors and the Democratic Ideal, in Ilias Bantekas and Cephas Lumina (eds) Sovereign Debt and Human Rights, Oxford University Press, 2019.

alleged, at least $200 million in bribes were paid - to Mozambican, Privinvest and Credit Suisse staff.

In order to keep the whole matter secret, the loans were made to three new private companies, totally owned by the Mozambican government, and controlled by the security services, SISE.

Initially the hope was to raise $3 billion, but this proved unexpectedly difficult, even in a loan pushing era. The loan was being pushed by Credit Suisse (CS) in London. It intended to raise the money from other lenders, such as hedge funds, in what is known as a syndicated loan. But even CS's regular partners found the loans dubious and CS could not raise the money, so it drew in VTB, a Russian state bank said to be close to President Vladimir Putin. Both were based in London. Even then, there were not enough willing lenders, so they decided to also issue bonds. The total raised was $2 bn. Syndicated loans are secret, but bonds are public. This meant that from 2013 to 2016, part of the "secret debt" became known, while the rest remained secret. (See table 1).

Table 1 - 3 different loans

	Proindicus	MAM	Ematum
2011-3	$622 mn	$535 mn	$850 mn
	Credit Suisse (504 mn) & VTB ($118 mn)	VTB	Credit Suisse ($600 mn) & VTB ($350 mn)
	Syndicated loan	Syndicated Loan	Bond
	Secret	Secret	Public
2014			Agree with IMF to make part military
2016			Nationalized
	No longer secret	No longer secret	
2018-9	Bankrupt	Renegotiating	Renegotiating

The IMF and donors did, indeed, object to the bonds but a settlement was negotiated (discussed below). Until 2016, the $1157 mn syndicated loans remained officially secret, but rumours circulated in the international financial community. IMF officials and ambassadors began to ask questions of Mozambican ministers, who continued to assure them that there were no secret debts, only the Ematum bonds. When the secret loans were finally revealed

in 2016, there was a huge backlash, in part because ambassadors and even IMF Director Christine Lagarde were personally offended, because they had been lied to by Mozambican ministers. Budget support and all other aid directly to government, as well as an IMF loan, were immediately cut; donors and the IMF demanded a full and public forensic audit. An audit was conducted by Kroll Associates; it was only partial and never formally published.

2. SUCH BIG SECRETS CANNOT BE KEPT SECRET

Ematum was supposed a be a tuna fishing company and the $850 mn bonds were officially for fishing boats. Indeed Mozambique President Armando Guebuza, French President François Hollande and shipyard owner (and owner of Privinvest) Iskandar Safa held a very public launch of the boats on 29 September 2013 at the Cherbourg, France, shipyard.

But it was obvious that the boats were not worth that much money, and some coastal patrol boats were also delivered. (None of the boats was ever used.) The government, never admitting the existence of the other loans, negotiated with the IMF that only $350 mn of the loan would stay with Ematum, and $500 mn would go onto the Defence Ministry budget. Even though the bonds had been sold by Credit Suisse as civilian expenditure related to national development, it was quickly admitted that most of the money was military. The government refused to give Kroll any information about the use of that $500 mn and it is unclear how the money was used. Since then, Mozambique has been accused of North Korea sanctions breaking[4], probably importing spare parts for Soviet-era weapons. Did some of this money go, indirectly, to North Korea? Obviously, no one will say. But the total blackout on information on one-quarter of the debt remains.

The bonds had been issued and the boats purchased without parliamentary approval. By 2016, it became obvious that Ematum was catching no tuna and could not make its bond payments. Government went to parliament and asked that the debt to the private company Ematum be nationalized. At this point the syndicated loans were still secret, and parliament in March 2016 agreed that new government bonds would be issued to replace the one issued by the private (but state-owned) company. However, the Wall Street Journal in April 2016 discovered that buried in the details of the new bond document was an admission of another $1157 mn in secret debt. Government ministers had to admit they had been lying to ambassadors and the IMF for three years. Aid cuts, economic crisis and the Kroll audit followed.

It soon became obvious that the economic crisis meant that the government could not pay either the syndicated loans or the new bonds. In 2018 government opened a negotiation with bondholders to issue long term bonds to be paid over 15 years, and promised bondholders 5% of the government's revenues from the Rovuma Basin gas projects, up to a maximum of

4 David Albright et al, Countries Involved in Violating UNSC Resolutions on North Korea, Institute for Sciene and International Security, 5 December 2017 https://isis-online.org/uploads/isis-reports/documents/Countries_Involved_in_Violating_NK_UNSC_Resolutions_5Dec2017_Final.pdf

$500 million.

A letter to the International Monetary Fund, signed by finance minister Adriano Maleiane and the governor of the Bank of Mozambique, Rogerio Zandamela, on 10 April 2019, unexpectedly revealed government was negotiating with VTB and was close reaching a deal with VTB on the MAM loan similar to that obtained by the Ematum bondholders. The letter also revealed that government had decided not to pay the ProIndicus loan as it was "criminally-obtained". It subsequently brought legal action in London to have the CS loan to Proindicus declared null and void.

This has caused amazement and confusion, because in all respects the MAM and Proindicus loans are identical. How can one be paid and the other declared void and illegitimate?

3. ALL THE LOANS ARE ILLEGAL AND ILLEGITIMATE

Both parliament and the audit court (Tribunal Administrativo) have declared that the loans are illegal and illegitimate. This is based primarily on the way that the three loans had government guarantees signed by then Finance Minister Manuel Chang and Maria Isaltina Lucas, then national director of treasury. Under the constitution, only parliament can guarantee loans. Thus the loans were illegal from the start.

But this raises a broader question. Lenders and their agents - CS and VTB in this case - have a fiduciary duty to do what is know as a "due diligence" investigation, to ensure that the loans are reasonable and can be repaid. Even the simplest due diligence would have shown that it is parliament, not the finance minister or treasury director, who approves a loan guarantee.

The Kroll audit suggested that London-based Credit Suisse may have violated British Law by failing to undertake an adequate due diligence enquiry on the loans to ProIndicus and Ematum. And it said that both Credit Suisse and SISE refused to provide any information on the due diligence. Kroll said: "Credit Suisse, as a UK financial institution, has an obligation under the UK Money Laundering regulations to undertake enhanced due diligence where there is the prospect of Politically Exposed Persons (PEPs) being a party to the financial transaction - in this instance the Mozambican Companies are recognised as state-owned companies and consequently those responsible officers i.e., Person A, should be regarded as PEPs. Further, Credit Suisse has an obligation under the UK Money Laundering regulations to establish the Ultimate Beneficial Owner(s) of the Mozambique Companies." António Carlos do Rosário, a SISE senior official and CEO of MAM, ProIndicus and Ematum, confirmed that he is "Person A".

A special parliamentary commission in 2016 issued a damning report on the secret debt. The commission was headed by former finance minister Eneas Comiche, which was highly critical of "the financial projections were made on the basis of unsustainable and

hypothetical assumptions". The plan said the company would be profitable and pay off its debt in 8 years. It was subsequently revealed that the business plan said that Ematum would sell yellowfin tuna at $13.94 per kg. Yet it is easy to check the FAO's public website of fish prices to find that in November 2013 when the business plan was written, the Seychelles was selling yellowfin to Europe for $2.69 per kg, one-fifth of the value stated in the feasibility study. Bond buyers and those who made the syndicated loans did so because CS loan salespeople told the that there was a government guarantee and that there was a sound business plan. CS's defence is that investors sign what is called a "big boy clause" - we are adults and know the risk and did our own due diligence. Many did not bother, but some who did declined to participate in the loan. Many who joined in the loans took the same view as Finance Minister Adriano Maleiane, speaking at a press conference 27 December 2016, when he said these are major global banks and they agreed that the assumptions made sense. Thus the primary responsibility is with the banks for accepting the feasibility study.

It is obvious that even the simplest checks would have shown the supposed government guarantees were illegal, and that the business plan was unrealistic. To promote the loans on that basis is classic loan pushing.

A US indictment5 on 19 December 2018 provided some of the explanation. Charged were three CS employees, including Andrew Pearse, a managing director of CS, and two other senior CS staff; former Mozambican Finance Minister Manuel Chang; António do Rosário; head of economic intelligence at the government's state intelligence and security service (Serviço de Informações e Segurança do Estado, SISE) and who headed the three private companies that took the loans; Teofilo Nhangumele "acting in an official capacity for and on behalf of the Office of the President of Mozambique", then Armando Guebuza; Jean Boustani; "lead salesman for Privinvest", Najib Allam, Chief Financial Officer of Privinvest.

The US indictment says they "created the maritime projects as fronts to raise money to enrich themselves and intentionally diverted portions of the loan proceeds to pay at least $200 million in bribes and kickbacks to themselves, Mozambican government officials and others. … In furtherance of the scheme, Privinvest charged inflated prices for the equipment and services it provided." Chang is charged with receiving at least $17 mn, Rosário $18 mn and Nhangumele $8.5 mn.

Together, this makes it clear that the original three loans were illegal and illegitimate and should not be repaid. On 25 October 2017 the Global Group of Mozambique Bondholders issued a statement saying that "forensic and tribunal sources have underscored the illegality of the purported government guarantees" and that all three of the original loans - including their own bonds - were illegal. But because the illegal bonds were nationalized, the new bonds are legal and must be paid, they argue. But the US indictment makes clear that the

5 http://bit.ly/ChangIndict/

new bonds are also illegal. It says that Credit Suisse bankers and Privinvest employees, "in furtherance of the fraudulent scheme", convinced the Mozambique government, VTB and CS to create the new government bonds. It adds that "based upon the co-conspirators' false and misleading information [not revealing the other secret debt], the EMATUM investors consented to the exchange" of bonds. Thus the new bonds are also illegal.

Thus we argue that the $2 bn secret debt satisfied the criteria of an odious loan, and should not be repaid: the people of Mozambique did not consent, there was no benefit to the population, and the creditor was aware of the facts. All of the outstanding loans and bonds are illegal, illegitimate, and should not be repaid. The are the responsibility of CS, VTB and Privinvest, not Mozambique.

Under the loan contract, if Mozambique refuses to pay, the banks and lenders would need to bring an action against Mozambique in English courts. A ruling in the High Court on 29 March 2017 by Sir William Blair about Ukraine debt effectively set the guidelines about when a debt could be seen as illegitimate. It appears that Mozambique's debt fits these criteria.

Ukraine argued that the Finance Minister agreed the loan without it being approved by parliament as required by the constitution, as in the case of Mozambique, although in other respects there were important differences. Mr Justice Blair set conditions for the loan to be considered illegitimate, which Ukraine did not satisfy but at least to the $1.2 bn Mozambique syndicated loans do satisfy. The loans were to private companies and not the state, were not approved by the Council of Ministers, there were no similar previous loans, none of the money entered Mozambique, it was never included in any state accounts, and all statements by public authorities (parliament, Tribunal Administrativo) said the loans were illegal and unconstitutional. The secrecy of the loan meant that lenders had no public statements to believe in the legality and should have done their own investigation.[6]

4. ASSET AND DAMAGE RECOVERY

The Attorney General's office (Procuradoria-Geral da República, PGR) ordered banks to provide details from the bank accounts of Manual Chang and Antonio Carlos do Rosario in early 2017. Then on 29 March 2017 the PRG ordered domestic banks to provide details of all movements during 2012-16 for all accounts in Meticais and foreign currency for 19 individuals and one company. These included former President Armando Guebuza and his sons Mussumbuluco and Ndambi, as well as Teofilo Nhangumele, Renato Matusse (an advisor to Guebuza) and three members of the embassy in the UAE (United Arab Emirates) where a major Privinvest shipyard is based. The company was Jociro International, an investment company mainly owned by António Carlos do Rosário.

6 Joseph Hanlon, Mozambique can now refuse to pay the secret debt, say analysts, and would gain by it, Mozambique News Reports and Clippings 439, 25 Feb 2019, http://bit.ly/Moz-439, Joseph Hanlon, Moçambique pode agora recusar pagar a dívida oculta, CIP, 19 Feb 2019. https://cipmoz.org/2019/02/26/moçambique-pode-agora-recusar-pagar-a-divida-oculta-dizem-os-analistas-e-ganharia-com-isso/ The full text of the ruling is on https://www.judiciary.gov.uk/judgments/law-debenture-v-ukraine/

When the international community forced the Kroll audit, they also forced government to agree it would be published. It never was. The summary was published in June 2017, and the full report was finally leaked and published by this author in August 2017.[7]

Then the PRG went quiet and apparently nothing happened, until the 19 December 2018 United States indictment brought a flood of action in Mozambique. The indictment revealed details of high level corruption, and most importantly of negotiations on bribes before the deal was signed.

Perhaps most notorious is the following, from the US indictment:

In 2011, early in the discussions, Boustani (of Privinvest) and Nhangumeleo (linked to the President) negotiated the first bribes and kickbacks. On 11 November 2011, Nhangumele wrote to Boustani by email, stating: "To secure that the project is granted a go-ahead by the HoS [Head of State], a payment has to be agreed before we get there, so that we know and agree, well in advance, what ought to be paid and when." On 28 December 2011, Boustani and Nhangumele agreed to $50 million in bribes to Mozambican government officials and $12 million in kickbacks for Privinvest co-conspirators. Nhangumele confirms this in a note to Boustani the same day: "Fine brother. I have consulted and please put 50 million chickens." Later that day Boustani sends a note to a Privinvest co-conspirator: "50M for them and 12M for" Privinvest. Chang's involvement is made clear in a 22 December 2012 note in which he says "the financing of this project is still constrained by the IMF imposed limitation on the Government for Mozambique to accept commercial credit for commercial projects. Therefore, we have devised an alternative solution whereby an SPV [Special Purpose Vehicle]... will be formed."

Chang was arrested in South Africa on 29 December 2018 on a US warrant. Nhangumele and Antonio do Rosario were arrested in Maputo in February. Also arrested were Gregório Leão - dismissed as director general of SISE in January 2017; Ndambi, son of former President Armando Guebuza; and Inês Moiane - personal secretary to Guebuza. In all 20 people were charged, with nine held in preventive detention. They are charged with corruption, money laundering, blackmail, falsification of documents, use of false documents, embezzlement, abuse of office, abuse of trust, and membership of a criminal organization. Fifteen buildings and six luxury cars allegedly bought with fraudulent money have been attached and 31 bank accounts frozen. Attorney-General Beatriz Buchili told parliament on 24 April 2019 that her office has hired "international experts to help us identify, seize and value other assets" from the fraudulent scheme, that may exist inside and outside Mozambique.

The Mozambican charges also reveal how bribes were passed between people and used to buy property. Gregorio Leao is charged with receiving $9 mn in bribes and of laundering the money through a complex network of family and friends and their companies. Inês Moiane is charged with receiving $1 mn from Privinvest for arranging six meetings

7 http://bit.ly/Kroll-Moz-full

between Privinvest executives and Guebuza. Moiane used part of the Privinvest money to buy two flats, which she registered in the name of her brother, Elias. Renato Matusse, a political adviser to Guebuza, is said to have acted as an intermediary between Privinvest and the President, for which he received $2 mn. He organized Guebuza's visits to Privinvest shipyards in Abu Dhabi in March 2013 and in Cherbourg, France, in September 2013, for the launch of the fishing boats.

All of the bribes reported so far are claimed to have been paid by Privinvest, which received all of the loan money (less large commissions) directly from the two banks, Credit Suisse and VTB. Not one penny of the money was paid (legally) to Mozambique. But bribery is illegal in Mozambique, the United States and UK, so Mozambique has the right to recover assets acquired illegally.

All of these are still allegations and charges; court cases, trials and plea bargains are still to occur. But a key point is that the details in the indictments provide substantial information about the misconduct and illegal activity around the secret debt, and thus help to build the case the that debt should not be paid - that the debt itself is illegitimate and illegal. In this way, asset recovery runs in parallel with not paying the debt, because both build on the same information, and investigations provide more details.

Recovery of assets and ill-gotten gains is an essential part of the establishment of the illegality of the original loans, and important to stress that government officials and ministers should not profit from bribery and corruption. But the amount to be recovered is relatively small.

Damage to Mozambique is much larger, and under international conventions it should be possible to recover the costs of such damager from those allegedly involved in illegal conduct in instituting the loans, the banks and Privinvest. When the full scale of the secret debt was revealed in April 2016, the response of the IMF and donors was harsh. This triggered an economic crisis. Between April 2016 and April 2017, the Metical was devalued by 36% - from MT 52 = $1 to MT 71 = $1, making all imports one-third more expensive. The cut in aid and IMF loans was approximately $250-500 mn per year.[8] Cuts in aid and rising import costs were particularly reflected in government cuts in capital spending, on roads, schools, and health facilities. There is an ongoing study to quantify the damage done to Mozambique by the secret loans, but it is clearly in billions of dollars.

5. "At peace with the world" at too high a price?

Mozambique is agreeing to pay two of the three secret loans to permit the country to be "at peace with the world", Economy and Finance Minister Adriano Maleiane told parliament on 9 May 2019[9]. But at what price?

8 Various IMF country reports, 19/136, 18/65 and 16/9.
9 Maleiane's original statement in Portuguese reads permitir ao país ficar "de bem com o mundo"

In November 2018 the government agreed in principal a new deal with the bond holders in which payments would be $36-40 mn per year for the first four years (2019-22) and would be $60-100 mn for the next six years (2023-28), with large payouts of $288-337 mn per year (2029-33) only when there is significant gas income. But deferring the biggest payments for more than a decade comes at a very high cost. Mozambique has had to promise to give the bondholders $500 mn of the gas income. And the total cost repaying the original $850 mn Ematum loan will be $2370 mn - nearly times the value of the original corrupt loan.[10]

If the $535 mn MAM loan is negotiated at the same rate, Mozambique will have to pay $1.5 bn. The Proindicus loan was $622 mn (Credit Suisse $504 mn and VTB $118 mn), and it is not clear if part of this is included in the negotiations with VTB. But in all respects, the MAM and Proindicus loans are identical and equally illegal. If Mozambique agrees to pay VTB, then it will be unable to resist court challenges to pay Credit Suisse. Thus Proindicus could cost $1.7 bn - repaying a total of $5.6 bn for a $2 bn corrupt loan.

It will be hard to argue in courts in Mozambique and elsewhere that bribe receivers should be prosecuted if bribe givers are being profitably compensated. And if Mozambique agrees to pay off the corrupt lenders, will it also, in order to "keep peace" within Mozambique, let those who received bribes keep their money?

The dream in 2011 was that by 2018 gas money would be flowing into state coffers and no one would know or care about the secret debt. Now the dream is that in 10-15 years, billions of dollars will be flowing in and no one - diplomats, IMF officials, ministers, senior government officials and civil society leaders - will even remember the secret debt and how it came about.

Key people want to keep their bribes and have Mozambicans pay the $5.6 bn to repay $2 billion secret debt. Others do not want to admit that some of the money was used for dubious and perhaps sanctions busting arms purchases. That is Finance Minister Zandamela's "peace with the world" - payouts to ensure "peace" with bribe givers and bribe takers; "peace" with senior figures in Mozambique who do not want to reveal how the money was used. But it creates no peace with the victims of the secret debt, who suffered from unbuilt schools, devaluation and inflation.

If there is to be an a serious attempt at asset and damage recovery, and ensuring that the corrupt do not benefit from their ill-gotten gains, then Zandamela buying "peace with the world" by paying off the corrupt cannot be accepted. Credit Suisse, VTB and Privinvest must be challenged if the "peace" is to involve more than just the corrupt.

10 "$2.4bn 'price of credibility' for Mozambique, but economists warn of more instability", Zitamar, 9 Nov 2018. This is $200 mn already paid, $700 mn in interest, $1000 mn in principal repayments, and a $500 mn gas bonus. https://zitamar.com/2-4bn-price-credibility-mozambique-economists-warn-instability/

CHAPTER III

Recovery Of Assets

FLÁVIO MENETE

1. WHY BOTHER WITH ASSET RECOVERY?

- Motivation for economic and financial crime is profits and more profits.
- This profit ends up being a compensation if those who commit the crimes can benefit from it after fulfilling the prison sentences.
- It makes sense to create mechanisms that lead to the detection and seizure of the products of crime and other assets belonging to criminals.

2. RECUPERATION OF ASSETS AS A GLOBAL CONCERN

- United Nations Convention on combating transnational organized crime.
- At the request of another State-party, take steps to identify, locate and apprehend the proceeds of the crime.
- Consider as a priority the restitution of the proceeds of the crime or confiscated property, either for the purposes of compensation to the victims or for the purposes of evidence.
- Consider the possibility to share the assets seized with the other states-parties.
- Convention on Combating Drugs.
- Council of Europe decision.
- States-Parties shall take the necessary measures to permit the identification, location, embargo or seizure of proceeds of crime or property whose value corresponds to those proceeds, as well as of the goods and equipment and other instruments used or Intended to be used in the practice of criminal offences.
- If the proceeds of the crime have been wholly or partially converted into other assets, they shall be the object of recovery, including earnings and other benefits.

3. WHAT DO THE ASSET RECOVERY UNITS DO?

- Identification, localization and seizure of goods or products related to crimes, both inside and outside the country.
- Financial and or asset investigations, with each country determining the threshold of severity beyond which the intervention of the ARU is justified.

4. WHAT POWERS AND PREROGATIVES DO THE ASSET RECOVERY UNITS HAVE?

- Access to relevant databases: Registers of cadasters and notary data, tax authority, insurance, stock exchange.
- Ideally, there should be a judicial authorization.
- The usual barriers should be reduced, including the requirement for the full name of the account holders.
- Administer the recovered or seized goods (this function can be assigned to a separate unit).
- Protect, conserve and manage.
- Sell or destroy.
- Assessing goods for the purposes of any compensation.
- Request the collaboration of other entities for evaluation when special knowledge is required.
- Prepare statistical data.
- Make sure that the goods declared lost in favor of the state by a judicial decision is effectively registered in favor of the State consonant with the judgement.

5. MODELS OF ASSET RECOVERY UNITS

- The ARUs may be integrated into any of the following authorities:
- Administrative
- Police
- Judicial
- Regardless of the model, it is important that they have a representative composition of the most important sectors with access to the databases on assets:
- Police
- Tax authority
- Registers of cadasters and Notary Public.

6. NECESSITY FOR INTERNATIONAL EXCHANGES

- Considering the increasing tendency of organized crime to be transnational, the ARUs can only fulfill their mission if there is effective international cooperation:
- At the request of the equivalent or other competent authority of another State, such an exchange should spontaneously extend to the area of good practice with regard to means to improve the effectiveness of States in detecting and identifying assets related to criminal activity.

- Simplification of the exchange of information should be considered.

7. FINAL CONSIDERATIONS AND RECOMMENDATIONS

- In various legislations we have provisional measures [in Mozambique] regarding the seizure and confiscation of goods.
- The great difficulty is the identification, localization and effective seizure.
- Imprisonment, in addition to being a penalty in predicament, for not effectively fulfilling the purpose for which it was conceived and representing a very high cost for the state (taxpayers), is not linked to the loss of goods and thus conveys the idea that crime pays.
- The creation of an asset recovery unit in Mozambique is urgently needed
- Let us hope that this is not ignored, as is the case with article 13 of the anti-money laundering and financing of terrorism Law, which states that "the regulation and supervision of the real estate sector in the field of money laundering and terrorist financing rests with an entity to be defined by the Council of Ministers"and... this entity has not been defined, unless we missed something.

BIOGRAPHY

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Richard E. Messick consults for international organizations, development agencies, and non-governmental organizations on legal development and anticorruption issues. As an attorney in the United States he specialized in complex litigation and represented individuals and corporations in state and federal matters involving fraud and corruption. After serving as Chief Counsel of the Senate Committee on Foreign Relations, he joined the World Bank where he worked until his retirement on legal and judicial reform and anticorruption projects. His writings have appeared in scholarly and popular publications including the American Political Science Review, the World Bank Research Observer, the Wall Street Journal, and the Washington Post.

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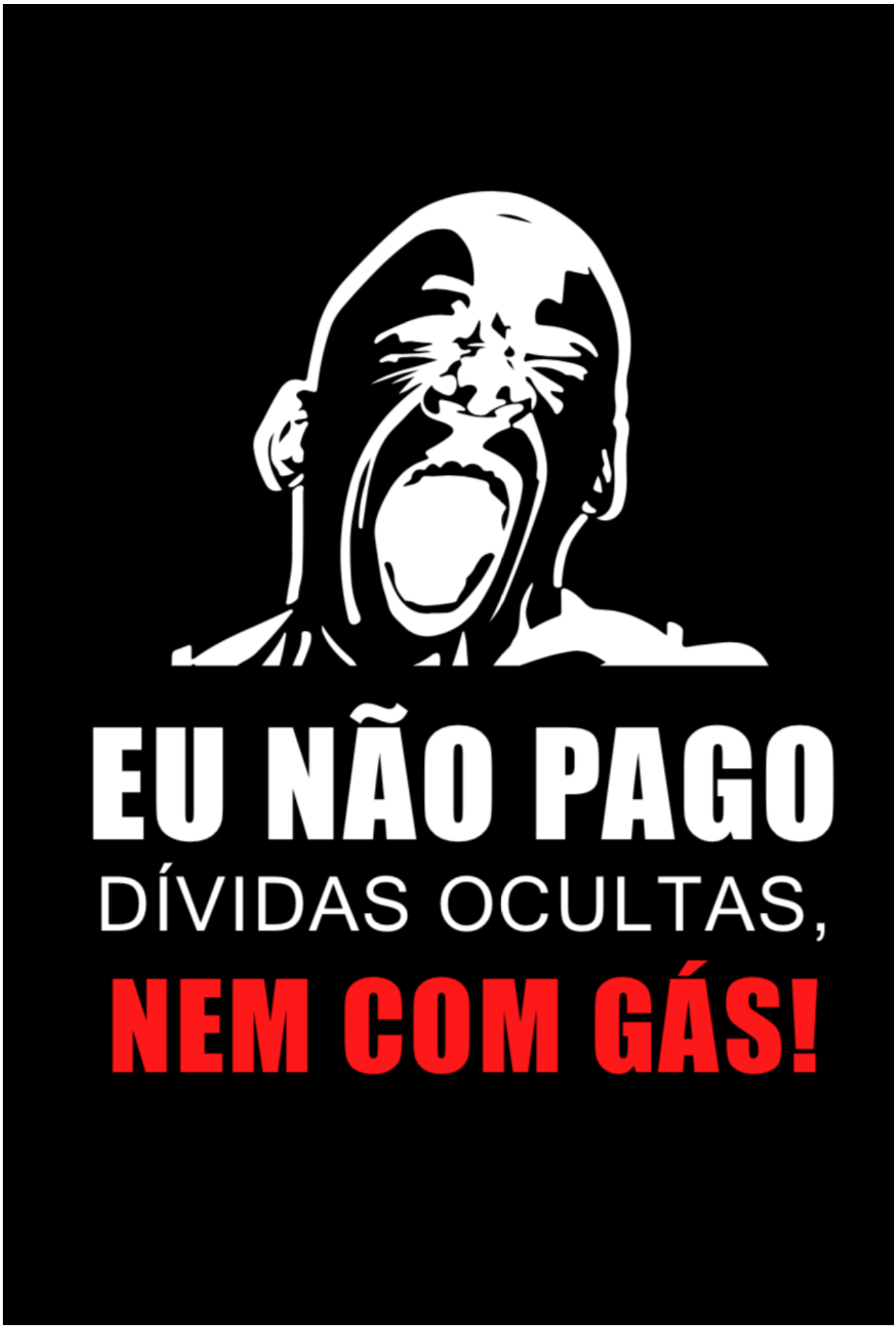
Born in Jangamo, in a rural area, in the city of Inhambane he finished his 5th year of high school, continuing his studies in the then city of Lourenço Marques. He wanted the fate that, before fulfilling his dream of being a lawyer, was an aviator pilot of the Air Force of Mozambique, arriving at the Commander of the Air Base of Nacala. He later held a number of positions: Senior Consultant at Ernst & Young, lecturer, Advisor to the Minister of the Interior, National Director of Criminal Investigation, first president of Generation 8 March, among others. Since March 2016, Flávio Menete has been a member of the Mozambican Bar Association.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