

Towards a Comprehensive, Effective, Transparent and Accountable Implementation of UNCAC Chapter V

UNCAC Coalition statement to the 7th Conference of States Parties in Vienna

During the last Conference of States Parties (CoSP) in St Petersburg, two resolutions were adopted on the topic of asset recovery: Resolution 6/2 on Facilitating international cooperation in asset recovery and the return of proceeds of crime and Resolution 6/3 on Fostering effective asset recovery. Two years have passed since then, so one may well ask whether there has been any progress: What volume of assets has been seized and confiscated? How much has been returned to victim countries?

The answers to these questions are difficult to find as, despite the “invitation” contained in Resolution 6/3 (operative clause n°7), most States Parties still do not collect or publish data on the volume of assets seized, confiscated and returned or disposed of by their jurisdictions. And yet, adequate data are critical to assessing effectiveness in meeting the UNCAC’s commitments. As the international community recently committed to significantly improving asset recovery and return by 2030 (Sustainable Development Goal n°16.4) and in light of the on-going second cycle of the review mechanism (which precisely covers Chapter V on asset recovery), it is all the more urgent for States Parties **to collect and make public data on asset recovery at a national level.**

States Parties also have yet **to recognise the importance of the principles of transparency and accountability with regard to the use and management of returned assets.** In fact, despite some attempts during the last CoSP in Saint Petersburg, none of the two resolutions on asset recovery that were adopted (just like the ones before) contain any language items regarding these principles.¹ This failure ought to be addressed. Transparency and accountability are of critical importance: not only was it their absence that helped facilitate the diversion and theft of assets in the first place, but their absence may further undermine the credibility of the overall asset recovery process. Why is it so hard to recognise them?

¹ Resolution 6/3 contained in its draft version relevant operative clauses in that regard:

- OP 21 Urges States Parties to ensure that procedures for international cooperation facilitate the disposition of confiscated proceeds of corruption in a transparent and accountable manner and in a manner that directly benefits those harmed by corruption, recognizing that returned assets can contribute to sustainable development impact. In this regard, as agreed in the Addis Ababa Action Agenda, States Parties will ensure that standards of good practices on asset return or disposition will be developed that will guide future asset disposition.
- OP 22 Acknowledges the important role that civil society can play in asset recovery, including in the phase of confiscated asset disposition, where it can, when appropriate, promote transparency and, at the request of the receiving country, provide input on the use of returned, confiscated assets in a manner that takes into account the particular importance of recovered assets for sustainable development and stability.

Belgium further proposed the inclusion of the following operative clause: “Urges States Parties to ensure that assets returned pursuant to the Convention are used and managed in a transparent and accountable manner conducive to their contributing to sustainable development”.

In the end, however, all we got was operative clause n° 6 which encourages “States parties to consider sustainable development in the use and management of recovered assets”, with no further reference to transparency and accountability. As for the role played by civil society, the language was ultimately removed into the preamble: “Noting the important role that civil society could play in asset recovery and return”.

The UNCAC Coalition is still concerned by the poor implementation of Article 53 on direct measures for asset recovery. Notwithstanding the fact that some jurisdictions do not even recognise foreign states' standing to sue in legal proceedings – in blatant violation of UNCAC provisions² – another shortcoming results from the fact that most often states are simply not aware of the existence of proceeds of corruption abroad (or of legal proceedings/settlements involving said property taking place in foreign jurisdictions). The right to bring civil claims as provided by Article 53 is of no use if countries are not aware of the existence of legal proceedings and settlements abroad and, as a consequence, they are not in a position to claim ownership of property or compensation.

The Resolution on asset recovery adopted during the 2013 CoSP in Panama contained strong language about proactive information sharing, which is an important reminder of States Parties' commitments in that regard (cf. Article 56). Resolution 6/2 adopted during the 2015 CoSP in Saint Petersburg also contained relevant language on proactive information sharing in the context of settlements.³ Paper promises are, however, not enough. In order to give effective teeth to Article 56 and CoSP resolutions, States Parties should now be called upon **to provide the UNCAC Secretariat and/or StAR with updated information about any on-going cross-border corruption proceedings in view of its dissemination through exiting databases.**⁴ In addition to enhancing the direct recovery of property, such a measure is also critical to enable victim countries to pursue their own remedies domestically.

The low level of recoveries under Article 53 may be further explained by governance failures. While Article 53 lays out a comprehensive legal framework to support countries in their asset recovery efforts, these provisions become almost toothless whenever they are run (or otherwise controlled) by those engaged in large-scale corruption. Indeed, under this scenario government claims, as envisioned by Article 53, are either rendered unlikely or unlikely to succeed. In particular, given that under Article 53 once ownership or damage is established no further step is required to repatriate the ill-gotten gains to the defrauded state, many jurisdictions prefer not to comply with this provision rather than return assets to corrupt regimes.⁵ These are legitimate concerns, but lead to the unfortunate situation where the citizens of these countries – the true victims – are doubly penalised for the corrupt behaviour

² In accordance with UNCAC Article 53, affected countries should be entitled to stand before the foreign jurisdiction/s where proceeds of corruption are located and claim their repatriation to their national treasuries. This should apply to any and all court or out of court proceedings whenever proceeds of corruption are involved.

³ See preamble and operative clauses 6.b, 9 & 10 in Resolution 6/2.

⁴ Information should be shared with StAR in a timely manner - i.e. before a final decision is rendered or a settlement concluded - to precisely enable states with an interest to take action towards the direct recovery of property in line with Article 53. This should include basic information about the case including a short description of the facts and proceedings, the date/period and place of alleged offences/wrongdoings and the names of the parties involved (with the exception of confidential pieces of information), as well as the contacts of competent authorities.

⁵ In that regard, the decision rendered by the Court of Guernsey in the case of *Garnet Investments Limited v. BNP Paribas (Suisse) SA* is, as recognised by the UNODC, "an important warning signal". The Guernsey Court of Appeal was faced with a claim by the government of Indonesia for a continued freeze on assets controlled by a son of former President Suharto, Hutamo Putra, also known as Tommy Suharto. The Court decided to lift the freezing order previously granted to Indonesia because of insufficient efforts by the government of Indonesia to pursue civil claims against Mr Putra in Indonesia, despite an earlier extension of the freeze. According to the UNODC: "If the authorities of requested States question the diligence of a requesting State in seeking domestic recovery of the proceeds of corruption from powerful persons, that scepticism may affect their exercise of discretion in attempting to recover corruption proceeds". See: "Digest of Asset Recovery Cases", UNODC (2015).

of their public officials. To challenge this, States Parties should be encouraged **to allow prominent public-spirited citizens or organisations to bring public interest claims in relation to the recovery of proceeds of corruption transferred in their jurisdictions**. This would echo Resolution 6/3 adopted in Saint Petersburg, which noted “the important role that civil society could play in asset recovery and return”.⁶

With regard to UNCAC Article 53.b (on compensation for damages), Resolution 6/2 adopted by the CoSP in Saint Petersburg was a major breakthrough as it explicitly covered the relationship of transnational bribery cases to asset recovery. In fact, it called on States Parties to ensure that “settlements and other alternative legal mechanisms [used] by some States parties to conclude transnational corruption cases [are] used in such a way that is mindful of the goals of the Convention to enhance the recovery of proceeds of crime”. The UNCAC Coalition welcomed that operative clause; it regrets, however, that only settlements were covered in the Resolution while **UNCAC Article 53.b applies to any cross-border corruption-related court or out of court proceedings involving proceeds of corruption**.⁷ The Coalition further wishes to call on States Parties **to mandate the UNODC to continue its efforts to gather information on good practices in relation to the identification and compensation of victims of corruption, as well as to develop a set of guiding principles based on best practice examples**.

Another issue of concern for the UNCAC Coalition relates to the low level of enforcement of the Convention when it comes to corporate wrongdoers. Indeed, while many of them remain unpunished, the proceeds of their crime are rarely confiscated:⁸ this is contrary to the provisions on asset recovery. In fact, asset recovery is not only about recovering stolen or embezzled public funds stashed away by corrupt agents, or confiscating the lavish properties they have illicitly acquired abroad. Instead, it involves any proceeds of corruption transferred abroad, including those of private origin such as the illicit profits, benefits or advantages of monetary value gained by companies as a result of paying a bribe to a foreign official. Therefore, States Parties should be called on **to enact and implement comprehensive laws providing for the confiscation of any asset obtained through or derived from the commission of an offence established by the Convention – including the proceeds of active bribery**. States Parties should be further called upon **to allow for quick freezing of assets suspected to be derived from the commission of UNCAC offences**.

Last but not least, the UNCAC Coalition wishes to call on States Parties **to do more to prosecute corrupt officials domestically and to recover their ill-gotten gains stashed away abroad**.

⁶ See, for example, the Guide to the role of civil society organisations in asset recovery, jointly developed by countries and CSOs in 2013, during the 2nd Arab Forum on Asset Recovery (AFAR). See: https://cso.assetrecovery.org/sites/collective.localhost/files/documents/cso_guide_e.pdf.

⁷ In fact, the process of asset recovery involves “any proceeds of offences established in accordance with this Convention” (Article 3 – Scope of the convention) that have been transferred abroad; that is to say, “any property derived from or obtained, directly or indirectly, through the commission of an offence” (Article 2. (e) – Use of terms). In other words, Chapter V is applicable (and ought to be applied) in any court or out of court proceedings involving proceeds of corruption.

⁸ As highlighted by a joint StAR/OECD publication, while some countries still lack legislation to address the confiscation of the proceeds of active bribery considering such calculations too complicated; others may have legislation in place but have never implemented it in practice. See: “Identification and Quantification of the Proceeds of Bribery: A joint OECD-StAR analysis”, OECD (2012).

To that end, the UNCAC Coalition believes that, in addition to having in place the necessary legal framework and ensuring the independence and adequate resourcing of enforcement bodies and the judiciary, States Parties should be called upon **to introduce necessary safeguards to prevent sensitive cases from being disregarded or closed down for political reasons**. These may include the right for NGOs to initiate private prosecutions, the imposition of a duty to prosecute or the possibility of challenging a public prosecutor's decision not to do so through a judicial review application.

Immunities – and, not only domestic ones – are another major obstacle to the effective prosecution of cross-border corruption offences. Therefore, in addition to calling on States Parties to ensure that domestic immunities for public officials are strictly limited with transparent and effective procedures for suspending them, States Parties should be called upon **to ensure that immunities and other privileges enjoyed by public officials – domestic, foreign and international – are not abused or used to shield individuals from accountability for corruption offences or to provide safe havens to their ill-gotten gains.**⁹

In that regard, the UNCAC Coalition believes that it is high time for States Parties **to recognise and take effective action to address the seriousness of the crime of grand corruption** including the exercise of extraterritorial jurisdiction for the prosecution of the same where there is a failure of *aut dedere, aut judicare*.

Since the 2015 CoSP resolutions on asset recovery, many more millions of dollars in much needed state funds – including money destined for health, education and poverty alleviation – have been stolen and deposited abroad by corrupt individuals. The few have enriched themselves at the expense of the many for too long and it is essential that States Parties address these failures to adequately prosecute and punish the corrupt and recover the proceeds of their crime.

20 October 2017.

⁹ Past cases have shown how easy it is for public officials to abuse the privileges attached to their functions to transfer illicit vast wealth abroad – through, for example, the illegal use of the diplomatic pouch – and/or to protect their ill-gotten gains by registering them as diplomatic assets (residences; cars...).