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TOWARDS A COMPREHENSIVE, EFFECTIVE, TRANSPARENT AND ACCOUNTABLE IMPLEMENTATION OF UNCAC CHAPTER V

Almost two years have passed since the last Conference of States Parties in Panama and the adoption of resolution 5/3 on asset recovery. So one may well ask whether there has actually been any progress: What volume of assets has been recovered? How much has been returned to victim countries? How has it been used? Has it benefited the victim populations?

The answers to these questions are difficult to find, as **to date most States Parties do not collect or publish data relating to asset recovery – a failure that could be easily addressed through the creation of national public registers.**

States Parties also have yet to recognise the importance of the principles of transparency and accountability with regards to the use of returned assets. These principles are of critical importance; it was their absence that helped facilitate the diversion and theft of assets in the first place. In fact, justice cannot be served if only a half of the original abuses are addressed. And yet, the Resolution on asset recovery that was adopted during the last CoSP in Panama (like the ones before) does not contain any language items regarding these principles. While the UNCAC Coalition welcomes the various on-going and upcoming initiatives regarding the disposal of returned assets, it believes that those should not preclude States Parties from recognising the importance of the principles of transparency and accountability.

Lack of information is also a key obstacle to the effective implementation of the UNCAC Article 53 on measures for direct recovery of property. In fact, the right to bring civil claims with a view to recovering assets (as provided by this article) is of no use if countries are not aware of the existence of legal proceedings and settlements abroad and, as a consequence, are not in a position to claim ownership of property or compensation. The Resolution on asset recovery that was adopted in Panama contains strong language about proactive information sharing which is an important reminder of States Parties' commitments in that regard. In order to give effective teeth to UNCAC Article 56, States Parties should now be called upon to provide StAR with updated information about any ongoing cross-border corruption proceedings involving proceeds of corruption in view of its dissemination though exiting databases. 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 is 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

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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. These are legitimate concerns, which however lead to the unfortunate situation where the citizens of these countries – the true victims – are doubly penalised for the corrupt behaviour 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.

UNCAC Article 53.b poses additional challenges. This article – which provides for the direct recovery of property through compensation claims – was established to provide a concrete remedy to states harmed by corruption in situations, such as bribery or trading in influence, where the proceeds of corruption involve funds of private origin – that is to say assets over which states cannot establish prior ownership. However, many States Parties have yet to acknowledge that the award of damages constitutes a way of recovering the proceeds of corruption under the UNCAC. According to a recent report produced by StAR[1], in the majority of foreign bribery cases settled abroad, victim countries are left out of the bargain. This is all the more unfortunate given the heavy and increasing reliance on negotiated settlements in both common law and civil law jurisdictions. Regrettably, those findings are believed to be equally true when it comes to ordinary court proceedings. The issue started to receive some attention during the last CoSP held in Panama; the Resolution on asset recovery adopted on that occasion urged *"States parties to consider the use of the tools set out in chapter V of the Convention when resolving cases involving offences outlined in the Convention, including transnational bribery"* (op. clause n° 26). The inclusion of this operative clause was clearly a welcome move towards a comprehensive implementation of UNCAC Chapter V. However, the language remains unclear and misleading: in fact, Article 53.b) is mandatory; therefore, there should be no room for consideration and this provision ought to be applied whenever a cross-border corruption case involves proceeds of corruption. To that end, States Parties should be provided with a set of guiding principles to facilitate the implementation of UNCAC Article 53.b) and, where applicable, the award of damages to victim countries. This should include best practice examples with respect to the identification, quantification and reparation of the damage caused by corruption.

Another issue of concern for the UNCAC Coalition relates to the low level of enforcement of the convention when it comes to the corporate wrongdoers. Indeed, while many of them remain unpunished, the proceeds of their crime are rarely confiscated: this is contrary to the provisions on asset recovery. Indeed, 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.

[1] "Left out of the bargain", StAR (2013).

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

The UNCAC Coalition believes that in addition to ensuring the independence of enforcement authorities, States Parties should introduce necessary safeguards to prevent sensitive cases from being disregarded or closed down for political reasons. Those 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 are another major obstacle to the effective prosecution of corruption offences. This was confirmed by the report produced by UNODC on the implementation of UNCAC Chapter III.

It is critical to limit as much as possible the scope of domestic immunities. It is also essential for democracy and the rule of law to have procedures in place in order to lift domestic immunities and to hold corrupt officials accountable. In that regard, the recent laudable decision of the Congress of Guatemala to lift President Otto Perez's immunity amid a corruption scandal there shows how important such limits are.

Such limits ought to be extended to foreign and international immunities which are regularly abused. The UNCAC Coalition believes that immunities of convenience – granted for the sole purpose of escaping legal proceedings or hiding stolen assets – should be ruled null and void. It further believes that the time has to come for the international community to re-evaluate the international rules on immunity: personal immunity should be strictly limited and, in any case, should not apply where crimes of international concern, such as grand corruption, are involved.

In that regard, and while a recent study by the Institute for Economics and Peace, based in Sydney, found strong statistical evidence that high levels of corruption is a leading indicator for political instability and insecurity[2], 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.

Since the 2013 Resolution 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.

[2]" Lowering corruption — a transformative factor for peace", Institute for Economics and Peace (May 2015).