

16 May 2013

Re: Recommendations for Action by the UNCAC Implementation Review Group and Conference of States Parties

Dear Chair, Bureau and Members of the UNCAC Implementation Review Group,

On behalf of the UNCAC Coalition and its Coordination Committee we are writing this second letter to urge the UNCAC Implementation Review Group (IRG) and Conference of States Parties to advance the work on international best practice guidance to States Parties in support of effective country implementation. This submission is made on behalf of the UNCAC Coalition by the Transparency and Accountability Network in the Philippines and by Transparency International.

Despite progress in law enforcement efforts against corruption around the world, this work is still hampered by numerous obstacles ranging from weaknesses in legal framework to deficiencies in enforcement systems. This is shown by the results of UNCAC reviews in the 5-year cycle of the UNCAC review process as well as the findings other review processes.

This letter focuses on three key topics and urges action: (1) settlements/ plea bargains in corruption cases; (2) immunities; and (3) independence and resources for specialised enforcement bodies and the judiciary. It draws on information from official country review reports as well as civil society reports.¹

Settlements/ plea bargains in corruption cases: Articles 26(4) and 30(1)

Summary of experience in this area: In an increasing number of countries CSOs have reported new legislation providing for plea bargains or settlements in corruption cases and have also reported concerns about the settlements actually reached in those cases. In one country, new legislation was applied to reach a confidential settlement in a long-running international corruption case involving three "oligarchs". The case was concluded with the accused paying a fine of an unknown amount without admission of guilt. In another country, a high profile settlement reached with a major multinational company levied a low fine, barred enforcement against accused employees of the company and closed files to enforcement agencies in other countries. Parts of the settlement were not made public. In a small-island territory, a confidential settlement reached in a case involving alleged bribes to high level officials resulted in the accused wealthy bribe-payer returning property without admission of guilt.

Conclusion: Settlements and plea bargains in corruption cases have a role to play but should not be a vehicle allowing the wealthy and well-endowed to buy their way out of being held to account. Safeguards against abuse should be built in, such as settlements only in cases where guilt is admitted; publication of agreements with justifications as well as performance reports; judicial oversight; dissuasive sanctions and confiscation of illicit proceeds; compensation to victims for damages; and allowing for prosecution of other persons involved.

Recommendation: UNODC should be requested to convene expert discussions on best practices for settlements in corruption cases.

¹ See for example, UNCAC CSO reports available here: <http://www.uncaccoalition.org/uncac-review/cso-review-reports>
See also TI Progress Reports on OECD Convention Enforcement, available here:
http://archive.transparency.org/global_priorities/international_conventions/projects_conventions/oecd_convention.

Immunities: Article 30(2)

Summary of experience in this area: Immunities pose an important barrier to anti-corruption law enforcement in many countries and this is well-covered in UNODC's thematic report.² The problems posed in such cases are well known to CSOs in many countries whether due to immunities under domestic law or under international law. CSOs have reported on a range of cases where investigation and prosecution of parliamentarians, ministers and high ranking officials were stymied due to the immunities barrier, often despite solid evidence of malfeasance. One CSO cited the case of a parliamentary leader who introduced legislation providing for retroactive immunity that would serve to shield him from ongoing investigations.

Immunities can also pose serious problems in international investigations of corruption. As an example, a CSO reported on a case involving the son of a head of state. After the son was made the subject of an international corruption investigation, he was appointed vice president of the country and made a delegate to an international institution, claiming immunities associated with these positions.

Conclusion: Countries should impose strict limits on immunities for public officials and have procedures for suspending them as well as ensuring that immunities are not used to shield individuals from being held to account for corruption offences. Consideration should be given to the recommendation in the 2005 Report of the Commonwealth Working Group on Asset Repatriation that "Commonwealth Heads of State/Government, ministers and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity".³

Recommendation: Building on its thematic report, UNODC should convene an expert meeting to discuss recommendations for implementing Article 30(2). It should also prepare a report on immunities under international law.⁴

Independence and resources for specialised enforcement bodies and the judiciary: Article 36 (does not cover the judiciary)

Summary of experience in this area: Problems of limited independence of prosecution services and lack of resources and training of enforcement bodies are known across numerous countries and have been cited in UNCAC review reports as well as country reports from other review processes. Likewise, CSOs in numerous countries have also reported on these problems.⁵ In a recent example, one CSO cited media reports in their country that the finance

² UNODC Thematic report on articles 30 – 39, <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/27-31May2013/V1382050e.pdf>

³ Key recommendation 2 of the Report of the Commonwealth Working Group on Asset Repatriation (August 2005). Available here: http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/E6642A80-04E0-4848-A2FE-0397BADBC2DE_LMM05_AssetRepatriationReport.pdf

⁴ A report might also be made on follow-up to UN General Assembly Resolution 58/4 of 31 October 2003 adopting the UNCAC which requested "the Conference of the States Parties to the Convention to address the criminalisation of bribery of officials of public international organisations, including the United Nations, and related issues, taking into account questions of privileges and immunities, as well as of jurisdiction and the role of international organisations, by, inter alia, making recommendations regarding appropriate action in that regard." UN General Assembly Resolution, A/RES/58/4, paragraph 6. Available here: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/58/4&Lang=E. See also COSP Resolution 1/7 <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session1-resolutions.html>

⁵ See footnote 1

minister had a veto over the decisions of a key enforcement body's decisions on whether to pursue corruption cases.

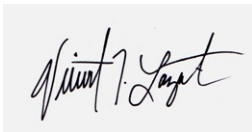
It is also important to look at these issues as they relate to the judiciary. In many countries, CSOs have reported that courts are under-resourced and that cases may continue for years before conclusion. In one country a CSO reported that the chief judge of a central appeals court announced that the court would be shut down due to lack of resources. In another, they reported on pressure brought to bear on a judge in an important case.

Conclusion: The lack of independence, resources and/or training for specialised enforcement bodies presents a serious obstacle to anti-corruption enforcement in many countries and requires attention. The same is true for the judiciary in many countries, though the Convention text does not refer to this specific potential problem.

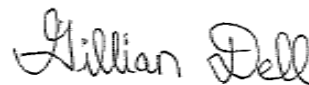
Recommendation: UNODC should prepare a study on experiences and best practices in implementation of UNCAC Article 36, in particular regarding the functional independence and resourcing of specialised law enforcement bodies and other investigative bodies or persons. Along the same lines, they should also address in this study issues relating to the resourcing and independence of the judiciary.

We believe that these steps will serve to strengthen UNCAC implementation and thus the potential of UNCAC to make a difference in the global fight against corruption.

Yours sincerely,



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