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Presentation by Gillian Dell, Transparency International, to UN Vienna delegations on a proposal for an intergovernmental expert working group

Transparency International and other groups have proposed that the General Assembly commission new work in an intergovernmental expert working group on addressing transnational organised corruption, high-level corruption and corruption involving "vast quantities of assets" as large-scale corruption is called in UN parlance.[1] The working group's remit should include issues in international asset recovery, including those outlined in the joint TI/ UNCAC Coalition proposal for a multilateral agreement on asset recovery.[2]

What we are especially concerned about with this initiative is large-scale, cross border, networked corruption, often involving high-level officials.[3] UNCAC does not provide enough clarity and tools for addressing this. There are also national-level topics that are insufficiently covered in the UNCAC that could be addressed.

Twenty years after negotiations started on the UNCAC, we are still faced with, as the UN Secretariat puts it, "the looting of staggering amounts of assets undermining the achievement of the Sustainable Development Goals (SDGs)" and "pervasive corruption networks that often include politicians, civil servants working at all levels of state institutions, representatives of the private sector and members of crime syndicates".[4]

One of the questions for today is what makes UNCAC inadequate to tackle corruption involving vast quantities of assets? We should also ask what makes UNCAC inadequate to tackle transnational, networked corruption, especially involving high-level officials?

I will mention a handful of weaknesses and gaps that I will call prevention and detection gaps; criminalisation gaps; jurisdictional gaps; international coordination gaps; and international dispute settlement gaps. These are just a few examples.

Before starting let me mention that the only UNCAC reference to corruption involving high-level officials and large quantities of assets is in UNCAC Article 52 in the asset recovery

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[1] Transparency International, Proposals on the international legal framework and infrastructure to address grand corruption impunity (March 2020) https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TransparencyInternational.pdf; Joint letter with Proposal concerning the UN General Assembly Special Session Against Corruption (13 April 2021) https://www.transparency.org/en/press/ungass-2021-uncac-create-new-expert-group-solutions-globalised-corruption See also Oslo Statement on Corruption Involving Vast Quantities of Assets (June 2019) https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Oslo_Outcome_Statement_on_Corruption_involving_Vast_Quantities_of_Assets_-_FINAL_VERSION.pdf

[2] Transparency International and UNCAC Coalition, Proposal for a Multilateral Agreement on Asset Recovery (12 June 2020) https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TI_UNCAC_Coalition_Proposal_for_Asset_Recovery_Agreement.12.6.2020.pdf

[3] As stated in the UNCAC Legislative Guide in 2006, page 134 "in the context of globalization, offenders often try to evade national regimes" and "[t]his is especially so in the case of serious corruption, as offenders can be very powerful, sophisticated and mobile." (emphasis added) The Guide also refers to kleptocratic practices. https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf

[4] UN Common Position to address global corruption (2020) page 3 https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/UN_Common_Position_to_Address_Global_Corruption_Towards_UNGASS2021.pdf

chapter. Financial institutions are required to attempt to determine the beneficial owners of high-value accounts and to conduct enhanced scrutiny of individuals who are or have been entrusted with *prominent public functions*. (Italics added) The article recognises a risk of international money laundering in such cases. As for definitions of transnational offences, serious crime and networked criminal groups – these are not to be found in UNCAC but instead in the UN Convention against Transnational Organized Crime (UNTOC).

Prevention and detection gaps: The focus here will be on asset declarations although many other issues could be mentioned. In UNCAC Article 52, in non-mandatory provisions, states are invited "to consider" establishing effective financial disclosure systems for appropriate public officials and "to consider" requiring those officials to report their interest in a foreign financial account. This is weak, like the related provisions on asset and interest declarations in Article 8. As far back as 1997, a UN Expert Group Meeting on Corruption urged States to have measures that oblige public officials to disclose assets, liabilities and copies of their income tax returns.[5] There were also proposals at around that time that false statements in these disclosures should result in criminal liability. A joint UNODC/World Bank/OECD Guide published in 2020 provides all the standards and guidance that are missing from UNCAC, including about transparency and verification.[6] Stronger standards in this area should be covered in a new framework.

Likewise, there are issues concerning beneficial ownership transparency which have been discussed in another briefing and I will not go into them here.[7]

Criminalisation gaps: With regard to the transnational, networked corruption that is part of the focus here, weaknesses and gaps arise from the lack of cross-referencing between UNCAC and UNTOC. That link should be actively made and it should be established that, at a minimum, corruption offences involving high-level officials and vast quantities of assets – known in many countries as aggravating factors - should be universally recognised as "serious crimes" under UNTOC. As defined under UNTOC, that means they must, at a minimum, be punishable by up to four years in prison. It also means the UNTOC Article 5 offence of an agreement to commit a serious crime applies in those cases. The UNTOC offence of participation in an organized criminal group is also relevant in cases of transnational, networked corruption. And UNTOC Article 31 prevention provisions should also apply with respect to transnational corruption, in particular the paragraphs on prevention of misuse of legal persons by organized criminal groups.

Jurisdictional gaps: A key reason for jurisdictional gaps is national justice systems that are "unable or unwilling" to pursue corruption cases. This often occurs in cases of high-level, large-scale corruption. The UNCAC Legislative Guide tells us that Article 42(6) on jurisdiction is intended "to expand the jurisdiction of States parties in order to ensure that serious

[5] Action against corruption and bribery – Report of the Secretary General (1997) https://digitallibrary.un.org/record/233642

[6] World Bank/OECD/UNODC, Preventing and Managing Conflicts of Interest in the Public Sector – Good Practices Guide (2020) http://documents1.worldbank.org/curated/en/950091599837673013/pdf/Preventing-and-Managing-Conflicts-of-Interest-in-the-Public-Sector-Good-Practices-Guide.pdf

[7] See Petition: UNGASS 2021: Commit to Transparency in Company Ownership for the Common Good (February 2021) https://www.transparency.org/en/ungass-2021-commit-to-transparency-in-company-ownership-for-the-common-good

transnational crimes do not go unprosecuted as a result of jurisdictional gaps."[8] UNODC explains that this includes the exercise of universal jurisdiction.[9] A good case for such exercise would be corruption involving high-level officials and on a large-scale. However, according to UNODC, there is confusion about this provision and the majority of states have not introduced additional jurisdiction based on it. The exercise of forms of extensive jurisdiction could be elaborated in a new instrument. There should also be greater provision for assistance to countries willing to pursue complex corruption cases but lacking resources and skills.

In case no enforcement authorities are willing and able to take on a case, another solution is to provide non-state actors with the power initiate a prosecution in the public interest, with associated technical and financial assistance.[10] Many common law jurisdictions have a private prosecution model and in civil law jurisdictions there are the examples in the form of the *partie civile* in France and the *acusador popular* in Spain.

A related issue would be to recognize standing for non-state actors who have not been directly harmed to make claims for compensation in foreign jurisdictions on behalf of a victim population. Claims for collective and social damages should also be recognized, whether presented by state or non-state representatives.[11] These are also areas where there are gaps in the UNCAC.

Jurisdictional gaps may also be created by immunities of high-level or other public officials, both domestically and in foreign jurisdictions. States are relatively free to decide on this matter under Article 30(2) but greater clarity would be helpful. There are strong arguments for saying that functional immunities should not be recognised in corruption cases either in domestic or foreign jurisdictions and that personal immunity should be strictly limited.[12]

International coordination gaps: Both UNCAC Article 49 and UNTOC Article 19 foresee the possibility of *multilateral agreements for joint investigative bodies* for matters that are the subject of investigation, prosecution or judicial proceedings in more than one state. According to UNODC's 2017 UNCAC Implementation report, there were relatively few such agreements

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[8] UNODC, Legislative Guide to the United Nations Convention against Corruption (2006), page 134 https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf

[9] UNODC, The State of Implementation of the United Nations Convention against Corruption (2017) page 192. The report also discusses the state protection principle as a basis for jurisdiction. (page 191) https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf

[10] See 2nd UNGASS submission of the International Bar Association, page 10, https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/Final_UNGASS_2nd_Submission_clean.pdf This is sometimes called an "*actio popularis*", which can be understood as "A right for each member of a community -or designated members of the community- to bring an action in defense of a public interest."

[11] The concept of social damage and related concepts such as "moral damages" are recognised in several countries and are associated with compensation for damages to the public interest. For a discussion of this subject see article by Juanita Olaya, Dealing with the Consequences: Repairing the Social Damage Caused by Corruption (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475453 and some discussion in the TI Exporting Corruption Corruption Report 2020 at pages 21 et seq 2020 https://images.transparencycdn.org/images/2020_Report-Full_Exporting-Corruption_EN.pdf

[12] On this subject see eg. Peter A. Allard School of Law, Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply? (2016) https://allard.ubc.ca/sites/default/files/2020-06/when_do_immunities_apply_final.pdf and Maud Perdriel-Vaissiere, International Immunities and the Fight Against Grand Corruption (2019) https://www.justiceinitiative.org/publications/legal-remedies-for-grand-corruption-2 and Tilman Hoppe, Public Corruption Limiting Criminal Immunity of Legislative, Executive and Judicial Officials in Europe (2011) http://tilman-hoppe.de/ICL_Journal_5_4_11.pdf

and only 16 countries had actually created a coordination body.[13] This looks like a big gap considering the estimated scale of cross-border corruption. Coordination may also be needed regarding court proceedings as foreseen by Article 42(5).

New ways of addressing cooperation and coordination should be considered. An independent international coordination body with its own staff would enable a pooling of resources and accumulation of experience. It would help improve international cooperation and reduce duplication of efforts. Eurojust in the European Union and the International Anti-Corruption Coordination Centre are examples of how this could work.[14]

Such a body could also help provide assistance to countries lacking resources and skills. This might extend to introducing an international body into a country, upon invitation, along the lines of the International Commission against Impunity in Guatemala (CICIG).[15] In terms of court proceedings, support could be provided along the lines of the Extraordinary Chambers in the Courts of Cambodia.[16] These types of arrangements could be provided for in a new instrument.

International dispute settlement gaps: UNCAC Article 66(2) foresees a process for settlement of disputes about the interpretation or application of the Convention. This could provide the basis for establishing an arbitration mechanism, another subject that would require elaboration in a supplementary agreement. Only twenty states have registered reservations to this provision.[17]

The role of an intergovernmental expert working group: The UNCAC itself provides for the Conference of States Parties to make recommendations to improve the Convention and its implementation (UNCAC Article 63). However, amendment of the Convention is not a promising route.

What is needed now is a multilateral agreement or optional protocol to the UNCAC with elements that strengthen and expand the framework established by UNCAC. It is to be expected that the number of states participating in such an agreement will not be as large as those that are parties to the UNCAC itself, because a number of governments may not agree with stronger provisions. This should not stop others from developing a stronger framework.

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[13] UNODC, State of Implementation of the UN Convention against Corruption (2017) page 254. The report says that 38 States parties are parties to agreements allowing the establishment of joint investigation bodies, of which 27 are members of the European Union, party to EU agreements.
https://www.unodc.org/documents/treaties/UNCAC/COSP/session7/V.17-04679_E-book.pdf

[14] Information about the International Anti-Corruption Coordination Centre can be found at this link:
https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/bribery-corruption-and-sanctions-evasion/international-anti-corruption-centre

[15] See https://dppa.un.org/en/mission/cicig

[16] https://www.eccc.gov.kh/en

[17] The following twenty states registered reservations to the dispute settlement process: Algeria, Azerbaijan, Bangladesh, China, Colombia, Cuba, Indonesia, Iran, Israel, Moldova, Pakistan, Panama, Qatar, South Africa, Tunisia, UAE, the USA, Uzbekistan, Vietnam and Yemen.
https://www.unodc.org/documents/treaties/UNCAC/ReservationsDeclarations/DeclarationsAndReservations14Aug2008.pdf

We believe that an intergovernmental expert working group should do three things: first, it should study in-depth areas not yet explored by the UN system– especially possible new structures; second, it should summarise known and already-studied tools that have not been introduced into the UNCAC; and third, it should develop concrete, technical proposals for new legal and institutional frameworks. These proposals could provide the basis for new multilateral agreements or an optional protocol to the UNCAC.

Part of the in-depth study should cover possible additions to the international anti-corruption infrastructure such as those discussed in Transparency International's first submission on grand corruption to the UNGASS against Corruption.[18] One possible avenue would be to request the UN Secretary General's Office to prepare such a study.

The expert group should have a fixed time frame for completing its work and should include experts from civil society and other relevant stakeholders, to ensure a wide range of expertise.

The model of an open-ended intergovernmental expert group with a defined time frame for producing specific outputs and multi-stakeholder participation is one currently being used in Vienna, for example in connection with the expert group on cybercrime.[19] In Geneva another example is the intergovernmental working group established by the Human Rights Council to develop an international regulatory framework relating to the activity of private military and security companies.[20]

[18] Transparency International, Proposals on the international legal framework and infrastructure to address grand corruption impunity (March 2020) https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TransparencyInternational.pdf

[19] In Vienna, on the basis of a resolution of the Crime Congress, the Commission on Crime Prevention and Criminal Justice set up an intergovernmental expert group to prepare a comprehensive study of the problem of cybercrime. https://www.unodc.org/unodc/en/organized-crime/open-ended-intergovernmental-expert-group-meeting-on-cybercrime.html. That working group includes participants from academia and the private sector https://www.unodc.org/documents/Cybercrime/IEG_Cyber_website/UNODC_CCPCJ_EG.4_2020_INF_1_REV.1.pdf

[20] This working group was established in 2017 by the Human Rights Council for a period of three years in its resolution 36/11. The working group's discussion was to be informed by the discussion document on elements for an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies, prepared by the Chair-Rapporteur, and further inputs from Member States and other stakeholders. The Human Rights Council also acknowledged the importance of providing the working group with the expertise and expert advice necessary to fulfil its mandate, and decided that the working group should invite experts and all relevant stakeholders to participate in its work https://www.ohchr.org/EN/HRBodies/HRC/IGWG_PMSCs/Pages/Session2.aspx