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**Globalization and interdependence: preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin**

**Crime prevention and criminal justice**

## **Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin**

### **Report of the Secretary-General**

#### *Summary*

The present report, prepared pursuant to General Assembly resolution 58/205 of 23 December 2003, contains a summary of the responses received from Croatia, Nigeria, Norway, Pakistan, Slovakia, Slovenia and Turkey. It also provides a summary of the legal framework of asset recovery under the newly adopted United Nations Convention against Corruption, highlighting recent international initiatives in that area, and includes a brief analysis of how the Convention and the recent initiatives tackle the issue of asset recovery, followed by conclusions and recommendations.

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\* A/59/150.



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## I. Introduction

1. In its resolution 58/205 of 23 December 2003, the General Assembly welcomed the adoption of the United Nations Convention against Corruption (resolution 58/4, annex); invited all Member States and competent regional economic integration organizations to sign, ratify and fully implement the Convention as soon as possible in order to ensure its rapid entry into force; encouraged all Member States that had not yet done so to enact laws to prevent and combat corrupt practices and the transfer of illicitly acquired assets and for the return of such assets to the countries of origin, in accordance with the Convention; encouraged subregional and regional cooperation, where appropriate, in the efforts to prevent and combat corrupt practices and the transfer of assets of illicit origin and for the return of such assets to the countries of origin; called for further international cooperation, inter alia, through the United Nations system, in support of national, subregional and regional efforts to prevent and address the transfer of assets of illicit origin, as well as to return such assets to the countries of origin; requested the international community to provide, inter alia, technical assistance to support national efforts to strengthen human and institutional capacity aimed at preventing corrupt practices and the transfer of assets of illicit origin, returning such assets to the countries of origin and formulating strategies for mainstreaming and promoting transparency and integrity in both the public and private sector; and requested the Secretary-General to submit a report to it at its fifty-ninth session on the implementation of the resolution.

2. The Ad Hoc Committee for the Negotiation of a Convention against Corruption agreed on the use of the generic term “asset recovery” to replace the phrase “preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin” in the United Nations Convention against Corruption. Accordingly, the term “asset recovery” is also used in the present report, which is submitted pursuant to General Assembly resolution 58/205.

## II. National measures

3. Pursuant to General Assembly resolution 55/188 of 20 December 2000, the Centre for International Crime Prevention of the United Nations Office on Drugs and Crime submitted a report to the Assembly at its fifty-sixth session on the prevention of corrupt practices and illegal transfer of funds (A/56/403 and Add.1) containing the responses received from Member States and relevant bodies of the United Nations system regarding measures adopted to implement resolution 55/188 of 20 December 2000, including action against corrupt practices and the issue of preventing and combating the transfer of funds of illicit origin and returning such funds. Twenty-nine States provided replies at that time: Algeria, Bahamas, Bahrain, Bosnia and Herzegovina, Brazil, Cook Islands, Estonia, France, Greece, Guyana, India, Italy, Japan, Kuwait, Malaysia, Malta, Mauritius, New Zealand, Panama, Peru, Philippines, Spain, Switzerland, Syrian Arab Republic, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Zimbabwe. Replies were also received from two bodies of the United Nations system, the United Nations Development Programme and the United Nations

Conference on Trade and Development. Many responses included copies of national legislation and recent legal reforms in the area, the status of ratification of relevant treaties and a description of international or regional initiatives. The report also provided an analytical overview and specific recommendations concerning the return of illegally transferred funds to the countries of origin.

4. A further report (A/57/158 and Add.1 and 2) was submitted to the General Assembly at its fifty-seventh session in response to resolution 56/186 of 21 December 2001. The following 28 States provided information on progress made in the implementation of resolution 56/186 or updated the replies that had appeared in the previous report of the Secretary-General: Azerbaijan, Bolivia, Brazil, Bulgaria, Colombia, Croatia, Czech Republic, Germany, Greece, Haiti, Hungary, Jordan, Mauritius, Mexico, Monaco, Myanmar, Oman, Pakistan, Poland, Republic of Korea, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey and Ukraine. The topics covered in the responses included national anti-corruption programmes, domestic legislation and reform plans, institutional arrangements and relevant international legal instruments ratified. Considering that national legislation on the subject in many parts of the world was inadequate and the question of the transfer of funds of illicit origin and the return of such funds had not been specifically regulated by any of the existing treaties, the report concluded that the forthcoming convention against corruption could make a significant contribution to the fight against corruption.

5. A report was also submitted to the General Assembly at its fifty-eighth session, complementing the previous report of the Secretary-General with an additional response provided by Lebanon (A/58/125).

6. During the period under review, the Governments of Nigeria and Norway have provided information on progress made pursuant to General Assembly resolution 58/205, with detailed explanatory notes on their national legislation and measures concerning asset recovery. In addition, the Governments of Croatia, Pakistan, Slovakia, Slovenia and Turkey updated the information with regard to progress made in the implementation of General Assembly resolutions 55/188 and 56/186 contained in previous reports of the Secretary-General.

#### **Croatia**

7. The Government of Croatia reported that, since 2002, progress made by it included ratification of the Council of Europe Civil Law Convention on Corruption of 5 June 2003,<sup>1</sup> which became effective on 1 November 2003 for Croatia, as well as signature of the United Nations Convention against Corruption on 10 December 2003, which the Government indicated would be ratified in the near future. In that connection, the Government was considering establishing a new anti-corruption body to implement preventive anti-corruption measures in accordance with the United Nations Convention against Corruption.

8. New developments with regard to national legislation and measures on anti-corruption and asset recovery since 2002 were also mentioned. With a view to strengthening the role of the Office for the Suppression of Corruption and Organized Crime, established as a specialized state attorney's service for action against criminal offences of corruption and organized crime, the Ministry of Justice was preparing amendments to the Act on the Office in order to ensure coordination

among state attorneys, judges and the police in the fight against corruption and organized crime. In addition, the Criminal Procedure Act had been amended in May 2002 so as to contribute to faster and more efficient prosecution of criminal offences related to corruption. In order to bring substantive criminal law in line with international standards, in particular, the United Nations crime conventions and the Council of Europe Criminal Law Convention on Corruption<sup>y</sup> and other conventions of the Council, amendments to the Penal Code had been sent to governmental and parliamentary bodies in early April 2004.

9. In addition to those amendments to the existing legislation, the Government had enacted several new laws. The Witness Protection Act had entered into force on 1 January 2004 and a special unit had been established in the Ministry of the Interior. Moreover, the Act on Criminal Liability of Legal Persons (*Official Gazette*, No. 151/03), which incorporated the principles of the United Nations crime conventions, had also been enacted to address the increasing problems of economic, corruption and other criminal offences where a legal person was responsible for criminal activity and the user of illegally gained proceeds. The Act on Preventing Conflict of Interest had been enacted in October 2003 (with amendments on 5 July 2004) with a view to complementing other criminal regulations and resolving conflicts of interest arising from situations where public officials had a private interest that affected or could affect impartiality in the performance of their public duties. Another important law was the Act on Foreigners, which included measures to protect victims, as well as cooperation with non-governmental organizations. The Act on Asylum had been enacted on 1 July 2004.

10. Taking into account the importance of transparent, open and fair public administration in the prevention of corruption, Croatia had adopted the Act on the Right of Access to Information of 16 October 2003, which created a legal framework for the protection of the right of access to information in line with the new Media Act and the Personal Data Protection Act.

11. The Government of Croatia also indicated that the new law on funding of political parties was expected to be adopted in 2004 with a view to ensuring that funding of political parties followed the principle of transparency in the use of budgetary funds and that limitations were imposed on donations by individuals and firms who might ask for privileges and special status in exchange.

## **Nigeria**

12. The following measures were reported to have been taken pursuant to paragraphs 7 and 8 of General Assembly resolution 58/205: measures to combat corruption, economic and financial crime and money-laundering. With regard to anti-corruption measures, Nigeria had enacted the Corrupt Practices and Other Related Offences Act in 2000, which sought to prohibit and prescribe punishment for corrupt practices and related offences. It had also established the Independent Corrupt Practices and Other Related Offences Commission, vesting it with responsibility for investigation and prosecution of offenders in that area. In addition, the Act contained provisions for the protection of whistle-blowers who provided information to the Commission in relation to offences committed or likely to be committed by any other person. In 2003, an amendment had been submitted to the National Assembly in order to strengthen the Act, as well as to take cognizance of the Convention against Corruption. The Government had also strengthened

preventive measures against corrupt practices and fraudulent tendencies, which hindered national development.

13. As regards measures to combat economic and financial crime, in 2002 the Government of Nigeria had enacted the Economic and Financial Crimes Commission (Establishment) Act, which set up the Economic and Financial Crimes Commission to be responsible, *inter alia*, for the prevention, detection and investigation of economic and financial crimes, as well as for the prosecution of the culprits. The Act of 2002 had been replaced with the Economic and Financial Crimes Commission (Establishment) Act of 2004, which was more comprehensive, effective and result-oriented. In addition, section 1 (2c) of the Act of 2004 designated the Financial Intelligence Unit of Nigeria in the Commission. The Economic and Financial Crimes Commission had been functioning effectively since its formal establishment in 2003.

14. At the beginning of 2004, the Government had enacted a new Money-Laundering (Prohibition) Act of 2004, which amended the Money-Laundering (Prohibition) Act of 2003. The new Act contained comprehensive provisions to prohibit the laundering of proceeds of illicit origin, expanding the interpretation of “financial institutions” and their obligations with a view to maintaining due diligence and vigilance for the purposes of transparency, prevention and detection of the placement of funds of illicit origins.

#### **Norway**

15. Norway reported that it had amended its national legislation regarding corruption through the following new provisions in its Penal Code: § 276a, b and c on 4 July 2004. New section 276a read as follows:

“Any person shall be liable to a penalty for corruption who (a) for himself or other persons, requests or receives an improper advantage or accepts an offer of an improper advantage in connection with a post, office or commission, or (b) gives or offers anyone an improper advantage in connection with a post, office or commission. By post, office or commission in the first paragraph is also meant a post, office or commission in a foreign country. The penalty for corruption shall be fines or imprisonment for a term not exceeding three years. Complicity is punishable in the same manner.”

In addition, section 276b established that gross corruption was punishable by imprisonment for a term not exceeding 10 years and section 276c extended the scope of corruption to trading in influence. While the three amendments had been made with a view to implementing Norway’s obligations under the Council of Europe Criminal Law Convention on Corruption and its Additional Protocol,<sup>7</sup> section 276a went further in criminalizing corrupt behaviour than was required by that Convention.

16. With regard to new provisions on asset recovery, in particular implementing provisions relevant to article 57 of the United Nations Convention against Corruption, the Government of Norway was in the process of reviewing and amending its legislation. On 2 July 2004, the Ministry of Justice had presented a draft proposal for the new provisions on asset recovery that was expected to be adopted by the end of 2005.

## Pakistan

17. The Government of Pakistan provided detailed information with regard to progress made in the fight against corruption, as well as new initiatives since the last report. The National Accountability Ordinance had been promulgated in order to circumvent various forms of corruption and resolve the weaknesses of earlier laws. The National Accountability Bureau had successfully prosecuted senior bureaucrats, military personnel, politicians and businessmen on charges of corruption and corrupt practices. The Bureau had also devised the National Anti-Corruption Strategy, which was currently in the implementation phase. The Strategy recommended a detailed anti-corruption action plan for all pillars of the national integrity system, that is, the legislature, the executive, the judiciary, public accountability bodies, anti-corruption agencies, the media, civil society and the private sector. It also recommended a comprehensive anti-corruption approach for Pakistan, encompassing awareness, prevention and enforcement.

18. The State Bank of Pakistan, the central bank of the country, had taken concrete steps to prevent the use of banking channels for the transfer of funds of illicit origin, including the establishment of an Anti-Money-Laundering Unit, issuance of guidelines to banks and financial institutions, as well as regulation of the business of money-changers (*bureaux de change*).

19. Pakistan had been among the first signatories of the United Nations Convention against Corruption. With a view to raising awareness about the Convention, an international conference had been organized in April 2004, at which delegates had endorsed the anti-corruption initiatives of the Asian Development Bank and the Organization for Economic Cooperation and Development. Leading anti-corruption experts and representatives of international organizations had attended the conference and the provisions of the Convention and possibilities of enhancing international and regional cooperation had been discussed.

## Slovakia

20. Since 2002, progress made by Slovakia with regard to international and regional instruments included the entry into force of the Council of Europe Civil Law Convention on Corruption on 1 November 2003; the signature of the United Nations Convention against Corruption on 9 December 2003; and the approval of accession to the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union<sup>4</sup> by the National Council of Slovakia on 14 May 2004 (the technical conditions for accession to the latter Convention are in preparation). In addition, the effectiveness of the measures adopted by the Slovak authorities in order to comply with the requirements with regard to proceeds of corruption, public administration and corruption as well as legal persons and corruption had been evaluated by the evaluation team of the Group of States against Corruption of the Council of Europe in the second evaluation round.

21. The Government of Slovakia had provided for its legislative framework for the fight against corruption, according to which the definition of corruption was in full compliance with the requirements of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I). By amending the Penal Code (No. 421/2002 Coll.), the Government had harmonized

the Code with the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime of the Council of Europe,<sup>°</sup> as well as the Council framework decision of 26 June 2001 on money-laundering.<sup>¶</sup> Additional highlights included a new Penal Code and Code of Criminal Procedure, which was scheduled to be adopted in late 2004 and to enter into force on 1 April 2005. The new Penal Code would establish the criminal liability of legal persons in line with the recommendations made by the Group of States against Corruption of the Council of Europe and the Organization for Economic Cooperation and Development, as well as the conditions set by the European Union directive on corruption in the private sector.<sup>∇</sup>

22. With a view to making the fight against corruption and organized crime more effective, the Ministry of the Interior had carried out a comprehensive reform of the police force, within which the Office for the Fight against Corruption had been established. The Office addressed the most serious forms of corruption and aimed at eliminating corruption, in particular in the fields of public administration, the judiciary and the health sector, as well as in the sphere of international grants and protection of the financial interests of the European Communities. The Government was to organize a ministerial conference on the fight against corruption in the health sector in October 2004, which would adopt a charter and establish a European Union-level central body for its implementation.

#### **Slovenia**

23. Slovenia reported that it had ratified the Council of Europe Civil Law Convention on Corruption in 2003 (*Official Gazette RS*, No. 35/2003). In 2004, the Government had adopted the Law on the Prevention of Corruption (*Official Gazette RS*, No. 2/2004), which established the independent Commission for the Prevention of Corruption with coordinative and preventive tasks in the fight against corruption. In addition, the Law on Amendments to the Criminal Code had been adopted (*Official Gazette RS*, No. 40/2004) in order to bring the definitions of foreign and international public officials, as well as the description of the corruption offences, into compliance with the Council of Europe Criminal Law Convention on Corruption and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development.<sup>^</sup> In the amendments, the sanction for the basic criminal offence of money-laundering (art. 252 of the Criminal Code) had been increased from three to a maximum of five years of imprisonment. On 16 June 2004, the Slovenian Parliament had adopted a national strategy for the fight against corruption, the Resolution on the Prevention of Corruption in the Republic of Slovenia, which introduced 172 measures against corruption, including seizure and confiscation of the proceeds of all crime, as well as provisions on the reversal of the burden of proof. Those measures would become effective in the Action Plan for the Implementation of the Resolution.

24. The Government of Slovenia also indicated that accession to the United Nations Convention against Corruption was one of its priorities and that it intended to complete the accession procedure by the end of 2004.



## Turkey

25. Turkey reported having ratified the Council of Europe Civil Law and Criminal Law Conventions on Corruption and having been a member of the Group of States against Corruption since 1 January 2004. It had also signed the United Nations Convention against Corruption and had started the domestic proceedings required for its ratification.

26. An amendment had been made to article 221 of the Turkish Penal Code, which defined bribery. With that amendment, the relevant provisions of the Penal Code also applied in the case of bribery of foreign officials, as foreseen in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic and Cooperation Development. The Law on the Prevention of Money-Laundering had also been amended so as to make offences related to bribery predicate offences. In addition, Turkey had established the criminal liability of legal persons for bribery without prejudice to the criminal liability of natural persons who committed acts of bribery.

27. Moreover, the Law on the Establishment of a Board of Ethics for Public Officials (Law No. 5176) had been enacted and put into effect upon promulgation in the *Official Gazette* on 8 June 2004, with a view to establishing a code of ethics that public officials needed to adhere to for the correct and proper performance of their public functions.

### III. Legal framework for asset recovery under the United Nations Convention against Corruption

#### A. Background

28. In its resolution 56/260 of 31 January 2002, the General Assembly decided that the Ad Hoc Committee for the Negotiation of a Convention against Corruption should negotiate a broad and effective convention; and requested the Ad Hoc Committee, in developing the draft convention, to adopt a comprehensive and multidisciplinary approach and to consider several elements, including preventing and combating the transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds, and returning such funds. The issue of asset recovery was discussed extensively during all seven sessions of the Ad Hoc Committee. In order to assist delegations, a technical workshop featuring expert presentations on asset recovery was held in conjunction with the second session of the Ad Hoc Committee (see A/AC.261/6/Add.1 and A/AC.261/7, annex I) and a global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption, was submitted to the Committee at its fourth session (see A/AC.261/12).

29. In its resolution 58/4 of 31 October 2003, the General Assembly adopted the United Nations Convention against Corruption and opened it for signature at the High-level Political Signing Conference, held in Merida, Mexico, from 9 to 11 December 2003. At the time of writing, there were 111 signatories and 4 parties.

## **B. Asset recovery provisions**

30. In a major breakthrough, the United Nations Convention against Corruption includes a complete and far-reaching set of provisions on asset recovery (chap. V, arts. 51-59). Article 51 explicitly provides that asset recovery is a fundamental principle of the Convention (see also A/58/422/Add.1, para. 48). This is a particularly important issue for many developing countries where high-level corruption has plundered the national treasury and where resources are badly needed for reconstruction and the rehabilitation of societies under new Governments. Reaching agreement on the chapter on asset recovery by the Ad Hoc Committee involved intensive negotiations, as the needs of countries seeking return of illicit assets had to be reconciled with the legal and procedural safeguards of the countries whose assistance was sought.

31. The Convention includes substantive provisions that set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. With regard to return actions, chapter V includes a series of provisions that favour return to the requesting State party, depending on how closely the assets are linked to it in the first place. Thus, funds embezzled from a State are supposed to be returned to it without further conditions (art. 57, para. 3 (a)). Proceeds of other offences covered by the Convention are to be returned to the requesting State party if it establishes ownership or the requested State party recognizes damage to the requesting State party (art. 57, para. 3 (b)). In other cases primary consideration is given to returning assets to the requesting State party or a prior legitimate owner (art. 57, para. 3 (c)). Chapter V of the Convention also provides for mechanisms for direct recovery in civil or other proceedings (art. 53) and a comprehensive framework for international cooperation (arts. 54 and 55), which incorporates the more general mutual legal assistance requirements, *mutatis mutandis*. Recognizing that recovering assets once transferred and concealed is an exceedingly costly, complex, and all too often unsuccessful process, chapter V also incorporates elements intended to prevent illicit transfers and generate records that can be used should illicit assets eventually have to be traced, frozen, seized and confiscated (art. 52). The identification of experts who can assist developing countries in that process is also included as a form of technical assistance (art. 60, para. 5).

## **IV. International initiatives**

### **A. Legislative guide for the implementation of the United Nations Convention against Corruption**

32. In order to assist States in the ratification and implementation process by identifying legislative requirements, issues arising from those requirements and options available to States in developing and drafting the necessary legislation, the United Nations Office on Drugs and Crime, in close cooperation with the United Nations Interregional Crime and Justice Research Institute, has begun developing a legislative guide for the ratification and implementation of the United Nations Convention against Corruption.

33. The guide will be developed through a fully participatory process with the active involvement of a group of experts from all regions, following the methodology used for the development of the legislative guides for the United Nations Convention against Transnational Organized Crime and the Protocols thereto. The first expert meeting, held in Turin, Italy, from 10 to 12 July 2004, reviewed the contents and structure of the legislative guide, including legislative requirements arising from the provisions on asset recovery. The second expert meeting is scheduled to be held in the first quarter of 2005.

34. The legislative guide will be made available in all official languages and disseminated as widely as possible.

## **B. Group of Eight**

35. The Group of Eight Justice and Home Affairs Ministers met in Washington, D.C., on 11 May 2004 and agreed to take action to advance asset recovery, building upon the mandates of the United Nations Convention against Corruption. The action decided by the ministers of justice and home affairs in order to help victim States recover illicitly acquired assets is as follows:

(a) Establishment of accelerated response teams, consisting of forfeiture-related mutual legal assistance experts, which would be deployed at the request of victim States;

(b) Asset recovery case coordination, which would establish case-specific coordination task forces to work through responses to mutual legal assistance and forfeiture requests;

(c) Asset recovery workshops, which would be held at the regional level, as appropriate, and in coordination with existing regional and international organizations, including the United Nations Office on Drugs and Crime.

36. In addition, the ministers agreed to ensure that the countries of the Group of Eight should adopt laws and procedures to detect, recover and return proceeds of corruption.

37. At the Sea Island Summit, on 10 June 2004, the heads of States of the Group of Eight expressed their support to the commitments made at the meeting of their ministers of justice and home affairs.

## **C. Commonwealth working group on asset repatriation**

38. In the Aso Rock Commonwealth Declaration on Development and Democracy: Partnership for Peace and Prosperity, adopted at the summit in Abuja in December 2003, the Commonwealth heads of Government urged the early signature, ratification and implementation of the United Nations Convention against Corruption by the States members of the Commonwealth. They also pledged maximum cooperation and assistance among their Governments to recover assets of illicit origin and to return them to their countries of origin. To that end, a Commonwealth working group on asset repatriation was established to examine the issue of the recovery of assets of illicit origin and return of those assets to the

countries of origin, focusing on maximizing cooperation and assistance between Governments, as well as to prepare a report with specific recommendations for the advancement of effective action in that area. The United Nations Office on Drugs and Crime was invited to participate as an observer in the meetings of the group.

39. From 14 to 16 June 2004, the first meeting of the Working Group on Asset Repatriation was held in London to discuss issues relating to misappropriation of assets, civil asset forfeiture, movement of funds, tracing and trafficking of assets, mutual assistance, restraint of assets, return of assets and the use of the Harare Scheme, which is a commitment of ministers of justice of the Commonwealth countries to provide mutual assistance in criminal matters.

40. The Working Group is expected to meet three more times in 2004 and 2005 to finalize a report with specific recommendations for the advancement of effective action in asset repatriation, to be submitted to the Commonwealth Heads of Government Meeting to be held in Malta in 2005 through the Commonwealth Secretary-General.

## **V. Progress made in overcoming obstacles to asset recovery**

41. In the report of the Secretary-General of 8 July 2003 on preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin (A/58/125), a number of obstacles were identified in asset recovery.

42. The present section illustrates how the newly adopted United Nations Convention against Corruption and the other international initiatives described above might contribute to overcoming the obstacles identified in the previous report of the Secretary-General.

### **A. Obstacles identified**

43. The previous report of the Secretary-General identified the following obstacles to asset recovery:

- (a) With regard to recovery actions, four major obstacles were indicated:
  - (i) Anonymity of transactions impeding the tracing of funds and the prevention of further transfers;
  - (ii) Lack of technical expertise and resources;
  - (iii) Lack of harmonization and cooperation;
  - (iv) Problems in the prosecution and conviction of offenders as a preliminary step to recovery;
- (b) Difficulties concerning return actions included:
  - (i) Concerns about the motivation behind recovery efforts;
  - (ii) Competing claims within and across States.

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## **B. Possible remedies as a result of recent efforts**

44. The United Nations Convention against Corruption and other international initiatives have the potential to offer a number of remedies and solutions to the obstacles and difficulties identified above.

### **1. Anonymity of transactions impeding the tracing of funds and the prevention of further transfers**

45. In addition to the provisions against money-laundering under articles 14, 23 and 24 (see also articles 6 and 7 of the Organized Crime Convention), the Convention against Corruption requires States parties to take measures to prevent and detect transfers of proceeds of crime. Article 52 requires States parties to apply enhanced measures of scrutiny in addition to normal due diligence to accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.<sup>3</sup> In that connection, the Commonwealth Working Group on Asset Repatriation (see paras. 38-40 above) underlined that the United Nations Convention against Corruption had made an important advance by expanding the scope of application of enhanced scrutiny to any individuals regardless of their nationality. The wider scope of enhanced scrutiny would enable States parties to detect suspicious transactions more effectively.

46. With regard to bank secrecy, article 40 of the Convention requires States parties to ensure that there are appropriate mechanisms available within their domestic legal systems to overcome obstacles that may arise out of the application of bank secrecy laws.

### **2. Lack of technical expertise and resources**

47. The lack of expertise and resources was another obstacle to recovery actions and several ways to finance those recovery actions were suggested in the report of the Secretary-General.

48. In general, chapter VI of the Convention against Corruption includes provisions for training, technical assistance, information exchange and analysis and implementation through economic development and technical assistance that are similar to those contained in the Organized Crime Convention, modified to take account of the broader and more extensive nature of corruption and to exclude some areas of research or analysis seen as specific to organized crime. Also called for is work through international and regional organizations (many of which have already established anti-corruption programmes), research efforts and the contribution of financial resources both directly to developing countries and countries with economies in transition and to the United Nations Office on Drugs and Crime (art. 60, paras. 3-8), which is expected to support pre-ratification assistance. (See paragraph 9 of General Assembly resolution 58/4, in which the Assembly requested the Secretary-General to provide the Office with the resources necessary to enable it to promote in an effective manner the rapid entry into force of the Convention against Corruption.)

49. In particular, development of training programmes relevant to asset recovery is required under article 60, paragraph 1 (e)-(h). Additionally, States parties are

encouraged to cooperate in exchanging the names of experts in asset recovery (art. 60, para. 5) for facilitating recovery actions.

50. In that context, the recommendations contained in the Ministerial Declaration of the Group of Eight Justice and Home Affairs Ministers (see paras. 35-37 above), should be noted in connection with the need for expertise and resources. In particular, the accelerated response teams and asset recovery case coordination proposed by the Group of Eight could have a significant impact in successful recovery actions.

### **3. Lack of harmonization and cooperation**

51. The report of the Secretary-General also pointed out that further obstacles had been created by the diversity of approaches taken by different legal systems with respect to asset recovery, such as diverse standards in evidentiary and procedural rules, the relationship between criminal prosecution and recovery proceedings and the availability of civil forfeiture.

52. The Convention against Corruption provides a new framework for cooperation with a view to asset recovery, while maintaining the flexibility in recovery action that might be warranted by particular circumstances.

53. The new framework under the Convention provides for two alternatives in order to allow flexibility in the way States parties can initiate recovery procedures. Article 53 establishes a regime of direct recovery (see paras. 57 and 58 below), while articles 54 and 55 foresee a regime of international cooperation for confiscation.

54. Under the regime for international cooperation for confiscation set forth in articles 54 and 55, a State party that receives a request for confiscation from another State party is required to take one of the following two options to the extent possible within their domestic legal system: the requested State party must either directly submit for enforcement by its competent authorities an order issued by the requesting State party (art. 55, para. 1 (b)) or it must submit the request to its competent authorities in order to obtain a domestic order of confiscation, to which, if granted, the requested State party would be required to give effect (art. 55, para. 1 (a)).

55. With a view to further facilitating cooperation, article 55 provides guidelines as to what should be included in a request for confiscation (art. 55, para. 3), as well as criteria for refusing cooperation (art. 55, para. 7). Under this article, cooperation may be refused or provisional measures lifted if the requested State party does not receive sufficient and timely evidence. Before lifting any provisional measure, however, a requesting State party shall be given an opportunity to present its reasons in favour of continuing that measure (art. 55, para. 8).

56. In connection with strengthening cooperation in asset recovery, it should be emphasized that the dual criminality requirements are narrowed as much as possible within the fundamental legal requirements of the States that cannot criminalize some of the offences established by the Convention, in order to ensure that States parties that do not criminalize certain forms of conduct would cooperate with other States parties that have done so. This is reflected in the mutual legal assistance provisions, which provide that mutual legal assistance should be available even in

the absence of dual criminality, when the assistance requested involves non-coercive measures. Further, States parties are encouraged to allow a wider scope of assistance without dual criminality where possible (art. 46).

#### **4. Problems in the prosecution and conviction of offenders as a preliminary step to recovery**

57. Furthermore, the report of the Secretary-General noted that the recovery of assets could not be sought in many cases until there was a criminal conviction.

58. The provisions of the Convention dealing with civil recovery (arts. 34, 35 and 53) are formulated so as to allow one State party to seek civil recovery from another State party irrespective of criminalization and States parties are encouraged to assist one another in civil matters in the same way as is the case for criminal matters (art. 43, para. 1, which makes cooperation in criminal matters mandatory and calls upon States parties to consider cooperation in civil and administrative matters). These provisions would provide a wider range of options to States parties requesting asset recovery depending on the circumstances involved.

#### **5. Concerns about the motivation behind recovery efforts**

59. The previous report indicated concerns that might arise from claims or suspicions that recovery efforts might be politically motivated, as well as doubts harboured by a requested State about whether the requesting State was free from corruption and the fate of the returned funds or assets.

60. Article 57 of the Convention against Corruption addresses those issues by providing objective criteria for the return of assets. According to article 57, the return of recovered assets can be placed in the following three categories:

(a) In the case of embezzlement of public funds, such funds shall be returned to the requesting State party (art. 57, para. 3 (a));

(b) In the case of proceeds of any other offence covered by the Convention, article 57, paragraph 3 (b), provides that such proceeds are to be returned to the requesting State party when it reasonably establishes its prior ownership of such confiscated property to the requested State party or when the requested State party recognizes damage to the requesting State party as a basis for return;

(c) In all other cases, the requested State party shall give priority consideration to returning confiscated property to the requesting State party, returning such property to its prior legitimate owners or compensating the victims of the crime (art. 57, para. 3 (c)).

61. It should be emphasized that article 57, paragraph 2, of the Convention requires that return of assets be carried out taking into account the rights of bona fide third parties.

#### **6. Competing claims within and across States**

62. Last but not least, competing claims over the same asset, such as assets embezzled from foreign aid projects, reflect the complexity of return actions.

63. The Convention gives flexibility in how to approach this issue, encouraging States parties to consider concluding arrangements on a case-by-case basis for the final disposal of confiscated property (art. 57, para. 5).

64. With regard to the observations made in paragraphs 44-63 above, the Secretary-General wishes to emphasize that they are not intended to provide a legal interpretation of the Convention.

## VI. Conclusions and recommendations

**65. As shown above, much progress has been made with regard to asset recovery by the adoption of the United Nations Convention against Corruption and other international initiatives taken over the past year. In view of this, the Secretary-General submits the following recommendations to the General Assembly for its consideration and action:**

(a) Towards the early entry into force of the Convention. Despite the wide range of opportunities for asset recovery given by the Convention, those opportunities are of no practical use unless the Convention receives the necessary number of ratifications (30) for its entry into force and becomes fully functional. The prompt entry into force of the instrument, to which all participants at the High-level Political Signing Conference attached the highest importance, and subsequently the full implementation of the Convention are matters of urgency, in particular for those who suffer most severely from corrupt practices and illicit transfer of assets. **Based on this, the General Assembly may wish to reiterate its appeal made in its resolutions 58/4 and 58/205, in which it urged all Member States and competent regional economic organizations to sign, ratify and fully implement the United Nations Convention against Corruption as soon as possible in order to ensure its rapid entry into force;**

(b) Need for further cooperation and technical assistance. In connection with the promotion of the entry into force of the Convention, the General Assembly may recall that many government representatives at the High-level Political Signing Conference stressed the importance of assisting developing countries in ratifying and implementing the Convention. **Accordingly, the General Assembly may wish to welcome the initiatives taken by the Group of Eight and the Commonwealth Secretariat with regard to advancing asset recovery in line with the provisions of the United Nations Convention against Corruption. The Assembly may also wish to reiterate its appeal for technical assistance to support national efforts for asset recovery;**

(c) Work of the United Nations Office on Drugs and Crime. With a view to sustaining the political momentum, the United Nations Office on Drugs and Crime has prepared a programme of activities to promote the prompt entry into force of the Convention. It has drawn inspiration from the successful experience gained from the series of activities undertaken to promote the entry into force of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, while tailoring the programme to the specific requirements of the new Convention, including the provisions on asset recovery. **The General Assembly may wish to support the high priority given by the United Nations Office on Drugs and Crime to technical cooperation to promote the signature and ratification of the**



**United Nations Convention against Corruption, including the early finalization of the legislative guide for the ratification and implementation of the Convention. In that respect, the Assembly may wish to encourage Member States to provide adequate financial and human resources to pursue such work;**

(d) Need for further coordination. While welcoming an increasing number of initiatives taken by Member States for advancing asset recovery, such as the activities of the Group of Eight and the Commonwealth Secretariat, the Secretary-General is of the view that it is essential to coordinate current work in this area with a view to eliminating the risk of duplication of activities and streamlining assistance efforts for asset recovery. **For that reason, the General Assembly may wish to invite further efforts to coordinate existing and future initiatives taken by Member States and other organizations with the work of the United Nations Office on Drugs and Crime in the area of asset recovery.**

#### Notes

<sup>1</sup> Council of Europe, *European Treaty Series*, No. 174.

<sup>2</sup> *Ibid.*, No. 173.

<sup>3</sup> *Ibid.*, No. 191.

<sup>4</sup> *Official Journal of the European Communities*, C 195.

<sup>5</sup> United Nations, *Treaty Series*, vol. 1862, No. 31704.

<sup>6</sup> *Official Journal of the European Communities*, L 182/1.

<sup>7</sup> *Ibid.*, L 358.

<sup>8</sup> *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).

<sup>9</sup> The *travaux préparatoires* will indicate that the term “close associate” is deemed to encompass persons or companies clearly related to individuals entrusted with prominent public functions (A/58/422/Add.1, para. 50).