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**Open-ended Intergovernmental
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**Good practices for identifying victims of corruption and
parameters for their compensation**

**Good Practices in Identifying the Victims of Corruption and
Parameters for their Compensation**

Note prepared by the Secretariat

Summary

In its resolution 6/2 entitled “Facilitating international cooperation in asset recovery and the return of proceeds of crime”, the Conference of the States Parties to the United Nations Convention against Corruption decided that the Open-ended Intergovernmental Working Group on Asset Recovery should “*initiate the process of identifying best practices for identifying victims of corruption and the parameters for compensation*”.

This note aims to explore the various dimensions of the issue of compensation of victims of corruption, focusing on States’ different approaches to how victims of corruption are defined and identified, what legal avenues are available to victims who seek compensation, how the extent of damage suffered is assessed and how compensation is determined. The note provides an account of good practices that exist in various States and makes reference to several cases in which compensation was sought by and for victims of corruption.



I. Introduction

1. In its resolution 6/2 entitled “Facilitating international cooperation in asset recovery and the return of proceeds of crime”, the Conference of the States Parties to the United Nations Convention against Corruption (hereinafter, the Conference) directed the Open-ended Intergovernmental Working Group on Asset Recovery (hereinafter, the Working Group) to “*initiate the process of identifying best practices for identifying victims of corruption and the parameters for compensation*”. In the same resolution, the Conference noted that a large proportion of the proceeds of corruption, including those emanating from transnational bribery and other offences established under the Convention, are yet to be returned to the requesting States parties, their prior legitimate owners and victims of the crimes.

2. The Secretariat has prepared the present note with the aim to explore the various dimensions of the issue of compensation of victims of corruption, focusing on States’ different approaches to how victims of corruption are defined and identified, what legal avenues are available to victims to seek compensation, how the extent of damage suffered is assessed and how compensation is determined. The note provides an account of good practices that exist in various States and makes reference to several cases in which compensation was sought by and for victims of corruption. The note draws primarily on the information collected during the first cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption¹ (hereinafter, the implementation review mechanism) and the findings of various relevant tools and publications, in particular those developed by UNODC and the joint UNODC-World Bank Stolen Asset Recovery Initiative (StAR).

3. The United Nations Convention against Corruption underlines the importance of the availability of remedies to those who have suffered damage as a result of corruption in numerous articles. Article 35 requires States parties to take measures to ensure that entities and persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. The *Travaux Préparatoires* to the Convention include an interpretative note for Article 35, which stipulates that the expression “entities and persons” is deemed to include States as well as legal and natural persons.² Several other articles of the Convention are also relevant. Article 26 calls upon States parties to establish the liability of legal persons for corruption offences, which may be of particular importance when victims of corruption seek compensation. Article 32 calls on States parties to protect and enable victims to have their views and concerns presented and considered during criminal proceedings against offenders, thus giving corruption victims the possibility to be heard. Article 34 addresses consequences of corruption and encourages States parties to consider corruption a relevant factor in legal proceedings to annul or rescind a contract. Article 42 explicitly encourages States to increase means of establishing jurisdiction over corruption offences, such as those committed against a State party or its national(s), thus removing potential obstacles to the initiation of legal proceedings against alleged criminals. Chapter V of the Convention on asset

¹ Based on the full country review reports finalized as of June 2016.

² *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption, p. 299.

recovery also includes several relevant provisions. For example, Article 53(b) calls on States parties to take measures to permit their courts to order those who have committed corruption offences to pay compensation or damages to another State party that has been harmed by such offences. Further, Article 57 (3(c)) on return and disposal of assets further emphasizes the importance of returning confiscated property, inter alia, to its prior legitimate owners or of compensating the victims of the crime.³

4. At the regional level, some conventions address directly or indirectly the issue of victim compensation. The Council of Europe Civil Law Convention on Corruption in Articles 1 and 3 requires States parties to provide for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Article 8 of the Convention further requests States parties to allow all parties to a contract whose consent has been undermined by corruption to be able to apply to court for the contract to be declared void, notwithstanding their right to claim for damages. Moreover, the Arab Convention against Corruption in Article 8 requests States parties to give the right to those who suffered damage as a result of corruption to bring an action for compensation for such damage. In Article 30 on asset recovery, the Arab Convention underscores the importance of returning assets to their legal owners and compensating victims.

5. The first cycle of the Implementation Review Mechanism represents an important source of insight on the issue of compensation of corruption victims. This note relies substantially on the information provided by States parties during the reviews, primarily legal provisions and cases provided. Particularly relevant is the information collected with regard to Article 35, as the key provision of the Convention on victim compensation. However, the information collected so far relates only to provisions of Chapters III and IV of the Convention, given that only these two chapters were reviewed during the first cycle. The compensation-related provisions of Chapter V on asset recovery are yet to be reviewed during the second cycle of the review mechanism.

6. A number of tools and publications developed by UNODC and the StAR initiative touch also upon the issue of compensation of victims of corruption, including:

- The Technical Guide to the United Nations Convention against Corruption (2009);
- The Legislative Guide for the Implementation of the United Nations Convention against Corruption (second revised edition 2012);
- The Report on the State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International

³ In addition, the United Nations Convention against Transnational Organized Crime in Article 14(2) requires States parties to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State parties so that they can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners. Article 25(2) also calls upon States parties to establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by that Convention.

Cooperation (2015), which analyses responses of 68 States under review during the first cycle of the implementation review mechanism;

- The Digest of Asset Recovery Cases (2015);
- The StAR Asset Recovery Handbook: A guide for Practitioners (2011);
- The StAR Report on Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action (2011);
- The joint StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012);
- The StAR Report on Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery (2014); and
- The StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015).

7. The issue of compensation of victims of corruption has also been previously discussed by the subsidiary bodies to the Conference, including the Working Group on Asset Recovery. For example, one of the conclusions of the Working Group at its eighth session was that “*procedures for the compensation of victims should be further studied as a possible avenue for asset recovery in accordance with article 57 of the Convention with a view to identifying opportunities and requirements*”.⁴ The discussion guide for the thematic discussion on Articles 52 and 53 prepared by the Secretariat for the same session of the Working Group, as well as the discussion guide on Article 57 prepared for the ninth session, also looked at the issue of compensation and highlighted the key obligations of States parties in this regard.⁵ In addition, during the briefing for non-governmental organizations at the seventh session of the Implementation Review Group in June 2016, a panel discussion took place on the topic of “*Giving voice to victims: in settlements and asset repatriation and through civil actions for damage*”. The panel made several points including that:⁶

- Compensation of victims represents the essence of justice and victims should be empowered to present their views and seek remedies;
- While the Convention does not provide a definition of who is a victim of corruption, it is important to adopt a broad and inclusive approach, recognizing that individuals, entities and States can be considered victims of corruption;
- Civil society and non-governmental organizations play an important role in ensuring that victims are represented in corruption proceedings, and as such should be able to report crimes, give evidence, represent victims or bring public interest litigation;
- Compensation should not be based on a narrow interpretation of damage, but on a full analysis of the broader harm caused by an act of corruption. This should include recognition of collective damage or social harm.

⁴ CAC/COSP/WG.2/2014/4 para. 64.

⁵ CAC/COSP/WG.2/2014/2 and CAC/COSP/WG.2/2015/2.

⁶ CAC/COSP/IRG/2016/CRP.4.

II. Definition and identification of victims of corruption

8. The Convention encourages States to identify victims of corruption and have mechanisms in place permitting victims to seek compensation. It does not provide a definition of a victim of corruption, although the interpretative note on Article 35 in the *Travaux Préparatoires* to the Convention explains that the possibility to seek compensation should be available to States as well as legal and natural persons. Article 53(b) also requires States parties to permit their courts to order corruption offenders to pay compensation or damages to foreign States that have been harmed by corruption offences.

9. Various approaches have been adopted by States to establishing parameters of who is a victim of corruption. Most States do not provide an explicit definition of a victim of corruption in their national legislation. Instead, they rely on general provisions on victims of crime and compensation for damage contained in their national laws, most notably criminal and civil laws. The most common legislative avenues include the following:

(a) Some States define in their criminal laws who is a victim of crime and what rights such a victim is entitled to (including the right to seek compensation);

(b) While not explicitly referring to victims, some States establish in their criminal laws the right to seek compensation by “injured”/“harmed”/“aggrieved”/“damaged” persons;

(c) In some States, the possibility to seek compensation is provided through civil provisions on compensation or through tort law.

10. Only some States explicitly address the right to seek compensation in the context of corruption offences, either by providing a definition of who is a victim of corruption or by regulating compensation mechanisms available in corruption cases. Such approaches are usually included in separate anti-corruption laws, building upon existing criminal and civil provisions, and contain slight variations of the phrase “*any person suffering damage as a consequence of a corrupt act*” to refer to victims of corruption.

11. With regard to the Convention’s requirement to give foreign States the right to stand before courts and receive compensation, from the information collected through the review process of Chapters III and IV, it appears that most States do not explicitly address this right in their general compensation provisions. However, one State explicitly provides in its anti-corruption law that “*Every State signatory of the Convention that [the country] is part of has the right to file suit at [the country’s] courts to claim its right in recovering the ownership of proceeds related to corruption crimes stated in the Convention, and to claim indemnity for damages it suffered as a result of such crimes in accordance with prevailing laws, as long as this state applies the same regulations*”. In addition, several States indicated during their reviews that foreign States fell under the general definition of legal persons and thus, at least in theory, were able to seek compensation. One State explained that although its legislation did not explicitly give foreign States the right to seek compensation, the case law confirmed the existence of this right.

12. Corruption may victimize people directly, but also indirectly and it may also negatively affect the society as a whole. Consequently, some groups of persons may

not be readily considered victims and their legal standing may be denied when they do not have a direct and specific interest. In this context, the concept of social damage should be mentioned, which exists in some jurisdictions and allows compensation for damages to the public interest. It could include damage to the environment, to the credibility of institutions, or to collective rights such as health, security, peace, education or good governance.⁷ As a concrete example, one State⁸ enables the Attorney General to file a civil suit for compensation when the offence caused damage to society (*see the case in Box 1*).

13. During the first cycle of the implementation review mechanism, the vast majority of States were considered to be in compliance with Article 35. The fact that many compensation provisions reviewed were general in nature and did not explicitly address victim compensation in cases of corruption, was not considered an issue by reviewers. Article 35 of the Convention does not require States parties to take a particular approach to defining victims of corruption and their right to seek compensation.⁹ As long as natural persons, legal persons and foreign States are considered to fall under the national definition of persons entitled to claim compensation, the Convention does not require any additional legislative changes.¹⁰ Only a few States parties were found to be non-compliant, employing a restrictive approach granting the status of a victim only to natural persons or not having any relevant measures in place.

14. Despite the fact that most States have in place compensation mechanisms that appear to be compliant with the requirements of the Convention, little is known at the international level about how victims are identified, defined and compensated in practice. A relatively low number of States have referred to concrete compensation cases during the review process and only few relevant cases have been identified by the Secretariat through a desk research. However, from the cases identified, several concern the issue of definition and identification of corruption victims and are summarized in *Box 1* below.

Box 1

Examples of Implementation: Categories of victims

A company as a victim: In one case, an employee of the company F.G. took bribes from a shipping company in exchange for negotiating contracts between F.G. and the shipping company that were favourable to the shipping company. The court found the employee, the shipping company and its agents jointly liable and ordered them to pay compensation to F.G.¹¹

A shareholder as a victim: In one case concerning private bribery, an arbitral award regulating a contract between two legal entities X and Y, which were the two main

⁷ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), pp. 96-98.

⁸ For more information, see the Conference Room Paper presented by Costa Rica during the fourth session of the Conference of the States Parties to the United Nations Convention against Corruption in Marrakech, 2011: CAC/COSP/2011/CRP.6.

⁹ Article 35 explicitly states that the measures taken are to be in accordance with principles of domestic law.

¹⁰ CAC/COSP/WG.2/2014/2 para. 39.

¹¹ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), *Fyffes Group Ltd. v. Templeman* (United Kingdom), p. 91.

shareholders of a company, was submitted to the Court of Appeals. The Court of Appeals reversed the outcome of the award in favour of one of the two parties previously disadvantaged by the arbitral award. Several years later, X filed a civil action within criminal proceedings claiming that Y bribed the judge of the Court of Appeals to obtain a favourable decision. After having found sufficient evidence, the Court ordered Y to pay monetary compensation to X who suffered a loss of profit from an unfair judgement.

An unsuccessful bidder as a victim: In one case, a dishonest bidder was awarded a contract. In response to this, a rival bidder sued the Ministry of Finance (corrupt Ministry employees had accepted bribes from the dishonest bidder) and sought compensation. The unsuccessful bidder was granted compensation by the court.¹²

A foreign State as a victim: In one case, the court of one State ordered a large sum of money (GBP 29.5 mil.) to be paid to another State as damages as a result of a bribery scheme that substantially inflated the cost of a radar contract with that country.¹³

Society as a victim: In one State that incorporates the concept of social damage, the Attorney General sought compensation for the social damage and the loss of prestige suffered by the nation caused by a company that had paid bribes to government officials to secure a cellular network. The Attorney General accepted a settlement agreement and a large sum of money (USD 10 mil.) was paid by the company as a compensation for the social damage caused by bribery.

III. Legal proceedings for compensation — who can initiate them and the nature of proceedings

Who can initiate legal proceedings?

15. States have taken different approaches to granting *locus standi* or legal standing to pursue compensation. The approach most commonly taken includes the right of the individual victims, including natural and legal persons and foreign States, to initiate proceedings to recover compensation. In addition, some States allow the victim's heirs or immediate family members to institute proceedings for compensation, either independently of the victim or where the victim is no longer able to file a claim.

16. In certain cases, even those who are not the sole and direct victims may also be recognized as having legal standing. Some States allow class actions or collective interests actions (in some States called *intereses colectivos o difusos*) by organizations or subsequently by the prosecutor. In general, collective interests proceedings are civil proceedings in which one or several persons institute legal action on behalf of a larger group of persons. They have as an advantage that they reduce the number of representatives in a lawsuit where harm has allegedly been done to a great number of victims. They may also take place in the context of criminal proceedings in which a group of persons start a criminal action or join a

¹² StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012), Gore NO v. Minister of Finance and others Case (South Africa), p. 58-59.

¹³ UNODC Digest of Asset Recovery Cases (2015), p. 84.

case started by the prosecution. One State recognizes the concept of “diffused interests”, which are those that belong to groups not formally organized but united by a specific social need, a physical characteristic, ethnic origin or a particular orientation. In this context, the concept of social damage should also be mentioned, which exists in some jurisdictions and allows compensation for damages to the public interest (*see also para. 12*).

17. Where the corrupt acts have affected the State, the action for compensation is typically brought by the Prosecutor or Attorney General on its behalf.

18. In several States, the courts can issue a “compensation order”. This compensation order is a form of punishment for the offender issued at the discretion of the court, either on its own initiative or following an application by the prosecutor.¹⁴ However, this does not necessarily give victims the right to claim compensation and initiate proceedings. During the review process, this approach was considered insufficient for the purpose of compliance with the Convention.¹⁵

Box 2

Example of Implementation

In one country, NGOs established an important precedent when they were allowed to file a complaint in a corruption case concerning three foreign heads of State and their relatives using the proceeds of corruption to buy luxury assets. The NGOs filed a formal complaint with national prosecutors seeking an investigation. When the prosecution declined to open a case, the NGOs brought suit as permitted by law. The Supreme Court concluded that the collective action of an anti-corruption association is deemed admissible before a criminal court and that they did have legal standing.

Nature of legal proceedings

19. There are three main avenues used by victims to recover damages: (i) civil proceedings within criminal proceedings; (ii) civil proceedings; and (iii) administrative proceedings.

Civil Proceedings in Criminal Proceedings

20. Many States foresee the possibility of victims participating in criminal proceedings as *partie civile*. These systems allow persons that have suffered injury as a result of a criminal offence the possibility of taking advantage of a criminal proceeding to claim compensation. In joining the proceeding, these victims then become part of it as *partie civile*. A State can also join as *partie civile* as can any other legal entity. The main advantages are that (a) it is a faster and often less expensive mechanism to seek damages; (b) as a *partie civile* the victim has greater rights while participating in the criminal action; and (c) being a *partie civile* allows the party to be in a closer contact to the investigating magistrate or prosecutor who are responsible for the case.¹⁶

¹⁴ Report on the State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation (2015), p. 140-141.

¹⁵ Ibid.

¹⁶ J. A. Oduor, F.M.U. Fernando et al., *Left out the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington D.C.: World Bank, 2014), p.87-88.

21. Depending on the jurisdiction, the victim as a civil party may be entitled to various rights, including to: give testimony regarding the case; submit evidence; participate in court hearings; submit requests; request the recusal of a judge, public prosecutor, or investigator; access and make copies of documents in the case file; complain against orders or acts of the Court, prosecutor and other officials; agree to mediate with the accused or defendant in case an offence does not endanger society; retain a legal representative; withdraw the claim; or receive compensation for losses.

22. Many States have provisions that require the civil party to meet certain procedural requirements. These include time limitations within which it may be permissible to join the criminal proceedings or the limitation to only bring compensation claims before the court of first instance. In one State, the application to join proceedings is denied by the court if it is evidently unjustified or was submitted too late. One State stipulates a threshold of seriousness of the offence for claiming compensation.

23. The outcome of this type of proceeding is a criminal judgement that also decides upon civil remedies. The prerequisites and calculation of compensation are typically governed by the rules of civil procedure while the conviction is governed by criminal law. Given the combined nature of the proceedings, in some States the courts have the power to award compensation out of a fine, or from money found in the possession of the offender. When an accused is acquitted, the legislation of some States provides that the civil plaintiff may still seek recourse in civil proceedings.

Box 3

Example of Implementation

Some States allow criminal and civil cases against corruption suspects to be brought by both the State and the individual, at the same time. In one State, property seized by the State in connection with an ongoing criminal prosecution was awarded to successful plaintiffs of a civil suit against the defendant, giving precedence to individual victims of corruption over the State.

24. Apart from allowing a victim to participate as a civil party in criminal proceedings, some States allow a victim, his/her legal representative or the prosecutor acting on the instructions of the victim to make an application for compensation to the criminal court after criminal conviction and prior to sentencing, if damages were proven during the trial. Although the degree of involvement of victims in these scenarios are less than that of a party to the proceedings, the courts are still empowered to award compensation for injury, damage or loss, and make an order for restitution in respect of the property involved. One State allows the victims to request that the court that convicted an individual in a final judgement also hears the civil suit instituted against the perpetrator. In the criminal proceedings of some States, the courts either satisfy compensation claims fully or direct injured persons to assert the rest of the claims in a separate civil action.

25. Moreover, various forms of settlements are also used in criminal proceedings to compensate victims. Some States permit procedures similar to settlements in the context of criminal proceedings through the use of plea agreements that can include victim compensation. A further form of civil avenue used by States to ensure compensation of victims, especially the State as a victim, is out of court settlements.

In one State, the court may instruct the injured party and the defendant to try to settle the dispute through mediation processes.

Civil Proceedings

26. Most States allow the victims to institute separate civil proceedings to recover damages. These may be based on statute, such as procurement or bidding laws, or common law theories such as tort, negligence, civil rights theories and contract. Such proceedings may be instituted independently.

27. Most States' legislation allows victims to choose between civil and criminal avenues, and goes so far as to explicitly provide that no civil remedy for any act or omission shall be suspended by reason that such act or omission amounts to an offence. In such jurisdictions, it is possible to institute civil proceedings at any time, notwithstanding progress on a criminal case.

28. The evidentiary requirements for the underlying conduct are generally higher in criminal proceedings. In civil cases, the plaintiff has to prove that he or she suffered prejudice as a result of the actions, but not necessarily that a crime was committed. Therefore, in some States, if the evidence in the criminal proceedings is not sufficient to grant compensation or if its additional collection would cause unjustified delay, the court will refer the injured party to civil proceedings. In addition, some States also have legislation that specifically provides that the results of the criminal proceedings can be used as evidence in the subsequent civil proceedings to expedite the process.

29. In some States, the right to claim compensation in civil proceedings is conditional on a successful prosecution or proof that the damage is the result of a criminal offence. Other States take the converse approach and provide explicitly that compensation orders granted within the context of criminal proceedings shall not prejudice any right to a civil remedy for the recovery of damages, but the civil courts shall take into account the amount of compensation already ordered in criminal proceedings.

30. Some jurisdictions further allow parties to a civil dispute to decide on an out-of-court award of compensation which can be confirmed by a civil court. These procedures vary in nature and in one State provide for collective redress to mass damages on the basis of a settlement agreement concluded between one or more associations representing a group — or “class” — of persons who allege that damage was caused to them by one or more allegedly liable parties. Following the conclusion of a settlement agreement by these parties, they may request the court to declare the collective settlement binding.

Administrative Proceedings

31. Furthermore, some States provide for administrative avenues for victims whose rights have been violated by the unlawful activities of a public authority. The practice of States in this regard varies. The public authority whose activities caused damage is required to compensate the injured person for the damage and where it failed to issue an administrative act or take appropriate measures it is required to compensate for damage caused by the failure to act. Apart from financial compensation, in one jurisdiction an injured party may request from a public

authority the elimination of the unlawful consequences of a repealed administrative act or a partially amended administrative act or a measure.

IV. Parameters of Compensation

32. The Convention does not specify which types of damage are to be compensated. It is up to States parties to decide whether only material damages can be sought or to also recognize claims for loss of profits and non-pecuniary loss (such as those related to the loss of trust and reputation). Similarly, States need to decide if and to what extent compensation for indirect damage is recoverable.¹⁷ In addition, if corruption occurred in the context of the execution of a contract, in many instances it will be possible for the victim to claim damages for the failure to meet contractual obligations.

33. Most States appear to award compensation for actual material damage and loss of profits. Some States also additionally explicitly allow for compensation for other non-pecuniary damage, such as moral injury and physical suffering. Consequential damages may also be awarded if corruption occurred during the execution of a contract. In such cases, States can also decide to award contractual damages on account of a failure to meet a contractual obligation.¹⁸

Factors taken into consideration when awarding compensation

34. In most States, the basic principle applied in the determination of damages is that the victim must be placed as closely as possible in the position he or she would have been in if the corrupt act that caused the damage had not taken place.¹⁹ In awarding and determining the amount of compensation, States take into account various factors. These usually include the nature and seriousness of the offence committed and the degree and nature of injury or property damage suffered. In addition, the following factors appear in compensation provisions of some States: the extent to which the damage was foreseeable and the objective obstacles to preventing damage; the personal circumstances of the injured person; the ability of the liable person to pay; the expenses incurred by the victim; and the existing customs regarding compensation. In some States, the victims' right to compensation may be reduced or even disallowed in cases of negligence on his or her part.²⁰

35. The calculation of damages is typically based on civil procedure laws. The actual quantification of the amount of compensation often lies within the discretion of the courts. In some States, the upper limits of compensation are established by law — for example, one State provides that the amount of compensation may not exceed the amount of assets obtained through corruption. In another State, the law explicitly provides that compensation is set according to the value of the damage or suffering caused, on the day the offence was committed or on the day the decision on compensation is handed down, whichever is greater. Several States in addition

¹⁷ CAC/COSP/WG.2/2014/2, para. 40.

¹⁸ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), p. 90.

¹⁹ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), p. 90.

²⁰ StAR Asset Recovery Handbook: A guide for Practitioners (2011), p. 163.

provide for compensation in kind, such as the issuance of a public apology or a declaration to help restore the reputation of the victim; the publication of the judgement of conviction as a means to repairing non-proprietary damage; and the publication of the case in a newspaper.

36. Quantification of compensation appears to be challenging in the context of corruption given the far-reaching effects of corruption and possible difficulties in deciding the extent of damage that has been caused by it. In addition, it may be problematic to identify the monetary value of proceeds derived from corruption. The StAR Identification and Quantification of Proceeds of Bribery Report explains that the calculation of damages caused by corruption is particularly challenging with regard to the profits that have not been gained due to corruption as well as indirect or non-pecuniary damage that cannot be immediately calculated.²¹ For example, in cases of bribery, courts might need to estimate the difference between the price and quality of goods and services provided by the briber, and the price and quality to which the customer was entitled, if its agent had not taken the bribe.²² The StAR Report on Public Wrongs, Private Actions and the StAR Asset Recovery Handbook further found that:

- In bribery cases, some States consider the loss sustained to be equivalent to the value of the bribes. However, that amount may not be sufficient as the bribe might have resulted in a price for goods and services that is above market value or may have permitted the use or the sale of government property at less than market value. In the example of bribery in government contracts for projects, the contractor's profits may be an insufficient measure of the damages given that the loss suffered may be larger. If bribery affected the type of the project, its size, or the way it was performed, the damages should be closer to the entire cost of the project.²³
- The social, environmental, moral or reputational damage that has been incurred as a result of corruption should also be taken into consideration.²⁴
- Compensation claims may require the calculation of interest income earned by the briber, or lost by the claimant, on amounts awarded as damages. When lengthy time periods are considered, the determination of applicable interest rates and the periods over which the interest is calculated will be crucial.²⁵
- Punitive damages may motivate private plaintiffs to go to court because the damage awards would be far greater. However, some States oppose this approach, stressing that damages should not be higher than the loss sustained by the victim and that damage multipliers of a punitive nature are inconsistent with the general principles of compensation.²⁶

²¹ StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012), p. 21.

²² StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012), p. 33.

²³ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), p. 90. StAR Asset Recovery Handbook: A guide for Practitioners (2011), p. 163.

²⁴ StAR Asset Recovery Handbook: A guide for Practitioners (2011), p. 163.

²⁵ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), p. 95.

²⁶ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), pp. 95-96.

Box 4

Example of Implementation

In the F.G. case (*see also Box 1*), the shipping company as well as the employee of F.G. who took bribes from the shipping company in exchange for negotiating contracts were found liable for compensation. The court rejected granting restitution for all profits made by the shipping company because it was highly probable that F.G. would have entered into an agreement with the company even if the employee had not been dishonest.²⁷ However, the Court decided that in addition to the value of the bribes, the shipping company and its agent were liable to pay additional compensation for the loss that F.G. had suffered from entering into the contracts under unfavourable terms. The court took into consideration the difference between the amounts actually paid by F.G. and the amounts that would have been paid if there had been no bribery.²⁸

In another case, a company paid bribes to obtain a permit for logging in a prohibited area. During the court proceedings against the company, the issue of compensation arose. In calculating the amount of compensation, an argument was made that the environmental damage had been significant and that the court should take into account the multiplier effect of the damage such as an increased risk of floods and erosion. The court rejected the argument, stating that under the law of that State judges could not order compensation greater than the amount of the bribes paid plus the direct proceeds of the corrupt conduct.²⁹

Who is liable?

37. In the vast majority of States, the persons liable to pay compensation are either offenders, if the compensation is dealt with in the criminal laws; or persons ultimately responsible for causing the damage, if the compensation is addressed in civil laws. Primary liability usually lies with entities and individuals who directly and knowingly participate in corrupt acts; however, courts may hold liable also those who facilitated the corrupt act or failed to take appropriate steps to prevent corruption.³⁰ This may be the case for lawyers or intermediaries who assisted in corrupt acts or for parent companies and employers who failed to exert appropriate control over their subsidiaries or employees.³¹

38. As for the liability of legal persons, several States allow compensation to be claimed from employers of bribe paying individuals as a form of secondary liability. In one State, compensation can be claimed from the employer of the person responsible if the corrupt acts have taken place in connection to the execution of work or functions for the employers, unless the employer can establish that all reasonable precautions to prevent corruption have been taken and responsibility will not be reasonable after an overall assessment of the circumstances of the case. Other

²⁷ StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012), Fyffes Group Ltd. v. Templeman (United Kingdom) pp. 56-57.

²⁸ StAR Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015), Fyffes Group Ltd. v. Templeman (United Kingdom), p. 91.

²⁹ StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012), Case in re Surya Dumai Group (Indonesia), pp. 63-64.

³⁰ StAR Asset Recovery Handbook: A guide for Practitioners (2011), p. 162.

³¹ Ibid.

States establish the joint liability of individual perpetrators and directors or the legal entity for which the perpetrator served a function or performed a duty at the time of committing the crime. Similarly, in some jurisdictions the injured party may file a case against the State where the damage was caused by an act of a public official in the exercise of his or her public administration function as a form of secondary liability.

39. With regard to “intent” in corruption offences, the approaches taken differ across jurisdictions. In many States both intent and negligence can lead to responsibility for corrupt acts. The absence of personal interaction between the perpetrator and the victim, or if the perpetrator was not aware of the specific damage to specific victims’ interests, should not serve as a defence nor as a legal obstacle for those who have suffered damage and try to pursue compensation.³² In one State, persons who have committed or authorized an act of corruption and persons who have failed to take reasonable steps to prevent corruption are severally liable for the damages.

40. Concerning the question of burden of proof, it is usually the victim who has to prove on a balance of probabilities the breach of duty and the occurrence of damage, as well as the causal link between the corruption offence and damage.³³

Enforcement of compensation judgements

41. Compensation is most commonly paid through the assets of offenders, although some States have State-funded compensation schemes in place.

Box 5

Example of Implementation

One State has established a special compensation fund within the Ministry of Justice, which is responsible for the enforcement of the decisions of criminal courts regarding civil liability and compensation for damage. The fund takes the necessary measures for the collection of the amounts due from the obligated persons (including through the seizure of salaries, wages and other income) and their transmission to the victims. It also guarantees compensation in cases where the perpetrators do not meet their responsibilities by drawing funds from other sources, such as from discounts in the remuneration for the work of prisoners, seized moneys that have not been claimed within one year from the finality of judgement, the value of confiscated assets, compensation amounts from previous cases that were not claimed within the legal term and surcharges imposed in cases of delayed payments.³⁴

42. Some States put in place provisional measures to ensure that compensation remains available to the victims after the final judgement. In one State, the court can attribute a tentative amount of compensation before the final decision is made. Similarly, in another State the court may take provisional measures to secure a compensation claim. Assets that undoubtedly belong to the injured person and do

³² Report on the State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation (2015), p. 141.

³³ StAR-OECD Analysis: Identification and Quantification of Proceeds of Bribery (2012), p. 21.

³⁴ Report on the State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation (2015), p. 142.

not serve to determine facts will be handed over to the injured person even prior to the termination of proceedings.

43. In some States, persons liable for compensation must also pay interest at a prescribed rate. The courts often set a time frame for compensation payments. In one State, if the offender does not pay the compensation within one month following the legal effect of a court verdict, the assets of such person may be seized by the prosecutor and auctioned off to cover the compensation. In several States compensation takes priority over other fines ordered in the court proceedings.

44. Courts may also put in place measures to ensure that compensation is paid. In one State, the courts consider the offender's financial ability for the purpose of establishing the time and manner of payments. In another State, the courts may direct that compensation be paid by specified instalments. If the offender does not pay the amount on the due date, victims can file a civil claim for the recovery of the full amount.

V. Recommendations issued and technical assistance and good practices identified during the implementation review mechanism

45. A few States were issued recommendations with a view to addressing challenges in the effective implementation of Article 35 of the Convention. The most common challenges faced appear to be limited resources and inadequate normative measures which do not allow or ensure payment of compensation for damage suffered as a consequence of corruption. In addition, several States identified technical assistance needs with regard to compensation for damages. Technical assistance requested included: the preparation of a summary of good practices and lessons learned by States parties to the Convention; on-site assistance by anti-corruption experts; support to develop an action plan for implementation; legal advice; support for awareness-raising through specialized training of judges and prosecutors; and assistance in capacity-building.

46. During the review process, good practices related to compensation for damage were identified in several States. These good practices mainly concern legal avenues to seek compensation or the quantification of compensation. In one State, the wide range of options for seeking compensation under national legislation was recognized as a good practice because it allows the State, individuals and private entities to seek redress for the harm suffered as a consequence of an act of corruption. In another State, non-governmental organizations active in the prevention of corruption can bring a civil action in criminal proceedings on behalf of the victims, and this particular mechanism has been encouraged as it increases the role and participation of civil society in domestic legal processes. In another State, the possibility of a pretrial seizure of assets as a means to securing assets to compensate victims has been seen as a good practice.

47. Apart from the results of the review mechanism, further practices appear to represent effective examples of implementation. As an example, in some States, compensation orders also include the loss of interests. This allows for a wider protection of victims and wider redress. Procedures that allow the payment of

compensation out of the fines imposed also appear to be a good way of ensuring that a victim receives compensation. Furthermore, using the results of criminal proceedings as evidence in civil claims can further facilitate the compensation of victims. The development of schemes or funds for victim compensation may also be seen as a good practice.

VI. Conclusions and Issues for Further Consideration

48. The information contained in the present note demonstrates the wide range of legislative and other measures taken by States parties to ensure that victims of corruption are identified and compensated in accordance with the Convention. While further information will be provided by States in the review of implementation of Chapter V, responses provided by States in the first cycle of the Implementation Review Mechanism demonstrate significant efforts taken by States to compensate victims of corruption.

49. The Working Group may wish to consider requesting the Secretariat to continue its efforts, subject to the availability of resources, in gathering information on good practices in relation to the identification and compensation of victims, including through soliciting information from States parties, the conduct of an expert group meeting and/or organizing an expert panel at the eleventh session of the Working Group.

50. The Working Group may wish to consider the relationship between measures aimed at compensating victims and the recovery and return of assets to States under Chapter V.