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Thematic discussions

Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V

Note by the Secretariat

I. Introduction

1. In its resolution 7/1, the Conference of the States Parties to the United Nations Convention against Corruption directed the Open-ended Intergovernmental Working Group on Asset Recovery to continue “its efforts to gather information on and conduct enhanced analysis of best practices for the identification and compensation of all different types of victims” and to conduct “analysis on third-party challenges and their impact on asset recovery under chapter V”.

2. The secretariat has prepared the present note to facilitate the thematic discussion to be conducted on those topics during the thirteenth meeting of the Working Group. The note draws on the information received in response to two notes verbales sent by the secretariat,¹ information collected during the first cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption and the United Nations Office on Drugs and Crime (UNODC) report entitled *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*,² as well as the findings of various relevant tools and publications, in particular those developed by UNODC and the Stolen Asset Recovery (StAR) Initiative of UNODC and the World Bank. The part of the present note relevant to the compensation of victims builds on a previous note prepared by the Secretariat on good practices in

* [CAC/COSP/WG.2/2019/1](#).

¹ As at 10 March 2019, the secretariat had received contributions from 26 States parties: Algeria, Argentina, Belarus, Bolivia (Plurinational State of), Colombia, Costa Rica, Czechia, Egypt, El Salvador, Guatemala, Hungary, Iraq, Ireland, Kuwait, Mali, Mexico, Mongolia, Morocco, North Macedonia, Panama, Poland, Republic of Korea, Russian Federation, Sri Lanka, United Republic of Tanzania and United States of America.

² The report analyses responses of 156 States reviewed during the first cycle of the Implementation Review Mechanism. Available at www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html.



identifying the victims of corruption and parameters for their compensation (CAC/COSP/WG.2/2016/CRP.1).

II. Definition and identification of victims of corruption

3. 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 “victim of corruption”, although the interpretative note on article 35 in the *travaux préparatoires* for the Convention explains that the possibility of seeking compensation should be available to States as well as legal and natural persons.

4. Various approaches have been adopted by States to establishing parameters for determining who should be considered a victim of corruption. Most States do not provide an explicit definition of “victim of corruption”. 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” or “damaged” persons;

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

5. Few States have adopted special acts on victims of crime that define the status of victim in general and stipulate the conditions for financial compensation.

6. 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.

7. One State relied on “immediacy of violation” as the element that distinguishes the concept of victim from the concept of injured party that occurs in civil law.

8. With regard to the Convention’s requirement to give foreign States the right to stand before courts and receive compensation, it appears that most States do not explicitly address that right in their general compensation provisions. Several States indicated, however, that foreign States fell under the general definition of legal persons and thus, at least in theory, were able to seek compensation.

9. Corruption may victimize people directly, but may also negatively affect society as a whole. In this context, the concept of social damage 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.³ As a concrete example, one State enables the Attorney General to file a civil suit for compensation when the offence has caused damage to society.⁴

³ Jean-Pierre Brun and others, *Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (Washington, D.C., World Bank, 2015), pp. 96–98.

⁴ For more information, see CAC/COSP/2011/CRP.6, presented during the fourth session of the Conference of the States Parties.

10. For article 35, on compensation for damage, all but a few of the reviewed States parties had adopted measures to fully or partly implement the article, making it a provision of the Convention enjoying a very high level of compliance.

11. The fact that many compensation provisions were general in nature and did not explicitly address victim compensation in cases of corruption was not considered to be a problem by reviewers. 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.⁵ Only a few States parties were found to be non-compliant, either employing a restrictive approach granting the status of victim only to natural persons or not having any relevant measures in place.

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

Who can initiate legal proceedings?

12. States have taken different approaches to granting locus standi, legal standing to pursue compensation. The approach most commonly taken includes the right of direct victims to initiate proceedings to recover compensation. In addition, some States allowed a victim's heirs or immediate family members to institute proceedings for compensation, either independently of the victim or when the victim is no longer able to file a claim.

13. In certain cases, even those who are not the sole and direct victims might also be recognized as having legal standing. Some States allowed class actions or collective interest actions by organizations or by the prosecutor. In general, collective interest proceedings are civil proceedings in which one or several persons institute legal action on behalf of a larger group of persons. They have the advantage of reducing the number of representatives in a lawsuit dealing with harm that 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 case started by the prosecution.

14. When corrupt acts have affected the State, the action for compensation is typically brought by the prosecutor or attorney general on its behalf.

15. In several States, the courts can issue a "compensation order". This is a form of punishment for the offender that is issued at the discretion of the court, either on its own initiative or following an application by the prosecutor. 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 purposes of compliance with the Convention.⁶

Nature of legal proceedings

16. There are three main avenues used by victims to recover damages: (a) civil proceedings within criminal proceedings; (b) civil proceedings; and (c) administrative proceedings.

Civil proceedings within criminal proceedings

17. Many States foresee the possibility of victims participating in criminal proceedings as a *partie civile*. Their systems allow persons who 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, the victims then become

⁵ CAC/COSP/WG.2/2014/2, para. 39.

⁶ United Nations Office on Drugs and Crime (UNODC), *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017), p. 60.

part of it as *parties civiles*. A State can also join as a *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 closer contact with the investigating magistrate or prosecutor who is responsible for the case.⁷

18. Depending on the jurisdiction, the victim as a civil party may be entitled to various rights, including the rights to give testimony regarding the case; to submit evidence; to participate in court hearings; to submit requests; and to receive compensation for losses.

19. Many States have provisions that require the civil party to meet certain procedural requirements. These include time limitations within which it is permissible to join the criminal proceedings or the limitation of bringing compensation claims before only 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 stipulated a threshold of seriousness of the offence for claiming compensation.

20. The outcome of this type of proceeding is a criminal judgment that also decides on 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.

21. Apart from allowing a victim to participate as a civil party in criminal proceedings, some States allowed victims to have legal representatives, or the prosecutor acting on the instructions of the victim, 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 is less than that of a party to the proceedings, the courts are still empowered to award compensation for injury, damage or loss and to make an order for restitution in respect of the property involved. One State allowed the victims to request that the court that convicted an individual in a final judgment also hear the civil suit instituted against the perpetrator. In the criminal proceedings of some States, the courts either satisfied compensation claims fully or directed injured persons to assert the rest of the claims in a separate civil action.

22. Moreover, various forms of settlement were used in criminal proceedings to compensate victims. Some States permitted procedures similar to settlements in the context of criminal proceedings through the use of plea agreements that could include victim compensation. Another 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 a mediation process.

Civil proceedings

23. Most States allowed victims to institute separate civil proceedings to recover damages. These may be based on statutes, 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.

24. Most States' legislation allowed victims to choose between civil and criminal avenues, and went so far as to explicitly provide that no civil remedy for any act or omission should be suspended by reason that such act or omission amounted to an

⁷ Jacinta Anyango Oduor and others, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington D.C., World Bank, 2014), pp. 87–88.

offence. In such jurisdictions, it is possible to institute civil proceedings at any time, notwithstanding progress on a criminal case.

25. The evidentiary requirements for the underlying conduct were 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 was not sufficient to grant compensation or if its additional collection would cause unjustified delay, the court would refer the injured party to civil proceedings. In addition, some States had legislation that specifically provided that the results of the criminal proceedings could be used as evidence in the subsequent civil proceedings to expedite the process.

26. 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 opted for the opposite approach and provided explicitly that compensation orders granted within the context of criminal proceedings should not prejudice any right to a civil remedy for the recovery of damages, but that the civil courts should take into account the amount of compensation already ordered in criminal proceedings.

27. Some jurisdictions further allowed parties to a civil dispute to decide on an out-of-court award of compensation that can be confirmed by a civil court. These procedures varied in nature; one State provided for collective redress for mass damages on the basis of a settlement agreement concluded between one or more associations representing a group – or “class” – of persons who claim 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

28. Furthermore, some States provided 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 varied. The public authority whose activities caused damage is required to compensate the injured person for the damage, and if 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

29. 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. Similarly, States need to decide if and to what extent compensation for indirect damage is recoverable.⁸

30. Most States appeared to award compensation for actual material damage and loss of profits. Some States also explicitly allowed for compensation for other non-pecuniary forms of 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 decide to award contractual damages on account of a failure to meet a contractual obligation.⁹

⁸ CAC/COSP/WG.2/2014/2, para. 40.

⁹ Brun and others, *Public Wrongs, Private Actions*, p. 90.

Factors taken into consideration when awarding compensation

31. In most States, the basic principle applied in the determination of damages was 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.¹⁰ 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 appeared in the 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 victim's right to compensation may be reduced or even disallowed in cases of negligence on his or her part.¹¹

32. The calculation of damages was 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 value is greater. Several States also 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 judgment of conviction as a means to repair non-proprietary damage; and the publicization of the case in a newspaper.

33. The report of the StAR Initiative entitled *Identification and Quantification of Proceeds of Bribery* explains that the calculation of damages caused by corruption is particularly challenging with regard to profits that have not been gained owing to corruption, as well as indirect or non-pecuniary damages that cannot be immediately calculated.¹² 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 would have been entitled if its agent had not taken the bribe.¹³ The StAR Initiative 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.¹⁴
- The social, environmental, moral or reputational damage that has been incurred as a result of corruption should also be taken into consideration.¹⁵
- Compensation claims may require the calculation of interest income earned by the briber, or lost by the claimant, on amounts awarded as damages. When

¹⁰ Ibid.

¹¹ Jean-Pierre Brun and others, *Asset Recovery Handbook: A Guide for Practitioners* (Washington D.C., 2011), p. 163.

¹² Organization for Economic Cooperation and Development (OECD) and Stolen Asset Recovery (StAR) Initiative, *Identification and Quantification of the Proceeds of Bribery: A Joint OECD-StAR Analysis*, revised ed. (Washington D.C., World Bank, 2012), p. 21.

¹³ Ibid., p. 33.

¹⁴ Brun and others, *Public Wrongs, Private Actions*, p. 90, and Brun and others, *Asset Recovery Handbook*, p. 163.

¹⁵ Brun and others, *Asset Recovery Handbook*, p. 163.

lengthy time periods are considered, the determination of applicable interest rates and the periods over which the interest is calculated will be crucial.¹⁶

- 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.¹⁷

Who is liable?

34. In the vast majority of States, the persons liable to pay compensation are either offenders, if the compensation is dealt with in 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. 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.¹⁸

35. As for the liability of legal persons, several States allowed 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 with the execution of work or functions for the employer, unless the employer can establish that all reasonable precautions to prevent corruption have been taken and after an overall assessment of the circumstances of the case demonstrate that the employer cannot reasonably be held responsible. Other States established a 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, as a form of secondary liability, if the damage was caused by an act of a public official in the exercise of his or her public administration function.

36. The elements of liability, such as causality and the extent of damage inflicted on the claimant because of an act of corruption (“damage as a result of”), will have to be substantiated in accordance with the principles of the domestic law of each State that govern causality and the extent of due compensation. 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 serve neither as a defence nor as a legal obstacle for those who have suffered damage and try to pursue compensation.¹⁹

37. 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 the damage.²⁰

Enforcement of compensation judgments

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

39. Some States put in place provisional measures to ensure that compensation remains available to the victims after the final judgment. 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

¹⁶ Brun and others, *Public Wrongs, Private Actions*, p. 95.

¹⁷ *Ibid.*, pp. 95–96.

¹⁸ Brun and others, *Asset Recovery Handbook*, p. 162.

¹⁹ *State of Implementation of the United Nations Convention against Corruption*, p. 160.

²⁰ *Identification and Quantification of the Proceeds of Bribery*, p. 21.

compensation claim. One State indicated that it seeks to use confiscated property to ameliorate some of the harm caused by criminal conduct.

40. 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 a court verdict, his or her assets 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.

41. 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 in specified instalments. If the offender does not pay the amount by the due date, victims can file a civil claim for the recovery of the full amount.

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

42. 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 were limited resources and inadequate normative measures that did not allow or ensure payment of compensation for damage suffered as a consequence of corruption. In addition, several States identified technical assistance needs, including needs for 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.

43. During the review process, good practices related to compensation for damage were identified in several States. Those good practices mainly concerned 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 allowed 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 could bring a civil action in criminal proceedings on behalf of the victims. That mechanism was 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 secure assets to compensate victims was noted as a good practice.

44. Apart from the results of the review, further practices can be cited as examples of effective implementation. In some States, compensation orders also included the loss of interest, which allowed for a wider protection of victims and wider redress. Procedures that foresaw the payment of compensation out of fines imposed also appeared to be a good way of ensuring that a victim received 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 a good practice.

VI. Introduction to the issue of third-party challenges and their impact on asset recovery under chapter V

45. The issue of third-party challenges is significant in the context of asset recovery under the Convention, as it could affect the ability of States parties to recover proceeds of corruption, since third parties could also claim ownership over assets stolen from requesting States parties.

46. Third-party claims will inevitably arise in cases of asset restraint, seizure and confiscation. Targets often will have complicated holdings that involve third parties with legitimate interests, such as business partners and investors. A third party may have an interest in or own an instrumentality that was used in the commission of an offence but be unaware of the illegal uses to which it was put.²¹

47. While the Convention protects bona fide (good faith) parties who could not and did not know about the illicit origin of assets at the time they were acquiring property rights, there could also be mala fide (bad faith) third parties that knowingly or negligently acquired property representing proceeds of corruption. In practice, mala fide third parties could also abuse the protection normally afforded to bona fide third parties. States parties, therefore, may want to consider what kind of policy measures and good practices exist and could be employed in order to clearly distinguish between bona fide and mala fide third parties and how the proceeds of corruption could be recovered where such parallel claims arise.

VII. Bona fide third parties and protection of their rights under the Convention

48. The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, the Convention requires ensuring that the system developed by States parties maintains the rights of bona fide third parties who may have an interest in the property in question.²²

49. There could be various definitions of “bona fide third party”, but, as noted in the legislative guide, it would at a minimum include those with no knowledge of the offence or connection with the offender or offenders.²³

50. The Convention refers to the rights of bona fide third parties in several provisions that are important for asset recovery and confiscation procedures. Those provisions include article 31, paragraph 9; article 55, paragraph 3 (b) and paragraph 9; and article 57, paragraph 2. All these provisions are intrinsically connected and relevant to the process of asset recovery.

51. Article 31, paragraph 9, requires States parties not to construct any of the provisions of that article on domestic seizure and confiscation in such a way as to prejudice the rights of bona fide third parties.

52. Article 55, paragraph 3 (b), states that a request to give effect to an order of confiscation issued by a court in the territory of the requesting State party shall, inter alia, contain a statement specifying the measures taken by the requesting State party to provide adequate notification to bona fide third parties and to ensure due process. The same article additionally highlights in paragraph 9 that its provisions shall not be construed as prejudicing the rights of bona fide third parties.

53. Finally, paragraph 2 of article 57 stipulates that the measures adopted by a State party to enable its authorities to return confiscated property, when acting on the request made by another State party in accordance with the Convention, shall also take into account the rights of bona fide third parties.

54. The Convention does not, however, specify to what extent third parties should be provided with effective legal remedies in order to preserve their rights.

55. As noted in the *State of Implementation* study,²⁴ in the context of the first cycle review, in the examination of the question of the rights of bona fide third parties many

²¹ Brun and others, *Asset Recovery Handbook*, p. 87.

²² UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed. (Vienna, 2012), para. 424.

²³ *Ibid.*, para. 423.

²⁴ *State of Implementation of the United Nations Convention against Corruption*, pp. 140–141.

challenges were identified. The following examples of implementation, adopted to varying degrees by States parties, were highlighted in that regard:

(a) Providing in the relevant legislation that when an instrument of a crime or other property belongs to a third party, it may be confiscated only if it has been conveyed to him or her after the commission of the offence, and if he or she knew or had justifiable reason to believe that the object or property was linked to an offence, or if he or she received it as a gift or otherwise free of charge;

(b) Notifying interested third parties of proceedings that may affect their property rights or widely publicizing such proceedings;

(c) Allowing third parties to apply for their legitimately acquired property to be excluded from restraint or forfeiture, to appeal a freezing or confiscation order and to file a civil claim challenging a confiscation order;

(d) If legitimately obtained property has been forfeited, allowing the relevant party to apply for compensation for the value of the legitimately acquired property;

(e) Taking into account potential claims by the victims or civil claimants in determining the extent of confiscation measures and the disposition of confiscated assets;

(f) When an accused person or suspect dies before the end of the investigation or trial, providing the possibility for the court to continue civil proceedings in order to ensure the return of assets to bona fide third parties.

56. Similar approaches to the legislative protection of bona fide third parties were also contained in the responses to the information requests received from States parties.

57. In terms of the procedural requirements for the recovery of assets under the Convention, an essential element is the ability to demonstrate that bona fide third parties were provided with adequate notification. If such a notification was not provided, a requesting State party may face difficulties in enforcing its domestic confiscation order in another State party in accordance with the Convention (see article 55, para. 3 (b)).

58. In that regard, it was also highlighted in the *State of Implementation* study that States should ensure, in particular, that the time frames for challenging or asserting third-party interests in confiscation proceedings are not overly restrictive and do not prejudice the exercise of such rights.²⁵

59. In domestic practice with respect to notifications, States either directly informed interested parties about the confiscation procedure if they were known, or ensured that such information was publicly available, including via mass media.

Practical difficulties in asset recovery and confiscation

60. States parties may face difficulties in asset recovery when a particular asset is held by a third party that was able to prove its bona fide status.

61. In practical terms, in restraint and confiscation proceedings, practitioners should be open to submissions from third parties and, where permitted, should consent to vary the restraint order or release assets or instrumentalities held legitimately. States parties should also be aware that, depending on the laws of the jurisdiction and the circumstances of the case, there may be a risk that the government will have to pay damages if the confiscation order is unsuccessful, if it is determined that a loss was incurred (in property value or income) and if the property manager should have released the assets to the third party.²⁶

²⁵ Ibid., p. 141.

²⁶ Brun and others, *Asset Recovery Handbook*, p. 88.

62. In such cases, it would be important that both the requesting and requested States be able to confiscate not only the actual proceeds of corruption offences as specific objects, but also value corresponding to such proceeds. Where such “value confiscation” is employed, it may be possible to target other assets of the wrongdoer rather than a specific object that came into the possession of a third party.

63. However, according to the *State of Implementation* study, in a considerable number of countries, the confiscation of property corresponding to the value of the proceeds of corruption-related crime still did not appear to be covered or was covered only in relation to particular offences (especially money-laundering). In some of those cases, the national laws were based on the principle of object-based confiscation and did not recognize value-based confiscation. As a consequence, if the specific property in question had disappeared or could not be traced, there was no immediate redress available. In addition, difficulties arise when proceeds have been transferred to bona fide third parties. Accordingly, recommendations to address this issue were made.²⁷

VIII. Issues associated with mala fide third parties and possible solutions

64. While the Convention, as demonstrated above, does provide for the protection of the rights of bona fide third parties, the practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread.²⁸

65. Often, such mala fide third parties would be able to challenge confiscation and return of assets to rightful owners, including States. Confiscation from such third parties would be possible only when their lack of bona fide status is proved.

66. Procedural steps for the assertion of third-party interests may vary. Generally, for criminal confiscation, the criminal proceedings dealing with the underlying offence must be concluded and the defendant’s interest ordered confiscated before third-party interests are heard by the court. Some jurisdictions permit prejudgment appearances by third parties who can assert limited defences, such as that provisional restraint is causing severe hardship or that the asset is from a legitimate source and is needed for living expenses.²⁹

67. Typically, the party must prove that he or she has a legally cognizable interest in the assets and that either (a) the interest was obtained prior to the commission of any criminal offence and the party did not have reason to believe the assets were involved in the underlying crime; or (b) the interest in the assets arose after the criminal activity was committed and the party was a bona fide purchaser for the value of the assets.

68. The present note examines below some of the approaches used to address the challenges associated with mala fide third parties.

69. The problem of mala fide third parties has been addressed in directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

70. Based on article 6, paragraph 1, of the directive, European Union member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition

²⁷ *State of Implementation of the United Nations Convention against Corruption*, p. 128.

²⁸ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (*Official Journal of the European Union*, L 127/39 of 29 April 2014).

²⁹ Brun and others, *Asset Recovery Handbook*, pp. 118–119.

was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value. Paragraph 2 of article 6 stipulates that the rights of bona fide third parties shall not be prejudiced by paragraph 1.

71. Recital 24 to the directive additionally clarifies that before the adoption of that instrument, European Union legislation did not contain binding rules on the confiscation of property transferred to or acquired by third parties. It is also clarified that article 6 covers situations in which the criminal offence has been committed on the behalf or for the benefit of third parties, and when an accused person does not have property that can be confiscated. It is also highlighted that the rules on third party confiscation should extend to both natural and legal persons.

72. As can be seen from the above, article 6 of directive 2014/42/EU contains certain elements that should be used as criteria for identifying a mala fide third party. Those elements include: direct or indirect transfer of proceeds by an already suspected or accused person to third parties; or acquisition of such proceeds by third parties from suspected or accused person, and the actual knowledge or the presumption of knowledge (“ought have known”) that the purpose of the transfer or acquisition was to avoid confiscation.

73. The knowledge and the presumption of knowledge shall be demonstrated on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

74. It appears that these conditions establish rebuttable presumptions that could be used to invalidate transfers to and acquisitions by mala fide third parties. In some legal systems, once the prosecutor establishes forfeitability, the burden shifts to the claimant to establish cognizable defences. A claimant must first prove that he or she has an ownership interest in the property.³⁰

75. As European Union member States are required to transpose the directive requirements into their domestic legislation, there may be other variations on how those can be expressed in domestic legislation.

76. For example, one State’s criminal code stipulates that in the absence of proof to the contrary, it shall be presumed that the third party knew or had reason to suspect that the property was the proceeds of an unlawful activity or was transferred to avoid confiscation when the property or effects were transferred to him or her free of charge or at a price lower than the market price.

77. Similar examples exist in other countries. One criminal code, for example, stipulates that the property benefit shall also be confiscated from members of the offender’s family to whom it has been transferred, should it be obvious that they have not provided any compensation corresponding to the value of the obtained property benefit, or from third parties unless they prove that they have given counter-compensation for the object or the property that corresponds to the value of the obtained property benefit; objects declared to be cultural heritage and natural rarities, as well as those to which the damaged party is personally attached, shall be confiscated from third parties, regardless of whether those objects have been transferred to the third parties with or without an appropriate compensation; the confiscated goods are returned to the damaged party, and if there is no damaged party, they become State property.

78. One State applies a so-called “relation back doctrine”. According to this doctrine, all transactions with illicit proceeds are void. The doctrine shifts the burden of proof to a third party, which would need to convince the court that at the time of

³⁰ Theodore S. Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington D.C., World Bank, 2009), p. 63.

purchase for value it had a reasonable belief that the property was not subject to forfeiture (i.e., did not represent criminal proceeds).

79. The same State also referred to a practical third-party challenge in an asset return case in which an attorney contended that he was owed legal fees by the country requesting the return. The attorney had launched numerous lengthy appeals that delayed the entry of a final order of forfeiture for more than two years. In that regard, States, in their legal regulation pertinent to confiscation, asset return and relevant third-party rights, may wish to address the issue of attorney fees and especially contingency attorney fees, which are fees in cases where governments contract private attorneys for representation in asset recovery matters in exchange for the attorneys' receiving a percentage of the funds that might be recovered.

80. These examples also demonstrate possible approaches to the issue of mala fide third parties. The European Union directive contains certain criteria that may allow the burden of proof to be shifted to third parties regarding their status and entitlement to assets in confiscation proceedings, while the "relation back doctrine" appears to be even broader by creating a legal presumption that all transactions with illicit proceeds are void unless the contrary is proved in court by a third party.

81. Some important practical considerations may also be brought to the attention of the Working Group.

Type of ownership

82. As mentioned above, an acquisition or transfer needs to be done "for value" to be considered valid and not mala fide. In practice, there could also be different types of ownership over the contested assets. It appears that third parties with a more direct interest in the property, including through rights of ownership, use or share, would have a better claim than general unsecured creditors.

Duty of care

83. An important element of the qualification of a mala fide third party could be the presumption of the knowledge of the illicit nature of proceeds or the intent to avoid confiscation by a third party. States therefore may consider specifying relevant "duties of care" that third parties need to exercise when involved in asset transactions. More detailed provisions on the duty of care could strengthen the clarity around the status of third parties.

Confiscation from legal persons

84. As criminals could also transfer assets to legal persons to shield them from confiscation, including by specifically setting up companies or other legal structures, it is important that States parties be able to confiscate property from legal persons as well. In theory, the mere fact that assets have been transferred to legal structures established or controlled by a criminal could be qualified as an indication of bad faith and thus the transfers could be considered void.

IX. Conclusions and issues for further consideration

85. The Working Group may wish to review the information above containing a number of considerations relevant to issues of the identification and compensation of victims and third-party challenges and their impact on asset recovery under chapter V of the Convention.

86. The Working Group may wish to inform the Secretariat whether some particular considerations require additional analysis and discussion in the future meetings of the Group.

87. The Working Group may also wish to consider requesting the Secretariat to continue its efforts, subject to the availability of resources, in gathering information on these issues.
