

## The United Nations Convention against Corruption: A New Focus?-Part I

In an article published in the August 21, 2011 edition of the Sunday Nigerian Tribune, entitled “*Corruption in Nigeria: Multi-nationals pay \$3.2 b fine*”; author Olawale Rasheed discussed the petition filed on August 2, 2011 by the Socio-Economic Rights and Accountability Project (SERAP) against the Nigerian Economic and Financial Crimes Commission (EFCC). The Petition sought to have the EFCC “take steps to seek adequate damages and compensation against multinational corporations who have ***been found guilty in the US*** for committing foreign bribery in Nigeria, and to take all necessary steps to effectively bring to justice the Nigerian officials complicit in such cases of bribery.”

Rasheed reported that “The non-governmental organization (SERAP) stated further that the penalty disparity violates the fundamental provisions of the United Nations Convention against Corruption (UNCAC) whose Article 35 provides that **persons** who have suffered damage as a result of an act of corruption have the right to adequate damages and compensation.” Rasheed ended by stating that “While the EFCC was yet to reportedly act on the petition, the possibility of such companies paying another fine to the Nigerian anti-corruption body was generating **ripples** within the American Department of Justice which administers the Foreign Corrupt Practices Act.”

The next day there was a follow up article was published in the Nigerian Tribune, authored by Tunde Oyesina which stated that the “Economic and Financial Crimes Commission (EFCC) has agreed to seek further damages against multinational companies found to have violated Nigerian laws while operating the companies.” The article continued stating “Responding to SERAP’s request, EFCC’s Director of Operations, Mr. Ibrahim Lamorde said: ‘I write to acknowledge receipt of your letter dated August 2, 2011 and to inform you that all the issues raised therein would be appropriately and fully addressed.’”

These articles were intriguing in a variety of ways. What is SERAP? What is their mission? On what basis can the EFCC bring an action in Nigeria against multinational corporations who have ***been found guilty in the US*** for committing foreign bribery in Nigeria? Does the UNCAC grant a private right of action for foreign counties or foreign individuals in the U.S. for violations of Nigerian law? And finally, on what basis did the author of Sunday’s article have reason to believe that the “possibility of such companies paying another fine to the Nigerian anti-corruption body was generating “ripples” within the DOJ?

Let’s consider the issues one at a time:

### 1. What is SERAP and what is their mission?

SERAP has a website (<http://www.serap-nigeria.org/>) which provided some good information. According to the website:

“The Socio-Economic Rights and Accountability Project (SERAP) is a non-governmental, non-profit organization established in 2004, under the Companies and Allied Matters Decree 1 of 1990 of the Republic of Nigeria. SERAP aims to promote transparency and accountability in the public and private sectors through human rights”.

“In a country where systemic corruption and the resulting poverty, inequality and discrimination deprive many Nigerians of dignity and freedom to explore ways towards development and prosperity, we work to hold government and public officials at the local, state and federal levels accountable for acts of corruption which are conducive to violations of socio-economic rights of citizens. SERAP also aims to ensure Nigeria’s full compliance with the human rights and anti-corruption treaties to which it has voluntarily subscribed”.

## 2. What rights are granted under the United Nations Convention against Corruption?

The petition filed by SERAP refers to possible violations of the UN Convention against Corruption by the EFCC. Rasheed stated “The failure by the Nigerian government to ensure that adequate damages are paid in proven cases of foreign bribery in the country constitutes a violation of the international legal rights of the deprived, and may itself constitute an international wrong.” Rasheed later in the article notes that the group (SERAP) argued that, “The disparity in payment of damages is unfair and violates the fundamental provisions of the UN Convention against Corruption, which Nigeria has ratified”. “In particular, Article 34 obligates member states to address consequences of corruption, and to consider any remedial action. And Article 35 provides that persons who have suffered damage as a result of an act of corruption have the right to adequate damages and compensation.” It is curious that the newspaper article referred only to Article 34 and Article 35 of UNCAC (which articles focus primarily on the recovery of damages) and not include any references to Article 16 which specifically addresses in paragraph 2 the obligation of each State party to consider establishing as a criminal offense the solicitation or acceptance of a bribe by a public official. “

### **A. Article 34- Consequences of acts of corruption**

Article 34 of the UNCAC provides that “With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action”.

### **B. Article 35- Compensation for damage**

Article 35 of the UNCAC, specifically provides that “Each State Party shall take such measures

as may be necessary, in accordance with principles of its domestic law, to ensure that entities or 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. According to footnote #60 on page 345 of *The Foreign Corrupt Practices Act and the New International Norms, Second Edition* by Stuart H. Deming (Section of International Law American Bar Association), “The Senate Foreign Relations Committee agreed with the position taken by the Secretary of State in her letter of transmittal to the U.S. Senate of the UN Convention.” The Secretary of State’s letter provides in part that “It should be noted that nothing in this article (referring to Article 35) should be interpreted as requiring the United States to create a private right of action under the Foreign Corrupt Practices Act or as expanding the scope of the Alien Tort Statute to permit foreigners to litigate corruption claims in U. S. Courts”.

### **C. Article 16-Bribery of foreign public officials and officials of public international organizations**

Article 16 , Section 2 of the UNCAC provides that “Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

We recognize that the UNCAC does not **mandate** that each State Party enact legislation prohibiting the solicitation or acceptance of a bribe from a foreign official. However, there are local laws in Nigeria which do make the solicitation or acceptance of a bribe by a foreign official illegal. According to Anti-Corruption Regulation 2011 published by “Getting the Deal Through” under Nigerian law a public official who seeks or receives any material benefit for him or herself or for any other person or who agrees or attempts to receive such material benefit on account of any action taken by him or her that is connected with the discharge of his or her official functions is guilty of corruption. Similarly, any person who gives or offers to give a public official a material benefit on account of any action to be taken by the public official in his or her official capacity is guilty of corruption.

The newspaper article did urge EFCC to “take all necessary steps to effectively bring to justice the Nigerian officials complicit in such cases of bribery”; however, it did not refer to any local Nigerian law only the UNCAC. In addition, while the newspaper articles did not specifically refer to Article 53 of the UNCAC, in order to make sense of some of the comments contained in the articles, we believe it is important to examine Article 53 of the UNCAC as well.

#### **D. Article 53-Measures for direct recovery of property**

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

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