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HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Draft OHCHR Guidelines on a Human Rights Framework for Asset Recovery

Principle 1: States have a duty to protect and fulfill human rights by adopting and enforcing laws and policies on the prevention of corruption and money laundering.

Principle 2: States' laws and policies for the prevention of corruption must reflect the principles of accountability, transparency, and participation.

Principle 3: States have a duty to protect the human rights of persons who report corruption and money laundering.

Principle 4: States have a duty to ensure the progressive realization of economic, social and cultural rights by providing international assistance and cooperation in the context of asset recovery.

Principle 5: States must respect the human rights of persons under investigation for, accused of, or convicted of corruption and money laundering offences.

Principle 6: Persons whose human rights have been violated as a result of corruption have a right to an effective remedy.

Principle 7: States have a duty to allocate returned assets in an accountable, transparent, and participatory manner.

Principle 8: Receiving States have a duty to use recovered assets in a manner that contributes to the realization of human rights.

Principle 9: Requested States have an obligation to return embezzled public funds to requesting States.

Introduction

1. According to non-governmental organization Global Financial Integrity (GFI), which has published estimates of the scale of illicit financial flows with a focus on developing countries since 2008, USD 620–970 billion was transferred out of developing countries in 2014. For the years 2005–2014, GFI claims that the average outflows reached 4.6 – 7.2 % of the total volume of trade done by developing countries. Africa alone is losing more than USD 50 billion annually through illicit financial outflows according to the UN High Level Panel on Illicit Financial Flows from Africa.
2. Stolen assets are part of illicit financial flows. The term is used as synonymous with proceeds of corruption. The Stolen-Asset Recovery (StAR), a joint initiative by United Nations Office on Drugs and Crime (UNODC) and the World Bank, concluded that a “huge gap remains between the results achieved and the billions of dollars that are estimated stolen from developing countries. Only USD 147.2 million was returned by the Organisation for Economic Co-operation and Development members between 2010 and June 2012, and USD 276.3 million between 2006 and 2009, a fraction of the USD 20–40 billion estimated to have been stolen each year”.
3. Given these estimates and the discrepancy between the amount of assets stolen and the actually returned funds, it is understandable that the recovery and return of assets is high up on the political agenda of the concerned countries, both from the perspective of financing for development, as part of their domestic financial resource mobilization efforts, as well as a way to fulfil the obligation to maximize available resources for the realization of economic, social and cultural rights and to achieve the right to development. This was also echoed in the 2030 Agenda for Sustainable Development. With SDG 16.4. Member States committed to significantly reduce illicit financial flows and to strengthen the recovery and return of stolen assets by 2030. A similar commitment is contained in the Addis Ababa Action Agenda on Financing for Development.
4. Since 2011, the Human Rights Council has been considering the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation in this matter. In its most recent resolution, the Council “invited the Conference of the States Parties to the United Nations Convention against Corruption to consider ways of adopting a human rights-based approach in the implementation of the Convention, including when dealing with the return of the proceeds of crime” (OP 14 HRC/ 40/4 of 21 March 2019).
5. The Council also “called upon requesting and requested States with practical experience in asset recovery to develop, as appropriate, in cooperation with interested States and providers of technical assistance, non-binding practical guidelines, such as a step-by-step guide for efficient asset recovery, with a view to enhancing effective approaches to asset recovery based on best practices, practical experience and the lessons learned from past cases, while being mindful to seek to add value by building upon existing work in this area through innovative and efficient means” (HRC 40/4, OP 23).
6. In order to support Member States’ efforts to develop practical guidelines, the OHCHR initiated a project aimed at developing guidelines on a human rights framework for asset recovery. The draft guidelines highlight the ways in which human rights law and anti-

corruption law can act as mutually reinforcing bodies of law. To date human rights law and anti-corruption law have been treated as fundamentally distinct from each other. The draft guidelines illustrate the commonality within these areas of law as they are based on the same fundamental principles of accountability, transparency and participation.

7. In her 2019 annual report to the General Assembly, the High Commissioner informed Member States that “Corruption and associated illicit financial flows were among the gravest challenges to sustainable development; they stripped societies of vital and scarce resources, which were indispensable to the exercise of human rights, including the right to development. OHCHR organized an expert round table on the human rights aspects of the repatriation of funds of illicit origin, with a view to elaborating human rights principles and guidelines for the repatriation and use of stolen assets” (A/74/36, para 21).
8. To date, the OHCHR has organized two expert consultations, to comment and review draft guidelines prepared by an international law expert specializing on the international legal framework against corruption, including asset recovery, as well as international human rights law. Some 30 international experts, including Special Procedure mandate holders, practitioners and representatives from international and non-governmental organizations such as UNODC, the StAR Initiative, UNDP, the International Centre for Asset Recovery and Transparency International, actively participated in the last meeting held virtually on 10 June 2020.
9. The next step of the project is to share the draft with Member States and other stakeholders more broadly and to integrate their comments and views. Additional research into regional approaches and jurisprudence will complement this process. In addition to refining the guidelines, attention will be paid to identify good practices and lessons learned. It is further envisaged to develop a model agreement and/or model legislation provisions for the responsible return and use of stolen assets.
10. The final product will be a tool made available to concerned and interested parties and bodies, with a view to support international cooperation in applying a human rights-based approach to stolen asset recovery.
11. These Guidelines provide a human rights framework for the recovery and return of proceeds of corruption, a process known as ‘asset recovery’.¹ Corruption is a human rights issue because acts of corruption negatively impact the realization of human rights, and in some cases acts of corruption can even violate human rights.² When a government official embezzles public assets, for example, this detracts from the State’s capacity to realize economic, social and cultural rights, to the maximum of its available resources.³

¹ The term ‘proceeds of crime’ refers to ‘any property derived from or obtained, directly or indirectly through the commission of an offence’. United Nations Convention against Corruption (adopted 9 December 2003, entered into force 14 December 2005) 2349 UNTS 41, Art 2(e).

² The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has, for example, identified circumstances in which the undue advantage in a corrupt transaction amounts to torture or ill-treatment, such as the provision of an undue advantage in the form of a sexual act or forced labour. Human Rights Council, Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/40/59 (16 January 2019) para. 28.

³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 933 UNTS 3, Art. 2(1) (ICESCR).

The history of the last several decades is unfortunately replete with examples of the large-scale bribery and theft of public resources by heads of State and other high-level government officials, especially in developing States rich in natural resources.⁴ Furthermore, anti-corruption investigations and prosecutions can infringe on the enjoyment of civil and political rights, such as the right to a fair trial. States not only have obligations to undertake anti-corruption measures, but to do so in a manner that is consistent with their human rights obligations.

12. In recent years, States have called for the development of a human rights-based approach to asset recovery, and for the further development of good practices in the recovery of assets.⁵ These Guidelines therefore seek to meet this demand by highlighting the ways in which human rights law and anti-corruption law can act as mutually reinforcing bodies of law. These two bodies of law remain fundamentally distinct from each other, as human rights law concerns fundamental rights held by individuals and peoples, whereas anti-corruption law deals primarily with the criminalization of certain conduct by private actors as well as public officials. Yet, approaching asset recovery from the perspective of human rights law reveals that these bodies of law are also complementary, and based on the same fundamental principles of accountability, transparency and participation. Furthermore, each body of law has its limitations, e.g. with respect to the scope of application, and the precision and mandatory character of the norms. These limitations can be partly remedied by integrating these two bodies of law.⁶ The harmonization of States' treaty obligations requires anti-corruption law to be understood in the light of human rights law, and vice versa. In building this legal framework on a human rights approach to asset recovery, these Guidelines focus on international human rights and anti-corruption treaties that enjoy high ratification rates and therefore have nearly universal applicability, although regional instruments are also discussed and referenced.⁷
13. The term 'asset recovery' in these Guidelines refers to the process by which States recover the proceeds of corruption and return them to a foreign jurisdiction.⁸ The focus of these Guidelines is on the recovery of assets that can be qualified as 'stolen', meaning public assets that have been embezzled, misappropriated or otherwise diverted by a public official.⁹ But the Guidelines also cover the recovery of proceeds of other acts of corruption, such as bribery, trading in influence, abuse of functions, and illicit

⁴ See e.g. Michela Wrong, *In the Footsteps of Mr Kurtz: Living on the Brink of Disaster in Mobutu's Congo* (Harper Collins 2002).

⁵ Human Rights Council, Resolution 40/4, A/HRC/RES/40/4, 'The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation' (5 April 2019) para. 4 ('the repatriation of funds of illicit origin is key for... improving the realization of economic, social and cultural rights, including the right to development, and for fulfilling their obligation to meet the legitimate aspirations of their peoples'); Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015) para. 25 (Addis Ababa Action Agenda).

⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 31(3)(c) (VCLT) (providing for the systemic integration of treaties).

⁷ UNCAC; International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights.

⁸ Larissa Gray et al., 'Few and Far: The Hard Facts on Stolen Asset Recovery' (Stolen Asset Recovery Initiative 2014) p9.

⁹ UNCAC Art. 17.

enrichment.¹⁰ In some instances, the proceeds of these other forms of corruption (bribery, trading in influence, abuse of functions, and illicit enrichment), raise different legal questions, which are noted in the Guidelines.¹¹ Other forms of illicit financial flows, such as tax evasion, abusive transfer pricing, and transnational criminal activities, including drug trafficking and human trafficking, fall beyond the scope of these Guidelines.¹² Each of these forms of illicit conduct raises separate legal questions, which require human rights frameworks that are specific to these different forms of illicit conduct. Although the Guidelines focus on international asset recovery, most of the principles are relevant in domestic asset recovery proceedings, and the commentary references domestic cases and laws.¹³

14. These Guidelines consist of 9 principles, which cover all phases of the process of asset recovery, including prevention and detection of corruption, tracing of proceeds of corruption, the preservation and confiscation of proceeds of corruption, and the return and allocation of proceeds of corruption. Each principle is accompanied by a commentary, which sets out the relevant legal framework and best practices drawn from national legislation and asset recovery processes.

<p>Principle 1: States have a duty to protect and fulfill human rights by adopting and enforcing laws and policies on the prevention of corruption and money laundering.</p>

Commentary

15. Compliance by States with their human rights obligations requires them to ‘respect, protect, and fulfill’ all human rights, including civil, political, social, economic and cultural rights, as well as the right to development.¹⁴ This commentary focuses on the duties to protect and fulfill, which are of the greatest relevance in the context of corruption and asset recovery. The duty to respect requires the State itself to refrain from violating human rights. Under the law on state responsibility, questions persist about whether (or under what circumstances) the conduct of a corrupt public official is attributable to the State, such that the duty to respect is implicated by the corrupt conduct at issue. This important legal debate, however, lies beyond the scope of these Guidelines.

¹⁰ For definitions of each of these acts of corruption, see UNCAC Arts. 15-16, 18-20.

¹¹ See e.g. Principle 9. The Guidelines do not deal specifically with the legal issues that arise with respect to the restitution of the proceeds of foreign bribery through settlement agreements. For a detailed treatment of these issues, see Jacinta Anyango Oduor et al., ‘Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery’ (Stolen Asset Recovery Initiative 2014); Tina Søreide and Abiola Makinwa (eds.) *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar 2020).

¹² For a discussion of the broader term ‘illicit financial flows’ see Mathis Lohaus, ‘Asset Recovery and Illicit Financial Flows from a Development Perspective: Concepts, Scope and Potential’ (U4 Anti-Corruption Resource Centre 2019).

¹³ Only Principle 4, concerning international assistance and cooperation, applies only to international, as opposed to domestic, asset recovery proceedings.

¹⁴ See e.g. Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24 (10 August 2017), paras. 10-24.

16. Measures to prevent corruption and money laundering represent critical means by which States can protect and fulfill human rights. Because of the negative impacts that corruption has on the enjoyment of human rights, States have a duty to put in place measures to prevent such conduct. In other words, compliance by States with their human rights obligations depends, in part, on compliance with anti-corruption treaties and anti-money laundering standards. States must therefore adopt and enforce anti-corruption and anti-money laundering laws or regulations, develop anti-corruption and anti-money laundering policies, and establish and fund domestic anti-corruption bodies.¹⁵
17. The duty to protect requires States to prevent third parties from interfering with the enjoyment of human rights. In the context of corruption and asset recovery, key third parties include businesses, such as multinational corporations, financial institutions, such as commercial banks, and designated non-financial businesses and professions.¹⁶ Because such private actors can play critical roles in the misallocation or theft of public funds, their conduct must be regulated as part of any anti-corruption strategy. By preventing private actors from engaging in corrupt conduct and facilitating money laundering, States prevent those actors from interfering with the optimal use of public funds for the enjoyment human rights.
18. The duty to fulfill requires States to take positive action to facilitate the enjoyment of human rights. The fulfillment of economic, social and cultural rights, for example, involves the maximal use of available resources for purposes such as funding public schools and healthcare systems.¹⁷ Research by development economists shows that corruption is correlated with the diversion of government resources away from the fulfillment of human rights through, for example, the funding of education and health care.¹⁸ Anti-corruption and anti-money laundering laws aim to prevent such diversions of public funds, and to thereby ensure that government resources are devoted towards the fulfillment of human rights.
19. The adoption and enforcement of anti-money laundering measures are especially critical for preventing the theft of public funds and other corrupt conduct by public officials, also known as ‘politically exposed persons’.¹⁹ Without the capacity to launder the proceeds of

¹⁵ UNCAC Art. 6. See e.g. Inter-American Commission on Human Rights, Guidelines for Preparation of Progress Indicators in the Area of Economic Social, and Cultural Rights, Doc. OEA/Serv.L/V/II.132 (19 July 2008), p24 (listing the existence, empowerment and funding of an anti-corruption monitoring agency as a structural indicator for national progress reports on economic, social and cultural rights).

¹⁶ For a definition of designated non-financial businesses and professions, see ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations’, Glossary pp116-117 (Updated June 2019) (FATF Recommendations).

¹⁷ ICESCR Art. 2(1); see also the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc. A/63/435, Art. 8(4) (providing that the Committee shall use the standard of ‘reasonableness’ in evaluating the ‘steps taken’ by States Parties in accordance with the Covenant). See also On the meaning of ‘maximal use’ see e.g. CESCR General Comment No. 12: The Right to Adequate Good (Art. 11) (12 May 1999) para. 17; CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (11 August 2000) para. 47.

¹⁸ See e.g., Sanjeev, Gupta, Hamid Davoodi, and Erwin Tiongson, ‘Corruption and the Provision of Health Care and Education Services’ IMF WP/00/116 (2000); Clara Delavallade, ‘Corruption and Distribution of Public Spending in Developing Countries’ (2006) 30 Journal of Economics and Finance 222.

¹⁹ Politically exposed persons are individuals with high-level government functions, such as heads of State or government; senior politicians; senior officials in the government, judiciary, or military; senior executives of State-owned corporations, and important officials in political parties. FATF Recommendations, Glossary, p123.

corruption, the ability of public officials to make use of these proceeds is greatly diminished. Preventive anti-money laundering measures involve due-diligence obligations for financial institutions and designated non-financial businesses and professions.²⁰ Key rules require customer identification, beneficial owner identification, record keeping, and the reporting of suspicious transactions.²¹ States should adopt anti-money laundering measures that conform with a risk-based approach, by which the anti-money laundering regime in place must be commensurate with the risks identified.²² The anti-money laundering provisions contained in UNCAC reflect the more detailed recommendations of the Financial Action Task Force (FATF), an inter-governmental body that serves as the global standard setter in the anti-money laundering field. Because the FATF 40 Recommendations are significantly more detailed than UNCAC's provisions, the following refers to UNCAC's provisions as well as FATF's standards.²³ This commentary thus focuses specifically on measures to prevent money laundering, while the commentary to Principle 2 discusses the prevention of corruption more generally.

20. Customer identification and verification requirements aim to deter money laundering by impeding the ability of corrupt persons to conceal their identities as well as the source of their money.²⁴ FATF Recommendation 10 prohibits financial institutions 'from keeping anonymous accounts or accounts in obviously fictitious names'. In addition, FATF Recommendation 10 further provides that financial institutions must identify and verify their customers' identities by using 'reliable, independent source documents, data or information'. These customer identification requirements apply to new as well as existing customers. Financial institutions must therefore verify the identity of customers not only before establishing a business relationship, but also during the course of the relationship.
21. Beneficial owner identification requirements aim to deter money laundering by preventing corrupt persons from concealing their identities through the use of corporate vehicles, which are subject to the customer identification requirements described above.²⁵ The term 'beneficial owner' refers to a 'natural person who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted'.²⁶ The term also refers to 'those persons who exercise ultimate effective control over a legal person or arrangement'.²⁷ UNCAC Article 52(1) specifically requires States parties to impose beneficial owner identification requirements on high-value accounts. Taken together, customer and beneficial owner identification requirements help to ensure that

²⁰ With respect to human rights due diligence of business enterprises, see Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (21 March 2011) Principle 17.

²¹ UNCAC Arts. 14, 52.

²² FATF Recommendations, Recommendation 1.

²³ Although the FATF Recommendations are non-binding, compliance with the recommendations has been monitored by FATF (and FATF-Style Regional Bodies) in a manner which has brought about very widespread domestic implementation.

²⁴ UNCAC Art. 14(1)(a).

²⁵ FATF Recommendations, Recommendations 10, 24-25.

²⁶ FATF Recommendations, Glossary, p113.

²⁷ *Ibid.*

corrupt persons cannot misuse legal persons for money laundering purposes, as financial institutions must identify the natural persons at the source of the funds in question.

22. Suspicious transaction reporting requirements aim to facilitate the detection of transactions that involve the proceeds of corruption.²⁸ Anti-money laundering regimes must require financial institutions to report suspicious transactions to financial intelligence units.²⁹ The term suspicious transaction refers to ‘unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer’s business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general’.³⁰ While FATF requires States to establish financial intelligence units, UNCAC only requires States parties to consider doing so.
23. Record keeping requirements aim to allow government authorities to trace and identify the proceeds of corruption.³¹ These requirements are essential for preventing money laundering, and also for investigating acts of money laundering in the context of asset recovery cases. According to FATF Recommendation 11, financial institutions must retain, for at least five years, records that would allow for the reconstruction of individual transactions, to be used as evidence of criminal activity. Financial institutions must retain the records obtained through customer due diligence measures, account files, and business correspondence.
24. These are among the anti-money laundering measures that aim not only to prevent money laundering, but also to detect and trace it.³² By requiring financial institutions to institute such procedures, States work towards safeguarding the integrity of public funds by preventing public officials from laundering the proceeds of corruption.

<p>Principle 2: States’ laws and policies for the prevention of corruption must reflect the principles of accountability, transparency, and participation.</p>

Commentary

25. Accountability, transparency, and participation are fundamental principles in both anti-corruption law and in human rights law. These two bodies of law are thereby grounded in the same fundamental principles, and can be seen as complementing and reinforcing each other. The implementation of anti-corruption laws and policies enables compliance with fundamental human rights norms. The prevention of corruption constitutes a precondition for the enjoyment of certain human rights, such as participation in public affairs.³³

²⁸ UNCAC 14(1)(a).

²⁹ FATF Recommendations, Recommendation 20.

³⁰ United Nations Office on Drugs and Crime, ‘Travaux Préparatoires de the Negotiations for the Elaboration of the United Nations Convention against Corruption’ (2010) p154.

³¹ UNCAC Arts. 14(3), 52(1); FATF Recommendation 11.

³² See more generally FATF Recommendations, Recommendation 9-23. Self-reporting obligations are also a useful tool for the detection of money laundering and corruption. By requiring or encouraging self-reporting by businesses, States can foster the detection of money laundering and corruption offences.

³³ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 3rd ed. 2013) para. 22.23.

Conversely, the fulfilment of the rights to access to information and participation in public affairs, in keeping with the overarching concept of the rule of law, helps to further anti-corruption objectives.³⁴ The rule of law requires not only transparency and participation in decision-making, but also equality before the law, accountability to the law, fairness in the application of the law, separation of powers, legal certainty, and avoidance of arbitrariness.³⁵

26. Accountability may be defined as ‘a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences’.³⁶ In the asset recovery context, the actor would be a branch of the government (or certain government officials) of the requested and/or requesting State, and the forum would be the general public of the requested and/or requesting State (or certain stakeholders). This relationship involves three elements. First, the actor (i.e. the governmental branch or official) must inform the public about its conduct by providing information, explanations, and justifications.³⁷ Second, the actor must be answerable for its conduct, which means that the forum (i.e. the public) must be able to question the actor and the adequacy of the information given about its conduct.³⁸ Third, the forum may pass judgment on the actor, by imposing sanctions of some sort, such as by condemning the behavior of a government official.³⁹ Accountability focuses on ex post facto processes, which involve answerability and sanctions after the actor has taken decisions.⁴⁰ Both human rights law and anti-corruption law play roles in building a legal framework that ensures accountability. Human rights law, in particular, provides a legal basis for the principles of transparency and participation, which are critical for ensuring answerability.⁴¹
27. Transparency is a precondition for prevention of corruption, as well as the enjoyment of human rights more generally.⁴² The principle of transparency is grounded in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which provides that the right to freedom of expression includes the right to seek and receive information, i.e., the right to access to information.⁴³ The right of access to information requires States parties

³⁴ General Assembly Resolution, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1 (24 September 2012).

³⁵ Report of the Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616 (23 August 2004) para. 6.

³⁶ Mark Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13 *European Law Journal* 447, 450.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.* p467.

⁴¹ UN Office of the High Commissioner for Human Rights, ‘Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda’ (2013) p11.

⁴² Andrea Bianchi, ‘On Power and Illusion: The Concept of Transparency in International Law’ in Andrea Bianchi and Anne Peters (eds.) *Transparency in International Law* (Cambridge University Press 2013).

⁴³ See also African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 I.L.M. 58 (1982) Art. 9; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights or ECHR) Art. 10; UN Doc A/RES/70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*

to the ICCPR to put government information of public interest in the public domain.⁴⁴ From an anti-corruption perspective, information about public finances, public procurement, public decision-making processes, and public sector human resource systems is of particular relevance. States parties should ‘make every effort to ensure easy, prompt, effective and practical access’ to such information of public interest.⁴⁵ At the same time, however, transparency in the public procurement context must be carried out in a balance manner, meaning that government authorities must avoid requiring the release of sensitive information that could be used by bidders to distort competition.⁴⁶ In the context of extreme poverty, States may have to take special measures to ensure that information is made available in a manner that is accessible to the poorest or most disadvantaged who may be illiterate or experience language barriers.⁴⁷ The right to access to information covers information that is held by the State but is not yet in the public domain.⁴⁸ States must therefore put procedures in place, such as freedom of information legislation, to allow people to gain access to such information.⁴⁹

28. Transparency enables private persons or entities to carry out a ‘watchdog’ function with respect to matters of legitimate public concern.⁵⁰ The fight against corruption is widely accepted as a matter of legitimate public interest, as it concerns the allocation public funds and governmental decision-making processes more generally.⁵¹ The provision of information by the government to an individual allows for the circulation of that information within society, which can then access and assess that information.⁵² Access to government-held information allows persons to ‘question, investigate, and consider

(21 October 2015) Goal 16.10 (‘ensure public access to information and protect fundamental freedoms’) (Sustainable Development Goals).

⁴⁴ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (12 September 2011) para. 19.

⁴⁵ Ibid.

⁴⁶ OECD, ‘Recommendation of the Council on Public Procurement’ C(2015)2, Recommendation II(i); OECD, ‘Recommendation on Fighting Bid Rigging in Public Procurement’ C(2012)115, Recommendation 4 (‘when publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this case facilitate the formation of bid-rigging schemes, going forward’).

⁴⁷ Human Rights Council, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona’, UN Doc A/HRC/23/36 (11 March 2013) para. 61 (information ‘should be free of charge, relevant, up-to-date, understandable, free of technical language or jargon, and in local languages’. Dissemination of information in non-written form (e.g. radio announcements) may be necessary to reach the poorest).

⁴⁸ Nicola Wenzel, ‘Opinion and Expression, Freedom of, International Protection’, Max Planck Encyclopedia of Public International Law (OUP, last updated April 2014) para. 19.

⁴⁹ Human Rights Council, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona’, UN Doc A/HRC/23/36 (11 March 2013) para. 61. See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/2000/63 (18 January 2000) Annex II, The Public’s Right to Know: Principles on Freedom of Information Legislation.

⁵⁰ Human Rights Committee, Views, Communication No. 1470/2006, *Toktakunov v Kyrgyzstan*, UN Doc CCPR/C/101/D/1470/2006 (21 April 2011) para. 7.4.

⁵¹ Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression, UN Doc A/70/361 (8 September 2015) para. 10 (corruption should be considered presumptively in the public interest).

⁵² Ibid.

whether public functions are being performed adequately'.⁵³ In order to facilitate participation, access to information should be incorporated into all stages of decision-making by government authorities, including initial planning, budgeting, implementation, monitoring and evaluation.⁵⁴ Without information about the process by which a government privatizes an industry or grants concessions, the people may not be able to effectively pursue their rights. Access to information thereby enables people to defend their own human rights and to combat corruption.⁵⁵

29. Participation in public affairs is also a precondition for the prevention of corruption, as well as the enjoyment of human rights more generally. The principle of participation in public affairs is grounded in ICCPR Article 25, which provides that 'every citizen shall have the right and opportunity... to take part in the conduct of public affairs, directly or through freely chosen representatives'.⁵⁶ Ensuring participation in public affairs is thus a legal obligation for States Parties to the ICCPR, and not simply a policy option that governments can decide not to pursue.⁵⁷ The right to participation in public affairs is dependent on the right to access to information, as information about government decision-making processes enables or facilitates the public's contribution to and assessment of those decisions.⁵⁸

30. The term public affairs is a 'broad concept' which covers the exercise of all facets of political power, whether legislative, executive, or administrative.⁵⁹ The term 'public affairs' also refers to public administration at all levels of government, from local, regional, national, to international.⁶⁰ Participation in public affairs can take place directly or indirectly.⁶¹ Direct participation involves the exercise of power through membership in a legislative body or by holding an executive or administrative office, and through referenda and other electoral processes.⁶² Indirect participation involves the exercise of influence on public affairs through public debate and dialogue with freely chosen representatives and by organizing themselves.⁶³ In an anti-corruption context, non-governmental organizations and the media can play particularly important roles in fostering indirect participation, through public debate and dialogue about public finances and decision-making processes.

⁵³ Inter-American Court of Human Rights, *Claude-Reyes et al v Chile*, Judgment, 19 September 2006, para. 86.

⁵⁴ UN Office of the High Commissioner for Human Rights, 'Guidelines on the Effective Implementation of the Right to Participate in Public Affairs' (2018) para. 23.

⁵⁵ Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan', UN Doc E/C.12/1/Add.20 (22 December 1997), para. 29.

⁵⁶ See also Sustainable Development Goals (n 43) Goal 16.7 ('Ensure responsive, inclusive, participatory and representative decision-making at all levels'); Declaration on the Right to Development, GA Res 41/128 (4 December 1986), Art. 8.

⁵⁷ Report of the Special Rapporteur on Extreme Poverty and Human Rights (n 47) para. 24.

⁵⁸ OHCHR, 'Guidelines on the Effective Implementation of the Right to Participate in Public Affairs' (n 54) para. 15.

⁵⁹ Human Rights Committee, General Comment No. 25, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) para. 4.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.* para. 6.

⁶³ *Ibid.* para. 8.

31. Participation in public affairs must occur at all stages of governmental decision-making processes and it can take many different forms, depending on the stage and the circumstances. States must enable participation at early stages of decision-making, when agendas are being set, priorities are being established, and when policy options have not yet been foreclosed.⁶⁴ As participation is a continuous process, States must also ensure that participation takes place at later stages when the implementation of a law, policy, project or program can be monitored and ultimately evaluated.⁶⁵ With respect to the form of participation, it can take place online (e.g. through written consultation processes) or in person (e.g. through public hearings, stakeholder committees, or advisory bodies).⁶⁶ The intensity or level of participation can range from consultation and dialogue, to co-drafting and partnership.⁶⁷ Finally, participation in public affairs must not be limited to ‘marginal or peripheral’ aspects of public affairs, but ‘should focus on key issues such as public services, budgets and fiscal policy’.⁶⁸ Public awareness of and debate about corruption in the context of public procurement or public expenditures, for example, represent important manifestations of the right to participate in public affairs.
32. In anti-corruption law, the principles of accountability, transparency and participation play a fundamental role. UNCAC identifies the promotion of ‘integrity, accountability and proper management of public affairs and property’ as one of its main purposes.⁶⁹ To this end, States Parties’ policies to prevent corruption must ‘promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability’.⁷⁰ Chapter II of UNCAC, which deals with the prevention of corruption, gives these broad principles some definite contours. Chapter II includes provisions on the transparent and accountable management of public finances and public administration, transparent conduct by public officials, and the participation of civil society in the prevention of corruption.⁷¹
33. UNCAC requires the transparent and accountable management of public procurement and public finances⁷² and transparent public administration more generally.⁷³ In order to ensure transparency, States Parties’ measures for the management of public finances must include procedures for the adoption of a national budget, and timely reporting on revenues and expenditures.⁷⁴ States parties are also required to ensure accountability by implementing accounting and auditing standards, systems of risk management and

⁶⁴ OHCHR, ‘Guidelines on the Effective Implementation of the Right to Participate in Public Affairs’ (n 54) paras. 64, 70.

⁶⁵ Report of the Special Rapporteur on Extreme Poverty and Human Rights (n 47) para. 26; OHCHR, ‘Guidelines on the Effective Implementation of the Right to Participate in Public Affairs’ (n 54) para. 84.

⁶⁶ Ibid. paras. 54, 64, 74.

⁶⁷ Ibid. para. 53.

⁶⁸ Ibid. para. 73.

⁶⁹ UNCAC Art 1(c).

⁷⁰ UNCAC Art 5(1).

⁷¹ UNCAC Arts 7-10, 13.

⁷² UNCAC Art 9.

⁷³ UNCAC Art 10.

⁷⁴ UNCAC Art 9(2)(a), (b).

internal control, and ‘corrective action’, where appropriate, in cases of a failure to comply with such requirements.⁷⁵ States parties must also take measures to enhance transparency in their public administration by publishing information and by adopting procedures or regulations that allow members of the general public to obtain information on governmental decision-making processes.⁷⁶ The administration of the public sector must also be based on the principle of transparency, in particular human resource systems in the public sector (e.g. recruitment, hiring, retention, promotion and retirement of civil servants).⁷⁷ Finally, with respect to participation in public affairs, States Parties must promote the active participation of society (e.g. civil society, non-governmental organizations and community-based organizations) in the prevention of and the fight against corruption.⁷⁸

34. These provisions for the prevention of corruption must be understood in light of human rights law, which is discussed in detail in the Principles that follow. Chapter II of UNCAC ultimately provides relatively little detail on how these broad principles of accountability, transparency, and participation can be operationalized in practice by States Parties. As these principles have been the subject of significant elaboration in human rights law, this field of law can aid in the development of a better understanding of what these anti-corruption provisions require and how they can be implemented in practice.⁷⁹

35. **Best practice:** In resource-rich States, membership in the Extractive Industries Transparency Initiative could be considered a best practice for ensuring the transparency of revenues and expenditures, and participation in public affairs.⁸⁰ Accountability, transparency, and participation can also be fostered through membership in the Open Government Partnership, an initiative that aims, in part, to promote transparency, empower citizens, and fight corruption.⁸¹

<p>Principle 3: States have a duty to protect the human rights of persons who report corruption and money laundering.</p>
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Commentary

36. Both human rights law and anti-corruption law address the situation of reporting persons (i.e. whistleblowers). A reporting person is someone who ‘exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law,

⁷⁵ UNCAC Art 9(2)(c)-(e)

⁷⁶ UNCAC Art 10.

⁷⁷ UNCAC Art 7.

⁷⁸ UNCAC Art 13.

⁷⁹ Such an approach to treaty interpretation is in keeping with the principle of systemic treaty integration (VCLT, Art. 31(3)(c)).

⁸⁰ See UNCAC Coalition Civil Society Statement for the Global Forum on Asset Recovery (4 December 2017) Recommendation 1.

⁸¹ Open Government Partnership <<https://www.opengovpartnership.org/>>.

abuse of authority, waste, fraud...'.⁸² Reporting persons play an important role in the detection of acts of corruption, as the perpetrators of corruption typically go to great lengths to conceal their conduct. The detection of corruption thus depends, in part, on persons reporting relevant information to governmental authorities. Yet, insufficient protections for reporting persons, and instances of retaliation against reporting persons, can deter people from coming forward to report acts of corruption.

37. UNCAC addresses the need for the protection of reporting persons, but it does so in a semi-mandatory manner, meaning that it requires States Parties to consider implementing protections for reporting persons, but does not require States Parties to do so.⁸³ Each State Party has an obligation to consider taking measures to 'provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts' concerning the offences set out in UNCAC.⁸⁴ States parties also have an obligation to consider establishing measures and systems for reporting by public officials, 'when such acts come to their notice in the performance of their functions'.⁸⁵ These provisions, while semi-mandatory, have generated a substantial body of commentary, which greatly elaborates upon the substantive content of whistleblower protections in an anti-corruption context.⁸⁶

38. Under human rights law, the protection of reporting persons is a function of the right to freedom of expression, which States have a legal obligation to respect, protect, and fulfill.⁸⁷ Thus, while anti-corruption law does not mandate protections for reporting persons, human rights law imposes legal obligations on States to protect these persons. Human rights law thereby complements anti-corruption law with respect to protections for reporting persons.⁸⁸ The obligation of States to establish protections for reporting persons is grounded in the right to freedom of expression, as set out in ICCPR Article 19(2).⁸⁹ The reporting of information concerning corrupt conduct falls within the scope of the right to impart information.⁹⁰ Moreover, the public (as opposed to confidential) disclosure of information by reporting persons is covered by the right to receive information, subject to the limitations set out in Article 19(3). The right to receive information advances the principle of transparency, and it also enables the development

⁸² Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression (n 51) para. 28.

⁸³ UNCAC Arts. 8(4), 33.

⁸⁴ UNCAC Art. 33.

⁸⁵ UNCAC Art. 8(4).

⁸⁶ See e.g., Transparency International, 'Whistleblower Protection and the UN Convention Against Corruption (2013); United Nations Office on Drugs and Crime, 'The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons' (2015).

⁸⁷ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms, A/70/217, para. 69-70, 91.

⁸⁸ See e.g. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms.

⁸⁹ ICCPR Art. 19 provides that 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice'. See also ECHR Art. 10.

⁹⁰ Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression (n 51) para. 5.

of opinions (ICCPR Art 19(1)) and the right to participate in public affairs (ICCPR Art 25).⁹¹

39. **Best practice:** Domestic laws should detail protections for reporting persons in an explicit and clear manner.⁹² Such protections should address ‘coercion or harassment of themselves or their families, discrimination, physical harm to a person or property, threats of retaliation, job loss, suspension or demotion, transfer or other hardship, disciplinary penalty, blacklisting or prosecution on grounds of breach of secrecy laws, libel or defamation’.⁹³ In addition, domestic laws should require reporting persons to hold a reasonable belief of wrongdoing, regardless of whether the information proves to be correct and regardless of the reporting person’s motivations at the time of disclosure.⁹⁴ Finally, reporting persons should have access to external disclosure mechanisms, if they reasonably perceive that internal processes lack effective protection and redress.⁹⁵ An external but confidential avenue for disclosure would be a government-wide ombudsman or other oversight body.⁹⁶ Where avenues for disclosure are unavailable or ineffective, reporting persons may resort to public disclosure, provided that the requirements of Article 19(3) are met.⁹⁷ External, public disclosure would involve the reporting of information to external entities, such as the media, civil society, or through self-publishing.⁹⁸ The case law of the European Court of Human Rights further establishes that certain conditions must be met in order for such public disclosures to benefit from the protections provided by Article 10 of the ECHR.⁹⁹ This case law is, however, merely of persuasive value for States not party to the European Convention on Human Rights.

Principle 4: States have a duty to ensure the progressive realization of economic, social and cultural rights by providing international assistance and cooperation in the context of asset recovery.

Commentary

40. Under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), States parties have duties to provide international assistance and cooperation for the purpose of ensuring the progressive realization of economic, social and cultural rights. ICESCR Article 2(1) provides that each State Party to the ICESCR:

...undertakes to take steps, individually and through *international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

⁹¹ Ibid.

⁹² Ibid. para 41.

⁹³ Ibid. para. 41.

⁹⁴ Ibid. paras. 30-31.

⁹⁵ Ibid. para. 35.

⁹⁶ Ibid.

⁹⁷ Ibid. para. 37.

⁹⁸ Ibid.

⁹⁹ Council of Europe, ‘Thematic Factsheet: Whistleblowers and Their Freedom to Impart Information’ (May 2017).

recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’ (emphasis added).

This provision has relevance in an anti-corruption context, as corruption detracts from the public resources that are available for progressively achieving the full realization of human rights. States must therefore not only take steps to combat corruption (e.g. through laws, policies, etc.), but must also do so through international assistance and cooperation.

41. Similar obligations of international assistance and cooperation in an economic, social and cultural context can be found in the United Nations Charter and in a significant number of other treaties and non-binding instruments,¹⁰⁰ but none of these instruments specifies what assistance and cooperation must entail in practice.¹⁰¹ The duties to provide international assistance and cooperation do not represent ends in themselves, but instead represent the means by which States are obliged, by the ICESCR and other instruments, to achieve the broad goals of realizing of economic, social and cultural rights. The obligations of international assistance and cooperation are thereby general obligations of conduct, rather than obligations of result.¹⁰² These instruments create (or declare the existence of) obligations of conduct, without specifying the contents of these obligations, i.e., how States ought to engage in international assistance and cooperation. The exact means by which States may fulfill these obligations of conduct may be worked out by States on an ad hoc or permanent basis, and in bilateral or multilateral settings, through treaties, recommendations, or technical assistance.¹⁰³
42. UNCAC’s provisions on international cooperation and technical assistance¹⁰⁴ represent a means by which States can achieve not only the anti-corruption objectives explicitly set out in the treaty¹⁰⁵, but also the realization of human rights more broadly. One of the main purposes of the Convention is promoting, facilitating, and supporting ‘international cooperation and assistance in the prevention of and fight against corruption, including in asset recovery’.¹⁰⁶ The return of assets is, in particular, a ‘fundamental principle’ of the Convention, according to which States Parties must ‘afford one another the widest

¹⁰⁰ United Nations Charter, Arts. 55-56; Universal Declaration on Human Rights GA Res 217A(III) (10 December 1948) Arts. 22, 28; Declaration on the Right to Development, Arts. 3(3), 4(2); Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (25 June 1993) Arts. 1(2), 4, 10(4); Declaration on Principles of International Law, Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, A/RES/2625(XXV) (24 October 1970) (Friendly Relations Declaration); Charter of Economic Rights and Duties of States, UN Doc A/RES/3281 (6 November 1974) Arts. 9, 17; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) Arts. 4, 28(3); African Charter on Human and Peoples’ Rights, Art 22(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) Art. 36; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17 (8 January 1987) Principles 29-34. See also General Assembly Resolutions 73/222 (20 December 2018) and 73/190 (17 January 2019).

¹⁰¹ Tahmina Karimova, *Human Rights and Development in International Law* (Routledge 2016) pp129-130; Rüdiger Wolfrum, ‘International Law of Cooperation’, Max Planck Encyclopedia of Public International Law (OUP last updated April 2010).

¹⁰² Ibid. p153.

¹⁰³ ICESCR Art. 23; Karimova (n 101) p158.

¹⁰⁴ UNCAC Chapters IV-VI.

¹⁰⁵ UNCAC Art. 1.

¹⁰⁶ UNCAC Art. 1(b).

measure of cooperation and assistance'.¹⁰⁷ UNCAC's provisions on mutual legal assistance in the context of asset recovery thereby form an integral part of the Convention's anti-corruption goals.¹⁰⁸ But mutual legal assistance in the context of asset recovery can also be understood as serving a larger goal of human rights promotion. By providing a legal basis for the return of assets, these mutual legal assistance provisions work towards maximizing the resources that are available to States for the realization of economic, social and cultural rights.¹⁰⁹ UNCAC's provisions on mutual legal assistance in the context of asset recovery complement ICESCR Article 2(1), by detailing substantive cooperation obligations for the purpose of maximizing available resources.

43. UNCAC imposes a number of obligations concerning asset restraint and confiscation on 'requested States' (i.e., States that receive requests for international cooperation from States where the proceeds of corruption originated).¹¹⁰ Requested States are typically States with financial institutions and real estate markets that are attractive for public officials seeking to launder public funds (e.g. Switzerland, the United Kingdom, and the United States). Requested States Parties must first be able to restrain (i.e. 'freeze' or 'seize'¹¹¹) property when requested to do.¹¹² The competent authorities of requested States must have the capacity to restrain property on the basis of a freezing or seizure order issued by a court of the requesting State Party, or simply on the basis of a request by authorities in the requesting State (i.e., a State that requests international cooperation from other States, such as those States where the assets are located). Both orders and requests must 'provide a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation'.¹¹³ Second, requested States must be able to give effect to orders for confiscation¹¹⁴ that have been issued by a court in another State, such as the requesting State.¹¹⁵ States Parties must also be able to order the confiscation of property of foreign origins on the basis of domestic money laundering (or other) proceedings, without being requested to do so by another State¹¹⁶ Finally, UNCAC requires States Parties to consider allowing non-conviction based confiscation, a term which refers to confiscation in cases where the offender cannot be prosecuted due to death, flight or absence (or other appropriate circumstances).¹¹⁷

¹⁰⁷ UNCAC Art. 51.

¹⁰⁸ UNCAC Chapter V.

¹⁰⁹ Human Rights Council, Resolution 40/4, preambular para. 16.

¹¹⁰ UNCAC Art. 54.

¹¹¹ UNCAC Art. 2(f) defines freezing or seizure as 'temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority'. There is no clear distinction between the terms freezing and seizure. Cornelia Sporl, 'Article 2: Use of Terms' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds.) *The United Nations Convention against Corruption: A Commentary* (OUP 2019) pp30-31.

¹¹² UNCAC Art. 54(2).

¹¹³ Ibid.

¹¹⁴ UNCAC Art. 2(g) defines confiscation as 'the permanent deprivation of property by order of a court or other competent authority'.

¹¹⁵ UNCAC Art. 54(1)(a).

¹¹⁶ UNCAC Art. 54(1)(b).

¹¹⁷ UNCAC Art. 54(1)(c).

44. **Best practices** for requested States tend to involve more informal, flexible approaches to international cooperation, which go beyond the requirements of UNCAC. These practices allow, for example, for more rapid and proactive approaches to the freezing or seizing of assets, which do not depend on orders made by courts in requesting States or on other requests by States of origin.¹¹⁸ These measures for restraining assets aim to prevent the proceeds of corruption from being transferred to other jurisdictions, before mutual legal assistance processes can run their course.¹¹⁹ Swiss and Canadian laws, for example, allow those governments to freeze assets in a timely and proactive manner where political upheaval or the failure of State structures is taking place in the State of origin.¹²⁰ The Swiss Foreign Illicit Assets Act (FIAA) allows the State to freeze the assets of foreign public officials who have fallen from power, under certain conditions.¹²¹ First, the level of corruption in the State of origin must be ‘notoriously high’; second, the assets must appear to have been acquired through corruption, mismanagement or other felonies; and third, ‘the safeguarding of Switzerland’s interests’ must require the freezing of the assets. The Swiss FIAA also allows for freezing of foreign assets in situations where the requesting State is unable to meet mutual legal assistance requirements due to ‘the total or substantial collapse or the impairment of its judicial system’.¹²² This basis for freezing assets is conditioned on the existence of a provisional seizure order, made by the requesting State, and on the condition that ‘the safeguarding of Switzerland’s interests requires the freezing of the assets’.¹²³
45. **Best practice:** requested States should consider providing technical assistance to and sharing of information with States of origin. Technical assistance and information sharing are especially important in situations where the (would-be) requesting State lacks the expertise and evidence needed to meet mutual legal assistance requirements. The ability to restrain assets in the absence of a court order or other request does not, however, replace the need for compliance with mutual legal assistance requirements at later stages of the asset recovery process.¹²⁴ The Swiss FIAA, for example, acknowledges the need for international assistance by providing a legal basis for the Swiss Confederation to provide countries of origin with assistance in efforts to obtain the restitution of frozen assets.¹²⁵ Switzerland may provide training, legal advice, organize conferences or

¹¹⁸ Gray et al. (n 8) p2.

¹¹⁹ Ibid. p41; Radha Ivory, ‘Article 54: Mechanisms for Recovery of Property Through International Cooperation in Confiscation’ in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds.) *The United Nations Convention against Corruption: A Commentary* (OUP 2019) p550.

¹²⁰ Switzerland, Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Swiss Foreign Illicit Assets Act or Swiss FIAA); Canada, Freezing Assets of Corrupt Foreign Officials Act. See also United States, Preserving Foreign Criminal Assets for Forfeiture Act of 2010; Gray et al. (n 8) p37. See further asset freezing measures in the context of the Arab Spring: UN SC Res 1970 (2011); UN SC Res 1973 (2011); EU Council Decision 2011/72/CFSP; US Executive Order 13566; Swiss Ordinances on 19/1/2011 (Tunisia); 2/2/2011 (Egypt); and 21/2/2011 (Libya).

¹²¹ Swiss FIAA Art. 3(2).

¹²² Swiss FIAA Art. 4(2).

¹²³ Ibid.

¹²⁴ Gray et al. (n 8) p41 (explaining that mutual legal assistance will be required eventually for evidentiary purposes and for enforcing judgments).

¹²⁵ Switzerland, FIAA Art. 11.

meetings, and second experts to the country of origin. In addition, the Swiss FIAA provides for the transmission of information (e.g. bank information) to the country of origin so that it can prepare, or complete an insufficient, mutual legal assistance request.¹²⁶ The Swiss FIAA also notably provides that the transmission of information to the country of origin may be subject to conditions, in particular the right to a fair trial in the country of origin.¹²⁷

46. Requesting States also bear obligations of international cooperation. Successful cooperation in the context of asset recovery ultimately depends, in part, on requesting States actively seeking the return of assets on the basis of confiscation orders, and providing the information necessary to facilitate this process. When seeking the identification and restraint of assets, a requesting State must provide a statement of facts, a description of the actions requested, and ‘where available, a legally admissible copy of an order on which the request is based’.¹²⁸
47. The provision of information by the requesting State is likewise obligatory in the context of a request for effect to be given, by the requested State, to a confiscation order. The type and extent of information required depends on the legal basis for the confiscation, that is, whether authorities in the requested or requesting State ordered confiscation. When a requesting State seeks to have the requested State give effect to a confiscation order made by authorities in the requested State (a ‘local’ confiscation order), the requesting State must provide ‘a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon’ by it.¹²⁹ When the requesting State seeks to have the requested State give effect to a confiscation order made by its own authorities (a ‘foreign’ confiscation order), it must provide ‘a legally admissible copy of an order of confiscation... a statement of the facts and information as to the extent to which execution of the order is requested, 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 and a statement that the confiscation order is final’.¹³⁰

<p>Principle 5: States must respect the human rights of persons under investigation for, accused of, or convicted of corruption and money laundering offences.</p>

Commentary

48. The implementation and enforcement by States of domestic anti-corruption laws must conform with their human rights obligations. States must ensure that all stages of their anti-corruption investigations and prosecutions comply with human rights law, including the right to a fair trial, the right to property, the right to privacy, the right to be free from torture, the right to life, and the right not to be convicted on the basis of a retroactive criminal law. In addition, requested States must seek assurances that requests to restrain

¹²⁶ Switzerland, FIAA Art. 13(1).

¹²⁷ Switzerland, FIAA Art. 13(3).

¹²⁸ UNCAC Art. 55(3)(c).

¹²⁹ UNCAC Art. 55(3)(a).

¹³⁰ UNCAC Art. 55(3)(b).

and confiscate assets arise out of proceedings (or relate to detention conditions) in the requesting State that comply with human rights law. International anti-corruption treaties acknowledge the human rights implications of anti-corruption measures, but do not supply the applicable law.¹³¹ Anti-corruption treaties must therefore be applied by States together with human rights treaties, such as the ICCPR, which create a legal framework that complements and circumscribes the application of domestic anti-corruption laws. Anti-corruption treaties cannot be understood and applied in isolation, but must instead be harmonized with human rights law. The following focuses on the rights to a fair trial and to the protection of property, which have been at issue with particular frequency both in cases and in commentary.

49. States have an obligation to respect the fair trial rights of accused persons, who are entitled, in particular, ‘to be presumed innocent until proved guilty according to law’.¹³² In an anti-corruption context, questions have arisen about whether the prosecution of the crime of illicit enrichment is compatible with the presumption of innocence.¹³³ UNCAC requires States parties to consider criminalizing illicit enrichment, meaning ‘a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income’.¹³⁴ Many States have chosen not to criminalize illicit enrichment out of concerns that such an offence would conflict with the presumption of innocence, by requiring the defendant to bear the burden of proving his or her innocence.¹³⁵
50. The case law of the European Court of Human Rights (ECtHR) has, however, confirmed that illicit enrichment laws can indeed be drafted and enforced in a manner that is consistent with the right to a fair trial, and in particular the presumption of innocence. The ECtHR has found that shifting the burden of proof onto the defendant does not violate the right to the presumption of innocence, so long as such burden shifting is confined ‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’.¹³⁶ The shifting of the burden of proof onto individuals accused of illicit enrichment may be considered reasonable where the prosecution has first demonstrated a link between the assets and the public official, and the existence of a significant discrepancy between those assets and the public official’s legal income. Once the prosecutor has presented sufficient evidence to demonstrate a link and a significant discrepancy, then this creates a presumption that may be rebutted by the defendant. In

¹³¹ UNCAC preambular para. 9; see also references throughout UNCAC to the ‘fundamental principles’ of States parties’ legal systems and domestic laws.

¹³² ICCPR Art. 14(2). See also ECHR Art. 6(2).

¹³³ See Lindy Muzila et al., ‘On the Take: Criminalizing Illicit Enrichment to Fight Corruption’ (Stolen Asset Recovery Initiative 2012).

¹³⁴ UNCAC Art. 20.

¹³⁵ Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 30 (‘The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle’).

¹³⁶ European Court of Human Rights, *Salabiaku v. France*, Application no. 10519/83, Judgment, 7 October 1988, para. 28. See also European Court of Human Rights, *Phillips v. United Kingdom*, Application no. 41087/98, Judgment, 5 July 2001, para. 43.

order to rebut a presumption that such unexplained wealth has illicit origins, the defendant must refute the prosecution's evidence. The Swiss FIAA, for example, provides for a reversal of the presumption of illicit origins where the defendant demonstrates 'with overwhelming probability that the assets in question were acquired legitimately'.¹³⁷

51. Persons whose assets are the subject of criminal or civil confiscation proceedings also enjoy a right to the protection of property.¹³⁸ This right is also enjoyed by bona fide third parties who have a legitimate interest in the property in question.¹³⁹ The confiscation of assets obtained through acts of corruption interferes with the right of an accused or convicted person to the 'peaceful enjoyment of his possessions', which is protected under Protocol No. 1 to the European Convention on Human Rights.¹⁴⁰ The European Court of Human Rights has recognized the proceeds of crime as 'possessions' under Article 1 of Protocol No. 1.¹⁴¹ Such confiscations are only in keeping with the right to the protection of property if they are: (1) lawful; (2) serve a legitimate, public interest; and (3) are proportionate. The criterion of lawfulness means that there must be a legal basis for any interference with the peaceful enjoyment of possessions. The legal basis must, in particular, be precise, foreseeable, and non-arbitrary.¹⁴² The criterion of proportionality means that any interference with an individual's right to the peaceful enjoyment of possessions must be reasonably proportionate to the public interest that the measure aims to serve. States parties to the ECHR and Protocol No. 1 have broad discretion in determining how these criteria are interpreted and applied when implementing political, economic, or social policies such as anti-corruption measures.¹⁴³
52. Case law of the ECtHR supports the conclusion that the confiscation of assets obtained through acts of corruption serves the legitimate, public interests of combating corruption, repairing damage caused by corruption, and by deterring such conduct in the future.¹⁴⁴ The legitimacy of confiscation in this context is bolstered by the fact that UNCAC, and other anti-corruption treaties, specifically address the confiscation of property linked to corruption offences and money laundering.¹⁴⁵ In addition, the case law shows that proportionate means for achieving this legitimate aim include procedures whereby the accused persons have a reasonable opportunity to rebut the evidence presented by the prosecution.¹⁴⁶ The proportionality of such means is further assured by the broad

¹³⁷ Switzerland FIAA Art. 15. See also Australia, Proceeds of Crime Act 2002, section 179E(3); UK Criminal Finances Act 2017, Art. 362A (unexplained wealth orders).

¹³⁸ See generally Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press 2014).

¹³⁹ UNCAC Art. 31(9).

¹⁴⁰ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Art. 1; see also UDHR Art. 17(2).

¹⁴¹ Ivory (n 138) pp174-184.

¹⁴² European Court of Human Rights, *Dimitrovi v. Bulgaria*, Application no. 12655/09, Judgment, 3 March 2015, paras. 44-45.

¹⁴³ *Ibid.* para. 51.

¹⁴⁴ European Court of Human Rights, *Gogitidze and others v. Georgia*, Application no. 36862/05, Judgment, 12 May 2015.

¹⁴⁵ *Ibid.* para. 106.

¹⁴⁶ *Ibid.* para. 108.

discretion that States enjoy in formulating laws and policies to combat corruption in the public sector, especially in States where combating corruption is of critical importance.

Principle 6: Persons whose human rights have been violated as a result of corruption have a right to an effective remedy.

Commentary

53. Corruption is not a victimless crime.¹⁴⁷ The term victim, in this context, refers to persons who have suffered harm as a result of the commission of a corruption offence.¹⁴⁸ Depending on the circumstances, such harm may or may not involve a violation of a human right. Acts of corruption may violate rights based in human rights law, or rights based in other bodies of law, such as administrative law, international refugee law, or international environmental law.¹⁴⁹ In addition, in some instances, harm occasioned by acts of corruption may result in harm that does not necessarily violate any particular rights, but instead causes ‘social damage’ such as damage to the credibility of institutions.¹⁵⁰ Victims of acts of corruption may suffer harm individually or collectively.¹⁵¹ In many instances, acts of corruption harm the ‘public’ which is comprised of many individuals who form the collective.
54. International anti-corruption instruments require States to ensure that victims of acts of corrupt have a right to pursue a remedy.¹⁵² Article 35 of UNCAC, in particular, requires States parties 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’. The phrase ‘entities or persons’

¹⁴⁷ Open-ended Intergovernmental Working Group on Asset Recovery, ‘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’, CAC/COSP/WG.2/2019/5 (22 March 2019). For a debate about victims of corruption from a human rights perspective, see Anne Peters, ‘Corruption as a Violation of International Human Rights’ (2018) 29 EJIL 1251, 1255-1256; Franco Peirone, ‘Corruption as a Violation of International Human Rights: A Reply to Anne Peters’ (2018) 29 EJIL 1297, 1299-1301.

¹⁴⁸ See, by analogy, International Criminal Court, Rules of Procedure and Evidence, Art. 85(a); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005), para. 8.

¹⁴⁹ See e.g. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447; Convention Relating to the Status of Refugees (adopted 21 July 1951, entered into force 22 April 1954) 189 UNTS 137.

¹⁵⁰ Open-ended Intergovernmental Working Group on Asset Recovery, ‘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’, CAC/COSP/WG.2/2019/5 (22 March 2019) para. 9.

¹⁵¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005) para. 8.

¹⁵² UNCAC Art 35; Council of Europe Civil Law Convention against Corruption, Arts. 3-4. See also Civil Society Principles for Accountable Asset Return, Principle 8.

encompasses both States and natural and legal persons.¹⁵³ This provision leaves the exact extent and form of such private rights of action to the discretion of States parties.¹⁵⁴ Compliance with this provision has taken three general forms.¹⁵⁵ First, a general law can enable individuals to seek compensation for wrongful acts. Second, a law or mechanism can allow individuals to institute a civil claim for compensation as a private participant in criminal proceedings.¹⁵⁶ Finally, once a person has been convicted, courts can order compensation for damages either on their own initiative, or based on an application by the victim.¹⁵⁷

55. These domestic laws and mechanisms, by which individuals may pursue remedies for corruption, complement the existing human rights framework. While acts of corruption interfere with the enjoyment of human rights, and thus lead to human rights violations and victims of those violations, international human rights law does not currently provide a robust framework for victims of corruption to pursue legal remedies. The ICCPR requires States Parties to ensure that effective remedies exist for violations of civil and political rights (Article 2(3)). States must therefore ensure that victims of civil and political rights violations, such as those that occur in the context of anti-corruption investigations or prosecutions, can pursue effective remedies under domestic law. Yet, because many corruption-related human rights violations concern economic, social and cultural rights, this provision has limited applicability in the context of asset recovery. Moreover, the ICESCR itself does include a provision comparable to ICCPR Article 2(3), and thus does not require States Parties to ensure a right to an effective remedy.¹⁵⁸ While the Optional Protocol to the ICESCR creates a remedy at an international level, by allowing individuals to submit communications to the Committee on Economic, Social and Cultural Rights, this instrument has not yet been widely ratified, and thus has relatively limited applicability at present.¹⁵⁹ As a consequence of these limitations, international anti-corruption law can be seen as filling a gap in the human rights law framework, by requiring States to ensure that victims of corruption can institute legal proceedings in their domestic legal systems in order to obtain compensation.¹⁶⁰

56. The application of such domestic laws in an anti-corruption context can be difficult in practice, on account of the challenges involved in identifying victims directly harmed by

¹⁵³ United Nations Office on Drugs and Crime, 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption' (2010) p299.

¹⁵⁴ Abiola Makinwa, 'Article 35: Compensation for Damage' in Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds) *The United Nations Convention against Corruption: A Commentary* (OUP 2019) p358.

¹⁵⁵ United Nations Office on Drugs and Crime, 'State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement, and International Cooperation' (2nd ed 2017) p161.

¹⁵⁶ Makinwa (n 154) pp360-361.

¹⁵⁷ Ibid. pp363-364.

¹⁵⁸ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Principle 25. See also the work undertaken under the accountability and remedy project, <<https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx>>.

¹⁵⁹ There are currently 24 States Parties to the Optional Protocol to the ICESCR.

¹⁶⁰ But note that to an extent, economic, social and cultural rights have been addressed by other human rights courts or quasi-judicial bodies, such as the Human Rights Committee, under ICCPR Art. 26, the ECtHR, the ACHPR.

the corrupt conduct at issue.¹⁶¹ Legal proceedings brought by plaintiffs concerning corruption require the plaintiff to demonstrate a causal link between the act of corruption and the damage suffered by the plaintiff. Article 35 UNCAC, for example, concerns ‘entities or persons who have suffered damage *as a result of* an act of corruption’ (emphasis added). Tracing the damage caused by the theft of public assets to a particular victim, group of victims, or to a specific entity, represents an obstacle in some instances.¹⁶² Plaintiffs must be able to show, for example, that embezzled funds were allocated by the government for a particular use, and that because of the theft of those funds, certain individuals did not receive the benefits to which they were entitled. Tracing the harm occasioned by corrupt acts may be difficult, for example, where there is a lack of budget transparency. The challenges involved in tracing the harm that results from acts of foreign bribery are also considerable, as the distorting effects of foreign bribery sometimes cannot be measured in a manner that allows for ready identification of victims and damages.¹⁶³

57. Best practice: In light of the challenges involved in establishing causal links between acts of corruption and damage suffered by victims, domestic civil procedure laws that allow for public interest litigation represent a best practice in the context of asset recovery.¹⁶⁴ Combating corruption is widely regarded as being in the public interest, as corruption results in widespread harm to domestic and global economies and the enjoyment of human rights. When public assets are stolen by government officials, the entire population of the State should be considered the victim of this theft. Such public interest litigation can be directed not only towards obtaining damages caused by corrupt acts, but also triggering asset recovery processes, or the adoption of preventive measures. Domestic rules on standing in civil litigation cases should permit public interest litigation concerning the negative impacts of corruption on economies and societies. Relaxed rules on standing would permit plaintiffs to pursue remedies without having been personally injured by the conduct at issue.¹⁶⁵ Relaxed standing rules are justified in the context of corruption because combating corruption is in the public interest. An example of this best practice can be found in the French loi n°2013-1117, which permits certain anti-corruption NGOs to have civil party status in corruption cases.¹⁶⁶

¹⁶¹ CAC/COSP/WG.2/2019/5 (n 147); See generally the best practices identified in Conference of the States Parties to the United Nations Convention against Corruption, ‘Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption’ CAC/COSP/2019/10 (7 October 2019) para. 50 (identification of taxpayers as victims of corruption offences).

¹⁶² See e.g. Kevin E. Davis, ‘Corruption as a Violation of International Human Rights: A Reply to Anne Peters’ (2018) 29 EJIL 1289; Cecily Rose, ‘The Limitations of a Human Rights Approach to Corruption’ (2016) 65 International and Comparative Law Quarterly 405.

¹⁶³ United Kingdom, General Principles to Compensate Overseas Victims (including Affected States) in Bribery, Corruption and Economic Crime Cases, paras. 2-3.

¹⁶⁴ Open-ended Intergovernmental Working Group on Asset Recovery (n 161) paras. 7, 12, 16; UNCAC Coalition Statement for the Global Forum on Asset Recovery.

¹⁶⁵ See e.g. Community Court of Justice of the Economic Community of West African States (ECOWAS), *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v Nigeria*, ECW/CCJ/APP/08/08, Ruling on Admissibility (27 October 2009) paras. 33-34.

¹⁶⁶ France, Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière, Art. 1.

Principle 7: States have a duty to allocate returned assets in an accountable, transparent, and participatory manner.

Commentary

58. Under human rights law, States must allocate returned assets in an accountable, transparent and participatory manner. This commentary builds on the commentary to Principle 2, which discusses the legal bases for accountability, transparency, and participation. The importance of these principles with respect to the allocation of returned assets has been confirmed by the Human Rights Council, which has called on States ‘requesting the repatriation of funds of illicit origin to apply these principles in the decision-making process regarding the allocation of repatriated funds, for the purpose of realizing economic, social and cultural rights’.¹⁶⁷ While Principle 7 concerns procedural aspects of the allocation of returned funds, Principle 8 concerns the related, substantive issue of the use of returned funds for human rights purposes.
59. The accountable management of returned assets involves ensuring that the returned funds can be traced and monitored, in accordance with the sound management of public finances.¹⁶⁸ In practice, this involves receiving States treating returned funds separately for accounting purposes.¹⁶⁹ The direct return of assets to the central budget of a receiving State is undesirable, from an accountability perspective, in circumstances where the current mechanisms in place for the administration of public finances do not allow for the assets to be tracked. More desirable alternatives, from an accountability perspective, involve either directing funds to a dedicated government fund subject to special financial management procedures, or receipt by a third party, such as a non-governmental organization.¹⁷⁰ The exact mode of return must be the subject of an agreement, such as a memorandum of understanding, between the returning and receiving States. The trilateral agreement reached in 2020 between the United States, Jersey, and Nigeria can be seen as a good practice with respect to accountability.¹⁷¹ The agreement provides that the Nigerian Sovereign Investment Authority will administer the funds and related projects, and that this will be accompanied by financial review by an independent auditor, as well as monitoring by an independent civil society organization.¹⁷²

¹⁶⁷ Human Rights Council, Resolution 40/4, para. 21.

¹⁶⁸ Transparency International France, ‘Le sort des biens mal acquis et autres avoirs illicites issus de la grande corruption’ (2017), pp14-15 (TI France’s proposed 5 key principles that should govern the allocation of assets derived from grand corruption).

¹⁶⁹ Greta Fenner Zinkernagel and Kodjo Attisso, ‘Returning Stolen Assets – Learning from Past Practice: Selected Case Studies’ (International Centre for Asset Recovery 2013) p4; Greta Fenner Zinkernagel, Pedro Gomes Pereira, Francesco De Simone, The Role of Donors in the Recovery of Stolen Assets (International Centre for Asset Recovery 2014) p28.

¹⁷⁰ See e.g. FEDADOI, a special national fund established in Peru for the return of assets in the Montesinos case.

¹⁷¹ United States Department of Justice, Press Release, ‘U.S. Enters into Trilateral Agreement with Nigeria and Jersey to Repatriate over \$300 Million to Nigeria in Assets Stolen by Former Nigerian Dictator General Sani Abacha’ (3 February 2020).

¹⁷² Ibid.

60. The transparent allocation of returned assets requires States to make publicly available information about the transfer and administration of returned assets.¹⁷³ Such information should be available to people in both the returning and receiving States. The information provided by States should be reliable, exhaustive, and ideally available on a public website and in the local language.¹⁷⁴ All stages of the decision-making process concerning the allocation of returned assets should be transparent, including initial consultations, the selection of recipients, the choice of projects or programmes, the method for transferring the funds, and the recipient's administration of the funds.¹⁷⁵ Transparency in the management of returned assets also requires the publication of the agreements, such as memoranda of understanding, that form the basis (whether legal or political) for the return of assets. As of this writing, only a small number of such agreements had been made publicly available by States, which rely mainly on the issuance of press releases.
61. Receiving States must include stakeholders in the asset recovery process in order to ensure that funds are allocated and used in a manner that works towards the realization of human rights, and, where possible, meets the needs of victims, in particular.¹⁷⁶ The term stakeholder refers to individuals, civil society, non-governmental organizations, and community-based organizations (including, for example, victims' organizations).¹⁷⁷ At the stage when States are returning and allocating assets, stakeholders have a role to play in identifying victims and harm that can be remedied by the returned assets; contributing to decision-making concerning asset return and use; and 'fostering transparency and accountability in the transfer, disposition and administration' of the recovered assets.¹⁷⁸ Stakeholders can, for example, foster accountability by participating in monitoring returned assets. They can also foster transparency by helping to keep the public informed about the asset recovery process.¹⁷⁹
62. **Best practice:** The Swiss FIAA can be considered a best practice with respect to the inclusion of stakeholders, insofar as it specifically provides that agreements for the return of assets shall, 'to the extent possible... include non-governmental organizations in the restitution process' (Art 18(5)). The Memorandum of Understanding concluded between the United States, Switzerland and Kazakhstan exemplifies this practice (although it predates the enactment of the Swiss FIAA).¹⁸⁰ The BOTAF Foundation, an independent,

¹⁷³ Global Forum on Asset Recovery (GFAR), Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, Principle 4. See also United Kingdom, General Principles to Compensate Overseas Victims (including Affected States) in Bribery, Corruption and Economic Crime Cases, para. 3. ('ensure the process for the payment of compensation is transparent, accountable and fair').

¹⁷⁴ Transparency International France (n 168) pp14-15.

¹⁷⁵ Ibid. For discussion of a counter-example, see Global Witness, Press Release, 'Return of Blocked Oil Money to Angola Involves Opaque Deal with Swiss Arms Company', 10 June 2008.

¹⁷⁶ Transparency International France (n 168) pp14-15. See also Declaration on the Right to Development, Art. 2(3) (States have a duty to formulate development policies 'on the basis of the active, free and meaningful participation of the entire population and all individuals').

¹⁷⁷ UNCAC Art. 13.

¹⁷⁸ GFAR, Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, Principle 10; Civil Society Principles for Accountable Asset Return, Principle 10.

¹⁷⁹ UNCAC Coalition Statement for the Global Forum on Asset Recovery.

¹⁸⁰ Amended Memorandum of Understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan (April 2008).

non-governmental organization that was established in accordance with the Memorandum of Understanding, was deeply involved in the asset recovery process, as it served as the beneficiary of the funds that were returned to Kazakhstan.

Principle 8: Receiving States have a duty to use recovered assets in a manner that contributes to the realization of human rights.

Commentary

63. Under human rights law, States have a duty to use recovered assets for the purpose of realizing human rights. ICESCR Article 2(1) requires States to take steps, to the maximum of their available resources, for the purpose of realizing economic, social and cultural rights. Funds recovered by States through asset recovery processes must be considered as contributing to available financial resources, from which States can draw for the purposes of realizing economic, social and cultural rights, as well as civil and political rights. In allocating recovered funds, receiving States must further take into account the right to development, and the corresponding duties held by States. The Declaration on the Right to Development provides, in particular, that States have a ‘duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire-population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom’.¹⁸¹ Receiving States thereby have a duty to use returned funds for the benefit of the public (i.e. the general population of the State), in cases where no particular victims of corruption can be identified.¹⁸²
64. In formulating development policies for the purpose of improving the well-being of the population, receiving States should aim to address the conditions that gave rise to corruption, such as weak implementation and enforcement of anti-corruption laws and policies. In allocating recovered assets, receiving States should therefore give priority to anti-corruption as well as development initiatives.¹⁸³ Transparency International France has proposed, for example, that such funds should be allocated towards ‘improving the living standards of populations and/or strengthening the rule of law and prevention of corruption’ in the receiving State.¹⁸⁴ The use of assets in such a manner will also allow States to work towards achieving Goal 16 of the Sustainable Development Goals, which includes promotion of the rule of law (16.4) and ‘substantially reducing corruption and bribery in all their forms’ (16.5).¹⁸⁵
65. According to international anti-money laundering standards, the use of confiscated funds for the well-being of the population is also considered to be good practice. The Financial Action Task Force recommends that States use confiscated funds for the ‘public good’,¹⁸⁶

¹⁸¹ Declaration on the Right to Development, Art. 2(3).

¹⁸² GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, Principle 5.

¹⁸³ GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, Principle 6. See also Draft Common African Position on Asset Recovery (9 February 2020), pillar four.

¹⁸⁴ Transparency International France (n 168) pp14-15.

¹⁸⁵ See also UNCAC Coalition Statement for the Global Forum on Asset Recovery.

¹⁸⁶ Financial Action Task Force (FATF), ‘Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery’ (October 2012) para. 21.

in particular for ‘law enforcement, health, education, or other appropriate measures’.¹⁸⁷ In this regard, anti-money laundering standards and human rights law are mutually reinforcing. Both bodies of law direct States towards the use of recovered funds for the purpose of advancing human rights, even though FATF does not use the language of human rights law in making this recommendation.

66. **Best practice:** Receiving States can look to a number of best practices with respect to the use of returned funds for development initiatives. National legislation in both returning and receiving States should specify that returned funds must be devoted to development, as well as anti-corruption initiatives. The Swiss FIAA, for example, specifies that the restitution of assets is to be made in pursuit of the objectives of improving the living conditions of the inhabitants of the State of origin, and strengthening the rule of law, thereby contributing to the fight against impunity.¹⁸⁸ In practice, the United States, Jersey and Nigeria agreed in 2020 that funds stolen by Sani Abacha would be returned to Nigeria to help finance three specific infrastructure projects (concerning bridges, highways and roads).¹⁸⁹ In addition, funds returned from Switzerland to Angola in 2012 were allocated to ‘hospital infrastructure, water supply, and local capacity building for the reintegration of displaced persons’.¹⁹⁰ Finally, the funds returned from the United States and Switzerland to Kazakhstan according to their 2008 MoU were allocated to the promotion of children’s rights, through a number of initiatives run by the BOTA Foundation.¹⁹¹
67. The use of returned funds to further anti-corruption initiatives does not, however, appear to be common practice based on available information, despite being widely identified as one of the most appropriate uses of such funds. In the MoU between the United States, Switzerland, and Kazakhstan, however, the three States agreed that Kazakhstan would improve its public financial management system and become a participant in the Extractive Industries Transparency Initiative (EITI).¹⁹² Yet the recovered assets were not used to fund these anti-corruption initiatives. Instead, the MoU specifically States that the World Bank would support the public financial management initiative,¹⁹³ and that the government of Kazakhstan would ensure ‘adequate and sustainable financing for EITI implementation’.¹⁹⁴
68. The principle of accountability requires both returning and receiving States to ensure that returned funds do not benefit the persons who were involved in the commission of the offence (e.g., the public official(s) who embezzled and laundered the public funds).¹⁹⁵

¹⁸⁷ FATF Recommendations, Interpretive Note to FATF Recommendation 38.

¹⁸⁸ See also Swiss FIAA Arts. 17-18.

¹⁸⁹ United States Department of Justice, Press Release (n 171).

¹⁹⁰ Gray et al. (n 8) p5.

¹⁹¹ Amended Memorandum of Understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan (April 2008) para. 3.1.

¹⁹² Ibid. paras. 4.1, 5.1.

¹⁹³ Ibid. para. 4.1.

¹⁹⁴ Ibid. para. 5.1.

¹⁹⁵ GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, Principle 9; Transparency International France (n 168) pp14-15; Civil Society for Accountable Asset Return, Principle 5;

Returning and receiving States can work towards ensuring accountability by explicitly agreeing, in a written memorandum of understanding or other agreement, that recovered funds must not be used for corrupt or other illicit purposes. The Memoranda of Understanding concluded in the cases of Kazakhstan and Nigeria (Abacha II) exemplify this best practice.¹⁹⁶ In addition, ensuring the integrity of returned funds also requires returning and receiving States to agree to accountability mechanisms, to ensure and verify that the funds are administered in accordance with the agreement. Examples of accountability mechanisms include monitoring, auditing, and investigations in the event of suspicion of wrongdoing.

Principle 9: Requested States have an obligation to return embezzled public funds to requesting States.

Commentary

69. Requested States must return embezzled public funds to requesting States, which have an ownership claim over such funds.¹⁹⁷ UNCAC stipulates in Article 57 that the requested State Party ‘shall... return the confiscated property to the requesting State Party’, where the confiscated property represents embezzled public funds or embezzled public funds that have been laundered.¹⁹⁸ This requirement also applies to the proceeds of other corrupt acts, beyond embezzlement, but only where the requesting State ‘reasonably establishes its prior ownership’ of the confiscated property.¹⁹⁹ The proceeds of other corrupt acts such as bribery, for example, typically cannot be characterized as having been ‘owned’ by the receiving State, as the funds represent undue advantages received by public officials.²⁰⁰ In such circumstances, the receiving State can claim compensation for damaged caused by the corrupt act, but not prior ownership.²⁰¹ A requested State’s obligation to return confiscated property to the requested State therefore extends to embezzled funds and embezzled funds that have been laundered, but does not extend to other proceeds of corruption with respect to which the requesting State cannot establish prior ownership.
70. Article 57 of UNCAC imposes an obligation of result (as opposed to an obligation of conduct) on requested States, which must ensure that embezzled funds are actually returned to the requesting State. A good faith attempt by a requested State to return embezzled funds to a requesting states does not, in itself, fulfil this obligation of result.

United Kingdom, General Principles to Compensate Overseas Victims (including Affected States) in Bribery, Corruption and Economic Crime Cases, para. 3.

¹⁹⁶ Amended Memorandum of Understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan (April 2008) para. 2.6. See also Memorandum of Understanding among the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association on the Return, Monitoring and Management of Illegally-Acquired Assets Confiscated by Switzerland to be Restituted to the Federal Republic of Nigeria, Art. 13.

¹⁹⁷ Human Rights Council Resolution 40/4, para. 8.

¹⁹⁸ UNCAC Art. 57(3)(a).

¹⁹⁹ UNCAC Art. 57(3)(b).

²⁰⁰ United Nations Office on Drugs and Crime, ‘Legislative Guide for the Implementation of the United Nations Convention against Corruption’ (Second revised ed. 2012) para. 781.

²⁰¹ *Ibid.* para. 768.

The language ‘shall... return’ in Article 57 does not permit States to decline to return embezzled funds to the requesting State on the ground that certain terms have not been met by the requesting State.²⁰² UNCAC itself does not govern the resolution of concerns about compliance by the requesting State with its human rights obligations, as they pertain to the asset recovery process. Instead, UNCAC leaves the resolution of human rights concerns to case-by-case, ‘agreements or mutually acceptable arrangements’ for the disposal of assets.²⁰³

71. The requested State’s obligation to return embezzled public funds exists in parallel to the human rights obligations of the requesting State. As discussed above, human rights obligations govern the manner in which requesting states must conduct anti-corruption investigations and prosecutions (Principle 5) and the manner in which they allocate and use returned assets (Principles 7-8). Under human rights law, requesting States have a duty to allocate returned assets in an accountable, transparent and participatory manner (Principle 7) and to use recovered assets in a manner that contributes to the realization of human rights (Principle 8). Moreover, requested and requesting States have a duty to engage in international cooperation in the context of asset recovery processes, to ensure the progressive realization of economic, social and cultural rights (Principle 4).
72. Taken together, these duties require requested and requesting States to cooperate with each other, through formal or informal means, to ensure that embezzled funds are not only returned to requesting States, but returned in a manner that is consistent with human rights law. Returning and requesting States should reconcile these diverse obligations through negotiations that culminate in a memorandum of understanding or other written agreement governing the return of embezzled public funds.²⁰⁴ The duty to cooperate entails that requested and requesting States must pursue such negotiations in good faith, with a willingness to compromise. If necessary, requested and requesting States should engage a third party, such as an international organization or an independent expert, to assist as a mediator in the process of reaching an agreement that ensures that these obligations under both international anti-corruption law and human rights law are fulfilled.
73. The requirements set out in UNCAC with respect to the return of assets are further complemented and bolstered by human rights law on the right to self-determination. In certain circumstances, the obligation of a State to return embezzled funds to the requesting State exists alongside the right of the people of the requesting State to freely dispose of their natural wealth and resources, also known as a right to economic self-determination. This aspect of the right to self-determination thus provides a further legal basis for the return of embezzled public funds in the specific context of natural resource exploitation. Article 57 of UNCAC must be understood in light of the other treaty obligations of the States Parties to UNCAC, namely the two human rights covenants, which provide for the right of people to freely dispose of their natural wealth and resources.

²⁰² UNCAC Art. 57(3)(a) ‘... the requested State Party shall... return the confiscated property to the requesting State Party’.

²⁰³ UNCAC Art. 57(5).

²⁰⁴ UNCAC Art. 57(5).

74. The right to self-determination encompasses not only the right of people to choose by whom they are governed (political self-determination), but also the right to freely dispose of their resources (economic self-determination).²⁰⁵ Common Article 2(1) of the ICCPR and the ICESCR accordingly provides that '[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence'.²⁰⁶ The people of every State thus have a right to demand that the government exploit the State's natural resources in a manner that benefits the people.²⁰⁷ This specifically entails 'continuing procedural obligations on State authorities to ensure transparency in disposing of public resources'.²⁰⁸ The right to economic self-determination may be violated, for example, where a government exploits natural resources in a corrupt manner, in the interests of a small political elite and in disregard of the needs of the vast majority of the people.²⁰⁹ At the stage of asset recovery, the right of people to the free disposal of their natural wealth and resources cannot be exercised fully when requested States fail to return assets stolen from the State of origin, or when the State of origin fails to allocate returned funds in a manner that benefits the people.
75. The scope of application of the right to economic self-determination is limited in that it applies to States' 'natural wealth and resources', not to their wealth in general, such as wealth derived from tax revenues. The term 'natural wealth' refers to 'those components of nature from which natural resources can be extracted or which can serve as the basis for economic activities'.²¹⁰ Likewise, the term 'natural resources' refers to 'supplies drawn from natural wealth which may be either renewable or non-renewable and which can be used to satisfy the needs of human beings and other living species'.²¹¹ The right of the people to the free disposal of their natural wealth and resources is therefore only relevant in an asset recovery context where a public official has embezzled public funds derived from natural wealth and resources, such as revenues from the exploitation of oil, gas, and minerals. The proceeds of corrupt acts like bribery cannot be characterized as the 'natural wealth and resources' of the State of origin, and therefore fall outside of the scope of the right to economic self-determination, even though the given act of bribery may have taken place in the context of oil or gas exploitation.
76. The requested State's obligation to return embezzled public funds exists in parallel to the requested State's obligation, under human rights law, to ensure that returned funds are administered in an accountable manner. Accountability in this context means that the return of embezzled public funds must be accompanied by the establishment of

²⁰⁵ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) pp55-56.

²⁰⁶ See also ICCPR Art. 47; ICESCR Art. 25; Declaration on the Right to Development, Art 1(2); ACHPR Art. 2(1).

²⁰⁷ Cassese (n 205) pp55-56.

²⁰⁸ Ben Saul, David Kinley, Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014).

²⁰⁹ Cassese (n 205) pp55-56.

²¹⁰ Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) p18.

²¹¹ *Ibid.*

mechanisms for monitoring the administration of returned funds and handling complaints about irregularities.²¹² Returning and receiving States must reach mutually acceptable agreements concerning monitoring and complaints mechanisms before the return of the assets takes place. When requesting States are not compliant with UNCAC's provisions concerning transparency and accountability in public financial management, public reporting, and the participation of society, then monitoring mechanisms should be particularly stringent.²¹³ The monitoring of funds returned by the United States and Switzerland to the people of Kazakhstan through the BOTA Foundation, for example, involved trilateral monitoring by the requested States, representatives of Kazakhstan (instead of the State of Kazakhstan) and a third party, the World Bank.²¹⁴

77. Requested States should refrain from deducting, from the returned funds, their own costs incurred in the asset recovery process. UNCAC indicates only that '[w]here appropriate, unless the State Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in the investigations, prosecutions or judicial proceedings leading to the return or disposition of property...' (Art 57(4)). An interpretive note to this provision further explains that the term 'reasonable expenses' refers to 'costs and expenses incurred and not as finders' fees or other unspecified charges'.²¹⁵ In circumstances where the embezzlement of natural resource revenues is at issue, even the deduction of a relatively small fee by the requested State would conflict with the right of the people to the free disposal of their natural wealth and resources.

78. **Best practice:** A recent example of the best practice of waiving such fees can be found in MoU between the United States, Jersey, and Nigeria, according to which the United States and Jersey agreed to transfer 100% of the assets to Nigeria.²¹⁶ Another approach is to establish, through legislation, a small, fixed percentage of the confiscated assets that may be deducted by the requested State.²¹⁷ This approach would be appropriate in circumstances where the requesting State does not have an ownership claim over the confiscated assets (i.e., the assets represents proceeds of bribery, rather than embezzled public funds).

²¹² FATF, Best Practices on Confiscation and a Framework for Ongoing Work on Asset Recovery; Civil Society Principles for Accountable Asset Return, Principles 6-7; UNCAC Coalition Statement for the Global Forum on Asset Recovery; Zinkernagel and Attiso (n 169) p3.

²¹³ UNCAC Arts. 9, 10, 13; Civil Society Principles for Accountable Asset Return, Principle 6; UNCAC Coalition Statement for the Global Forum on Asset Recovery.

²¹⁴ Zinkernagel and Attiso (n 169) p5.

²¹⁵ United Nations Office on Drugs and Crime, 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption' (2010) p516.

²¹⁶ United States Department of Justice, Press Release (n 171).

²¹⁷ Swiss FIAA Art. 19(1) (allowing for the deduction of 2.5% of the value of the confiscated assets to cover costs incurred in proceedings for freezing, confiscating and restituting assets and to cover the implementation of support measures); Human Rights Council, Resolution 40/4, para 12.