



INTO THE VOID:

**The EU's struggle to recover
the proceeds of grand corruption**

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CONTENTS

EXECUTIVE SUMMARY	3
KEY RECOMMENDATIONS	6
ACKNOWLEDGEMENTS	8
ABBREVIATIONS	9
GLOSSARY	10
1. A POOR TRACK RECORD IN ASSET RECOVERY ACROSS EUROPE	12
2. MAPPING GAPS IN EU CURRENT ASSET RECOVERY POLICY FRAMEWORK	17
2.1 The limitations of the current EU misappropriation sanction regime	17
2.2 Heavy burden of proof and ineffective cooperation hindering EU asset recovery efforts	19

3. TOWARDS MORE PROACTIVE ENFORCEMENT ACROSS THE EU **25**

3.1 Adopting an EU-wide horizontal sanctions regime against human rights violations and corruption..... **25**

3.2 Adopting tools to facilitate autonomous confiscation by EU countries **28**

3.3 Introducing EU principles for the responsible return of stolen assets **32**

3.4 Harmonising and publishing data on asset recovery efforts **36**

ANNEX A: An overview of UNCAC and EU provisions regarding the sharing or restitution of confiscated assets **38**

A.1 UNCAC provisions..... **38**

A.2 EU provisions **39**

ANNEX B: Global Forum on Asset Recovery Principles For Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases **40**

Endnotes..... **42**

EXECUTIVE SUMMARY

Grand corruption is one of the biggest legal challenges of our time. It refers to the abuse of high-level power in the form of bribery, embezzlement or other corruption offences for the benefit of the few at the expense of the many. The amounts of money involved are vast. For example, it is believed that former Tunisian President Ben Ali and his family have hidden as much as US\$17 billion (€15 billion)¹ in bank accounts across the world, that is equivalent to more than a third of Tunisia's average Gross Domestic Product (GDP). For former Ukrainian leader Viktor Yanukovich and his cronies, and former Egyptian leader Hosni Mubarak, his family and associates, the estimates reach up to US\$37 billion (€33 billion) and between US\$40 to US\$70 billion (€35.5 to €62 billion).² This inevitably means there is less money to invest in public services and fewer funds to use towards achieving development goals in those countries. It also fuels growing inequality and public mistrust in institutions. Not only does grand corruption undermine the stability of individual states, as outlined above, it also affects the stability of the global financial system.

As grand corruption has both serious and global effects, combatting it needs to be the responsibility of the international community, in which the EU plays a part. The importance of the EU's role is emphasised by the most recent research estimates³, which show that the money generated from criminal activity in the European Union represented about €110 billion, i.e. approximately 1 per cent of EU GDP in 2010.

Despite recent efforts made to improve the effectiveness of asset recovery processes across the EU, the results are not very evident. The European Union Agency for Law Enforcement Cooperation (Europol) estimates that between 2010 and 2014, a tiny 2.2 per cent of the estimated proceeds of crime had been provisionally seized or frozen across the Union, and an even smaller 1.1 per cent was confiscated. This means that a staggering 98.9 per cent of estimated criminal profit remains at the disposal of those committing the crime.⁴ Though these figures are not limited to proceeds of grand corruption, rather crime in general, anecdotal evidence suggests that figures for acts of grand corruption are similar.⁵ It is striking that only one EU country – the United Kingdom (UK) – reportedly⁶ returned assets to foreign jurisdictions over the period 2006 – June 2012 corresponding to around 10 per cent of the total value of assets frozen by the country over that period.⁷

The recovery of illegal assets is critical if the EU wants to stop serving as an attractive destination for corrupt individuals and their money. It also has many other benefits: it makes crime less financially rewarding, saps the power bestowed on criminals by their wealth, deprives them of “seed money” and generates resources to compensate victims.⁸

This report focuses more specifically on the recovery of the proceeds of grand corruption, i.e. misappropriated public funds by high-level officials in third countries. It maps out gaps in the current EU asset recovery policy framework and identifies possible ways for asset recovery in the EU to be more effective.

Over the past decade, the EU has put considerable effort into enhancing its asset recovery framework, in particular through the adoption of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU⁹ in 2014, and the more recent adoption of Directive on combating money laundering by criminal law in 2018.¹⁰ This framework complements the provisions set out in the United Nations Convention Against Corruption (UNCAC) to support victim countries in their asset recovery efforts.

However, effective asset confiscation and return efforts are often impeded by ineffective international co-operation. In particular, the applicability of current international and EU asset recovery mechanisms tends to be overly dependent on the circumstances and situation in the country from which the stolen assets originate. Proceedings could be delayed by a poorly-functioning legal and/or judicial system or the individuals targeted could still be in power and have control over these institutions in the victim country.

In addition to criminal law instruments, the EU is also using foreign policy to respond to the challenge posed by grand corruptors using the EU as safe haven for their ill-gotten assets. These include the geographically-targeted sanctions imposed on individuals involved in the misappropriation of state funds in Tunisia, Egypt and Ukraine following

the Arab spring and Euromaiden events in 2011 and 2014. These instruments have facilitated the quick and timely freezing of assets and as such, prevented them from being transferred to another jurisdiction and becoming untraceable.

However, they have not proven so effective in achieving concrete results in terms of asset recovery and have raised some legal challenges. The system has made the EU very reliant on the outcome of the legal proceedings in the countries of origins, which are often hampered by the deficiencies of judicial and law enforcement systems in the countries affected by these sanctions. They may also be subject to political interference. An example of this is the recent decision to remove Ben Ali's son-in-law, Mohammed Marouen Mabrouk from the EU sanction list for Tunisia, which was based on a request from the Tunisian Ministry of Foreign Affairs.¹¹ Finally and most importantly, EU sanctions currently fail to address the entire process of asset recovery, which includes confiscation and repatriation. Instead, the current system foresees a division in two steps at two different levels: an EU-wide freeze effected via European legislation must then be followed by the processing of a Mutual Legal Assistance (MLA) request at national level. Both processes are currently unconnected which further hinders the effectiveness of asset recovery processes.



KEY RECOMMENDATIONS

Seizing and confiscating the money of corrupt people that is stored in European bank accounts or high-end property bought in European capitals can act as a deterrent for those tempted to look for shelter and enjoy the proceeds of their crime in the EU. It is also essential and a question of social justice that any asset recovery process initiated in the EU eventually leads to the return of the stolen assets to the country of origin for the benefit of the populations harmed by the corrupt conduct of those in power.

To do so in an effective way, it is critical that the EU further harmonises and upgrades its policy framework to allow for more proactive enforcement at all phases of the asset recovery process. In particular, the EU should:

► **Adopt an EU-wide horizontal anti-corruption sanctions regime to facilitate the freezing of assets belonging to individuals involved in grand corruption.**

Contrary to the existing Tunisian, Egyptian or Ukrainian misappropriation sanctions regimes, a horizontal anti-corruption sanctions regime would be global in scope and therefore allow the EU to decouple the decision to sanction an individual's misconduct from considerations regarding the political situation and relationship

with the country of origin of that individual. As the EU is currently discussing the possibility of adopting a sanctions regime against human rights abusers, it should make sure to expand the scope of said regime to grand corruption. The intimate link between anti-corruption and human rights is now well established.¹² However, the networks of those who commit human rights violations and those involved in corrupt activities while simultaneously financially supporting and/or benefitting from these violations may be distinct, and it is important that the regime also targets the latter. Following the US and Canadian models, corruption should be included as a standalone criterion for listing, a decision that would be easily justified by the fact that corruption systematically results in a deprivation of human rights, no matter what form it takes. EU policy makers should also consider addressing the current disconnect between EU asset freezes enacted as part of EU sanctions regime from subsequent endeavours by Member States to recover and repatriate assets which contributes to significantly undermining the effectiveness of EU sanctions and asset recovery efforts. In this regard, the Swiss legislation offers a more mature model for the recovery process as a whole by explicitly providing a legal basis not only for freezing but also for confiscation and restitution.

► **Adopt measures for Member States to initiate confiscation proceedings autonomously.**

Asset recovery efforts are undermined by both ineffective international cooperation and a heavy burden of proof placed on competent authorities for asset confiscation. Measures such as legal presumptions and non-conviction based confiscation tools could help overcome these obstacles and facilitate confiscation by respectively easing the establishment of the offence or by dispensing from requiring prior criminal conviction to confiscate the assets. This could be done as part of the upcoming review of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU.¹³

► **Introduce principles in EU legislation regarding the management, transfer and ultimate use of confiscated assets held in EU Member States**

In grand corruption cases involving third countries. Asset recovery processes initiated by Member States should at all phases respect principles of transparency, accountability, inclusiveness, efficiency and integrity and ultimately aim at redressing the damage caused by grand corruption in the country of origin of the assets and providing remedy to the population harmed by the corrupt conduct of their rulers.

The current EU legislation does not cover the issue of asset return except in domestic cases. As part of the review of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, the EU should consider addressing the return of confiscated assets in cross-border corruption cases and in doing so, introducing principles for the management, transfer and ultimate use of confiscated assets.

► **Require Member States to systematically collect and publish data on their asset recovery efforts**

Those should include information on assets frozen or confiscated, reparations or restitution ordered, and assets returned. Member States shall make statistics on cases and information on laws and results publicly available and accessible at a central location such as a dedicated website and issue timely press releases on specific cases. Data should be harmonised at EU level to facilitate cross-country comparison and effectiveness evaluation.

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ABBREVIATIONS

CFSP	Common Foreign and Security Policy
CiFAR	Civil Forum for Asset Recovery
EU	European Union
Europol	European Union Agency for Law Enforcement Cooperation
FIAA	Swiss Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act)
GDP	Gross Domestic Product
GFAR	Global Forum on Asset Recovery
IBA	International Bank of Azerbaijan
MLA	Mutual Legal Assistance
NCB	Non-conviction based
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
PEP	Politically Exposed Person
SDGs	Sustainable Development Goals
StAR	Stolen Asset Recovery Initiative
TI EU	Transparency International EU
TI France	Transparency International France
TI Netherlands	Transparency International Netherlands
TI UK	Transparency International United Kingdom
TNO	Teodorin Nguema Obiang (Vice President of Equatorial Guinea)
TRANSCRIME	Joint Research Center of Transnational Crime, Italy
UK	United Kingdom
UK NCA	United Kingdom National Crime Agency
UNCAC	United Nations Convention Against Corruption
UNCTAD	United Nations Conference on Trade and Development
UNODC	United Nations Office on Drugs and Crime
US DOJ	United States Department of Justice
UWO	Unexplained Wealth Orders

GLOSSARY

For the purpose of this report, and unless otherwise indicated, the terms below are defined as follows:

Asset recovery: The process through which the proceeds of corruption are recovered and repatriated to the country from which they were taken hereafter the “country of origin” or the “victim country” or through which the proceeds are disposed of including through compensation of individual victims. It usually involves several phases including the freezing, confiscation and ultimately return of the assets to the country of origin (known as the repatriation or restitution phase).

Confiscation (or forfeiture): “Permanent deprivation of property by order of a court or other competent authority” (UNCAC Article 2(g)).¹⁴ The confiscation can follow a criminal conviction by a court or can be non-conviction based (NCB); in the latter case, confiscation may be *in personam* (i.e. targeting the individual in possession of the property) or *in rem* (i.e. targeting the property rather than the person in possession of it).

Country/ies of origin (or victim country/ies): The country/ies where the predicate offence/s occurred.

Freezing or seizure: “An order issued by a court or other competent authority temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property” (UNCAC Article 2(f)).

Grand corruption: “Abuse of high-level power that benefits the few at the expense of the many and causes serious and widespread harm to individuals and society.”¹⁵

Holding country/ies: The country/ies where proceeds of corruption are located or being laundered.

Immunity (of jurisdiction): Privilege enjoyed by specific categories of persons that may prevent the adjudication of proceedings against them. There are various types of immunities (domestic/international; functional/personal...) with more or less far-reaching effects. When dealing with grand corruption cases, immunity of foreign officials may prevent the pursuit of an asset recovery case before the courts of holding states.

Money laundering: A generic term used to describe the criminal process by which criminals disguise the original ownership and/or sources of the proceeds of criminal conduct with a view to making these proceeds appear to have been derived from a legitimate source.

Politically Exposed Persons (PEPs): “Individuals who are, or have been, entrusted with prominent public functions and their family members and close associates” (UNCAC Article 52).¹⁶

Predicate offence/s: “Any offence as a result of which proceeds have been generated” (UNCAC Article 2(h)). The present report focuses on grand corruption cases involving one or more offences committed by Politically Exposed Persons (bribery, trading in influence, abuse of functions, illicit enrichment, embezzlement...).

Proceeds of corruption: “Any property derived from or obtained, directly or indirectly, through the commission of a [corruption] offence” (UNCAC Article 2(e)). In line with UNCAC terminology, “proceeds of corruption” will be used interchangeably throughout this document with the terms “property” or “asset”.



Photo: Pixabay

1. A POOR TRACK RECORD IN ASSET RECOVERY ACROSS EUROPE

EU countries remain a favourite destination for grand corruptors: their ill-gotten gains often end up in the coffers of European banks or in high-end property in European capitals. These funds can also be used to buy other luxury goods such as cars, jewellery, boats, aircrafts, pieces of art or to finance the acquisition of shares in private business companies or in the stock market, to fund private education for children, etc. The well-known cases of Ben Ali of Tunisia (2011), Hosni Mubarak of Egypt (2011), the now deceased Muammar Gaddafi of Libya (2011) and Viktor Yanukovych of Ukraine (2014) and their associates serve to illustrate how attractive the EU may appear to grand corruptors looking for a safe place to hide their stolen money.

Some EU jurisdictions are also reportedly involved in the different ongoing corruption cases connected to Gulnara Karimova, the elder daughter of Islam Karimov, the former leader of Uzbekistan either because they are cooperating with an investigation opened elsewhere (within the EU or in a third country) or because they opened their own investigation. Either way, it remains clear that Gulnara Karimova's illegal proceeds have been widely laundered throughout the European economy (see Box 3).

Grand corruption and subsequent laundering of the proceeds throughout the globe have a negative impact on development outcomes.¹⁷

BOX 1: What does UNCAC say about asset recovery?

Chapter V of the UNCAC includes provisions for direct recovery of property as well as provisions on international cooperation for purposes of confiscation; it also contains detailed provisions about the disposal of confiscated property.¹⁸

The UNCAC provides for the mandatory restitution of confiscated assets to the victim country in cases of the embezzlement of public funds or laundering of embezzled public funds (Article 57.3.a).

The Convention also organises the conditional restitution of the proceeds of any other corruption offence provided by the Convention. It stipulates that, in such cases, the holding country should return the confiscated property to the country of origin, whenever the latter “reasonably establishes its prior ownership of such confiscated property to the [holding country] or when the [holding country] recognises damage to the [country of origin] as a basis for returning the confiscated property” (Article 57.3.b).

The Convention also includes a provision for optional return applicable in all other cases where State Parties are invited to “give priority consideration to returning confiscated property to the [country of origin], returning such property to its prior legitimate owners or compensating the victims of the crime” (Article 57.3.c).

Article 57.5 offers the possibility of providing special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

BOX 2: EU track record in international asset recovery

EU countries' performance in international asset recovery has been so far quite limited. According to a 2014 joint report by the World Bank and OECD, only the **UK** returned assets to foreign jurisdictions (including Costa Rica, Libya and Tanzania) from 2006 to June 2012.^{19,20}

France is also another illustration of a country that has no experience in repatriation to date, despite considerable volumes of foreign illicit wealth amassed on its territory. Here are a few examples:²¹

- ▶ While both Mobutu Sese Seko of the Democratic Republic of the Congo and Jean-Claude Duvalier, former President of Haiti (see Box 4), had accrued vast assets in France, none of these have ever been returned to their respective countries.
- ▶ The assets of the Central African Republic's former ruler Jean-Bédél Bokassa in France were seized and then sold at auction. However, the proceeds of the sale were ultimately transferred to First Curaçao International Bank, which held a CHF3.3 million (€2.9 million) claim on the assets.
- ▶ As for Saddam Hussein's assets, they have been kept frozen since 2003 when the UN resolution 1483 was adopted. However, as far as we know, these have not been returned to Iraq yet.

Since the 2011 Arab Spring, European efforts to return assets seem to be paying off. The European Commission indicated in 2018 that the support provided by the EU to Egypt, Libya and Tunisia had resulted "in strengthened coordination between Arab Spring countries and EU Member States on asset recovery, and in facilitating the recovery and return of over US\$300 million".²² However, data is not disaggregated by country and we do not know whether the US\$300 million only involves assets amassed in the EU countries (and returned by them) or whether this also covers other countries.

In fact, such proceeds of corruption represent missed chances for development because millions of citizens back in the country of origin miss out on public services that should deliver clean water, education and basic healthcare. The United Nations Conference on Trade and Development (UNCTAD) estimates the gap in financing to achieve the Sustainable Development Goals (SDGs) – a universal call to action to end global poverty by 2030 – at US\$2.5 trillion per year in developing countries alone.²³

Grand corruption and money laundering also affect the stability of the global financial system, as well as undermine individual states – both victim and holding states.

And yet, in general, countries show a poor track record in international asset recovery. Despite an **international consensus to recover and**

repatriate the proceeds of corruption since the entry into force of the UNCAC in 2005 (see Box 1), provisions on asset restitution have almost never been used in past asset recovery cases.²⁴ This also goes for EU countries.²⁵ Europol estimates that 2.2 per cent of the estimated proceeds of crime²⁶ were provisionally seized or frozen from 2010 to 2014, and 1.1 per cent of the criminal profits were finally confiscated at EU level. In other words, **98.9 per cent of estimated criminal profits are not confiscated and remain at the disposal of criminals.**²⁷ Looking more specifically at the proceeds of grand corruption amassed in EU Member States over the past few decades, very few have been seized, and even fewer have actually been confiscated and returned to victim countries. The World Bank/OECD report²⁸ report that only one EU country – the UK – is among the countries that have returned assets to foreign jurisdictions from 2006 to June 2012 (see Box 2).

BOX 3: Corruption trials or shams?²⁹

Gulnara Karimova, the eldest daughter of the former President of Uzbekistan, is implicated in a series of corruption scandals that are currently being investigated in several countries around the globe. In a communication dated 31 July 2017,³⁰ the Uzbek prosecution office indicated that Gulnara Karimova was found guilty by the Tashkent Regional Criminal Court of various crimes (extortion, embezzlement and tax evasion) on 21 August 2015. She was subsequently sentenced to five years in prison.

However, there is no factual evidence to corroborate the reality of this trial nor to confirm whether proceedings were conducted following international human rights standards, including the right to a fair trial and due process of law. And yet, in its communication, the Uzbek prosecution office further mentioned the launch of subsequent proceedings targeting Karimova's business interests and related illegal proceeds in 12 countries, including the following EU jurisdictions: France, Germany, Ireland, Latvia, Malta, Spain, Sweden, and the UK.³¹

The strategy chosen by the government of Equatorial Guinea following the "Biens Mal Acquis" case was not so different, except for the fact that it aimed less at recovering the assets than at obstructing the proceedings against the country's Vice President **Teodorin Nguema Obiang** (hereafter 'TNO'). On 12 April 2017, almost two months before the trial was due to take place before the Paris Court, the prosecution authorities in Malabo opened an investigation on the representatives of SOMAGUI FORESTAL SL, EDUM SL and SOCAGE SL (three companies linked to TNO and targeted in the "Biens Mal Acquis" case).³² This expeditious inquiry led to a prompt trial on 8 June 2017. The court in Malabo cleared the defendants of any wrongdoing, "having found no hint of illegal acts committed by the defendants or the companies they represent". It goes without saying that this so-called "trial" was nothing more than a crude ploy whose only function was to impede the proceedings already under way in France (see Box 6 for more details).

What is the reason for this poor record of recovery? It could be that, in some cases, the people engaged in large-scale corruption are still in power and keep a tight rein over the state apparatus. The UNCAC framework, which is essentially based on international and bilateral cooperation between the holding state and the victim state, becomes useless in those cases. In cases of grand corruption and – in particular – whenever the illegal acts involve high-ranking public agents who are still in power, it is illusory to expect the victim state to institute proceedings because the judicial authorities are prevented from acting, whether for fear of reprisals or because they are themselves corrupt.

There are other cases where judicial proceedings are initiated in the victim country but where the underlying motives of such proceedings, as well as the circumstances under which they are conducted,

are questionable (see Box 3). These failures may constitute an obstacle to international cooperation and to the implementation of asset restitution provisions. Indeed, in most western countries legislation explicitly bars the enforcement of foreign decisions that do not meet the requirements of due process of law. For example, according to Article 713-37 of the French criminal code of procedure, France will refuse to enforce a foreign confiscation order whenever the decision in question is rendered under circumstances which do not offer sufficient guarantee regarding individual freedoms and due process. Even where domestic legislation does not contain specific provision, it is assumed that an EU Member State country may be in breach of its international human rights obligations if it enforces a foreign confiscation order that was issued in a proceeding that breaches these standards.³³

Even in cases where the judicial authorities of the victim state have the genuine will to initiate proceedings, a scenario that most often only happens after the fall of the corrupt regime, **the failings of their judiciary system (most notably their lack of financial and technical capabilities) may constitute an obstacle to successful proceedings.** One only needs to consider the difficulties encountered by the Republic of Haiti when it tried to recover the assets that former President Jean-Claude Duvalier had stolen and laundered in Switzerland. Those difficulties were the very reason behind the decision of Swiss authorities to enact a federal law specifically targeting cases involving foreign Politically Exposed Persons (PEPs) (see Box 4).



Photo: Pixabay

BOX 4: Baby Doc and the Swiss “Lex Duvalier”³⁴

The Duvalier case started in 1986, right after the fall of Haiti’s former dictator, when the new regime sent a formal request for Mutual Legal Assistance (MLA) to several western countries, including Switzerland, in order to identify and freeze the assets of Jean-Claude Duvalier and his associates.

Due to the rapid succession of coups in Haiti, the Haitian authorities had not been able to communicate the proof required to back up their request, a fact that had led the Swiss authorities to decide, on 15 May 2002, to terminate the MLA process. However, and in order to avoid the restitution of the Swiss frozen assets to the dictator’s family (CHF7.6 million – €6.7 million), the Swiss government ordered the seizure of the funds – a political measure that was to be repeated on several occasions.

Eventually, in December 2008, the Swiss government acknowledged the need to pass appropriate legislation to enable the restitution of stolen assets to victim states that fail to complete the MLA process. In this context, the Swiss “Federal Law on the Restitution of Assets Illegally Acquired by Politically Exposed Persons”³⁵ (FIAA also known as “Lex Duvalier”) was passed in 2010. It allows Swiss authorities to confiscate stolen assets autonomously (i.e. without having to wait for a court order from the victim state) whenever the victim state proves itself incapable of successfully completing the MLA process because of institutional breakdown.

On this basis, the Federal Tribunal ordered the confiscation of Duvalier’s assets in December 2013, thus opening the door towards their restitution to the Haitian people.

The Swiss legislation was later strengthened in order to cover other cases of failing states and/or grand corruption such as the Arab Spring cases (see further on page 30 for more details on FIAA).

Middle Eastern and North African countries are also currently facing huge challenges, mainly due to the political climate and the lack of capacity in their asset recovery efforts following the 2011 Arab Spring revolutions that toppled their former leaders.³⁶ In fact, according to the EU Commission, “EU-imposed sanctions against specific individuals linked to the former regimes are aging. The sanctions are being challenged before the Court of Justice, and **it is becoming increasingly difficult for the EU to keep these sanctions in place without strong evidence that sufficient progress is being made in criminal cases against the individuals targeted by the sanctions.** It is possible that in the coming year or two, maintaining these sanctions could no longer be justified. They

would then be lifted and the frozen assets allowed to be returned to the individuals linked to the former regimes”³⁷ (emphasis added).

In conclusion, asset recovery in matters of grand corruption is often hindered by rampant corruption or institutional failings and lack of state capacity in victim states preventing the initiation or successful conduct of proceedings.

The next section will show that this overdependence on the situation and circumstances in the country of origin also applies to the EU policy framework and undermines its effectiveness.



Photo: Sara Kurfeß/Unsplash

2. MAPPING GAPS IN EU CURRENT ASSET RECOVERY POLICY FRAMEWORK

To date, when foreign public officials are involved, asset recovery efforts on the part of the holding countries most often take the form of legal assistance and occur after a regime change only when and if the new government is willing to conduct the appropriate legal proceedings. In practice, as discussed above, this means that it usually takes several years (even decades) before proceedings are launched (if ever).

In asset recovery processes, **time is of the essence**. The longer it takes for enforcement authorities to institute proceedings towards the recovery of assets, the smaller the chance they will manage to secure a criminal conviction against the defendant and/or to recover the assets.³⁸

Indeed, the passage of time may well reduce the possible avenues for prosecution as a result of the expiration of the statutes of limitation, or of the loss or destruction of supporting evidence, or the death of potential witnesses or fading of their memories. As for the corrupt assets, they will have certainly been concealed or transferred through layers of anonymous corporations and trusts, likely in multiple jurisdictions, and commingled with legitimate funds – making them even more difficult, if not impossible, to trace and recover. Tunisia, Libya, Egypt and Ukraine are facing such challenges in their ongoing international asset recovery efforts.

The EU framework provides a mixture of foreign policy and criminal law instruments that may sustain EU countries in their international asset recovery efforts. However, there are still important gaps that

make it difficult in practice to freeze, confiscate and dispose of stolen assets in a proactive and autonomous manner, i.e. without prior request from the victim state, and/or without prior conviction or initiation of criminal or forfeiture proceedings in that jurisdiction.

The EU has put in place various instruments to facilitate and harmonise asset recovery efforts across Member States, either belonging to the area of foreign policy or criminal law. The current section assesses the gaps and deficiencies in each of these policy areas.

2.1 The limitations of the current EU misappropriation sanction regime

The EU reacted to the ousting of the leadership in Tunisia and Egypt in early 2011 by freezing the assets held in its Member States by the deposed leaders and their entourage, at the request of the Prosecutor General offices in these two countries. When the ruling regime in Ukraine was deposed in early 2014, the EU replicated this approach, again freezing the assets held by the leadership and its entourage. The freezes affect all accounts and property held in the territory and banks of EU Member States. The measures imposed on Tunisian, Egyptian and Ukrainian targets represent the first and only misappropriation sanctions regimes enacted by the EU.



Photo: Alisdare Hickson/ Flickr

The tool adopted to effect the asset freeze was a Decision under the Common Foreign and Security Policy (CFSP), the EU's main framework for foreign policy decision-making. The freezing of assets under the CFSP has become a habit in the EU's sanctions policy.³⁹ When the EU imposes foreign policy sanctions against a third country, it routinely freezes the assets of members of the leadership and supporting elites with a view to stigmatising them and disrupting the continuation of their policies. Individuals are singled out in a blacklist appended to the CFSP Decision. Individuals on this list are subject to both a visa ban to enter the EU and a freeze on all the assets located in the EU.

The use of a CFSP sanction on people suspected of the misappropriation of state funds in Tunisia, Egypt and Ukraine diverges from standard use in that they are the only measures applied on leaders who have been deposed, and the only freezes unaccompanied by a visa ban.⁴⁰ Most importantly, the freezes are neither designed to compel a policy change nor to replace the leadership of the country. Instead, the objective of the freezes is to prevent their flight pending their confiscation and

repatriation. However, there are no instruments allowing for the confiscation and repatriation of misappropriated assets at the EU level. These steps must be handled by the Member States where the assets are held via regular MLA requests.

The limits of this approach can be shown on three different levels:

First, the imposition of CFSP measures is, by its very nature, linked to foreign policy crises. This means that we can only expect the EU to activate this instrument in cases where a major foreign policy issue compels it to act, rather than in grand corruption cases unconnected to international politics, and in particular to events that make headlines in the international news.

Second, the viability of EU misappropriation sanctions is in question. Just like other CFSP sanction regimes, they tend to be vulnerable to court challenges. Many blacklisted former officials have brought cases to the Court of Justice of the EU, which has often ruled in favour of designees, annulling their listings. The court considered that

the evidentiary basis on which the EU determined its designation was often insufficient, noting that merely being under investigation in their countries did not fully satisfy the designation criteria, namely that of being responsible for misappropriation of state assets.⁴¹ The problem here is that investigations have proceeded at a slow pace, and no sentences have been produced in a vast majority of cases. Also, in contrast to all other EU sanctions regimes, designations are not generated directly by the EU on the basis of evidence available to Member States, but the listings are provided by the third states that request the asset freezes. This dependence of third country evidence makes these sanctions regimes particularly vulnerable to EU judicial scrutiny, undermining their sustainability in the long term.⁴² Consequently, the misappropriation sanctions lists are displaying uniquely decreasing dynamics: individuals get delisted, but no new entries are ever added. About half of the designees on the Ukrainian lists were at least partially successful in their requests for delisting.⁴³

Finally, and most importantly, CFSP sanctions fail to address the entire process of asset recovery, which includes confiscation and repatriation. Instead, the current system foresees a division in two steps at two different levels: an EU-wide freeze effected via a European foreign policy instrument must then be followed by the processing of an MLA request at the national level. Both processes are unconnected. By contrast, Switzerland revised legislation regarding the approach to misappropriated assets held in Swiss territory following its experience with efforts by Tunisia and Egypt to repatriate

assets in the aftermath of the Arab Spring. In 2016, it adopted the FIAA (see Box 4).⁴⁴ This is separate from powers of the Federal Council to adopt sanctions related to international peace and security, which are contained in the Federal Act on the Implementation of International Sanctions and would represent the equivalent to CFSP measures. The Swiss Act contains features that contrast with the CFSP framework: it addresses the entire asset recovery cycle holistically, providing a legal basis for freeze, confiscation and repatriation, and it makes the periodic renewal of the freezes conditional on progress made in the investigations conducted in the requesting states.

2.2 Heavy burden of proof and ineffective cooperation hindering EU asset recovery efforts

Recent changes in EU asset recovery policy framework

In recent years, the EU has adopted a number of instruments to harmonise standards and practices across Member States in terms of criminalisation of offences and asset freezing and confiscation.⁴⁵

First, the EU has introduced measures to harmonise and facilitate the criminalisation of offences across Europe. For example, since the **Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime**, EU Member States are required to criminalise **offences relating to participation in a criminal organisation**.⁴⁶ Though no comprehensive data is available on the impact of such legislation on confiscation within the EU, this kind of tool has proven quite effective in the past in other countries in the fight against grand corruption,⁴⁷ especially when associated with enlarged confiscation as illustrated by the Sani Abacha case in Switzerland (see Box 5).



Photo: Evgeny Feldman/Wikimedia Commons

BOX 5: Abacha as a criminal organisation⁴⁸

Switzerland criminalises the participation in a criminal organisation (Article 260 ter of the Swiss Penal code).⁴⁹ Under Article 72 of the same code, for the purpose of confiscation, all assets belonging to persons associated with said organisation are presumed to be at its disposal and therefore unlawful (unless proved otherwise).

This offence was used in an asset recovery case involving Nigerian military ruler Sani Abacha: on 7 February 2005, the Swiss Supreme Court ruled that “the structure set up by Sani Abacha and his accomplices constitutes a criminal organization since its object was to embezzle funds from the Central Bank of Nigeria for private purposes,⁵⁰ and to profit from corrupt transactions” (par. 9.1). As a consequence, and since the Abacha family did not even attempt to reverse the presumption, all their assets in Switzerland – a total of US\$508 million (€518 million) – were confiscated and repatriated to Nigeria.

The recently adopted EU **Directive on combating money laundering by criminal law** also contains relevant provisions aimed at enlarging the scope of the offence of money laundering.⁵¹ The new Directive harmonises the range of criminal activities that constitute predicate offences for money laundering in all Member States. Corruption is included in the list.⁵² It also provides for the recognition of **money laundering as an autonomous offence** (Article 3.3), which means that a conviction for money laundering should be possible without having to establish precisely the criminal activity that generated the property, or for there to be a prior or simultaneous conviction for that criminal activity. It also lifts obstacles related to the lack of harmonisation of criminal legislations between Member States and with third countries. Member States should not be prevented from prosecuting money laundering offences, even where the property is derived from conduct that occurred on the territory of another Member State or of a third country, as long as that conduct would constitute a criminal activity if it had occurred domestically.

Photo: Robin Benzrihem/Unsplash



Such measures are of critical importance as illustrated by the “Biens Mal Acquis” case that led to the conviction of TNO in France where these measures are already in place (see Box 6). Indeed, money laundering can be pursued in France as long as the illegal conduct that generated the illicit wealth (the predicate offence) constitutes a criminal offence under the French criminal code. It does not matter

where this illegal conduct took place, nor whether it has ever been pursued, nor whether the offender has been convicted; it does not matter if the conduct constitutes a criminal offence in the foreign country where it took place (no dual criminality requirement). It is the autonomy of the offence of money laundering that made the prosecution of TNO possible in France.

BOX 6 : The “Biens Mal Acquis” Case⁵³

Prompted by a criminal complaint (“*noticia criminis*”) lodged in 2007 by several French non-governmental organisations (NGOs), the “Biens Mal Acquis” (literally “ill-gotten gains”) case refers to ongoing criminal proceedings over allegations of money laundering by three African heads of State – Denis Sassou N’Guesso of the Republic of Congo, the now deceased Omar Bongo Ondimba of Gabon and Teodoro Obiang Mbasogo of Equatorial Guinea – their family members and close associates who have allegedly used embezzled and/or illicit funds to acquire vast assets in France.

To date, the investigation has been mostly focused on the wealth amassed in France by TNO, the son of Teodoro, the brutal and corrupt dictator of the oil-rich West African country of Equatorial Guinea. Since May 2012, he has been serving as Second Vice President of the country.

After 10 years of investigation, TNO was eventually ordered by the investigating magistrates to stand trial before the Paris Criminal Court on counts of laundering: proceeds of abuse of company assets; proceeds of embezzlement of public funds; proceeds of breach of trust; and proceeds of corruption. This was for acts committed on French soil between 1997 and 2011.

In an outstanding ruling rendered on 27 October 2017, the Paris trial court convicted TNO of money laundering in connection with embezzlement and other corruption offences and sentenced him to three years in prison. He was also fined €30 million, as well as being forced to forfeit his Paris townhouse with all the luxury furnishings, and the cars, art works, designer suits and other extravagant trappings of his now-concluded Paris lifestyle.

This decision, which is the first conviction of an incumbent senior foreign official for corruption-related charges, is not final yet as TNO has filed an appeal.

Some measures aim to harmonise and facilitate asset freezing and confiscation across Europe. The **2014 Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU** – building on previous policy instruments including the Framework decisions of 2001 and 2005 on extended confiscation – contains key provisions.⁵⁴ Member States are required to take any necessary measures to enable the **quick freezing of assets** “in order to preserve property” (Article 7). Given that assets can be shifted quickly (often instantly with the click of a mouse), such

a measure is critical to secure the assets and to prevent their dissipation while judicial proceedings are pending or are about to be instituted.

The Directive also recognises **proceedings in absentia** and allows for the confiscation of the proceeds of crime in cases where the accused does not appear before a trial court (Article 4). In other words, the absconding of the accused should not prevent enforcement authorities within the EU from getting their assets confiscated. It also provides for **extended powers of confiscation**

following a criminal conviction for the series of offences set out in the Directive (Article 5).⁵⁵ Extended confiscation eases the prosecution's burden of proof since it allows for the confiscation of assets belonging to a convicted person even though they are not (or not proven to be) derived from the criminal act for which the person was convicted. There is a presumption that assets are of criminal origin.

Finally, the Directive includes provisions on **third party confiscation**, i.e. confiscation of assets that have been transferred by an investigated or convicted person to third parties, as well as soft provisions on non-conviction-based confiscation in cases of illness or absconding of the suspected or accused person (Article 4.2).

The new **2018 Regulation on the mutual recognition of freezing and confiscation orders** further supports these efforts by clarifying and speeding up the process for the recognition and execution of freezing and confiscation orders between Member States.⁵⁶ The Regulation is not a harmonising instrument. Relying on the principle of mutual recognition, it rather aims to improve intra-EU cooperation.

Finally, EU policy touches lightly on the issue of victims' redress, although applicable only in domestic or intra-EU cross-border cases. The 2014 Directive urges Member States to "consider taking measures allowing confiscated property to be used for public interest or social purposes" in domestic

cases⁵⁷ while the 2018 Regulation sets out rules for restitution and sharing arrangements. However, these are only applicable between Member States, not when a third country is involved.

Lack of harmonised and proactive enforcement approach to asset recovery

All these instruments are welcome additions to the toolkit available in EU Member States for more effective asset recovery processes, and Member States should be prompted to implement and/or use them proactively. However, significant gaps remain in the EU legislation. The current EU asset recovery framework lacks a number of instruments that would facilitate the proactive enforcement of asset confiscation and victim redress in transnational grand corruption cases involving third countries and that would subsequently help to increase the effectiveness of Member States' asset recovery efforts. This includes **legal presumptions, non-conviction based confiscation instruments or provisions to ensure the responsible and transparent return of confiscated assets to benefit the victim populations** in the country where the assets were stolen from in the first place.

First, while the current EU legal framework facilitates the confiscation of assets belonging to a convicted person by providing Member States with extended powers of confiscation, it lacks tools such as legal presumptions to ease the prosecution's work in establishing the illicit origin of the assets by reversing the burden of proof.

Second, the current EU policy framework focuses merely on criminal confiscation and overlooks a wide range of non-conviction based (NCB) confiscation instruments that could increase the effectiveness of asset recovery efforts by allowing for the confiscation of illegal property without requiring prior criminal conviction.⁵⁸ These types of instruments, which differ from the traditional forms of confiscation that follow a conviction, can be key in achieving results in asset recovery processes. A number of Member States – including Bulgaria, Ireland, Italy and the UK – already have such measures in place and these have proved quite effective in helping to overcome the difficulty of getting a criminal conviction in the first place (see Box 7).



Photo: Marc Dossmann/European Parliament

BOX 7: The challenges posed by criminal confiscation

Criminal confiscation requires the prior conviction of the person who owns the assets that are under investigation. Confiscation orders are issued as part of sentencing following conviction at trial. The only assets that are subject to these orders, except where enlarged confiscation is allowed, are those that have been gained through the proceeds of the criminal offence for which the offender has been convicted.

In other words, prosecuting authorities need to prove that assets were obtained through or derived from this particular offence (the so-called “paper trail” challenge). If one of these two conditions is missing, the whole confiscation process falls through. Indeed, no confiscation order can be made if the accused manages to prove that the assets were not derived from this particular criminal act but were gained from another act. There can be a whole host of reasons why no confiscation orders can be made, such as limitations of the time period or lack of sufficient evidence to meet the high-level standard of proof that applies in criminal matters, impossibility to secure a conviction against the defendant – for example, due to immunity privilege or absconding.

While the EU framework includes provisions on enlarged confiscation or proceedings in absentia, it lacks instruments to facilitate the confiscation of assets without prior conviction. Likewise, the immunity issue,⁵⁹ particularly prevalent in grand corruption cases, has not been dealt with yet.

Third, EU legislation fails to address the issue of the disposal of confiscated assets in grand corruption cases involving third countries, i.e. who should use the assets and how. As mentioned earlier, the current EU legal framework – both due to an unclear legal basis and a lack of political willingness – contains only a soft provision in the 2014 Directive as regards the social reuse of assets.⁶⁰ It also provides for a detailed regime of asset disposal, clarifying sharing arrangements between issuing and executing authorities (see Annex A). However, this only applies for intra-EU cross-border cases.

For cross-border cases involving third countries, Member States are expected to apply the UNCAC framework. However, as mentioned earlier, it does not prove very useful in situations where international or bilateral cooperation is rendered impossible (see previous section and Annex A). The UNCAC framework is an international cooperation instrument which only works where there is strong genuine political will from both victim and holding countries to cooperate and recover the assets and does not include any provision for dealing with the disposal of assets when confiscated in an autonomous manner.⁶¹

As a result, whenever confiscation is ordered by EU countries in an autonomous manner (without cooperation from or upon request of the country of origin), the assets usually end up transferred to the public treasury of the EU holding state that ordered the confiscation.⁶² Indeed, under the UNCAC, the return of confiscated assets to the country of origin is mandatory *only if* the assets in question were confiscated pursuant to an MLA request from the victim country and the decision to confiscate was based on a final decision rendered there.⁶³ In all other cases, there is no obligation for the holding country to return the assets to the country of origin. However, one could easily argue that, from a moral point of view and a social justice perspective, these assets belong to the victim populations that have been deprived by their rulers of funds that should have been invested in the provision of public services and it is difficult to justify not using them for the benefit of victim populations that are, after all, the first victims of grand corruption.

The TNO case in France is a good example of the limitations of the current system. As highlighted by TI France,⁶⁴ under current domestic laws: in the event of a conviction of TNO and the issuance of a confiscation order by French courts (see Box 6), the confiscated assets would be transferred into the general budget of the French Public Treasury. The only way to get them – or some of them – used to the benefit of the victims would be to obtain a vote from the French parliament as part of the annual Budget Bill – a decision that would be highly political and, as such, surrounded by a lot of uncertainty.

French judges also expressed concerns regarding the fate of TNO's assets. During the audience where his conviction and the confiscation of all his assets in France were ordered – a decision currently subject to appeal – they made an unprecedented declaration recognising the moral grounds for bringing back victim populations into the picture: “in a traditional approach, [autonomous] confiscation usually involves assets which are not susceptible of restitution and lead to confiscated property

being transferred to the French State. Given the very nature of transnational corruption, **it now seems morally unjustified for the State ordering the confiscation to benefit from it without considering the consequences of the offence**” (emphasis added).⁶⁵

Last but not least, EU legislation does not provide for the publication of data regarding asset recovery. While EU legal instruments include provisions on the collection of data on the freezing and confiscation of the proceeds of crime,⁶⁶ making this data available to the public is not envisioned. And yet, data is critical to help provide a comprehensive picture of asset recovery efforts towards one country, which will usually involve multiple jurisdictions, and to contribute to the transparency and accountability of countries in the Paris Declaration, Accra Agenda for Action and the Busan Partnership. As highlighted in a recent joint World Bank/OECD report, “publishing information on domestic asset recovery efforts in one location or publication will help to highlight a country's commitments to asset recovery”.⁶⁷

3. TOWARDS MORE PROACTIVE ENFORCEMENT ACROSS THE EU

In order to overcome barriers related to failings in governance or judicial systems of victim states and to prevent victim populations from being penalised, it is critical that the EU provides for a harmonised framework: (1) to facilitate the preventive freezing of assets; (2) to ensure that Member States can initiate confiscation proceedings autonomously; and (3) to make sure that confiscated assets can be disposed of for the benefit of the victim populations. The EU should further provide for the systematic collection and dissemination of data on asset recovery.

3.1 Adopting an EU-wide horizontal sanctions regime against human rights violations and corruption

The freezing of assets to prevent asset flight could be made easier with the adoption of a horizontal sanctions list, i.e. a thematic sanctions instrument designed to include individuals who are responsible for specific breaches across constituencies, rather than breaches linked to a specific country. This would not differ substantially from the current approach, given that the operative paragraphs of the three EU misappropriation regimes virtually coincide. However, it would delink the freezing of

Photo: Aaron Burden/Unsplash



assets for grand corruption from the occurrence of high-profile crises in international politics. Importantly, the availability of pre-existing sanctions legislation speeds up the process of blacklisting, compared to the establishment of new sanctions regimes from scratch. EU horizontal sanctions regimes addressing cyberattacks and the use of chemical weapons already exist.⁶⁸

An EU horizontal human rights sanctions regime is currently under discussion, modelled on the US and Canadian Global Magnitsky legislation (see Box 8), named after a Russian lawyer who died in detention after having uncovered a grand corruption scheme.⁶⁹ It enjoys the support of large segments in the European Parliament, and civil society organisations recently endorsed the proposal, which they claim has the potential to deter would-be kleptocrats.⁷⁰ However, the initial proposal centres on human rights and lacks an explicit anti-corruption component, as confirmed by Dutch Prime Minister Mark Rutte.⁷¹

An anti-corruption angle should be included in the proposed human rights regime on account of the evident link between human rights breaches and corruption.⁷² Corruption should be included as a stand-alone criterion for listing. Corruption is a human rights issue. Whichever form it takes, corruption inevitably results in states not fulfilling their human rights obligations and in people not enjoying their rights. The nexus between anti-corruption and human rights has been well-evidenced and established by a number of experts and international bodies. In 2017 alone, the Human Rights Council, the European Parliament and the Inter-American Commission on Human Rights all addressed it in resolutions on corruption and human rights. The Parliamentary Assembly of the Council of Europe, also in 2017, reaffirmed that “the fight against corruption remains not only a cornerstone of the rule of law but also a key component of a genuine democracy and an essential element in ensuring the protection of human rights”.⁷³ Corruption is also addressed in a myriad of ways by other international human rights mechanisms (UN Human Rights Treaty Bodies and Special Procedures, European Committee for Social Rights, European Committee for the Prevention of Torture, European Committee on Racism and Tolerance, European Court of Human Rights, etc.)

from merely acknowledging its interference with the protection of human rights to looking into how it impedes states from fulfilling their human rights obligations.⁷⁴

The EU should rely on internationally recognized definitions of corruption offences to set corruption-focused designation criteria for listings. Such definitions include those provided in the UNCAC, the Council of Europe Criminal Law Convention on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD Convention establishes the offence of bribery of foreign public officials, while the Council of Europe Convention establishes offences such as trading in influence, and bribing domestic and foreign public officials. In addition to these types of conduct, the mandatory provisions of the UNCAC also include embezzlement, misappropriation or other diversion of property by a public official and obstruction of justice.⁷⁵ Transparency International also provides an internationally recognized legal definition of grand corruption which includes the deprivation of fundamental rights as a criterion.⁷⁶

The current EU Ukrainian misappropriation regime offers an interesting precedent of a sanction regime combining both dimensions of corruption and human rights abuse. The original formulation in the legal act of spring 2014 mirrored the language of the Egyptian freeze, but included a reference to human rights that was absent from previous misappropriation regimes: “All funds and economic resources belonging to, owned, held or controlled by persons having been identified as **responsible for the misappropriation of Ukrainian State funds** and persons **responsible for human rights violations in Ukraine**, and natural or legal persons, entities or bodies associated with them, as listed in the Annex, shall be frozen.” This makes the Ukrainian blacklist, uniquely, a human rights sanctions regime concurrently to a misappropriation sanctions regime. This criterion also delocalised the regime, reflecting the intervention in the country by foreign actors. While the embezzlement of state funds can be presumed to have been perpetrated by Ukrainian officials, the perpetration of “human rights violations in Ukraine” admits foreign agency.⁷⁷ This suggests that it should be possible to set up a similar regime with a global coverage. (See Box 8)

BOX 8: Example of language used in similar horizontal and geographically targeted sanction regimes

The US Global Magnitsky Act targets:⁷⁸

- any foreign person determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General:
 - (A) to be responsible for or complicit in, or to have directly or indirectly engaged in, ***serious human rights abuse***;
 - (B) to be a current or former government official, or a person acting for or on behalf of such an official, who is responsible for or complicit in, or has directly or indirectly engaged in:
 - (1) ***corruption***, including the misappropriation of state assets, the expropriation of private assets for personal gain, corruption related to government contracts or the extraction of natural resources, or bribery;
 - (2) the transfer or the facilitation of the transfer of the proceeds of ***corruption***;
- [...]
- any person determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General:
 - (A) to have ***materially assisted, sponsored, or provided financial, material, or technological support for***, or goods or services to or in support of: (1) any activity described in subsections [above] of this section that is conducted by a foreign person; [...]

The Canadian Sergei Magnitsky Law targets:⁷⁹

- a foreign national [...] responsible for, or complicit in, ***extrajudicial killings, torture or other gross violations of internationally recognized human rights*** committed against individuals in any foreign state [...]
- a foreign national [acting] as an agent of or on behalf of a foreign state in a matter relating to an activity described in paragraph [above];
- a foreign national, who is a foreign public official or an associate of such an official, [...] ***responsible for or complicit in ordering, controlling or otherwise directing acts of corruption*** [...] — which amount to ***acts of significant corruption*** when taking into consideration [...]
- a foreign national [who] ***has materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of***, an activity described in paragraph [above].

EU restrictive measures in response to the crisis in Ukraine establishes an explicit link between corruption and human rights abuses stating that:⁸⁰

[...] All funds and economic resources belonging to, owned, held or controlled by persons having been identified as ***responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations*** in Ukraine, and natural or legal persons, entities or bodies associated with them [...] shall be frozen.

Finally, while the existence of a dedicated blacklist would considerably help to speed up the freezing of assets, this still leaves the stages of confiscation and repatriation unaddressed. In the long term, replicating the Swiss legislative framework, in force since 2016, could provide a more comprehensive solution.⁸¹ The comparative strength of the Swiss tailor-made act is that it also addresses confiscation and restitution, which is currently left to individual Member States. This type of legislation, enabling the adoption of EU-wide asset freezes possibly followed by confiscation and return, could be adopted in the framework of the Area of Freedom, Security and Justice, removing it from the volatile foreign policy field.

RECOMMENDATIONS

Transparency International calls on the EU to adopt an EU-wide horizontal anti-corruption sanctions regime to facilitate the freezing of the assets belonging to individuals involved in grand corruption. This could be done as part of the current discussions regarding the adoption of a horizontal sanctions regime against human rights abusers. Following the US and Canadian models, corruption should be included as a standalone criterion for listing. Such a decision would be easily justified, as corruption systematically results in a deprivation of human rights.

The EU should also consider addressing the current disconnect between EU asset freezes enacted as part of EU sanctions regimes from subsequent endeavours by Member States to recover and repatriate assets which contributes to significantly undermining the effectiveness of EU sanctions and asset recovery efforts. In this regard, the Swiss legislation offers a more mature model for the recovery process as a whole by explicitly providing a legal basis not only for freezing, but also for confiscation and restitution.

3.2 Adopting tools to facilitate autonomous confiscation by EU countries

The EU toolkit should be further expanded to help achieve more proactive enforcement and autonomous confiscation by EU countries that are holding stolen assets. Whenever they receive credible information linking a corrupt official and their assets to a specific jurisdiction – through suspicious transaction reports, media reports, whistleblowers or any other valuable means – prosecuting authorities should be given the means to take proactive and early enforcement action. The ultimate aim should be to get these assets confiscated and to deprive corrupt individuals of their ill-gotten gains.

While there is no doubt that asset recovery is made more complex when there is no possible cooperation with the country of origin, recent proceedings – most notably the various asset recovery cases against TNO and his ill-gotten wealth demonstrate that such cases can be pursued as long as the legal tools are in place.

This dynamic is further confirmed by a recent joint World Bank/OECD publication that reports on the progress of 30 donor countries in meeting their Accra Commitments to combat corruption and recover illegally acquired assets. The report confirms that “countries with successful returns have been proactive in initiating domestic cases”, i.e. instead of waiting for the victim country to issue an MLA request, these countries have initiated their own investigation and prosecution of cases.⁸²



Photo: Aaron Burden/Unsplash

Two types of instruments can significantly help enhance autonomous confiscation and as such, contribute to better outcomes in asset recovery:

Legal presumptions to ease the establishment of the illicit origin of the assets by allowing the reversal of the burden of proof, which can ultimately pave the way to the confiscation of the assets.

Such presumptions focusing on the discrepancy between a person's property and lawful income are available in a number of jurisdictions and are believed to be promising tools to fight grand corruption. For example, in 2013 France introduced as part of its penal code a presumption of money laundering stating that "[a person's] assets or wealth are presumed to be the direct or indirect proceeds of a criminal offence whenever the material, legal or financial circumstances through which the assets were placed, layered and integrated cannot be explained otherwise but by the desire to hide the origin or the ultimate beneficiary of the assets".⁸³ In practical terms, this means that the burden of proof is reversed and lies with the suspect.

Non-conviction based (NCB) confiscation instruments that do not require prior criminal conviction to confiscate the assets.

There are different models of non-conviction based confiscation. The procedure can be preventative, as in Italy; administrative, as in Switzerland; or civil, as in the UK and other common law countries. Moreover, the non-conviction based confiscation can be done *in personam* or *in rem* depending on whether the legal action is targeted against the person or the property.

The Italian preventive confiscation model

The Italian anti-mafia code provides for non-conviction based extended confiscation of an individual's assets, whenever there is suspicion over their origin or that they belong to a suspect of organised or other serious crimes.

These preventive measures shift the burden of proof to the property owner to justify the legitimacy of the property. They do not require prior conviction and allow for the seizure and confiscation of assets

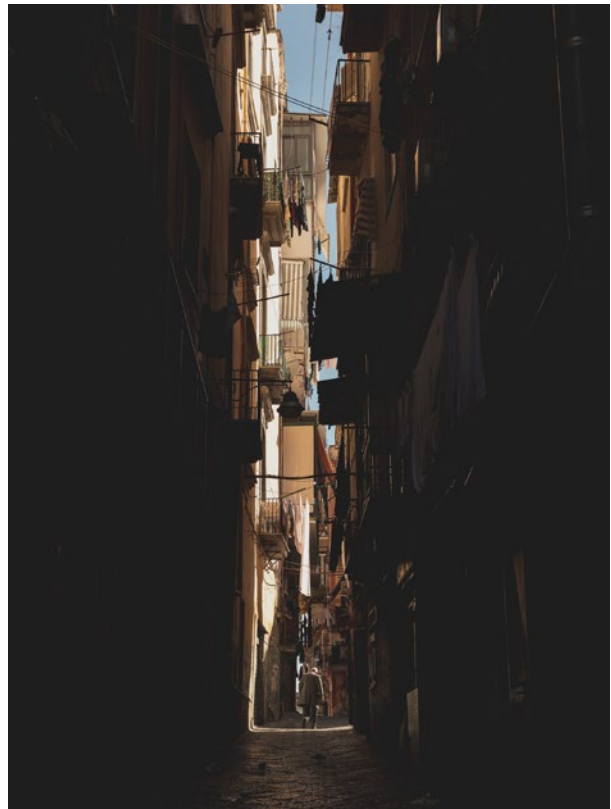


Photo: Mahkeo/Unsplash

for which lawful origin cannot be justified. Italian law distinguishes between "extra judicial" (non-conviction based) property-related or preventive measures and conviction-based "judicial" confiscation orders imposed in the course of criminal proceedings.^{84,85}

Preventive confiscation was first introduced in the 1980s, initially targeting suspected mafia members. The law was further amended over criticism that the mere suspicion of participation in a mafia-type organisation was considered enough to justify preventive confiscation. Two conditions are now required: i) assets must be directly or indirectly at the disposal of the suspect; and ii) there must be a discrepancy between the suspect's wealth and his or her income or there must be sufficient evidence that the assets are the proceeds of crime or the use thereof. The suspect is required to present sufficient evidence to justify that his or her assets are not the proceeds of crime.^{86,87}

This tool has proven to be an efficient way of depriving the Mafia of the proceeds of its crimes.⁸⁸

The Swiss confiscation model targeting Politically Exposed Persons

Adopted on 18 December 2015, the Swiss FIAA⁸⁹ provides for “the freezing, confiscation and restitution of assets held by foreign politically exposed persons or their close associates, where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or by other felonies” (Article 1).

More precisely, the Act authorises the Federal Administrative Court to order the confiscation of assets: “i) that are subject to the power of disposal of a foreign politically exposed person or a close associate of that individual, or of which those individuals are the beneficial owners; ii) that are of illicit origin; and which iii) have been frozen by order of the Federal Council in anticipation of their confiscation” (Article 14).

To that end, it provides for a rebuttable presumption that assets are of illicit origin whenever: “i) the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof *increased inordinately*,⁹⁰ facilitated by the exercise of a public function by a foreign politically exposed person; and ii) the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office” (Article 15).

It is worth mentioning that this administrative *in personam* confiscation measure was adopted in response to events triggered by the Arab Spring.

Common law non-conviction based confiscation systems

Also referred to as civil recovery, civil forfeiture, or *in rem* forfeiture in some jurisdictions, this type of non-conviction based confiscation is of civil nature and allows for the confiscation of assets on the basis of suspicion over their origin. **The action is against the property** not the person – hence why the proceeding is called *in rem* rather than *in personam*. This makes it a powerful tool to address grand corruption since it is available in situations where

the offender is beyond the reach of criminal justice. This might be, for example, when a prosecution might be thwarted by the statute of limitations or because the accused has died or has absconded, but also, apparently, where confronted with a foreign senior official enjoying personal immunity.⁹¹

In this respect, the case brought by the US Department of Justice (US DOJ) against TNO assets in the US offers an interesting precedent of civil forfeiture. When the launch of the proceedings was officially announced by the US DOJ in October 2011, TNO was Minister of Forestry, Fisheries and the Environment in Equatorial Guinea. He was then further nominated as Second Vice President of Equatorial Guinea in May 2012. However, as far as we know, the question of immunity was never raised in the course of the proceedings and the US DOJ ultimately reached a settlement with TNO, which involved the confiscation of more than US\$30 million (€26.7 million) worth of his ill-gotten gains.⁹²

Civil recovery is also available in the UK, where thanks to the recent introduction of Unexplained Wealth Orders (UWO), an investigating tool aimed at easing the law enforcement’s ability to act on corrupt assets, the volume of cases is expected to increase (see Box 9). Before this tool was introduced into law, little could be done to act on highly suspicious wealth in the UK unless there was a legal conviction in the country of origin.

In 2017, TI UK identified £4.4 billion (€5.06 billion) worth of property bought in London with suspicious wealth.⁹³ UWOs could prove particularly useful to investigate those cases, or more generally, in situations where there is no realistic prospect of cooperation or conviction in the country of origin, but where there are sufficient grounds for suspicion that an asset has been acquired with the proceeds of corruption or other forms of serious crime.

In practice, this is how UWOs work: in a case where there are reasonable grounds to suspect that the respondent is or has been involved in serious crime or the respondent is a politically exposed person – for example, a government minister with access to public funds – and has a known income that is insufficient to obtain the asset in question worth more than £50,000 (€57,577), law enforcement can

request information that can help them with their investigation. After application from an authorised enforcement authority, a high court judge can give notice of a UWO requiring the respondent to explain how they lawfully acquired the asset. If the respondent fails to respond or gives an inadequate response then this extra information can be used in a separate civil recovery process if law enforcement has gathered sufficient evidence.

BOX 9: The first steps of the British Unexplained Wealth Orders

UWOs⁹⁴ were brought into use at the beginning of 2018 after TI UK successfully campaigned for their introduction in the Criminal Finances Act in 2017. Since then, the UK's National Crime Agency (UK NCA) targeted the first UWOs against two properties worth £22 million (€25 million) in total. The respondent is **Zamira Hajiyeve**, wife of Jahangir Hajiyeve, who was formerly Chair of the International Bank of Azerbaijan (IBA). Jahangir Hajiyeve was convicted in Azerbaijan for his part in the embezzlement of £109 million (€125 million) from the IBA.⁹⁵ In addition to buying the properties mentioned above, the UK NCA also showed the court evidence of the couple exhibiting a pattern of spending that was not commensurate with their known lawful sources of income. During the court hearing, the UK NCA described how Zamira Hajiyeve had spent £16 million (€18.6 million) at Harrods alone using credit cards issued by the IBA over a 10-year period.⁹⁶ A legal challenge lodged by the respondent was dismissed by the High Court in October 2018, meaning that this first case continues to progress in court.

UWOs should now be used more widely to pursue more of the £4.4 billion (€5.1 billion) worth of suspicious wealth that TI UK has identified across the UK.

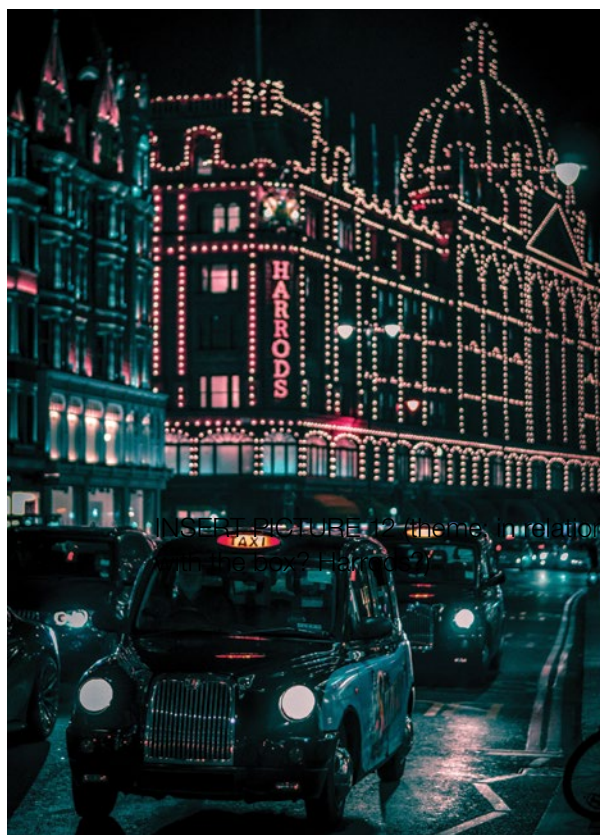


Photo: Biel Morro/Unsplash

Non-conviction based confiscation obviously raises the question of compatibility with fundamental rights such as the presumption of innocence and the protection of property, as well as the legality principle if the sentence amounts to sanctions that can be considered criminal in nature. The search for greater effectiveness of asset recovery processes should certainly not be done to the detriment of human rights. However, most of the legislation currently in place in EU Member States has passed the test of the highest national courts and, not least, that of the European Court of Human Rights.^{97,98} Provided that sufficient safeguards are in place – in particular, effective judicial review and compensation mechanisms for cases where assets were unduly seized and confiscated⁹⁹ – and provided that these measures do not aim to establish whether the defendant is guilty or not but rather to recover the proceeds of crimes, this type of measure can offer a particularly effective way for the autonomous confiscation of illegal assets. This has the potential to make crime less financially rewarding as well as releasing resources for victim redress.

RECOMMENDATIONS

Transparency International calls on the EU to introduce measures to facilitate the confiscation of assets such as non-conviction based confiscation instruments, legal presumptions, and other measures to facilitate the establishment of the illicit origins of the funds. This should be done in line with existing good country practices and as part of the **a broader revision of the 2014 Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU**.

3.3 Introducing EU principles for the responsible return of stolen assets

As well as having a powerful deterrent effect, the ultimate goal of asset recovery should be to mitigate and redress the damage caused by corruption. In the case of cross-border corruption involving misappropriation of public funds, every effort should be made to return the confiscated assets to the

country of origin for the benefit of the population that has been harmed by the underlying corrupt conduct.

As discussed in previous sections, two different types of scenarios are possible: i) either asset recovery is achieved through international and bilateral cooperation mechanisms such as UNCAC or mutual legal assistance; or ii) it is done in an autonomous manner by the holding state. Whatever the scenario, the process of returning the assets should be done in a transparent and responsible manner at all stages: i) consignment and management of recovered funds; ii) decision making over restitution arrangements and ultimate use of recovered funds; iii) selection of the third party/ies to manage and facilitate the return and disposal of the funds; iv) disbursement to recipients and implementation of projects or programmes; v) monitoring and reporting.

Whenever cooperation between the holding state and the victim state is possible, the principles developed by the Global Forum on Asset Recovery (GFAR) for the disposition and transfer of confiscated stolen assets in corruption cases and adopted by the UK, the US, Nigeria, Sri Lanka, Ukraine and Tunisia in December 2017 offer a good starting point.

Photo: Hayden Walker/Unsplash



Principles 4 on transparency and accountability, 5 on beneficiaries, 6 on strengthening anti-corruption and development, 9 on preclusion of benefit to offenders, 10 on inclusion of non-governmental stakeholders are of particular relevance (see Annex B for more details on the GFAR principles). The other principles mainly relate to the modalities of the cooperation between the holding state and the victim state: partnership, trust and confidence (Principle 1); mutual interests (Principle 2); early dialogue (Principle 3); case-specific approach (Principle 7); or leveraging international cooperation mechanisms such as UNCAC (Principle 8).

As mentioned above, however, there are situations where confiscation proceedings are initiated in an autonomous manner by the holding state and cooperation with the country of origin is

not possible. This should not prevent holding states from returning the assets when those are determined to be the proceeds of embezzlement and misappropriation of public funds. If the confiscated assets belong to the holding state from a legal point of view, it is nevertheless difficult to argue from a moral point of view against the restitution and use of these misappropriated public assets for the redress and benefit of victim populations, provided the conditions are in place in the country of origin to guarantee the respect of the principles listed below. The principles of transparency, accountability, integrity, inclusiveness and use for redress of victim populations and/or anti-corruption and development purposes should hold even if the principles related to cooperation with the country of origin cannot be respected.

RECOMMENDATIONS

Transparency International calls on Member States to follow the example of countries that have already committed to the GFAR principles and to adopt principles for the management, transfer and ultimate use of confiscated property held in EU Member States. Moreover, it would be more effective if those commitments were enshrined in EU legislation. The 2014 Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU should be revised to include the following **EU-wide principles adapted from GFAR principles¹⁰⁰ regarding the management, transfer and ultimate use of confiscated property held in EU Member States** in grand corruption cases involving third countries:

Cooperation (adapted from GFAR Principles 1, 2, 3 and 8)

- ▶ Whenever possible, the holding state, i.e. the Member State ordering the confiscation of assets – upon request from the country of origin of the confiscated assets or in an autonomous manner – should seek to establish strong partnership and continuous dialogue, and promote trust and confidence with the country of origin throughout the process.¹⁰¹
- ▶ Whenever the circumstances allow, the holding state should engage and discuss with the country of origin and if possible with other countries involved (e.g. countries where there are also ongoing legal proceedings related to the same case) the sharing and return of confiscated assets as early as the freezing stage. Early engagement has been highlighted by a number of stakeholders, including the World Bank and Eurojust,¹⁰² as a key success factor in past restitution cases.
- ▶ Whenever the circumstances allow, the holding state should seek agreement with the country of origin on the arrangements for the transfer and restitution of the confiscated assets and consider using an Agreement under UNCAC Article 57(5).¹⁰³
- ▶ Whenever cooperation is rendered impossible due to the circumstances in the country of origin, the holding state should not be prevented from seeking the return of confiscated assets in accordance with the other principles stated here.

Redress (adapted from GFAR Principles 5 and 6)

- ▶ Without prejudice to identified victims, recovered assets should be used to the greatest extent possible to:
 - ▶ benefit the population harmed by the underlying corrupt conduct in the country of origin and/or
 - ▶ tackle the institutional weaknesses which enabled or facilitated the commission of the predicate offence/s in the country of origin (i.e. the driving factors) and strengthen anti-corruption and/or
 - ▶ improve the standard of living of the population in the country of origin and more generally, contribute to the achievement of the Sustainable Development Goals in the country of origin.

Transparency (adapted from GFAR Principle 4)

- ▶ The holding state, whenever possible in shared responsibility with the country of origin, should guarantee transparency and traceability throughout the process of management, transfer, disbursement and disposition of the recovered assets.
- ▶ Whenever a third party is involved in the process, the holding state, whenever possible in shared responsibility with the country of origin, should guarantee transparency over the selection process of the third party hired for the management and facilitation of the return process.
- ▶ In the case of autonomous confiscation (where the confiscated assets legally belong to the holding state), recovered assets should be isolated from the holding state's general state budget and remain traceable throughout the disbursement phase through the implementation of an adequate accounting system by the recipient/s of the funds.
- ▶ Information on the transfer and administration of recovered assets should be made publicly available.

Accountability (adapted from GFAR Principle 4)

- ▶ The holding state, whenever possible in shared responsibility with the country of origin, shall guarantee accountability throughout the process of transfer, disbursement and disposition of the recovered assets.
- ▶ In the case of autonomous confiscation (where the confiscated assets legally belong to the holding state), the holding state, whenever possible in shared responsibility with the country of origin, should require recipient/s of the funds to submit narrative and financial reports each accounting year during the disbursement phase. This would be to report on the management and their disposition of the funds including, where applicable, the benefits gained by the population/s. The holding state should watch over the respect of the principles set out here and may organise on-site visits or commission independent audits and prescribe all corrective measures that may be appropriate.
- ▶ In situations where restitution arrangements provide for the involvement of a third party, such as the World Bank as facilitator or administrator of asset return process, the latter should be selected and operate in accordance with the principles stated here. In particular, the selection process should follow competitive and open tendering procedures.
- ▶ Costs associated with the implementation of the recovery scheme should be deducted from recovered funds within the limits of a percentage determined by law.

Inclusiveness (adapted from GFAR Principle 10)

- ▶ Individual experts and groups outside the public sector, such as non-governmental organisations and community-based organisations, should be encouraged to participate throughout the asset return process. In particular, they should be consulted and given the opportunity to present their views regarding how harm can be remedied and how recovered money be disposed of, to contribute to decisions on return and disposition, and to monitor and foster transparency and accountability in the transfer, disposition and administration of recovered assets.

Efficiency (adapted from GFAR Principles 7 and 8)

- ▶ Disposition of confiscated proceeds of crime should be considered in a case-specific manner.
- ▶ In the case of autonomous confiscation (where the confiscated assets legally belong to the holding state), the holding state should determine, whenever possible in consultation with the country of origin, the exact arrangements for the use of recovered funds. This includes the selection of the project/s or programme/s to be funded and/or the identity of the recipient/s of the funds, as well as the establishment of the disbursement plan. This should be done on a case-by-case basis with regard to the specific circumstances of the case with the aim of ensuring, in strict compliance with the principles set out here, optimal use of the funds.
- ▶ Where possible, the exact arrangements for the use of recovered funds should use existing political and institutional frameworks in the country of origin and should be in line with the country's development strategy in order to ensure coherence, avoid duplication and optimise efficiency. To this end, whenever appropriate and/or whenever the circumstances allow, the holding state should seek the involvement of the government of the country of origin in the process – and in the conclusion of an agreement providing, among other things, their commitment to observe the principles set out here.

- ▶ The transfer of recovered assets should only take place when the exact arrangements for their use are clearly defined and – where projects are to be conducted in the country of origin – where proper institutional safeguards are in place to ensure efficient allocation and to prevent the mismanagement of the recovered assets.

Integrity (adapted from Principle 9)

- ▶ The holding state, whenever possible in shared responsibility with the country of origin, should take and guarantee all necessary steps to ensure that recovered funds do not benefit, directly or indirectly, persons involved in the commission of the underlying offence/s.
- ▶ The holding state, whenever possible in shared responsibility with the country of origin, should administer recovered assets rigorously to prevent them being channelled back into corrupt circles or associated with any other illegal or illicit activities.
- ▶ In the case of autonomous confiscation (where the confiscated assets legally belong to the holding state), the holding state should ensure that any suspicion of irregularities concerning the management of the funds is investigated and, when grounded, leads to the suspension of disbursements.

The proposed framework aims to support and complement existing international and bilateral cooperation mechanisms, including UNCAC, by ensuring that confiscated assets held in the EU are repatriated and used for the benefit of the

populations that have been harmed by the corrupt conduct of their rulers in all situations. This includes when the circumstances in the country of origin make it legally impossible to apply existing sharing or restitution rules.

3.4 Harmonising and publishing data on asset recovery efforts

Adequate data is critical for assessing effectiveness in asset recovery. Data currently available on EU countries' asset recovery efforts is either non-existent or scattered, partial and inconsistent. The EU should require Member States to systematically collect and publish data on their asset recovery efforts in one location or publication.¹⁰⁴ This would not only help to assess how the country is doing against its commitments. It would also offer a useful resource for victim countries of origin of the stolen assets, which are usually held across several jurisdictions and under different legal proceedings. This would also contribute to complying with the principles of transparency and accountability stated above.

RECOMMENDATIONS

The measures taken by Member States in relation to managing confiscated property should be visible to the general public in order to have a deterring effect and to demonstrate that property acquired through criminal activity can be expected to be systematically forfeited by the state. In other words to show that crime does not pay.¹⁰⁵

In this respect, the example of Switzerland – which publishes its laws, case examples and policies on a website – could provide the beginning of a solution.¹⁰⁶ However, Switzerland fails to provide full details on case specifics. Member States should be required to systematically collect and publish comprehensive statistics on asset recovery cases, including assets frozen or confiscated, reparations or restitutions ordered, and assets returned. Wherever possible, countries should gather data on the various means used to return assets, including criminal and non-conviction based confiscation, administrative confiscation, private civil actions or other forms of direct recovery. Statistics on cases and information on laws and results should also be made publicly available and accessible at a central location such as a dedicated website. Member States should also consider issuing timely press releases on specific cases. This kind of harmonisation at the EU level would allow for cross-country comparison and effectiveness evaluation.¹⁰⁷



Photo: European Parliament

ANNEX A:

An overview of UNCAC and EU provisions regarding the sharing or restitution of confiscated assets

A.1 UNCAC provisions

The provisions for the return of confiscated property are stated in Article 57.3 of the UNCAC.¹⁰⁸

In accordance with Articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party [mandatory return].

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property [conditional return].

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime [optional return].

The return of *confiscated* assets to the country of origin is mandatory under the UNCAC *only where* (1) embezzled public funds are involved and *if* (2) the assets in question were confiscated pursuant to an MLA request from the victim country (3) which is based on a final decision rendered there.¹⁰⁹ In all other cases, there is absolutely no obligation for the holding country/ies to return the assets to the country of origin.

More precisely, the repatriation scheme under the UNCAC is as follows:

Scenario 1: Assets were confiscated pursuant to an MLA request from the victim country (i.e. confiscation was ordered in the country of origin and executed/enforced in the holding country/ies through international cooperation), which is based on final decision rendered there.

Under this scheme – according to UNCAC Article 57.3a) and b) – the return of assets requires a request from the country of origin (requesting party) to the holding country (requested party). Upon receipt of such a request, the requested party is *obliged* to return confiscated property to the requesting party:

- ▶ *whenever* said property is the proceeds of embezzlement of public funds or laundering of such funds (Article 57.3.a) – mandatory restitution) or
- ▶ *if* the requesting party establishes prior ownership over confiscated property or the requested party recognises damage to the requesting State party as a basis for returning the confiscated property (Article 57.3.b) – conditional restitution)

As indicated before, UNCAC Article 57.3.a) and b) have almost never been used in past asset recovery cases.

Scenario 2: applies to all other cases (UNCAC Article 57.3.c)

UNCAC Article 57.3.c does not specify the “all other cases” that are to be covered. Therefore, and pursuant to the Latin adage according to which “*Ubi lex non distinguit, nec nos distinguere debemus*” (“Where the law does not distinguish/exclude, neither should we distinguish/exclude”), this may include such situations as:

- ▶ where assets were confiscated pursuant to an MLA request from the victim country *BUT*:
 - ▶ the request was not based on a final decision rendered there¹¹⁰ and/or
 - ▶ the confiscated property does not involve proceeds of embezzlement of public funds or laundering of such funds and none of the conditions provided by Article 57.3.b) are met
- ▶ where assets were confiscated pursuant to an MLA request from another country (than the victim country)
- ▶ where assets were confiscated pursuant to an order rendered in the holding country (“autonomous confiscation”). As indicated previously, assets will usually be confiscated either through criminal proceedings involving offences of money laundering or foreign bribery or, where available, through non-conviction based tools (such as civil/*in rem* forfeiture).

Either way, in accordance with UNCAC Article 57.3.c), holding states *are only required to give priority consideration to*: (1) returning confiscated property to the requesting State Party; (2) returning such property to its prior legitimate owners; or (3) compensating the victims of the crime. However, they are under no legal obligation to actually do so.¹¹¹

Scenario 3: In any cases, pursuant to UNCAC Article 57.5, “States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by case basis, for the final disposal of confiscated property”. It should be emphasised that room for negotiation on the part of the holding state would be inevitably much more limited whenever the return is mandatory (i.e. based on UNCAC Articles 57.3.a) or b)).

A.2 EU provisions

The new Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders includes a specific provision regarding the “Disposal of confiscated property or money obtained after selling such property”. It reads as follows: “(...) *unless otherwise agreed by the Member States involved, the executing State shall dispose of the money obtained as a result of the execution of a confiscation order as follows: (a) if the amount obtained from the execution of the confiscation order is equal to or less than €10 000, the amount shall accrue to the executing State; or (b) if the amount obtained from the execution of the confiscation order is more than €10 000, 50 per cent of the amount shall be transferred by the executing State to the issuing State*” (Article 30.7; emphasis added).

Note that this 50/50 sharing rule (which differs greatly from provisions contained in UNCAC Article 57.3) only applies between requesting and requested EU Member States. This means that, whenever an EU Member State that is also party to the UNCAC deals with a case involving another UNCAC State party (that is not an EU Member State), UNCAC rules should prevail. Moreover, these are default rules that only apply where there is no agreement between EU Member States.

ANNEX B:

Global Forum on Asset Recovery Principles For Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases¹¹²

The co-hosts and four focus countries at the Global Forum on Asset Recovery (GFAR) reaffirmed their commitment to the return and disposition of confiscated stolen assets as articulated in the UN Convention Against Corruption (UNCAC). They highlighted the importance of technical assistance towards successful asset recovery and disposition. They reflected further on their experiences, and emerging lessons, from previous instances of returns. Cognisant of the work already going on under the auspices of the UN Office on Drugs and Crime (UNODC), and the call in the Addis Ababa Action Agenda¹¹³ for the international community to develop good practices on asset return, GFAR participants offered the following considerations for principles that would promote successful asset return.

These Principles address approaches and mechanisms for enhancing coordination and cooperation, and for strengthening transparency and accountability of the processes involved. Nothing in these Principles is intended to infringe national sovereignty or domestic principles of law.

Principle 1: Partnership. It is recognised that successful return of stolen assets is fundamentally based on there being a strong partnership between transferring and receiving countries. Such partnership promotes trust and confidence.

Principle 2: Mutual interests. It is recognised that both transferring and receiving countries have shared interests in a successful outcome. Hence, countries should work together to establish arrangements for transfer that are mutually agreed.

Principle 3: Early dialogue. It is strongly desirable to commence dialogue between transferring and receiving countries at the earliest opportunity in the process, and for there to be continuing dialogue throughout the process.

Principle 4: Transparency and accountability. Transferring and receiving countries will guarantee transparency and accountability in the return and disposition of recovered assets. Information on the transfer and administration of returned assets should be made public and be available to the people in both the transferring and receiving country. The use of unspecified or contingent fee arrangements should be discouraged.

Principle 5: Beneficiaries. Where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.

Principle 6: Strengthening anti-corruption and development. Where possible, in the end use of confiscated proceeds, consideration should also be given to encouraging actions that fulfil UNCAC principles of combating corruption, repairing the damage done by corruption and achieving development goals.

Principle 7: Case-Specific Treatment. Disposition of confiscated proceeds of crime should be considered in a case-specific manner.

Principle 8: Consider using an Agreement under UNCAC Article 57(5). Case-specific agreements or arrangements should, where agreed by both the transferring and receiving state, be concluded to help ensure the transparent and effective use, administration and monitoring of returned proceeds. The transferring mechanism(s) should, where possible, use existing political and institutional frameworks and be in line with the country development strategy in order to ensure coherence, avoid duplication and optimise efficiency.

Principle 9: Preclusion of Benefit to Offenders.

All steps should be taken to ensure that the disposition of confiscated proceeds of crime do not benefit persons involved in the commission of the offence(s).

Principle 10: Inclusion of non-government stakeholders. To the extent appropriate and permitted by law, individuals and groups outside the public sector – such as civil society, non-governmental organisations and community-based organisations – should be encouraged to participate in the asset return process. This includes by helping to identify how harm can be remedied, contributing to decisions on return and disposition, and fostering transparency and accountability in the transfer, disposition and administration of recovered assets.

ENDNOTES

- 1 All foreign currencies in the report have been converted to euros with the exchange rate of May 2019 using the xe conversion tool available at: xe.com/.
- 2 In March 2019, CiFAR launched EU Sanctions Watch, a new online tool that transforms raw data into a visualised list of the people subject to EU sanctions. The tool is accessible at sanctionswatch.cifar.eu/.
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- 5 See sanctionswatch.cifar.eu/.
- 6 Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linnea Mills, Few and Far The Hard Facts on Stolen Asset Recovery, StAR, OECD, World Bank and United Nations Office on Drugs and Crime (UNODC), 2014, p.2. Retrieved from: oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf.
- 7 In the case of UK between 2006 – 2009 the total of frozen assets were US\$229.6 million (€204.7 million) from which US\$2.2 million (€1.9 million) were returned. Between 2010 – June 2012 total of frozen assets were US\$451.2 (€402.3 million) from which US\$67.5 million (€60.1 million) were returned. Between 2006 – June 2012, the total value of UK frozen assets was US\$680.80 million (€607.07 million), from which US\$69.7 million (€62.1 million) were returned. Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linnea Mills, 2014, pp.19-20,22. Retrieved from: oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf.
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- 24 “While convictions for money laundering could occur in the state whose public funds are embezzled, most of those examined for this Digest took place in jurisdictions outside of where the embezzlement originally occurred. In reviewing the cases examined for the Digest, the scarcity of requests for international cooperation based on confiscation orders in the state whose resources were diverted, or which suffered harm is notable. One prominent example of domestic confiscation was the case of former state governor [in Nigeria] Diepreye Alamiyesigha (...). Other than this one possibility, review of the cases examined revealed no requests from states which had suffered harm seeking return of funds based upon confiscation orders under Convention Article 57, paragraphs 3 (a) and (b) based on an order of confiscation from their courts.” (emphasis added) UNODC, Digest for Asset Recovery cases, Conference of the State Parties to the United Nations Convention against Corruption Fifth session, Panama City, 27 November 2013, pp.81-82. Retrieved from: unodc.org/documents/treaties/UNCAC/COSP/session5/V1388146e.pdf.
- 25 Note that all EU Member States and the EU have signed and ratified the UNCAC, which is the only multilateral anti-corruption treaty with detailed provisions on international asset recovery. While there are instruments at the EU level that contain provisions on asset recovery, these instruments aim to facilitate cross-border cases within the EU only (they do not address asset recovery with third countries). In practice however, there might be conflicting situations between EU and UNCAC rules, especially when it comes to the disposal of confiscated property.
- 26 Note that the estimates are not limited to proceeds of corruption and cover proceeds of other crimes (e.g. drug trafficking).
- 27 Europol, 1 July 2016, pp.4,11. Retrieved from: europol.europa.eu/publications-documents/does-crime-still-pay.
- 28 Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linnea Mills, 2014, p.2. Retrieved from: oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf.
- 29 See in particular David G. Lewis, Tackling Corruption in Uzbekistan: A White Paper, Open Society Foundations, June 2016. Retrieved from: opensocietyfoundations.org/sites/default/files/tackling-corruption-uzbekistan-20160524.pdf and Professor Kristian Lasslett, Fatima Kanji and Dáire McGill, A Dance With the Cobra: Confronting Grand Corruption in Uzbekistan, International State Crime Initiative, 2017. Retrieved from: statecrime.org/data/2017/08/Full-Report-with-Executive-Summary.pdf.
- 30 Информационный дайджест Прессы узбекистана № 148, Информационное сообщение по уголовным делам в отношении Каримовой Г. [Information Press releases of Uzbekistan № 148, Information message on criminal cases against Karimova G.] (unofficial translation), 31 July 2017, pp.4-6. Retrieved from: uzembassy.ru/Dajdjest/31.07.17.doc.
- 31 Information Press releases of Uzbekistan № 148, Information message on criminal cases against Karimova G. (unofficial translation), 31 July 2017, p.6. Retrieved from: uzembassy.ru/Dajdjest/31.07.17.doc.
- 32 Press release of the Government of Equatorial Guinea, Absueltos los tres representantes de SOMAGUI FORESTAL, EDUM y SOCAGE, [The three representatives of SOMAGUI FORESTAL, EDUM and SOCAGE have been acquitted] (unofficial translation), Guinea Editorial (web), 15 June 2017. Retrieved from: guineaecuatorialpress.com/noticia.php?id=9898. For additional information about the case, also see Box 6.
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- 34 Plate-forme Haïti de Suisse, A propos des fonds Duvalier déposés en Suisse, Quelques éléments chronologiques – suivi 2007-2017 [Concerning the Duvalier funds deposited in Switzerland, Some chronological elements 2007-2017] (unofficial translation), updated 15 August 2017. Retrieved from: pfhs.ch/nouv/A%20propos%20des%20fonds%20Duvalier-29.3.18.pdf.
- 35 The Federal Council (Law Portal of the Swiss government), Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act), 18 December 2015. Retrieved from: admin.ch/opc/en/classified-compilation/20131214/index.html.
- 36 Ukraine also seems to be facing major challenges. See in that regard Tetiana Shevchuk, Recovery of stolen assets in Ukraine: Losing time and money, UNCAC Coalition Civil Society, 11 April 2017. Retrieved from: uncaccoalition.org/en_US/recovery-of-stolen-assets-in-ukraine-losing-time-and-money/.

- 37 European Commission, Commission implementing decision of 10.8.2018 on the Preparatory Action for Support to EU Neighbours to Implement Asset Recovery to be financed from the general budget of the Union, 10 August 2018, p.4. Retrieved from: ec.europa.eu/neighbourhood-enlargement/sites/near/files/c_2018_5142_preparatory_action_asset_recovery_merged.pdf.
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- 39 Clara Portela, *European Union Sanctions and Foreign Policy* (Routledge, 2010). Retrieved from: routledge.com/European-Union-Sanctions-and-Foreign-Policy-When-and-Why-do-they-Work/Portela/p/book/9780415552165. A user-friendly list of EU sanctions regimes currently in force can be found at: www.sanctionsmap.eu/#/main?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D.
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- 42 Andreas Boogaerts, 'Short-term Success, Long-term Failure? Explaining the Signaling Effects of EU Misappropriation Sanctions Following Revolutionary Events in Tunisia, Egypt, and Ukraine', *Journal of International Relations and Development*, February 2018. Retrieved from: researchgate.net/publication/322898373_Short-term_success_long-term_failure_Explaining_the_signalling_effects_of_EU_misappropriation_sanctions_following_revolutionary_events_in_Tunisia_Egypt_and_Ukraine.
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- 44 The Federal Council, FIAA, 18 December 2015. Retrieved from: admin.ch/opc/en/classified-compilation/20131214/index.html.
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- 47 In fact, it is easier to establish the participation of someone in a criminal organisation rather than specific underlying offences such as corruption, embezzlement, etc.
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- 51 According to Article 14 of the Directive, Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 December 2020. EUR-Lex, Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. Retrieved from: eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L1673.
- 52 Article 2(1) of the Directive provides the list of criminal activities that may constitute predicate offences. Corruption is covered under point (h).
- 53 Transparency International France (TI France), *Biens mal acquis: dates – clefs* [Ill-gotten gains – key dates] (unofficial translation). Retrieved from: transparency-france.org/aider-victimes-de-corruption/biens-mal-acquis/dates-clefs/.
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- 55 Article 5 of the Directive covers both specific offences as well as any criminal offences punished by a custodial sentence of a maximum of at least four years. In that regard, it is worth noting that offences relating to participation in a criminal organisation are explicitly covered by the Directive, which make the measures even more powerful in terms of tackling grand corruption.
- 56 EUR-Lex, Regulation 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. Retrieved from: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1805&from=EN.
- 57 Article 10.3: "Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes." EUR-Lex, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Retrieved from: eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042.
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- 61 Article 57.3(c) provides that "[holding states] shall give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime" But they are actually under no obligation to do so (see Annex A for further details). UNODC, UNAC, 2001, p.47. Retrieved from: unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
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- 63 With respect to "on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party", the UNCAC Legislative guide indicates: "The requested State Party should consider the waiver of the requirement for a final judgement in cases where a final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (A/58/422/Add.1, paragraph 69)." Emphasis added; UNODC, Legislative guide for the implementation of the United Nations Convention against Corruption, paragraph 784, Second revised edition 2012, p.284. Retrieved from: unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf.
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- 86 Article 24, Decreto Legislativo, 6 settembre 2011, n.159, Codice delle leggi antimafia e delle misure di prevenzione, nonche' nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n. 136. (11G0201) (GU n.226 del 28-9-2011 - Suppl. Ordinario n. 214) [Legislative Decree, 6 September, 2011, No. 159, Code of anti-mafia laws and preventive measures, as well as new provisions on anti-mafia documentation, pursuant to Articles 1 and 2 of the Law of 13 August 2010, n. 136. (11G0201) (GU n.226 of 28-9-2011 – Ordinary Supplement No. 214)] (unofficial translation), recently reformed by law n.161 of 17 October 2017. Retrieved from: normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2011-09-06;159lvig.

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- 98 Council of Europe, Fighting organised crime by facilitating the confiscation of illegal assets, 26 March 2018. Retrieved from: semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbncveG1sL1hSZWYyWDJILURXLWV4dHluYXNwP2ZpbGVpZD0yNDUwNyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsC9QZGYyVFJlZi1XRClBVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTI0NTA3.
- 99 See Transparency International recommendations in previous publication, Transparency International, Confiscation of Criminal and Illegal Assets: European Perspectives in Combat Against Serious Crime, March 2015. Retrieved from: confiscation.eu/site/wp-content/uploads/2015/03/Policy_Paper_EN_web.pdf.
- 100 The main difference between the proposed principles and the GFAR principles is that, where the latter only cover situations of possible cooperation between the holding state and victim state, the former would also apply in situations where cooperation with the country of origin is not possible.
- 101 Note that even in the case of autonomous confiscation by the holding country, cooperation with the country of origin may still be possible in the subsequent stage of restitution.
- 102 Eurojust, Eurojust’s casework in asset recovery at a glance, 18 February 2019, p.13. Retrieved from: publications.europa.eu/en/publication-detail/-/publication/691d5ade-33fb-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-87825223.
- 103 UNODC, 2001, p.48. Retrieved from: unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
- 104 Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linnea Mills, 2014. Retrieved from: oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf, as well as in previous UNCAC resolutions (see in particular Report of the Conference of the States Parties to the United Nations Convention against Corruption on its sixth session, Resolution 6/3 on Fostering effective asset recovery, Operative clause no 7, St. Petersburg, 16 November 2015, p.12. Retrieved from: unodc.org/documents/treaties/UNCAC/COSP/session6/Report_COSP_VI_advance_copy.pdf.
- 105 Transparency International, March 2015. Retrieved from: confiscation.eu/site/wp-content/uploads/2015/03/Policy_Paper_EN_web.pdf.

- 106 EDA (official Swiss legal database), Confederation Suisse, Federal Department of Foreign Affairs, Restitution of illicitly acquired assets. Retrieved from: eda.admin.ch/eda/en/home/foreign-policy/financial-centre-economy/illicit-assets-pep/rueckgabe-unrechtmassigerwerbenervermoegenswerte.html.
- 107 Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linnea Mills, 2014. Retrieved from: oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf.
- 108 Note that the current section is only intended to provide a general overview of how UNCAC provisions on the return of confiscated assets operate between a holding country (requested jurisdiction) and a victim country (requesting jurisdiction). In practice, several holding countries may be involved, and/or other/additional rules may apply (due to the existence of bilateral or regional treaties with specific provisions about the return/disposal of confiscated property).
- 109 With respect to “on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party”, the UNCAC Legislative guide indicates: “The requested State party should consider the waiver of the requirement for a final judgement in cases where a final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (A/58/422/Add.1, paragraph 69).” Emphasis added; UNODC, Legislative guide for the implementation of the United Nations Convention against Corruption, paragraph 784, Second revised edition 2012, p.284. Retrieved from: unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf.
- 110 It is worth noting, however, that this scenario is quite unlikely: either the requested state refuses to enforce the foreign order (precisely because it is not based on a final decision) or it enforces it (despite the fact it is not based on a final decision) but in that latter case, invoking this requirement afterwards as grounds to refuse the return of assets may be barely tolerable.
- 111 Note, however, that as indicated above (cf. direct recovery of property) in accordance with UNCAC Article 53.c), victim states may also intervene in a confiscation procedure to claim restitution of the assets.
- 112 GFAR, Global Forum on Asset Recovery Communique, Washington DC, 4-6 December 2017, pp.4-5. Retrieved from: star.worldbank.org/sites/star/files/20171206_gfar_communique.pdf.
- 113 United Nations, Report of the third International Conference on Financing for Development, Addis Ababa, 13-16 July 2015, paragraph 25, p.11. Retrieved from: undocs.org/pdf?symbol=en/A/CONF.227/20.

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