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International Asset Recovery and the United Nations Convention Against Corruption

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Introduction

According to the former Secretary-General of the United Nations, Kofi Annan:

Corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish ... The (United Nations) Convention (against Corruption) introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. ... And it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen. ... These provisions—the first of their kind—introduce a new fundamental principle, as well as a framework for stronger cooperation between States to prevent and detect corruption and to return the proceeds.¹

These words emphasize the importance of asset recovery for fighting the scourge of corruption and the pivotal role that the United Nations Convention against Corruption (UNCAC)² can play in fostering international cooperation in asset recovery. Corruption-related asset recovery is a prerequisite for

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global justice and the promotion of the international rule of law as backbones for sustainable development.

‘Always follow the money’ and make sure that ‘crime doesn’t pay’ has been sound advice in anti-corruption law enforcement and policy makers’ circles for decades. But the tracing, seizure, confiscation and return of corruption-related assets have faced many legal obstacles. These obstacles are particularly pronounced where corruption-related assets have been diverted from developing countries and laundered in foreign jurisdictions. Thus, procedural and evidentiary obstacles can be found in the anonymity of financial transactions, the lack of technical expertise and resources, the lack of harmonization of national criminal anti-corruption laws and of procedures for international cooperation, and the myriad of problems in criminal prosecution.³

The size of corruption-related wealth is hard to calculate. Estimating the amounts of corrupt assets that cross borders for money-laundering purposes relating to the proceeds of corruption is even harder.⁴ The size of corruption must be clearly differentiated from the much higher and even more difficult to calculate economic cost of corruption. The European Commission estimates that corruption costs European Union member states around EUR 120 billion per year.⁵ The United Nations Office on Drugs and Crime (UNODC) estimates that the total amount of criminal proceeds generated in 2009, including those derived from corruption but excluding those derived from tax crimes, may have been approximately US \$2.1 trillion, or 3.6% of global GDP.⁶ Out of this amount the money laundered was estimated to be close to US \$1.6 trillion or 2.7% of global GDP in the same year. On the other hand, if only *transnational* crime-related proceeds were considered, the money-laundering estimates would be expected to fall to levels around 1% of GDP. The UNODC research report further concludes that the ‘interception rate’ for anti-money-laundering efforts at the global level remains low—much less than 1% (probably around 0.2%) of the proceeds of crime laundered. The yearly proceeds of corruption alone are conservatively estimated to be between US \$20 billion and US \$40 billion.⁷

The sheer size of the problem demonstrates the necessity for developing effective responses. The analysis that follows focuses on the UNCAC. The UNCAC was opened for signature on 9 December 2003 in Merida, Mexico, and entered into force on 14 December 2005. The current⁸ 140 signatories and 181 States Parties make it the only truly global and legally binding anti-corruption instrument. The UNCAC addresses a wide range of preventive and deterrent provisions against corruption and sets out comprehensive provisions on asset recovery.

Asset recovery represents a relatively new field of international anti-corruption law and international cooperation. It serves mainly four essential purposes: it is a powerful deterrent measure, as it removes the profit incentive for people to engage in corrupt practices; it restores justice by taking away the profits from criminals; it plays an incapacitative role by depriving criminals and powerful criminal networks of their assets and instruments of misconduct; and it helps repair the damage done to victim countries and their populations.

For these reasons, Chapter V of the UNCAC establishes asset recovery as one of its 'fundamental principles' (Article 51 UNCAC). The respective provisions provide States Parties with a comprehensive set of tools to effectively prevent the transfer and laundering of the proceeds of corruption and a set of legal avenues for successful international cooperation in the tracing, seizing, confiscating and recovering of the proceeds of corruption.

This chapter briefly analyses the procedures and conditions for asset recovery set by the UNCAC. It is intended to serve as an introductory guide with regard to the various available legal tools for international cooperation in asset recovery. Before attempting a hermeneutical approach to the letter of the provisions of Chapter V of the UNCAC, the research explores, both from a criminological and a legal point of view, the systematic interconnection between the UNCAC provisions on the criminalization of corruption and other corruption-related offences on one side and the criminal and asset recovery provisions of the United Nations Convention against Transnational Organized Crime (UNTOC) on the other side. All respective provisions are systematically interpreted in combination with the UNCAC provisions on the prevention of money laundering as well as with the general provisions on international cooperation and mutual legal assistance.

Following the legal positivistic approach, the chapter then explores the sociolegal dynamics and, at the same time, the challenges for the UNCAC by addressing the problem of the unwillingness and/or inability of many victim states to recover stolen assets. The research goes on to identify some national (Switzerland and Canada) and regional (Arab Forum on Asset Recovery) best practices for overcoming these obstacles. Using the *Ao* case, a case where asset recovery efforts between Macao, Hong Kong and the United Kingdom came to a successful end, as an illustration for UNCAC's use as an autonomous legal basis for international cooperation in asset recovery, this chapter argues that UNCAC's full potential still remains to be discovered by recovering jurisdictions and practitioners.

The critical legal approach to the emerging issue of settlements in transnational grand corruption cases and their implications for corruption victims' rights, as well as an outlook on the future of international and domestic asset

recovery practices with a view to determine whether the existing UNCAC framework is sufficient, or whether any other tools or amendments are necessary, round up the chapter.

Asset Recovery and the UNCAC in the Criminological and International Legal Context

UNCAC's Broad Scope of Application

Corruption crimes must be conceived and legally addressed in their broader criminal context in order to be fought effectively. The UNCAC, like all other international anti-corruption conventions,⁹ understandably shies away from providing a general definition of corruption. However, Chapter III of the UNCAC on 'criminalization and law enforcement' lists specific offences as acts of corruption. Chapter III is the heart of the UNCAC. Not only does it ensure national suppression of corruption by creating a minimum anti-corruption criminal standard among States Parties, whose national laws diverge significantly, but it also enables both general and asset recovery-related international cooperation by ensuring satisfaction of the requirement of double criminality. UNCAC States Parties are obliged to criminalize bribery of national public officials,¹⁰ bribery of foreign public officials and officials of public international organizations,¹¹ embezzlement, misappropriation or other diversion of property by a public official,¹² laundering of the proceeds of crime¹³ and obstruction of justice,¹⁴ while several other articles such as the ones on bribery and embezzlement of property in the private sector,¹⁵ illicit enrichment,¹⁶ abuse of functions,¹⁷ trading in influence¹⁸ and concealment¹⁹ are non-mandatory provisions.

The broad spectrum of UNCAC's criminal provisions shows that corruption is much more than bribery. Actually, embezzled and misappropriated funds (Article 17) are unsurprisingly much higher sums than bribery-related assets. Looting the state proves to be much simpler, easier and also more profitable than just receiving bribes. Further, the UNCAC, by expanding the scope of application of the money-laundering offence of Article 23 'to the widest range of predicate offences'²⁰ including 'at a minimum a comprehensive range of criminal offences established in accordance' with the Convention, takes note of the symbiotic relationship between corruption and corruption-related money laundering.²¹ By including predicate offences 'committed both within and *outside* the jurisdiction'²² of the State Party criminalizing money laundering, the

UNCAC recognizes the transnational nature of both corruption and money laundering as predicate offences.

Applying the UNTOC to Grand Corruption

Grand corruption²³ cases are typically transnational and therefore multi-jurisdictional. Bribes for the award of public contracts or stolen public funds are usually paid into foreign bank accounts or used to acquire real estate or other assets abroad. The proceeds of corruption are usually laundered through a number of countries, both major financial (onshore) centres and offshore havens, to impede tracing and seizure. It comes therefore as no surprise that both 'corruption' and money laundering are included as core crimes²⁴ in the UNTOC.²⁵

The UNTOC is the main international instrument in the fight against transnational organized crime.²⁶ Article 8 UNTOC obliges States Parties to criminalize (active and passive) bribery of national public officials.²⁷ Article 6 UNTOC requests the 'criminalization' of the laundering of proceeds of crime. The laundering of the proceeds of organized crime is useful to organized criminal groups because, on one hand, it disguises the illicit origins of their profits and, on the other hand, it makes the proceeds reusable for further investment in criminal activities. Corruption and money laundering support organized criminal groups (OCGs)²⁸ by enabling and facilitating their operations before commission of their crimes and by concealing their crimes after these have been committed. The profit-making and very diverse 'final' crimes of OCGs, which include trafficking in drugs, human beings, firearms or wildlife, offences against cultural heritage, fraud and other 'serious'²⁹ offences, could not be carried out without the organizational and entrepreneurial structures provided by the core crimes.

UNTOC becomes applicable only when the offences of bribery and money laundering are both 'transnational in nature and involve an organized criminal group'.³⁰ But most grand corruption and money-laundering cases will fulfil these criteria.

Practical Implications of Grand Corruption's Transnational Organized Nature

UNTOC's applicability on corruption and money-laundering cases is of significant importance for asset recovery. First, and from a procedural point of view, it allows for the application of UNTOC's quite extensive provisions on

international cooperation for the purposes of seizure, confiscation and actual recovery of the proceeds of transnational organized corruption. Article 12 UNTOC ('Confiscation and Seizure') requests States Parties to adopt 'such measures as may be necessary to enable the identification, tracing, freezing or seizure' and the consequent confiscation of the proceeds of crimes derived from offences covered by the UNTOC. Article 13 UNTOC ('International Cooperation for purposes of Confiscation') requires that States Parties cooperate with each other 'to the greatest extent possible within their domestic legal system' to enable confiscation of the proceeds of crime. Article 14 UNTOC ('Disposal of confiscated proceeds of crime or property') regulates how confiscated assets shall be disposed of. Finally, Article 18 UNTOC ('Mutual Legal Assistance') contains extensive provisions on asset recovery-related tools of mutual legal assistance.

Secondly and from a substantive criminal law point of view, UNTOC's framework allows for the punishment of a group of criminals participating in transnational organized corruption and money laundering. The depiction of corruption crimes, including the laundering of the proceeds of corruption, as the purpose of the establishment and the continuing operations of such organized criminal groups (OCGs) helps to address the role of kleptocrats' associates and legal and financial service providers as criminal accomplices. In large-scale grand corruption cases, the focus of law enforcement should not be limited to convicting the offender, usually a senior government official, and recovering and repatriating the respective proceeds of corruption. Addressing the role of international business partners as well as banks and other gatekeepers is equally important. Asset recovery should not be used just as a tool for depriving the bribees of their profits but also for identifying and dismantling the global support system of corruption. Autonomous criminalization of the offence of participation in a transnational OCG aiming to commit corruption crimes can also lead to serious criminal procedural benefits, such as the very effective special investigative tools that can be utilized in cases of OCGs.³¹

Thirdly and from a criminological point of view, UNTOC's anti-corruption legal framework helps us to conceptualize bribery as an integral part of a much bigger criminal picture. Bribery does not occur as a stand-alone offence. It prepares the act of breach of duty or abuse of function by the bribee and often enables, as shown above, the commission of a series of further 'final' serious crimes by the briber or his accomplices. When these profit-motivated serious crimes are committed by an organized criminal group across national borders, corruption becomes much more than a crime against integrity: it is used to facilitate or conceal TOC and so becomes indirectly a threat for a myriad of legal interests and goods including the rule of law and public order.

The strong dependency of the application of UNCAC's asset recovery provisions on the very broad criminal provisions of the UNCAC and the UNTOC reveals the importance of national jurisdictions criminalizing all UNCAC and UNTOC offences and extending their legislative confiscation framework to all of these offences.

Despite the above theoretical and practical benefits for asset recovery of establishing a systematic interconnection between the UNCAC and the UNTOC, there are significant limitations to UNTOC's applicability in corruption-related asset recovery cases. Besides the vast difference in terms of content and in-depth analysis between the asset recovery provisions of the two international legal instruments,³² as well as UNTOC's limited scope of application to corruption cases of transnational and organized nature, UNTOC has two further main weaknesses compared with the UNCAC. First, UNTOC's provisions allow compliance-averse States Parties an 'escape hatch'³³ by requesting them to take only measures that are 'appropriate', 'consistent' and 'permitted' within their domestic legal system. UNTOC's asset recovery provisions are non-mandatory, whereas the basic UNCAC provisions are legally binding. Secondly, UNTOC's enforceability is limited by the lack of an effective review mechanism.³⁴ By contrast, state compliance with the UNCAC is supported by an extensive set of tools and guidance for implementation provided by UNODC.³⁵

The UNCAC as a Legal Basis for International Cooperation in Asset Recovery

International cooperation aims to ensure cooperation between prosecution and judicial authorities of different countries in various cross-border situations. The main instruments for international judicial cooperation are extradition (in criminal matters) and mutual legal assistance (MLA). The purpose of MLA is to facilitate gathering and exchanging of information and obtaining evidence in one ('requested') country in order to assist judicial proceedings in another ('requesting') country.

Domestic jurisdictions generally require one of the four legal bases to provide formal MLA in asset recovery cases: international conventions containing provisions on MLA in asset recovery, such as the UNCAC and the UNTOC; domestic legislation allowing for international cooperation in asset recovery; bilateral mutual legal assistance agreements; or a promise of reciprocity through diplomatic channels (known in some jurisdictions as letters rogatory).

International cooperation on the legal basis of the UNCAC can take two forms depending on the constitutional requirements of each State Party for the transposition of international law into domestic law.³⁶ In some jurisdictions

the mere act of ratification of a self-executing international convention such as the UNCAC makes the convention provisions part of domestic law. In these jurisdictions, MLA in asset recovery may be granted directly based on the UNCAC provisions. In dualist countries, the provisions of international treaties must be transposed into domestic law by virtue of national legislation before they acquire legal force.

Outline of UNCAC, Chapter V

Chapter V (Articles 51–59) of the UNCAC codifies international asset recovery best practices. State Parties are obliged to take the necessary measures, including legislative and administrative measures, in accordance with the fundamental principles of their domestic law, to ensure compliance with the UNCAC.³⁷ The special provisions of Chapter V must be read in combination with a number of general provisions contained in Chapters II–IV of the UNCAC and referring directly or indirectly to asset recovery. Particularly relevant for asset recovery are: Article 14 on the prevention of money laundering; Article 31 on the establishment of a regime for domestic freezing and confiscation of the proceeds of corruption as a prerequisite for international cooperation and the return of assets; Article 39 on cooperation between national authorities and the private sector; Article 43 on international cooperation; and Article 46 on mutual legal assistance.³⁸

Actual recovery of the corrupt assets by returning them to the victims of corruption³⁹ requires different phases of asset recovery. In general three different procedures can be used for asset recovery: criminal confiscation or forfeiture,⁴⁰ non-conviction-based confiscation or forfeiture⁴¹ and civil proceedings.⁴²

Prevention of Laundering the Assets

An effective anti-money-laundering environment is a prerequisite for asset recovery. Consequently, Article 52 UNCAC requires States Parties to take a series of measures in order to prevent the transfer of the proceeds of corruption crimes. Article 52 must be read in conjunction with Article 14 UNCAC on the prevention of money laundering. While the basic operational principles of an anti-money-laundering (AML) prevention system are foreseen in Article 14, Article 52 will, ideally, prevent the proceeds of corruption from leaving the State Party of origin or at least will alert the authorities of the relevant transactions. Even when the transfer cannot be prevented by the

institutions of the State Party of origin, state compliance with the provisions of Article 52 will help the institutions of the receiving State Party either to refuse the property transfer or to report it. The main requirements introduced by Article 52 are discussed below.

Verification of Customer Identity

Verification of a customer's identity by financial institutions goes much further than a mere formal identification. AML 'know-your-customer/client' (KYC) rules, when applied in a strictly formal way, can be limited to obtaining a copy of a customer's identity card or company formation document.

'Verifying' customer's identity includes confirming the authenticity of the identity documents, obtaining certified (by a public notary or another financial institution) copies of the identification documents particularly in cases of non-face-to-face establishment of the client relationship, or in the case of legal entities obtaining an updated copy of the documents of incorporation from the public companies' registries, official bulletins or gazettes.

Identification of Beneficial Owners of High-Value Accounts

By requiring States Parties 'to take reasonable steps to determine the identity of the beneficial owners of funds deposited in highly valued accounts',⁴³ the UNCAC aims to impede the use of third persons holding the proceeds of crime on behalf of corrupt individuals.

Beneficial owners are *natural* persons who ultimately own or control a fund or an asset and/or natural persons on whose behalf a transaction is being conducted. The term also includes those natural persons who ultimately exercise *effective* control over a legal person or arrangement.⁴⁴ In cases of beneficial ownership the ultimate ownership/control is exercised through a chain of ownership or by means of control other than direct control. Establishing such a long chain of ownership/control can serve legitimate purposes of tax planning or be abused to provide anonymity to criminals and slow down law (asset recovery) enforcement procedures.

In complying with their Convention obligations States Parties may consider prohibiting financial institutions (mainly banks) from accepting as an asset holder a corporate vehicle or a legal entity, the identity of which cannot be established as a beneficial owner, or may oblige their home financial institutions to require that corporate clients lift their so-called corporate veil.

Determining what minimum amount makes an account qualify as a 'highly valued account' remains within the discretionary power of implementing States Parties. So does applying the requirement not only to bank accounts but also to other financial products. Special attention must be given to joint bank accounts, joint securities accounts, investment companies and other collective investments, as well as to assets held by 'offshore' companies having their registered seat in 'tax havens'.⁴⁵ In the case of offshore companies, States Parties must compel their financial institutions to require, in addition to a certified copy of the incorporation documents verifying their identity, a written declaration indicating the beneficial owner(s) of the assets concerned.

Enhanced Scrutiny over Accounts Held by Politically Exposed Persons (PEPs)

Article 52 of the UNCAC next requires States Parties to compel their financial institutions to conduct enhanced scrutiny of accounts maintained by so-called politically exposed persons (PEPs). PEPs are defined in Article 52(1) as 'individuals who are, or have been, entrusted with prominent public functions, as well as their family members and close associates'. Individuals exercising public functions include, for example, Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations and important party officials.⁴⁶ PEPs can be domestic, foreign PEPs or individuals working for an international organization. The precise definition of PEPs remains with the States Parties. While defining the spectrum of family members based on the degree of family, kin and marriage relationships can be clear and easy, the definition of 'close associates' is very difficult and poses many interpretative challenges. According to the FATF Recommendations the definition of PEPs shall not cover middle ranking or more junior individuals in the categories mentioned above.⁴⁷

Record-Keeping

Article 52(3) requires that advisories issued in accordance with Article 52(2) (a) must specify a special record-keeping obligation for high-risk customers and PEPs going beyond the general duty in Article 14(1). The records must be 'adequate' and maintained over an 'appropriate' period of time, thus leaving to States Parties a lot of discretionary power in concretizing the respective obligations of financial institutions. In any case it is advisable that national regulators establish timescales for retention of records that go well beyond the

statutes of limitations for corruption offences. Significantly prolonging the time limits of record-keeping obligations for PEPs is a further best practice.

Preventing the Establishment of, and Correspondent Relationship with, Shell Banks

One of the most used financial vehicles to hide assets in the international financial system is a so-called ‘shell bank’. According to Article 52(4), shell banks are ‘banks that have no physical presence (in the country where they are incorporated and licensed) and are not affiliated with a regulated financial group’. Maintaining an office run by a local agent or by low-level staff is not enough for establishing a physical presence in a jurisdiction. The physical presence of a financial institution is usually understood as the place where ‘the mind and management’ of the institution is. Shell banks have their management located in a foreign jurisdiction, so preventing the regulator at the jurisdiction of incorporation from exercising its supervision and control.

The second element of the definition of a shell bank is the lack of affiliation with a supervised financial services group. Due to the consolidated nature of banking supervision, such an affiliation would extend regulatory supervision to the shell bank. Because of this lack of supervision and the anonymity offered to their clients, shell banks are frequently used to channel proceeds of crime out of a jurisdiction and are a popular money-laundering tool in major corruption schemes.⁴⁸ Consequently, Article 52(4) requires States Parties to adopt measures to prevent the establishment of shell banks in their jurisdictions.

Funds rarely remain deposited in a shell bank for long. Shell bank accounts are usually a ‘transit’ destination for corrupt assets. For this reason, the UNCAC recommends that States Parties also prohibit their banks from establishing correspondent banking relationships with shell banks.⁴⁹ A correspondent bank is effectively acting as its respondent’s agent, processing payments or other transactions for the respondent’s customers. Foreign correspondent banking can be abused to circumvent strict supervision conditions for respondent financial institutions and to facilitate money laundering.

Financial Disclosure Systems for Public Officials

Following up on Article 8(5) UNCAC,⁵⁰ Article 52(5)–(6) recommends States Parties to establish financial disclosure systems for appropriate public officials, including information on ownership of foreign accounts.

Detecting and Freezing the Assets

When it has not been possible to prevent the laundering of corrupt assets, then rapidly identifying, locating and freezing the assets becomes the most important stage of asset recovery. The chances of successful detection are in most cases higher before MLA has been formally launched.⁵¹ Article 56 UNCAC introduces the innovative and very useful concept of spontaneous sharing of information without prior request by the victim State Party. States Parties are encouraged to advise each other of information that could lead to investigations, judicial proceedings or requests for assistance to recover the proceeds of corruption.

Determining the Proceeds of Corruption

Determining what exactly constitutes ‘proceeds’ of corruption is the next step in asset recovery. Proceeds of crime are defined as ‘any property derived from or obtained *directly or indirectly* through the commission of an offence’.⁵² Direct proceeds would include funds paid for by a bribe or amounts stolen by an official from a national treasury or governmental programme. Indirect proceeds would include the appreciation in the value of the bribery payments or real estate or a stock portfolio purchased with the stolen treasury fund.

The following simple case scenario⁵³ shows how quantifying the direct and indirect proceeds of corruption works in practice. Mr. X is a corrupt official who accepted a cash bribe of US \$100,000. A series of transactions subsequently took place to launder the funds: (1) Mr. X deposited the bribe into a bank account in his wife’s name; (2) Mr. X caused his wife to transfer the money into the trust account of a lawyer in London, UK. This lawyer was already holding US \$900,000 on behalf of Mr. X (the origins of which are unknown); (3) the lawyer purchased a property worth US \$1 million in the name of an investment company controlled by Mr. X; and (4) three years later, Mr. X sells the property for US \$2 million and has the proceeds returned to an account controlled by him in his home country. In this case the capital gain on the sale of the house (doubled in value) must be added to the amount *directly* derived from the bribe (US \$100,000) to make up the *total proceeds of crime* in value of US \$200,000.

Freezing the Assets of Corruption

Once the exact amount of the proceeds of corruption has been estimated, it is pivotal for the effectiveness of international asset recovery that the involved states cooperate in freezing or seizing the assets temporarily. Articles 54 and

55 follow up on the general provisions of Article 46⁵⁴ regarding MLA by specifying the asset recovery-related procedures.

Article 54(2) of the UNCAC requires States Parties to take all necessary provisional (or interim) measures to enable the eventual permanent confiscation of corrupt assets. For this States Parties are required to cooperate in the recognition and enforcement of foreign freezing orders and in the issuance of domestic freezing orders. The freezing order can be issued by a court or competent authority of the requesting State Party (a) where either provides a reasonable basis to believe that there are sufficient grounds for enforcing it and that the property will eventually be subject to a permanent order of confiscation, or (b) upon a request by the victim State Party on the same basis.⁵⁵

Article 54(2)(c) recommends that States Parties take not only measures of seizure but also other provisional measures of asset recovery so that assets are preserved for eventual confiscation.

Confiscating the Assets

Seizure of the corrupt assets is to be followed by their permanent confiscation. Confiscation (also known as forfeiture) can take the form of criminal (conviction-based) confiscation, non-conviction-based/civil confiscation and administrative confiscation. Under domestic laws, confiscated assets are typically payable to the state, although they can also be used in some jurisdictions for restitution or compensation of victims.

Articles 31, 54 and 55 of the UNCAC are applicable in cases of criminal forfeiture. The required criminal liability for the underlying corruption offences is to be established by States Parties on the basis of the criminalization provisions of Chapter III of the UNCAC ('criminalization and law enforcement').

Article 54 aims at establishing procedures for States Parties to secure the confiscation of the proceeds of corruption originating from another State Party. The scope of international cooperation in confiscation is broadened significantly by including forms of property not only 'acquired through' but also 'involved in the commission' of a corruption offence.

The obligation of States Parties under Article 54(1)(a) to enforce an order of confiscation issued by a foreign court can be fulfilled, as is the case with seizure orders, by way of two procedures. The requested State Party may either recognize and enforce the foreign confiscation order or else initiate proceedings on behalf of the requesting State Party or issue a new domestic confiscation order in accordance with its own law. The latter option will in most cases prove very complicated, politically sensitive and less effective than the first,

since it transfers criminal proceedings to a foreign jurisdiction: ‘experience in this area clearly demonstrates that the direct enforcement approach is much less resource intensive, avoids duplication and is significantly more effective in affording the assistance sought on a timely basis’.⁵⁶ Nevertheless, sometimes the institution of new confiscation proceedings may be the only possible legal resolution, such as when the State Party requested to enforce a confiscation order against a legal person does not recognize the criminal liability of legal persons.

Article 54(1)(b) reflects the immense significance of prosecuting money laundering for effectively fighting predicate corruption offences. States Parties, to whose jurisdictions the corrupt proceeds have been exported, are required to legally enable the confiscation of the proceeds of foreign predicate offences through money-laundering-related proceedings.

Article 54(1)(c) complements the arrangements for criminal confiscation by recommending that States Parties put in place instruments for non-conviction-based confiscation. The implementation of this recommendation depends on the punitive or restorative character that each State Party assigns to the concept of confiscation. Non-conviction-based confiscation is the only way to recover assets when a criminal conviction cannot be obtained by reason of death, flight or absence.

Next, Article 54 enables the implementation of Article 55. Article 55(1) mandates States Parties to provide assistance ‘to the greatest extent possible’ within their domestic legal system, when they receive a request from another State Party having jurisdiction over a corruption crime for the confiscation of proceeds of crime situated in their territory. The formal details are set out under Article 55(3).

Returning the Assets

The provisions of Articles 54 and 55 regarding international cooperation in seizure and confiscation pave the way for Article 57 on the return and disposal of assets. There can be no effectiveness in prevention, no confidence in justice and the rule of law and no faith in the notion that corruption does not pay, unless the proceeds of corruption are taken away from criminals and returned to the rightful owners. For this reason, Article 57 lies at the heart of asset recovery. Article 57 of the UNCAC establishes some *mandatory* requirements and general rules upon which States Parties shall base their procedures for the return and disposal of confiscated assets, once the proceeds of corruption have been traced, frozen and confiscated.

States usually dispose of or return confiscated assets in two ways. The first is by 'sharing' confiscated assets with a foreign state that participated directly or indirectly in the investigation leading to confiscation. This will be in most cases the victim state, but it can also be any other state whose jurisdiction was affected directly or indirectly by the transborder transfer of the corruption-related assets. The state in whose territory the assets were confiscated will retain only that portion of confiscated assets to recoup the costs incurred in the confiscation procedure. Confiscated assets are 'shared' between states on the basis of respective ad hoc agreements. Another option is for states to 'remit' the confiscated assets to the victims of the criminal activity upon which confiscation was based (so-called 'underlying' criminal activity).

Returned assets fall within three main categories: First, there are embezzled or misappropriated (and later laundered) funds in accordance with the criminal provision of Article 17 ('Embezzlement, misappropriation or other diversion of property by a public official'). The bulk of the recovered assets recorded in the Asset Recovery Watch database⁵⁷ fall under this category. Secondly, there are other proceeds mainly resulting from foreign bribery (Article 16 on 'Bribery of foreign public officials and officials of public international organizations') and related cases. Asset Recovery Watch reports only a small number of foreign bribery cases. Lastly, there are other funds, such as voluntary reparation payments. Reparations are gratuitous or voluntary payments made by a wrongdoer to atone for harm caused. Such amounts are payable to the victims but could also be payable to a third party, such as a humanitarian organization. Minimal funds have been repaid so far for reparation on such a voluntary basis. One of the most notable cases is BAE Systems, in which the company agreed to make an ex gratia payment for the benefit of the people of Tanzania.⁵⁸

For the first set of assets (embezzled or misappropriated funds), Article 57(3)(a) provides for the *mandatory* return of the confiscated property to the requesting State Party. The confiscated proceeds of embezzlement and the laundered embezzled assets must be returned to their rightful owner after reasonable confiscation expenses have been deducted.

In the case of all other corruption offences, Article 57(3)(b) requires that assets be returned if the requesting state establishes prior ownership or if the requested state recognizes damage to the requesting state.

In all other cases Article 57(3)(c) recommends that State Parties shall consider 'compensating the victims of the crime'. Compensation must be interpreted in its broadest sense to include all forms of 'restitution'. The principle of restitution requires that a person who has suffered loss as a result of wrongdoing against him/her must be restored as nearly as possible to their circumstance

before the damage took place. Restitution can be either civil or criminal. In some jurisdictions, the court has the power to order the guilty party to pay restitution to the victim as part of a criminal conviction in an amount equal to the costs incurred by the victim as a result of the guilty party's actions. Compensation is a formal way of restitution, in that a court may issue a compensation order in a criminal case where a victim has been identified in the proceedings and has proved he or she suffered damage. The compensation order will often form part of the confiscation.

Article 57 is complemented by Article 53 on the direct recovery of dirty assets through civil proceedings. Prior ownership, damage recovery and compensation are different legal grounds for the victim State Party to claim in the civil courts of the State Party where the assets were located. Article 53 mandates States Parties to ensure in their jurisdictions that other States Parties have legal standing for claiming misappropriated assets by initiating civil actions and other direct means to recover illegally obtained and diverted assets. The UNCAC requires that victimized States Parties are granted appropriate legal standing in a civil action on property, as a party recovering damages caused by criminal offences, or as a third party claiming ownership rights in any civil or criminal confiscation procedures.

Articles 57(3)(c) and 53 must be read in conjunction with Article 35 ('Compensation for damage'), which requests States Parties 'to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation'.

Asset Recovery in Cases of Inactive (Unwilling or Unable/Failed) Victim States

Chapter V contains innovative, and most importantly mandatory, provisions regarding the return and disposal of corruption-related assets, but nevertheless gives States Parties discretion to make their own arrangements between themselves on a case-by-case basis. Article 57 clearly envisages that victim states will want stolen assets returned or will be able to claim such recovery.⁵⁹ Yet in many international grand corruption cases the actual recovery of stolen assets fails because there is no real interest on the side of victim states to recover their assets. It often occurs that victim states do not even submit a request for asset recovery.⁶⁰

The UNCAC itself does not oblige victim states to prosecute corruption domestically or to initiate international cooperation proceedings by request-

ing fellow States Parties to offer mutual legal assistance in the recovery of the proceeds of corruption. This could never be the declared aim of an international convention. Putting 'law in books' in 'action' is the sole responsibility of the national law enforcement agencies. UNCAC's purpose is to oblige States Parties to enact a minimum set of anti-corruption laws and to harmonize the national anti-corruption law *enactment* practices.

Barriers to Asset Recovery

The reasons why victim states remain inactive in recovering their stolen assets vary. When corruption becomes systemic and endemic, victim states often lack the political will to expose their corrupt political elite.⁶¹ Most developing countries also lack the institutions and law enforcement mechanisms to *effectively* seek restitution by initially prosecuting corruption at home and then supporting their developed fellow UNCAC countries in substantiating claims of seizure and confiscation.⁶²

In many cases victim countries are undergoing political transition or situations of war, or civil unrest, making interstate cooperation in complex asset recovery procedures impractical or impolitic. The cases of Arab countries like Libya, Egypt and Tunisia transitioning from their previous corrupt regimes⁶³ following the 'Arab Spring' (2011) demonstrate the major challenges for asset recovery in countries in transition. Despite the strong political impetus to repatriate stolen assets to the victim states, only minimal assets have been recovered so far.⁶⁴

For successful international cooperation in asset recovery, two states must cooperate effectively. The 2015 UK asset recovery case of former Ukrainian natural resources minister (under former President Viktor Yanukovich), Mykola Zlovesky, highlighted a crucial flaw in countries' efforts to cooperate in asset recovery cases across borders: 'Even in the rare cases when the UK does freeze a foreign official's property, it is dependent for evidence from colleagues abroad who usually have fewer resources, less training and a decades-long tradition of institutionalized corruption'.⁶⁵ Despite the United Kingdom's commitment to confiscate misappropriated money belonging to Yanukovich's allies and return it to the people of Ukraine, Ukrainian prosecutors failed to support the United Kingdom's Serious Fraud Office (SFO) in its efforts to confiscate USD 23 million of Zlovesky's London-based assets by providing adequate evidence that the temporarily frozen money is related to a specific corruption crime.

Absent the victim state being willing or able to take effective asset recovery action, questions remain about the possibilities for the international community and the countries of location of the dirty assets to do justice and the role of civil society.

Best National, Regional and International Asset Recovery Practices

In cases of troubled or failed victim states asset recovery efforts remain a work in progress that requires a coordinated and comprehensive strategy involving governments, the private sector, civil society and the international community. The (usually developed) countries of location of the corruption-related assets should not wait for a request from the (usually developing) victim country before freezing assets located within their territories. Developed countries should adopt a proactive approach towards asset recovery for the best interest of the people of looted troubled countries and global justice.

There are some national laws which adhere to this best practice of unilateral asset recovery. The 2011 Swiss Restitution of Illicit Assets Act (RIAA)⁶⁶ (known as the 'Duvalier Law')⁶⁷ permits Switzerland to freeze and confiscate ill-gotten assets, when it believes that 'the country of origin is unable to satisfy the requirements of MLA proceedings owing to the total or substantial collapse, or the unavailability, of its national judicial system (failure of state structures)'.⁶⁸ The Swiss law allows the freezing of contentious assets for up to ten years before launching action to confiscate them in order to later return them. The Swiss example is followed by Canada's 2011 Freezing Assets of Corrupt Foreign Officials Act which targets assets of foreign politically exposed persons when in the foreign state 'there is internal turmoil, or an uncertain political situation' and the freezing of assets is 'in the interest of international relations'.⁶⁹

A success story from the Arab region shows that strong regional commitment and continuing efforts for cooperation based on the rule of international law can bear fruits. In April 2013 US \$28.8 million corruptly acquired by Tunisia's former President Ben Ali and held at a Canadian bank in Lebanon by Ben Ali's wife was handed over to Tunisia's President by the Attorney General of the State of Qatar and the United Nations Special Advocate for the Prevention of Corruption, Dr. Ali bin Fetais al-Marri.⁷⁰

The recovery of stolen assets taking place within the Arab World is the result of much hard work done within the Arab Forum on Asset Recovery (AFAR). AFAR is an initiative in support of asset recovery efforts by Arab countries in transition.⁷¹ It was established in 2012 and is supported by the G7, the Deauville Partnership with Arab Countries in Transition, as well as key global and regional financial centres. Since its first meeting in November 2012 in Doha, Qatar, AFAR has addressed the key needs of Arab states in recovering assets and has served as a forum for practical action and cooperation. Mobilizing both policy makers and practitioners, the Arab Forum has

generated political momentum, raised awareness locally and internationally of effective measures for asset recovery, promoted domestic coordination and facilitated international cooperation in asset recovery cases.

Including Corruption's Victims in the 'Bargain'

Even in cases where victim states actively pursue recovery, and assets are successfully located, frozen and confiscated, a series of technical legal issues and competing states' claims complicate things and often result in leaving the true victims of corruption 'out of the bargain'.⁷² Despite the imperative to repatriate stolen and corrupt assets to the countries of origin, problems have often arisen with the actual return of assets. But as it has been noted emphatically, 'in the end, the UNCAC is and must be about actual recoveries'.⁷³

Defining 'Victims'

In this context one should first address the complex question of who is or should be considered a *victim* of corruption. In a particular foreign bribery case, whether harm was suffered, by whom, and where, may prove very difficult to identify and quantify. Things get even more complicated when dealing with various corruption-related offences. For these reasons, there is currently no commonly agreed upon legal definition of corruption victims at the global level. The UNCAC uses the term 'victim' when addressing participation as a civil party to a criminal action⁷⁴ and the conditions for qualifying for restitution,⁷⁵ but it intentionally avoids further definition of the term.

The concept of a *victim or affected country* is even more complicated and deserving of such a thorough debate, that would go well beyond the scope of this chapter. For the purposes of this study a victim or affected country is understood as any country that may claim harm as a result of transnational bribery, which includes in particular the countries whose officials were allegedly bribed. Countries whose facilities are used, whose nationals serve as intermediaries or whose markets are touched by transactions may also take the position that they are affected. At an individual level the victims of bribery shall be sought on the basis of the principal-agent theory⁷⁶ in the circle of the (public or private sector) principals of the corrupt agents/bribees and possibly be extended to competitors of the bribers and other third parties. The broad spectrum of corruption's victims at both a collective and an individual level clearly contradicts the myth that 'corruption is a victimless crime'.

Settlements in Foreign Corruption Cases

A study by the StAR Initiative on the implications of settlements in foreign bribery cases for asset recovery⁷⁷ and the respective database of foreign bribery cases,⁷⁸ which supplements and extends the study, show that of more than US \$6.9 billion realized worldwide between 1999 and mid-2012⁷⁹ in monetary sanctions for settlements, only 3.3% (US \$197 million) had been returned to states whose officials had been bribed and where corrupt transactions had taken place.⁸⁰

Settlements can be defined for the purposes of this study broadly to include various procedures for concluding foreign bribery cases short of a full trial. These abbreviated and negotiated procedures, in which the two sides (prosecution and defendant) reach a mutually acceptable agreement, can take different forms from one legal system and jurisdiction to the other: guilty pleas, out-of-court restitution arrangements, civil settlements in the United Kingdom and deferred- and non-prosecution agreements in the United States.

From a domestic enforcement perspective, law enforcement and judicial authorities consider settlements an efficient and effective tool to handle complex cases of foreign bribery in a timely manner. The StAR study indicates that settlements are increasingly being used to resolve cases of foreign bribery and related offences. Most recovered through settlement assets relate to embezzled and misappropriated assets (under Article 17 of the UNCAC). The settling jurisdictions are mainly developed countries,⁸¹ whereas the victim countries are mostly developing countries. The reported settlements have been concluded, for the most part, without the involvement or cooperation of the jurisdictions whose officials were allegedly bribed.

The StAR data reveals a huge gap between the amounts realized through settlements and other alternative mechanisms and those returned to the victim countries. Overall the victim jurisdictions were very infrequently and only occasionally informed, consulted or in any other way involved in the conclusion of settlements.⁸² These findings demonstrate that the victims of transnational grand corruption, mainly developing countries, have so far been left out of the settlement 'bargains' made mainly by developed countries.

The UNCAC does not explicitly deal with settlements. However, Chapter V of the UNCAC establishes as a fundamental principle the recovery and return of assets to prior legitimate owners and those harmed.⁸³ Transparency is a further underlying principle of the UNCAC. The trends in the current settlement and asset recovery practices, as outlined above, contradict one of the main functions and purposes of asset recovery: repairing the damage done

to the victims. Such practice is in clear contradiction with the basic principles and the true spirit of the UNCAC.

Correct implementation of the UNCAC by States Parties implies the need for greater transparency in settlements. The negotiation of settlements typically takes place between the authorities and alleged offenders, with little oversight by a judge and sometimes without any public hearing at the conclusion. Victims should be allowed access and participation and generally more involvement in the settlement process. There is also a need for more public information on settlements globally. Once an agreement has been reached, it should be made public. Most importantly States Parties must achieve higher rates of actual repatriation of corrupt assets, restitution and compensation of victims.

Last but not least, the needs of civil society must be considered when deciding upon the use of recovered assets. If civil society participation as a preventive measure provided by the UNCAC in Article 13 is to be taken seriously, a notable proportion of recovered assets should be invested in strengthening the capacities of civil society, anti-corruption education and youth empowerment. Youth anti-corruption education in integrity ethics must become one of the main recipients of recovered assets. In any case, the post-recovery use of assets by victim countries must guarantee transparency and accountability.⁸⁴

UNCAC in Practice: The AO Man-Long Case

In 2008 Ao Man-Long, former Secretary of Transport and Public Works of the Macao Special Administrative Region (SAR) of China, was convicted of bribery and bribery-related offences involving approximately US \$103 million. He was found guilty of receiving bribes from the Hong Kong real estate tycoon Joseph Lau for favouring Lau's company, Chinese Estates Holdings Ltd., in relation to the acquisition of land in Macao.

In order to launder the bribes, Ao had set up shell companies and a network of secret bank accounts in Hong Kong and the British Virgin Islands with the help of friends and family members. Thirty-nine bank accounts and a safe deposit box for cash were used to hide the corrupt assets at several banks in Hong Kong. Substantial funds were also sent from Hong Kong to the United Kingdom for the purchase of real estate.

Part of the corruption-related assets was recovered in Hong Kong on the basis of private civil action. Due to the absence of an MLA Treaty between Macao and Hong Kong, Macao had to file a civil suit in Hong Kong to recover Ao's illicit assets. Informal MLA channels were used in order for the Hong Kong Independent Commission against Corruption to trace the corrupt

assets. Subsequently Hong Kong issued a confiscation order of approximately US \$32 million.

The procedure followed for the recovery of the UK-based assets is an exemplary case of the successful implementation of the UNCAC as a basis for international cooperation. Both the MLA Treaty between Hong Kong and the United Kingdom and the UNCAC were used in parallel as independent legal bases for asset recovery. The UNCAC offences implicated were the ones established by Articles 16, 18, 19, 20 and 23. On the basis of the money-laundering offences committed in the United Kingdom, the requesting authorities could freeze the UK real estate asset. Eventually the property was sold under a court order. Under an agreement signed on 3 November 2015 between the government of Macao and the United Kingdom, the latter committed to return GBP £28,718,752.63 to the government of Macao.

Challenges and Outlook

The UNCAC is the most applicable multilateral treaty for international cooperation and MLA in the recovery of the proceeds of corruption. It obliges 181 States Parties to afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings concerning corruption matters. The UNCAC undoubtedly guides the design of the international asset recovery regime. Its asset recovery provisions present a well-established and supported, in terms of guidance for State Parties and practitioners, mechanism for international asset recovery.

However, the international framework can only be implemented and put to work through its implementation at the domestic level and through the action of national authorities. In this context, the coverage and convergence of national systems are critical in determining the effectiveness of UNCAC as a whole and its asset recovery provisions in particular. Part of the legal doctrine criticizes this dependency and the respective flexibility in UNCAC's provisions.⁸⁵ Yet, it must be acknowledged that in 2003, the UNCAC entered unknown territory with its detailed mandatory provisions on asset recovery and as a truly universal legal instrument it had to seek consensus and make compromises amid conflicting countries' interests.⁸⁶

Unfortunately, many States Parties still do not comply fully with their direct (MLA-related) and indirect (criminalization-related) obligations under Chapter V of the UNCAC. Criminal law-related compliance suggests that national jurisdictions expand their anti-corruption and AML criminal provisions to the widest range of offences established both under the UNCAC and

the UNTOC and ensure that the scope of their domestic legal framework for seizure and confiscation encompasses all offences under the international conventions.

With regard to MLA-related compliance, a few States Parties do not have a domestic MLA framework in place at all, while other states frequently fail to allow in their domestic MLA laws for all types of assistance (especially assistance in NCB and civil confiscation)⁸⁷ as set out in the UNCAC, provide for overly broad grounds for MLA refusal or apply overly stringent evidentiary requirements.⁸⁸ Even in jurisdictions where transposition of international self-executing provisions, such as many of the ones contained in Chapter V of the UNCAC, is not required, practitioners are often unfamiliar with the UNCAC provisions on asset recovery and rarely use them as an independent legal basis for cooperation.⁸⁹ The direct applicability of the UNCAC as an autonomous legal basis for transborder asset recovery is an invaluable tool, which is often overlooked in theory and practice.

Consequently, States Parties are encouraged to put in place legislation that provides for the widest possible range of asset recovery tools in accordance with the UNCAC. Particular attention should be given to mechanisms for non-conviction-based forfeiture and civil proceedings. In most jurisdictions these legal avenues require a much lower evidential threshold than criminal forfeiture, they are quicker and they don't have to meet the problematic precondition of dual criminality.

The challenges posed by money laundering and the flaws in effectiveness and efficiency of the global AML legal framework and regulatory policies should not discourage us from further strengthening international cooperation in asset recovery. Asset recovery theory and practice need to adopt the broadest possible approach and further explore and intensify synergies between the international laws against corruption, money laundering and transnational organized crime.

With regard to the repatriation of confiscated corrupt assets to the victim countries, this chapter argues that respect of victims' rights for compensation should be the guiding principle in international asset recovery. The current practice contradicts this finding. Despite the good deal of progress made by countries to foster asset recovery, much more work needs to be done if the international community truly aspires to fulfil the promise of the UNCAC: global justice in line with victims' rights for restitution.

The fact that Chapter V of the UNCAC (together with Chapter II on 'Preventive Measures') is currently (2015–2019) undergoing review by the Implementation Review Group of the Conference of States Parties to the UNCAC presents an ideal opportunity to strengthen compliance at the national level by helping countries identify and address any implementation gaps and

expand national and regional (e.g. Arab Forum on Asset Recovery) best practices in asset recovery. As experience and expertise will improve, more and more countries are expected to base their requests for international cooperation in asset recovery on the UNCAC. As the US Attorney General Eric Holder noted,

it is only with a truly international and cooperative response that we will be able to achieve success in recovering the proceeds of corruption.⁹⁰

Notes

1. United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) (UNCAC), Foreword iii–iv.
2. The text of the UNCAC is available at <<http://www.unodc.org>> accessed 10 April 2017.
3. For further discussion, see Kevin M Stephenson and others, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (World Bank 2011); Indira Carr and Robert Jago, ‘Corruption, the United Nations Convention Against Corruption (‘UNCAC’) and Asset Recovery’ in Colin King and Clive Walker (eds), *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate Publishing 2014).
4. For discussion of illicit financial flows from developing countries, see Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2004–2013* (Global Financial Integrity 2015).
5. EU Anti-Corruption Report, ‘Report from the Commission to Council and the European Parliament’ COM (2014) 38 final, 3.
6. UNODC, *Estimating Illicit Financial Flows Resulting From Drug Trafficking and Other Transnational Organized Crimes* (UNODC 2011); For criticism of the UNODC report, see Chap. 15 (van Duijne, Harvey, and Gelemerova) in this collection.
7. UNODC and World Bank, *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan* (World Bank 2007) 1.
8. As of 10 April 2017.
9. For a brief overview of the anti-corruption Conventions, see Carr and Jago (n 3) 206–10, and for more detail, Marco Arnone and Leonardo Borlini, *Corruption: Economic Analysis and International Law* (Edward Elgar Publishing 2014) 219–270; Jan Wouters, Cedric Ryngaert, and Ann Sofie Cloots, ‘The International Legal Framework Against Corruption: Achievements and Challenges’ (2013) 14(1) *Melbourne Journal of International Law* 1.
10. UNCAC art 15.
11. UNCAC art 16.

12. UNCAC art 17.
13. UNCAC art 23.
14. UNCAC art 25.
15. UNCAC arts 21 and 22.
16. UNCAC art 20.
17. UNCAC art 19.
18. UNCAC art 18.
19. UNCAC art 24.
20. 'Predicate offence' means according to UNCAC art 2(h) any offence as a result of which proceeds have been generated that may become the subject of money laundering.
21. David Chaikin and Jason C Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave Macmillan 2009), argue correctly that failure to properly understand the corruption-money laundering nexus undermines the success of policy measures to tackle them.
22. UNCAC art 23(2)(c).
23. *Grand* corruption as opposed to *petty* corruption is a non-legal term, which describes corruption occurring at the highest levels of (public or private) power and usually involving high sums of bribes or value of other undue advantages.
24. UNTOC itself proscribes four types of 'core' crimes: participation in an organised criminal group (Article 5), corruption (Article 6), money laundering (Article 8) and obstruction of justice (Article 23).
25. See United Nations Convention Against Transnational Organized Crime (UNTOC) (adopted on 15 November 2000, entered into force on 29 September 2003). The Convention has 147 signatories and 187 Parties as of 10 April 2017. For a comprehensive overview of the criminal provisions of the UNTOC, see Neil Boister, 'The UN Convention Against Transnational Organized Crime 2000' in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (OUP 2016).
26. See generally Roger S Clark, 'The United Nations Convention against Transnational Organized Crime' (2004) 50(1) *Wayne Law Review* 161; David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (OUP 2007); Dimitri Vlassis, 'The United Nations Convention Against Transnational Organized Crime and its Protocols: A New Era in International Cooperation' in International Centre for Criminal Law Reform and Criminal Justice Policy (ed), *The Changing Face of International Criminal Law* (International Centre for Criminal Law Reform and Criminal Justice 2002).
27. Article 8 UNTOC corresponds to Article 15 UNCAC, although it has a much broader title: 'criminalization of corruption'. Criminalizing bribery of *foreign* public officials or other forms of corruption remains a non-binding recommendation towards UNTOC States Parties.
28. The definition of 'organized criminal group' is set out in UNTOC art 2(a).

29. As defined in UNTOC art 2(b).
30. See UNTOC art 3(1). For the criteria of 'transnationality', see UNTOC art 3(2).
31. See UNTOC art 19 ('Joint investigations') and art 20 ('Special investigative techniques').
32. UNTOC's provisions are generally phrased and very basic when compared with UNCAC's thorough and clearly outlined procedures for international cooperation in asset recovery, as outlined below.
33. See Philippa Webb, 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?' (2005) 8(1) *Journal of International Economic Law* 191, 204. UNTOC's lacking precision and consequently enforceability is also seen in the loose definitions of 'organised criminal group' and 'serious crime'. See Boister (n 25) 149.
34. The Conference of Parties to the UNTOC has no clear powers: reviews need only be made 'periodically', and there is no process for verifying country reports. See Webb (n 33).
35. See, UNODC, *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* (2nd edn, United Nations 2012) <http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf> accessed 10 April 2017; UNODC and United Nations Interregional Crime and Justice Research Institute (UNICRI), *Technical Guide to the United Nations Convention Against Corruption* (United Nations 2009) <http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf> accessed 10 April 2017.
36. See Stephenson and others (n 3) 50.
37. UNCAC art 65(1).
38. Mutual legal assistance may be requested according to Article 46 for various purposes, including: '(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention'.
39. UNCAC art 57.
40. UNCAC arts 31, 54, and 55 in conjunction with Chapter III on corruption crimes.
41. UNCAC art 54(1)(c).
42. UNCAC art 53.
43. UNCAC art 52(1).
44. See FATF, 'International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation—the FATF Recommendations' (2012, last updated 2016), 113 <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> accessed 10 April 2017.
45. OECD, 'Global Forum on Transparency and Exchange of Information for Tax Purposes' <<http://www.oecd.org/tax/transparency>> accessed 10 April 2017, has identified a list of jurisdictions as 'tax havens'.

46. Public functions are exercised by 'public officials'. The latter are defined in UNCAC art 2(a).
47. FATF (n 44) 123.
48. See the Cayman Islands Guardian Bank and Trust case (Russo Cable case) in OECD, *Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes* (OECD 2001), 93 <<http://www.oecd.org/corporate/ca/43703185.pdf>> accessed 10 April 2017.
49. For further discussion of correspondent banks, see Chapter 11 (Ramachandran, Collin, and Juden) and Chapter 12 (Levi) in this collection.
50. '... requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials': UNCAC art 8(5).
51. Stephenson and others, (n 3) 55, recommend that jurisdictions should introduce mechanisms that allow for prompt tracing and *temporary* freezing of assets before a formal MLA request is filed.
52. UNCAC art 2(e). The same definition is adopted in UNTOC art 2(e). For 'property', see UNCAC art 2(d). Converted or mixed property is dealt with by UNCAC art 31(4)–(6).
53. Adopted from the training Module of the World Bank, *Asset Recovery Process and Avenues for Recovering Assets* (complementing the *Asset Recovery Handbook: A Guide for Practitioners* (World Bank 2011)), 12 <<http://pubdocs.worldbank.org/en/824561427730120107/AML-Module-5.pdf>> accessed 10 April 2017.
54. According to UNCAC art 46(1), 'States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention'.
55. UNCAC art 54(2)(a)–(b).
56. UNODC, *Legislative Guide* (n 35) 255.
57. StAR Asset Recovery Watch is a project of the Stolen Asset Recovery (StAR) Initiative of the UNODC and the World Bank. The database compiles, systematizes and publishes information about completed and active asset recovery efforts around the world. For more information, see their website <<http://star.worldbank.org/corruption-cases/arwcases>> accessed 10 April 2017.
58. See further Chapter 26 (Lord and Levi) in this collection.
59. Some see in this assumption a fundamental weakness of the UNCAC: Tim Daniel and James Maton, 'Is the UNCAC an Effective Deterrent to Grand Corruption?' in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (CUP 2013) 322.
60. This was the case with the assets of Zaire's (now the Democratic Republic of the Congo) corrupt President Mobutu Sese Sisoko. See Daniel and Maton (n 59) 321; Konye Obaji Ori, 'Swiss Court Approves African Kleptocracy: Mobutu's Loot to Go to his Family' *Afrik News* (15 July 2009) <<http://www.afrik-news.com/article15923.html>> accessed 10 April 2017.

61. Stephenson and others (n 3) 24 define lacking political will to mean a lack of a comprehensive, sustained, and concerted policy or strategy to identify asset recovery as a priority and to ensure alignment of objectives, tools, and resources to this end.
62. Daniel and Maton (n 59) 316 name Indonesia and Kenya as states which request assistance abroad but fail to produce evidence of any will to prosecute at home and the Democratic Republic of the Congo (DRC), Haiti, Equatorial Guinea, Gabon and the Congo Republic (Congo Brazzaville) as victim states which fail to take any action whatsoever.
63. Muammar Gaddafi, Hosni Mubarak and Zine El-Abidine Ben Ali, respectively.
64. See *The Economist*, 'Making a Hash of Finding the Cash' *The Economist* (Cairo, 11 May 2013) <<http://www.economist.com/news/international/21577368-why-have-arab-countries-recovered-so-little-money-thought-have-been-nabbed>> accessed 12 May 2017.
65. Oliver Bullough, 'The Money Machine: How a High-Profile Corruption Investigation Fell Apart' *The Guardian* (London, 12 April 2017) <<http://www.theguardian.com/world/2017/apr/12/the-money-machine-how-a-high-profile-corruption-investigation-fell-apart>> accessed 12 May 2017.
66. See full text of the 'Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons' (RIAA) <<http://www.admin.ch/opc/en/classified-compilation/20100418/201102010000/196.1.pdf>> accessed 10 April 2017.
67. For a discussion of the case of former (1971–1986) Haitian dictator Jean-Claude 'Baby Doc' Duvalier, see Daniel and Maton (n 59) 320ff, and the StAR, 'Asset Recovery Watch Report' <<http://star.worldbank.org/corruption-cases/node/18515>> accessed 10 April 2017.
68. RIAA (n 66) art 2 (c). For a detailed analysis of the RIAA, see Frank Meyer, 'Restitution of Dirty Assets: A Swiss Template for the International Community' in Katalin Ligeti and Michele Simonato (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart Publishing 2017).
69. Article 4(2)(b)-(c). See full text <<http://laws.justice.gc.ca/PDF/F-31.6.pdf>> accessed 10 April 2017.
70. Jean-Pierre Brun and Richard Miron, 'Tunisia's-Cash-Back: The Start of More to Come?' *StAR Asset Recovery Blog* (12 April 2013) <<https://star.worldbank.org/star/news/tunisia's-cash-back>> accessed 10 April 2017; The Guardian, 'Tunisia Recovers \$28m From Wife of Deposed President' *The Guardian* (London, 11 April 2013) <www.theguardian.com/world/2013/apr/11/tunisia-28m-wife-deposed-president> accessed 12 May 2017.
71. For more information about AFAR <<https://star.worldbank.org/star/ArabForum/About>> accessed 10 April 2017.
72. See Jacinta Anyango Oduor and others, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank 2014), 2 <<http://star.worldbank.org/star/sites/star/files/9781464800863.pdf>> accessed 10 April 2017.

73. Daniel Claman, 'The Promise and Limitations of Asset Recovery Under the UNCAC' in Mark Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 350.
74. Article 32 (Protection of witnesses, experts and victims) para 5 requires that States Parties 'enable the views and concerns of *victims* to be presented and considered at appropriate stages of criminal proceedings'.
75. Article 57(3)(c), as already discussed, asks States Parties to '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'.
76. For the principal-agent model as perceived by neo-institutional economics, see among others Niko Groenendijk, 'A Principal-Agent Model of Corruption' (1997) 27(3) *Crime, Law and Social Change* 207.
77. Oduor and others (n 72).
78. StAR Corruption Cases Search Center <<http://star.worldbank.org/corruption-cases/assetrecovery>> accessed 10 April 2017.
79. The database reports a further US \$4 billion of monetary sanctions imposed between mid-2012 and mid-2016.
80. The concluded settlements in the corruption cases of Ferdinand Marcos in the Philippines, Sani Abacha in Nigeria and Muammar el-Qaddafi in Libya (ongoing) and the individuals and entities associated with them make up the biggest portion of the recovered amount.
81. The United States, Germany, the United Kingdom and Switzerland lead the list, with approximately two-thirds of the cases having been settled by the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC).
82. Conference of the States Parties to the United Nations Convention against Corruption, Open-ended Intergovernmental Working Group on Asset Recovery, 10th Intersessional Meeting (Vienna, 25–26 August 2016), Note by the Secretariat on 'Settlements and other alternative mechanisms in transnational bribery cases and their implications for the recovery and return of stolen assets' CAC/COSP/WG.2/2016/2 (2016), 18.
83. Due consideration of victims' rights is not a novelty of the UNCAC. It is also manifested in UNTOC art 14(2).
84. The James Giffen—Mercator Corporation oil mining case (see the StAR Asset Recovery Watch report <<http://star.worldbank.org/corruption-cases/node/18528>> accessed 10 April 2017, and the subsequent establishment in Kazakhstan of the BOTA foundation for the repatriation of US \$ 115 million following a MoU between the governments of the United States, Switzerland and Kazakhstan is a successful case of assets invested in affected local communities and overseen by the World Bank. See Aaron Bornstein, 'Key Lessons of the BOTA foundation' *The FCPA Blog* (5 April 2017) <www.fcpanblog.com/blog/2017/4/5/aaron-bornstein-key-lessons-of-the-bota-foundation.html> accessed 10 April 2017.

85. Arnone and Borlini (n 9) 258 argue that ‘the drafters of the UNCAC gave “too” high a priority to flexibility with the purpose of accommodating an agreement meeting the various contracting parties’ positions’.
86. See Dimitri Vlassis, ‘The United Nations Convention Against Corruption: A Way of Life’ in Nikos Passas and Dimitri Vlassis (eds), *The United Nations Convention Against Corruption As a Way of Life: Selected Papers and Contributions from the International Conference on ‘The United Nations Convention Against Corruption As a Way of Life’ (Courmayeur, 15–17 December 2006)* (ISPAC—International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme 2007) 15, 32 <<http://ispac.cnpds.org/publications-22-the-united-nations-convention-against-corruption-as-a-way-of-life-22.html>> accessed 10 April 2017.
87. For the importance of domestic legislation permitting NCB confiscation, see Stephenson and others (n 3) 66. For a list of jurisdictions permitting NCB confiscation and relevant legislation, see Theodore Greenberg and others, ‘*Stolen Asset Recovery: A Good Practices Guide for NCB Asset Forfeiture*’ (World Bank 2009).
88. Stephenson and others (n 3) 50.
89. Ibid. 50.
90. Speech at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Doha, 7 November 2009) <<https://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>> accessed 10 April 2017.

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