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The Progressive Development of International Law on the Return of Stolen Assets: Mapping the Paths Forward

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Abstract

The return of stolen assets represents a 'fundamental principle' of the United Nations Convention against Corruption (UNCAC). The convention's inclusion of a chapter on asset recovery was considered a groundbreaking achievement at the time of the treaty's conclusion in 2003. The treaty negotiations concerning these provisions, however, were highly controversial, and the discussions did not benefit from a substantial body of practical experience concerning the return of stolen assets. In the 20 years since the treaty's conclusion, states have acquired some experience with asset return, and the gaps and limitations in UNCAC's regime governing asset recovery have become apparent. Article 57 of UNCAC, concerning asset return and disposal, exemplifies the need for progressive development of international asset recovery laws. Article 57 requires 'updating' or supplementation because the provision does not adequately address major recurrent issues, such as the recipients, use and monitoring of returned assets; the transparency of the asset return process; and the participation of civil society in the process. Normative development could involve formal law reform, within the UNCAC legal framework, but it could also involve more informal legal change, outside of the UNCAC regime. The Global Forum on Asset Recovery represents an important example of legal change that raises issues of both accountability and effectiveness.

1 Introduction

During the negotiation of the United Nations Convention against Corruption (UNCAC) in the early 2000s, asset recovery was both high on the agenda and very

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controversial.[1] States devoted an entire chapter of UNCAC to international asset recovery, which refers to international cooperation between states for the purpose of returning confiscated proceeds of corruption.[2] They also stipulated that asset recovery represents 'a fundamental principle of the Convention'.[3] UNCAC's inclusion of a chapter on asset recovery distinguishes it from all other anti-corruption treaties, none of which addresses the subject explicitly or comprehensively.[4] While UNCAC's asset recovery chapter remains a major diplomatic and legal accomplishment, the provisions reflect heated controversy among the negotiating delegations. On the one hand, delegations from some developed countries sought to ensure that UNCAC would govern the possible uses of returned assets to prevent their 're-corruption'.[5] On the other hand, delegations from some developing countries rejected such 'conditionalities', which they viewed as unacceptable infringements on their sovereignty.[6] Due to these conflicting perceptions and agendas, UNCAC's asset recovery chapter is a product of compromises and has some significant limitations.

In addition to the challenges posed by the delegations' conflicting standpoints, states also concluded the asset recovery chapter on the basis of very incomplete evidence about international asset recovery cases. At the time of UNCAC's conclusion in 2003, major ongoing asset recovery cases had not yet, or had just barely, reached the stage of asset return.[7] Ongoing cases concerned the theft of assets by Sani Abacha, the former head of state of Nigeria (1993–1998); Vladimiro Montesinos, the former head of Peru's National Intelligence Service under President Alberto Fujimori (1990–2000); and Ferdinand Marcos, the former president of the Philippines (1965–1986).[8] Some states had experiences with earlier stages of asset recovery (for example, identification, seizing/freezing and confiscation), but the last stage, involving asset return, remained largely hypothetical at this time. As a result, Article 57 of UNCAC on the

1 United Nations Convention against Corruption (UNCAC) 2003, 2349 UNTS 41.

2 *Ibid.*, Chapter V (asset recovery).

3 *Ibid.*, Art. 51.

4 See, e.g., Inter-American Convention against Corruption 1996; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, (1998) 37 ILM 1; African Union Convention on Preventing and Combating Corruption 2003, (2004) 43 ILM 5; Arab Anti-Corruption Convention 2010.

5 See, e.g., P. Mason, 'The End Game: Asset Recovery and Return – An Unfinished Agenda', U4 Practitioner Experience Note (2020), at 6.

6 *Ibid.*

7 In the case of Sani Abacha, an agreement was reached in 2005 between Nigeria, Switzerland and the World Bank for the return of approximately US $500 million from Switzerland to Nigeria. Lugon-Moulin, 'Asset Recovery: Concrete Challenges for Development Assistance', in M. Pieth (ed.), *Recovering Stolen Assets* (2008), at 304. In the case of Vladimiro Montesinos, the first return of assets from Switzerland to Peru took place in August 2002 and involved a transfer of US $93 million. 'Montesinos Is Gone, But Has Peru Recovered All the Money He Stole?', *CiFAR* (29 June 2017), available at https://cifar.eu/montesinos-gone-peru-recovered-money-stole/; Jorge, 'The Peruvian Efforts to Recover Proceeds from Montesinos' Criminal Network of Corruption', in Pieth, *ibid.*, 117. In January 2004, the USA returned approximately US $35 million to Peru. 'Montesinos Is Gone', *ibid.*; Jorge, *ibid.*, 119–120. In the case of Ferdinand Marcos, Switzerland returned US $683 million to the Philippines in August 2003. Marcelo, 'The Long Road from Zurich to Manila: The Recovery of the Marcos Swiss Dollar Deposits', in Pieth, *ibid.*, 107.

8 See generally Pieth, *supra* note 7.

return and disposal of confiscated assets was drafted without the benefit of significant practical experience and lessons learned. Now that states and practitioners have accumulated two decades of experience with asset recovery, including asset return, Article 57's limitations and gaps are increasingly apparent.

This article argues, in part, that Article 57 requires 'updating' or supplementation because the provision does not adequately address significant, recurrent issues, such as the recipients of returned assets, the use of returned assets, the monitoring of returned assets and the transparency of the asset return process. The presumption underlying this argument is that normative development would be beneficial for the current international legal framework governing asset recovery. At present, UNCAC's asset recovery chapter cannot sufficiently guide or constrain state behaviour. When states negotiate asset return agreements, UNCAC's asset recovery provisions do not provide an adequate framework for discussions and decision-making about many fundamental aspects of asset return. This potentially increases transaction costs for negotiators and also heightens the likelihood that states will conclude agreements that do not conform with emerging best practices.

This article therefore maps the various paths by which states and other actors could engage in the normative development of asset recovery laws, with a particular focus on Article 57 of UNCAC, governing return and disposal.[9] Normative development could involve formal law reform in the form of a binding or non-binding instrument developed within the UNCAC framework, perhaps by the Conference of States Parties' (CoSP) Working Group on Asset Recovery (WGAR). Normative development, however, could also involve broader legal change that takes place outside of the UNCAC framework and with the involvement of state and non-state actors. One prominent example of legal change in the asset recovery context is the Global Forum on Asset Recovery (GFAR), led initially by the USA and the United Kingdom (UK). The accountability and effectiveness of GFAR merits dedicated analysis because it has produced a set of principles on asset return that already forms a touchstone in the field, and it is an ongoing initiative. This article argues that, while GFAR represents an important initiative, it suffers from an accountability deficit and is yet to produce effective principles on asset return.

Section 2 begins with the current state of the law, as embodied in Article 57 of UNCAC. Section 3 then discusses contemporary state practice regarding asset return and disposal on the basis of a collection of agreements concluded between requesting and requested states. Section 4 assesses the various options for the development of norms concerning asset return and distinguishes between law reform and legal change. Section 5 focuses on GFAR as an example of legal change that raises issues of accountability and effectiveness.

[9] For a discussion of how normative development could be fostered by the creation of a new institution, see Helfer, Rose and Brewster, 'Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism', 117 *American Journal of International Law* (2023) 560.

2 International Law on the Return and Disposal of Assets

The following section analyses UNCAC's approach to the return and disposal of recovered assets. It explains how and why Article 57 of UNCAC departs from its predecessor provision – Article 14 of the United Nations Convention on Transnational Organized Crime (UNTOC) – and it discusses what UNCAC's drafting history reveals about Article 57's omissions.[10]

A *Article 57 of UNCAC on the Return and Disposal of Assets*

In situations where public funds are embezzled or misappropriated by a government official, the state of origin can claim ownership over the funds.[11] In cases involving the embezzlement, misappropriation or other diversion of property by a public official, Article 57 of UNCAC therefore requires the return of recovered assets but only in a narrow set of circumstances. When public funds have been embezzled, or embezzled and then laundered, two conditions must be met before a requested state is obliged to return the confiscated proceeds.[12] First, the confiscation must have been executed by the requested state in accordance with Article 55 of UNCAC, meaning that the state of origin must have requested international cooperation from the destination state for the purposes of confiscation. This condition would not be met where a destination state has confiscated proceeds as a result of its own domestic procedures in the absence of a mutual legal assistance request for confiscation by the state of origin.[13] Second, the requesting state party must have achieved a 'final judgment', such as a final judgment in the criminal prosecution of a public official for embezzlement. This condition would not be met where criminal proceedings in the requesting state are still ongoing or yet to be initiated or where they end in an out-of-court settlement rather than a final judgment. The requirement for a final judgment, however, may be waived by the requested party. An interpretive note in the *travaux préparatoires* indicates that a requested state party should consider a waiver of this requirement 'where a final judgment cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases'.[14]

Theoretically, an obligation to return confiscated proceeds could also arise with respect to the proceeds of corruption offences other than embezzlement of public funds (and embezzled public funds that have been laundered). Article 57 acknowledges the possibility that an ownership claim could be demonstrated by a requesting state party regarding proceeds of other corruption offences, such as bribery of a public official.[15]

[10] United Nations Convention against Transnational Organized Crime (UNTOC) 2000, 2225 UNTS 209.

[11] *UNODC Legislative Guide for the Implementation of the United Nations Convention against Corruption, Second Revised Edition* (2012) paras 768–769, 779–782.

[12] UNCAC, *supra* note 1, Art. 17 (embezzlement, misappropriation or other diversion), Art. 23 (money laundering).

[13] Ölcer, 'Article 57', in C. Rose, M. Kubiciel and O. Landwehr (eds), *The United Nations Convention against Corruption: A Commentary* (2019) 527.

[14] UNODC, *Travaux Préparatoires* of the Negotiations for the Elaboration of the United Nations Convention against Corruption (2010), at 499, n. 1, 516 [*Travaux Préparatoires*].

[15] UNCAC, *supra* note 1, Art. 57(3)(b).

But it is difficult to conceive the other corruption offences giving rise to an ownership claim, as opposed to a claim regarding socio-economic damage in the requesting state. Other corruption offences like bribery involve the receipt of an undue advantage by a public official rather than the theft of public property. In cases not involving an ownership claim, a requested state party may recognize, on a discretionary basis, damage to the requesting state party as a basis for returning the confiscated proceeds.[16]

By mandating the return of proceeds of corruption, albeit in limited circumstances, the drafters of Article 57 of UNCAC departed significantly from Article 14(2) of UNTOC, which does not mandate return under any circumstances. Instead, UNTOC allows states parties to exercise their discretion and legislate as they see fit regarding the disposal of confiscated assets. UNTOC's approach reflects the fact that requesting states typically cannot assert an ownership claim with respect to the proceeds of organized crime or a corresponding right to their return, even though the criminal conduct may have caused damage in the requesting state.

In practice, many asset recovery cases concerning corrupt proceeds may fall into a discretionary or non-mandatory realm because the requirements of Article 57 have not been met. A final judgment in the state of origin may be impossible due to the expiration of the relevant statute of limitations, or it may take many years to obtain. States of origin may also be unable to make sufficient requests for international cooperation that meet the requested state's requirements for providing mutual legal assistance. An insufficient request could be due to a lack of domestic capacity in the state of origin or concerns on the part of the destination state about whether the right to a fair trial is upheld in the state of origin.[17]

When the return of confiscated proceeds is non-mandatory, Article 57(3) requires that states parties '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 crime'.[18] Neither Article 57 nor the *travaux préparatoires* stipulates a hierarchy between the various possible recipients: the requesting state, prior legitimate owners and victims of corruption offences. Article 14(2) of UNTOC also identifies legitimate owners and victims as possible recipients of confiscated proceeds, but, under this provision, the requesting state itself receives the funds for subsequent distribution to other parties. By contrast, under Article 57 of UNCAC, the destination state could potentially return funds directly to prior legitimate owners or victims, thereby bypassing the state of origin. This innovation was controversial during the negotiations, and a number of delegations called for the deletion of this language. The objecting delegations considered that the disposition of returned proceeds 'should be within the purview of the requesting State party/State of origin'.[19]

Article 57 of UNCAC also abandons asset sharing, the approach adopted in Article 14(3) of UNTOC. Asset sharing involves the distribution of confiscated assets among

[16] *Ibid.*

[17] See, e.g., Haiti's failed cooperation with Switzerland, as detailed in Swiss Federal Department of Foreign Affairs, *No Dirty Money: The Swiss Experience in Returning Illicit Assets* (2016) at 13–15.

[18] UNCAC, *supra* note 1, Art. 57(3)(c).

[19] *Travaux Préparatoires, supra* note 14, at 504, n. 8; 508, n. 17.

states parties, such as those states that have provided international cooperation in the asset recovery process. Early drafts of Article 57 repeated UNTOC's language on asset sharing, but delegations later agreed that stolen assets should be returned and not shared among the states involved in the recovery process due to the importance of returning assets to states of origin.[20] Article 57(4) nevertheless allows the requested state to 'deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings'. The drafters retained this provision, even though a number of delegations considered that such deductions are an 'onerous' conditionality that would not be 'in line with the spirit' of the convention.[21]

Finally, Article 57 does not require states parties to reach an agreement on the disposal or ultimate use of returned assets. Instead, Article 57(5) just flags the possibility of such agreements: 'Where appropriate, 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.' During the drafting process, a number of delegations successfully pushed for the deletion of a passage stipulating that obligatory returns had to be carried out 'in a manner to be determined by technical arrangements, on a case-by-case basis, between the States Parties concerned'.[22] Again, some delegations considered that this provision imposed 'onerous conditionalities' on asset return.[23] The conclusion of arrangements or agreements to govern the return of confiscated assets therefore remains discretionary.

B *Article 57's Omissions*

Article 57 of UNCAC leaves a number of significant issues unaddressed – in particular, the ultimate use of returned assets and the monitoring of the disposal of assets once they have been returned. Draft language concerning the use of returned assets was highly controversial during the negotiations and was eventually removed entirely from what would become Article 57. An informal working group, chaired by Switzerland, produced draft provisions on the return and disposal of assets, but this text prompted 'strong objections' from some delegations, which did not even want it to be used as the basis for informal consultations. The drafters therefore used the Swiss text only as a 'reference' point for the 'preliminary consideration' of the article on return and disposal.

The Swiss text set out various options for the use of assets that are returned on the basis of case-by-case agreements or arrangements (under what would become Article 57(5) of UNCAC).[24] The first option involved contributing recovered assets to a UN funding mechanism; to economic and development assistance in support of the convention's implementation; or to 'intergovernmental organizations specializing in

[20] UNCAC, *supra* note 1, Art. 51.
[21] *Travaux Préparatoires, supra* note 14, at 509, n. 18.
[22] *Ibid.*, at 509, n. 18.
[23] *Ibid.*
[24] *Travaux Préparatoires, supra* note 14, at 508, n. 11. The text of the Swiss proposal can also be found in Ad Hoc Committee for the Negotiation of a Convention against Corruption, Proposals and contributions received from Governments, UN Doc. A/AC.261/15, 24 February 2003.

the fight against corruption, anti-corruption initiatives and programmes'. The second option involved the allocation of recovered assets to 'specific development projects or programmes' for the exclusive benefit of the population of the requesting state party and, possibly, with the involvement of specialized intergovernmental organizations. The third option involved contributing the recovered assets to the reduction of the requesting state's multilateral debt, which is to be arranged in cooperation with intergovernmental organizations specialized in international debt issues. These three options represented a non-exhaustive set of possible uses of recovered assets and appear to have been based, in part, on a similar set of options in Article 14(3) of UNTOC.[25]

The Swiss proposal would not have required recovered assets to be used for these specific purposes, but these options would probably have become a reference point in negotiations between requested and requesting states concerning the disposal of recovered assets. Such language might have created expectations among at least some states parties that recovered assets would generally be used to support the implementation of UNCAC, economic development projects or programmes or the reduction of multilateral debt. Developed countries reportedly considered these possible uses of recovered assets to be reasonable and necessary in light of the risk of returned assets being 're-corrupted' in the requesting state.[26] Developing countries, by contrast, viewed the delineation of such options as an attempt by destination states to impose conditions on the return of stolen assets, despite having been complicit in the original embezzlement by having hosted the funds in their financial systems.[27] During the negotiations, developing countries emphasized the importance of respect for their sovereign right to dispose of returned assets as they see fit.[28]

Article 57 also omits language concerning the monitoring of returned assets – in particular, their disposal. UNCAC's drafting history gives no indication that the delegations seriously considered including a provision on monitoring. Such a provision would likely have been completely unacceptable from the standpoint of many developing countries, especially given the level of controversy surrounding the related issue of the disposal of returned assets. The Swiss text, however, did provide for the general involvement of intergovernmental organizations in the disposal process. All of the options delineated in the Swiss text provided broadly for the involvement of 'intergovernmental organizations' in the disposal of recovered assets. Switzerland may have envisaged the involvement of international organizations such as the World Bank, other regional development banks, the International Monetary Fund and the United Nations (UN). But the Swiss text refrained from specifying the precise functions of these organizations, which could include providing advice to one or more parties involved, assisting with capacity building in the requesting state or formally monitoring the disposal of the returned assets. Given the level of controversy provoked by various aspects of Article 57, the omission of any explicit reference to monitoring in either the

[25] UNTOC, *supra* note 10, Art. 14(3)(a). Note the use of the word '*inter alia*' in the chapeau of Article 61(4). *Travaux Préparatoires, supra* note 14, at 509.

[26] Mason, *supra* note 5, at 4–5.

[27] *Ibid.*

[28] *Ibid.*

Swiss proposal or the final text of Article 57 is hardly surprising. But this omission has significance given subsequent developments.

3 The Contemporary Practice of Asset Return and Disposal

On the basis of the preceding analysis of the current state of the law, this section examines states' contemporary practices regarding asset return, many aspects of which are ungoverned or minimally governed by UNCAC. Article 57 does not touch upon (or barely touches upon) recipients, the use of returned assets, the monitoring of returned assets and transparency. The analysis in this section takes each of these issues in turn, with a view towards demonstrating the growing gulf between the law and practice. As to methodology, this analysis focuses on cases in which stolen assets have been confiscated and written agreements on return and disposal have been concluded between states or jurisdictions. This study relies on primary materials (for example, memoranda of understanding [MoUs]) because they provide a more reliable basis for analysis than secondary literature or press releases.[29] Moreover, under the law on treaties, these written agreements may have interpretative value as they could constitute a form of subsequent practice as a supplementary means of treaty interpretation under Article 32 of the Vienna Convention on the Law of Treaties.[30]

This study is based on a collection of 14 publicly available agreements concerning asset return (see Annex 1 at the end of this article).[31] One of these agreements was concluded in 2008, and the rest were concluded between 2016 and 2024. Ten agreements govern the return of specific assets, while four agreements are general or framework agreements that establish the parameters of future agreements on asset return. The 'returning' states or jurisdictions covered by these agreements are Ireland, Jersey, Luxembourg, Switzerland, the UK and the USA; the 'receiving' states are Kazakhstan, Kenya, Moldova, Mozambique, Nigeria, Peru and Uzbekistan. Nigeria alone is a party to six of the agreements. While this collection of agreements represents the product of exhaustive research, this data set presumably represents only a portion of the agreements on asset return and disposal concluded by states parties to UNCAC.[32] This

[29] For second-hand accounts of asset recovery cases, see, e.g., G. Fenner and K. Attisso, *Returning Stolen Assets: Learning from Past Practice: Selected Case Studies* (2013); Pieth, *supra* note 7.

[30] International Law Commission, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', 2(2) *ILC Yearbook* (2018) 16, Conclusion 4, para. 12; Conclusion 6, para. 24. Memorandums of understanding (MoUs) concluded between a limited number of states parties to UNCAC, however, could constitute a 'subsequent agreement' under Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, if they together establish an agreement between all parties to UNCAC regarding the interpretation of Article 57 of UNCAC.

[31] These agreements were identified through general and targeted internet searches and through searches of two databases: (i) the Asset Recovery Database of the Stolen Asset Recovery (StAR) Initiative, available at https://star.worldbank.org/asset-recovery-watch-database, and (ii) the database maintained by the Civil Society for Asset Return (CiFAR), 'Tracking Switzerland's Return of Assets', *CiFAR*, available at https://cifar.eu/projects-and-campaigns/research/tracking-swiss-asset-returns/.

[32] This assumption is informed by the fact that other asset recovery arrangements have been the subject of secondary literature. See, e.g., Fenner and Attisso, *supra* note 29; Pieth, *supra* note 7. Some of these asset recovery arrangements were very likely based on written agreements that have not been made publicly available.

collection naturally excludes written agreements that have not been made publicly available as well as arrangements that have not been the subject of any written agreement. This data set may therefore not be representative of the body of asset return agreements or arrangements that have been concluded by states parties to UNCAC since the treaty's entry into force.

First, regarding the issue of recipients, most of the recipients identified in the collected agreements are governmental entities. Although Article 57 identifies prior legitimate owners and victims as possible recipients of returned funds, none of the agreements collected for this study provided for such returns or even used the word 'victim'. The fact that recovered assets have not been used to provide compensation to victims of corruption may reflect the practical difficulties involved in identifying victims of corruption or transferring funds directly to them.[33] The regular return of funds to government entities also highlights the potential importance of putting mechanisms in place to ensure that the returned funds benefit the population and are not 're-corrupted'.

Article 57 of UNCAC does not contemplate the return of assets to non-governmental entities or international organizations, and yet agreements for the return of assets to Kazakhstan and Uzbekistan provide for such recipients. The 2008 MoU between Kazakhstan, Switzerland and the USA provides for return not to the state of Kazakhstan but, rather, to the Bota Foundation, a non-governmental organization that was established in accordance with the MoU.[34] The Bota Foundation's mandate was to 'benefit poor children and youth in Kazakhstan'.[35] More recently, the 2022 MoU between Switzerland and Uzbekistan provides for the transfer of assets by Switzerland to the Uzbekistan Vision 2030 Fund, which is a UN Multi-Partner Trust Fund.[36] The MoU indicates that the funds are to benefit 'the population of the Republic of Uzbekistan', which is perhaps the broadest possible formulation of intended beneficiaries. Asset returns to non-state entities in Kazakhstan and Uzbekistan raise open questions about the circumstances in which transfer to a non-state actor would be appropriate and preferable to transfer to the state of origin.

Second, regarding the disposal of assets, the collected agreements show that the use of funds for anti-corruption, human rights or development purposes is standard practice. Though the use of returned assets prompted serious controversy during the negotiation of UNCAC, the agreements show striking uniformity insofar as they all specify that the returned funds will be used for anti-corruption, human rights or development purposes. The general MoU between Nigeria and the UK, for example, stipulates that returned funds will be used to provide financial support 'for projects that will impact on

[33] Conference of the States Parties to UNCAC, Good Practices in Identifying the Victims of Corruption and Parameters for Their Compensation, Doc. CAC/COSP/2017/11, 31 August 2017; S. Giroud, *Le droit des victimes de potentats à obtenir réparation: progrès et lacunes de la LVP in Droit suisse des sanctions et de la confiscation internationales* (2020).

[34] Memorandum of Understanding between Kazakhstan, Switzerland and United States (Kazakhstan-Switzerland-USA MoU) (2008), Art. 3.

[35] *Ibid.*, Art. 3.1.

[36] Agreement between Switzerland-Uzbekistan (Switzerland-Uzbekistan Agreement) (2022), Art. 3(1).

the poorest segment of the society and to improve access to justice for all Nigerians'.[37] Thus far, the funds returned to Nigeria have been allocated to support a programme of targeted cash transfers under the National Social Safety Net Project[38] and to support 'high impact' infrastructure projects that 'will benefit the poorest segment of society'.[39] The funds returned to Kazakhstan, Mozambique and Uzbekistan were also allocated towards development and initiatives that appear to be geared towards fighting corruption or financial crime more generally.[40] In Kazakhstan, for example, the funds have been dedicated to programmes for poor children and youth as well as for improving public financial management. Funds have also been dedicated to supporting Kazakhstan's membership in the Extractive Industries Transparency Initiative, which aims to improve transparency regarding payments and revenues in the extractive industries.[41]

The agreements also show that parties routinely stipulate that returned funds must not be used for corrupt or fraudulent purposes. UNCAC does not address the misuse of returned funds, nor does the drafting history suggest that the delegations seriously considered doing so. Developed states, however, were reportedly concerned about the potential for the re-corruption of returned assets.[42] Many of the collected agreements specifically disallow the use of returned funds for the benefit of those involved in the corrupt conduct that gave rise to the theft of public funds or for the benefit of their family members or close associates.[43] Two of the MoUs to which Nigeria is a

[37] General Memorandum of Understanding between Nigeria and United Kingdom (Nigeria-UK General MoU) (2016), para. 4.

[38] Memorandum of Understanding between Nigeria, Switzerland and World Bank (Nigeria-Switzerland-World Bank MoU) (2017), preambular para. 12.

[39] Memorandum of Understanding between Ireland and Nigeria (Ireland-Nigeria MoU (2020), Art. 6(2); Memorandum of Understanding between Jersey, Nigeria and United States (Jersey-Nigeria-USA MoU) (2020), Art. 3(2), Art. 6; Memorandum of Understanding between Nigeria and United Kingdom (Nigeria-UK MoU) (2021), para. 1, Schedule 1. The infrastructure projects financed in Nigeria are the Lagos to Ibadan Expressway, the Abuja to Kano Road and the Second Niger Bridge. For critiques of the allocation of these funds to this infrastructure project in Nigeria, see Moskowitz, 'UK Repatriates Millions in Corrupt Assets of Nigerian Ex-Governor', *Organized Crime and Corruption Reporting Project* (11 March 2021), available at www.occrp.org/en/daily/14034-uk-repatriates-millions-in-corrupt-assets-of-nigerian-ex-governor; K. Alerechi, 'The Ibori Loot: The Controversy Surrounding the Destination of the Returned Money', *CiFAR* (15 June 2021), available at https://cifar.eu/ibori-loot-the-controversy-surrounding-the-destination-of-the-returned-money/.

[40] See, e.g., Memorandum of Understanding between Jersey and Mozambique (Jersey-Mozambique MoU) (2024), para. 6; Switzerland-Uzbekistan Agreement, *supra* note 36, Art. 2(a); Memorandum of Understanding between Switzerland and Uzbekistan (Switzerland-Uzbekistan MoU) (2020), para. 4.

[41] The government of the Republic of Kazakhstan committed to ensuring adequate and sustainable financing for the Extractive Industries Transparency Initiative (EITI) implementation, which apparently entailed appointing and monitoring an consulting and auditing firm and conducting workshops on data-reporting and implementation, among other things. Kazakhstan-Switzerland-USA MoU, *supra* note 34, Art. 5. See generally C. Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (2015), at 133–175 (chapter on EITI).

[42] Mason, *supra* note 5.

[43] See, e.g., Kazakhstan-Switzerland-USA MoU, *supra* note 34, Art. 2.6; Nigeria-Switzerland-World Bank MoU, *supra* note 38, Art. 13; Memorandum of Understanding between Luxembourg, Peru and Switzerland (Luxembourg-Peru-Switzerland MOU) (2020), Art. 5; Ireland-Nigeria MoU, *supra* note 39, para. 1(1); Switzerland-Uzbekistan MoU, *supra* note 40, para. 4; Jersey-Nigeria-USA MoU, *supra* note 39, Arts 3(3), 16; Memorandum of Understanding between Moldova and the United Kingdom (Moldova-UK MoU) (2021), Art. 6; Switzerland-Uzbekistan Agreement, *supra* note 36, Arts 6(4), 12.

party further specify that the returned assets may not be used to fund 'legacy debts', meaning financial obligations that arose prior to the entry into force of the agreement.[44] This provision helps to ensure that the returned funds will not be diverted to other uses beyond those contemplated by the MoU. On the one hand, provisions prohibiting certain uses of returned funds can be seen as stating the obvious: funds must be used for the purposes agreed upon, and they must not be diverted for corrupt purposes that are incompatible with the obligations held by the receiving party under UNCAC. On the other hand, these provisions have more than just a rhetorical value. Provisions that explicitly prohibit illegal or ineligible uses of returned funds potentially enable returning states and/or monitoring bodies to take 'corrective action' in the event that funds are misallocated or mismanaged. A number of the MoUs to which Nigeria is a party specify that Nigerian authorities shall undertake certain corrective measures, including investigations and remedial measures, where evidence emerges that funds have been used for illegal or ineligible purposes.[45]

Third, the agreements show that, even though Article 57 omits any reference to monitoring or auditing the disposal of returned assets, such arrangements are not uncommon.[46] Although developing countries, during the drafting process, considered that monitoring arrangements would impose unacceptable 'conditionalities' and interfere with their sovereignty, state practice has nevertheless evolved in this direction. The MoUs, for example, provide for monitoring or auditing by an independent auditor,[47] the national authorities of the state of origin,[48] the development agency of the requested state[49] and, in some cases, civil society organizations.[50] In addition, the MoU between Kazakhstan, Switzerland and the USA specifically provides for the involvement of the World Bank in monitoring the Bota Foundation, which was established for the benefit of children and youth in Kazakhstan. Some of the MoUs include detailed provisions on the composition of the monitoring mechanism and its functions, such as periodic auditing and the issuance of reports.[51]

[44] Agreement between Nigeria and United States (Nigeria-USA Agreement) (2022), Art. 3(3); Jersey-Nigeria-USA MoU, *supra* note 39, Art. 3(3).

[45] Nigeria-USA Agreement, *supra* note 44, Art. 15; Nigeria-Switzerland-World Bank MoU, *supra* note 38, Arts 10, 13; Ireland-Nigeria MoU, *supra* note 39, Art. 10(3); Jersey-Nigeria-USA MoU, *supra* note 39, Arts 8, 16, 19.

[46] See, e.g., Switzerland-Uzbekistan Agreement, *supra* note 36, Art. 7; Nigeria-UK MoU, *supra* note 39, paras 16–33; Switzerland-Uzbekistan MoU, *supra* note 40, para 4; 2017 Nigeria-Switzerland-World Bank MoU, *supra* note 38, Art. 5; Kazakhstan-Switzerland-USA MoU, *supra* note 34, s. 3.10; Luxembourg-Peru-Switzerland MOU, *supra* note 43, Art. 6. But see Ireland-Nigeria MoU, *supra* note 39, which does not provide for monitoring. Instead, the MoU indicates that Ireland assumes no liability or responsibility and that responsibility for the use and management of the recovered assets lies with the government of Nigeria.

[47] Jersey-Mozambique MoU, *supra* note 40, para. 8.

[48] Nigeria-USA Agreement, *supra* note 44, Art. 8; Jersey-Nigeria-USA MoU, *supra* note 39, Art. 8; Luxembourg-Peru-Switzerland MOU, *supra* note 43, Art. 6.

[49] Nigeria-Switzerland-World Bank MoU, *supra* note 38, Art. 5 (providing for the involvement of the Swiss Agency for Development and Cooperation in monitoring and implementation).

[50] Nigeria-Switzerland-World Bank MoU, *supra* note 38; Switzerland-Uzbekistan MoU, *supra* note 40; Jersey-Nigeria-USA MoU, *supra* note 39, Art. 9; Moldova-UK MoU, *supra* note 43, Art. 7; Nigeria-USA Agreement, *supra* note 44, Art. 9.

[51] See, e.g., Kazakhstan-Switzerland-USA MoU, *supra* note 34.

Finally, the transparency of asset recovery processes has emerged as an issue in practice. UNCAC's chapter on preventive anti-corruption measures makes transparency a key principle, but the chapter on asset recovery makes no reference to transparency.[52] Moreover, the issue of transparency does not appear to have featured in the treaty negotiations about the asset recovery chapter. Nevertheless, a number of the MoUs collected for this study specifically provide for the disclosure of the MoU itself and other related documents, such as reports on implementation.[53] This collection of agreements, however, cannot be taken as a representative sample regarding the issue of transparency. Based on a review of the Asset Recovery Database of the Stolen Asset Recovery Initiative, these agreements appear to represent the exception rather than the rule. The general approach adopted by the USA, for instance, involves limited transparency in the form of a press release.[54] The press releases issued by the US government specify the amount being returned and the criminal conduct that gave rise to the asset recovery process, but they provide little to no information on the terms of the return. Given the general public interest in information about the return of assets that could benefit the population of the state of origin, a strong argument can be made that transparency ought to be the general practice rather than the exception. UNCAC's emphasis on transparency as a preventive measure provides support for this stance.

The agreements discussed in this section reveal that contemporary state practice regarding the return of assets raises normative questions about how asset return should ideally be governed by international norms. A robust set of good practices on asset return would address, for example, normative issues such as:

- the selection of appropriate recipients of returned funds (for example, sovereign wealth funds, government agencies, non-governmental organizations and victims);
- the most appropriate uses of returned funds in light of the purposes of UNCAC;
- the optimal design of monitoring mechanisms to prevent the misallocation of returned funds;
- the roles of various actors in the implementation and monitoring of asset return (for example, national authorities of the requesting state, development agencies of the requested state and international organizations like the World Bank); and
- the need for, and suggested methods of, disclosure of agreements on asset return to the public.

[52] See UNCAC, *supra* note 1, Ch. II (prevention) and especially Art. 5; Ch. V (asset recovery).

[53] Nigeria-Switzerland-World Bank MoU, *supra* note 38, Art. 11; Ireland-Nigeria MoU, *supra* note 39, Art. 8; Jersey-Nigeria-USA MoU, *supra* note 39, Arts 10, 15; Switzerland-Uzbekistan Agreement, *supra* note 36, Art. 2(e), (h); Moldova-UK MoU, *supra* note 43, Art. 13l; Nigeria-USA Agreement, *supra* note 44, Art. 10; Jersey-Mozambique MoU, *supra* note 40, para. 9.

[54] See, e.g., 'Over $1 Billion in Misappropriated 1MDB Funds Now Repatriated to Malaysia', *US Department of Justice* (5 August 2021), available at www.justice.gov/opa/pr/over-1-billion-misappropriated-1mdb-funds-now-repatriated-malaysia.

The answers to these questions will depend, in part, on the circumstances, but robust guidance could play an important role in framing and constraining decision-making. The factors that would counsel in favour of one model or option, as opposed to another, merit significant elaboration whether by states parties to UNCAC or other actors. Some of these issues raise important technical issues of auditing and accounting that lie beyond the scope of this article, which aims to provide a public international law perspective on asset return.

The remainder of this article focuses on mapping the options for further normative development and analyses some of the efforts that have been made to date. Practitioners and scholars know much more about the actual practice of asset return than they did when UNCAC was concluded, and the time is arguably ripe for identifying best practices and pursuing normative development in this field. A key open question, however, concerns how states and other actors ought to go about developing the existing norms on asset return. The following sections explore this question by reference to the concepts of accountability and effectiveness.

4 Paths for the Development of Norms on Asset Return and Disposal

The further normative development of the law on asset recovery – in particular, the law governing the return and disposal of recovered assets – could involve formal law reform or more informal legal change or some combination thereof. Law reform would involve the formal revision of UNCAC and would take place within the institutional framework that accompanies the treaty. Such reform would take UNCAC as the basis for any additional protocols, amendments or modifications to states' existing legal obligations regarding asset recovery. States would lead this law reform process, but, in practice, they would depend on the support of the United Nations Office on Drugs and Crime (UNODC), which functions as the 'guardian' of UNCAC and serves as its Secretariat.

By contrast, more informal legal change would entail a shift in accepted understandings of the law by social actors, through an accumulation of practice over time.[55] This may involve, for example, a shift in the scope of 'acceptable contestation' about the law.[56] Legal change is more flexible than the methods of law reform described above, insofar as it may be carried out by states and non-state actors, such as international organizations and non-governmental organizations. In addition, treaties such as UNCAC do not necessarily serve as the touchstone, nor do their accompanying institutional structures necessarily provide the framework for such change. While judicial bodies may play an important role in bringing about legal change, in the context of international asset recovery, this has not (yet) been the case, as the meaning of Article 57 of UNCAC has not been litigated before international or domestic courts.[57]

[55] Krisch, 'The Dynamics of International Law Redux' (2021) 74 *Current Legal Problems* 269, at 279.

[56] *Ibid.*

[57] The meaning of Article 57, however, could be a legal issue in the case filed in September 2022 by Equatorial Guinea against France before the International Court of Justice. *Request Relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v. France)*.

As a result, other social actors have been driving the normative development of asset recovery.

A *Law Reform*

Law reform could involve the conclusion of a protocol to UNCAC, the formal amendment or modification of the treaty or the development of non-binding guidance by the CoSP – in particular, the WGAR. The first two possibilities – a protocol and amendment – represent relatively formal and onerous methods for bringing about law reform and may also be highly unrealistic given an observable decline in multilateral treaty-making, in general.[58] An amendment would entail reopening negotiations on the substance of the treaty and working towards a new consensus, which might not be forthcoming.[59] The formal amendment of UNCAC would also not necessarily be the most suitable solution to the need to supplement (rather than rewrite) Article 57 with detailed, technical guidance.

The modification of UNCAC represents another, somewhat less onerous and potentially more suitable method by which states parties could supplement UNCAC's provisions. Treaty modification occurs when two or more parties to a multilateral treaty conclude an agreement to modify the treaty as between themselves alone.[60] Such 'inter se' agreements typically allow parties to 'implement, update, and strengthen' a treaty between themselves.[61] The general or framework agreements on asset return that have been concluded by both Nigeria and Kenya represent the type of instrument by which states parties to UNCAC could, in theory, modify UNCAC's provisions.[62] But the wording of the agreements gives no indication that the parties concluded them with a view towards modifying UNCAC, nor does it seem that the parties notified the other states parties to UNCAC of such an intention, as would be required under the VCLT's rules on treaty modification.[63] Instead, these general or framework agreements seem to aim at complementing, rather than modifying, UNCAC by establishing the parameters for future asset recovery processes.

The development of non-binding guidance by the WGAR represents the most likely path towards law reform. The working group, which was created by the Conference of the States Parties to UNCAC, represents the most realistic and suitable mechanism by which Article 57 could be supplemented (as opposed to supplanted). A process led by the WGAR would represent law reform because it would be carried out by the

[58] See Mason, *supra* note 5; see further Motzfeldt Kravik, 'An Analysis of Stagnation in Multilateral Law-Making and Why the Law of the Sea Has Transcended the Stagnation Trend', 34 *Leiden Journal of International Law* (2021) 935; Pauwelyn, Wessel and Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25 *European Journal of International Law* (2014) 733.

[59] UNCAC, *supra* note 1, Art. 69; VCLT, *supra* note 30, Arts 39, 40.

[60] VCLT, *supra* note 30, Art. 41(1).

[61] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Doc. A/CN.4/L.682, 13 April 2006, para. 197.

[62] Nigeria-UK General MoU, *supra* note 37; Framework Agreement between Kenya, Switzerland and United Kingdom (2018); General Memorandum of Understanding between Kenya and Jersey (2018).

[63] VCLT, *supra* note 30, Art. 41.

institutional apparatus created by the convention and controlled by the states parties. The convention established a CoSP for the purpose of improving the capacity of states parties to achieve the treaty's objectives and to promote and review its implementation.[64] The functions of the CoSP include recommending improvements to UNCAC and its implementation and recommending any necessary action regarding the technical assistance requirements of states parties.[65] At its first session in December 2006, the CoSP decided to fulfil its mandate, in part, by establishing an 'interim open-ended intergovernmental working group' on asset recovery.[66] The WGAR's functions include 'developing cumulative knowledge in the area of asset recovery' and 'facilitating exchange of information among States by identifying and disseminating among States good practice'.[67]

Although the WGAR's engagement in normative development has been limited thus far, its mandate allows it to engage in standard-setting activities.[68] By producing guidelines that further develop existing asset recovery norms, the working group would be synthesizing 'cumulative knowledge' and 'facilitating the exchange of information' by codifying good practices in keeping with its mandate. While any guidelines produced by the WGAR would very likely be non-binding, they could nevertheless represent an authoritative statement of best practices, reached on the basis of a consensus among states parties. Such a non-binding instrument could potentially form a key reference point in negotiations among requesting and requested states regarding asset recovery.

Norm development has not been a core feature of the work undertaken by the CoSP or its working groups, but it could be, and there is important precedent for this within the field of international anti-corruption law.[69] The WGAR could reasonably be expected to produce such a document in the future, given that it has already produced draft non-binding guidelines regarding the management of frozen, seized and

64 UNCAC, *supra* note 1, Art. 63(1). See Webb and Landwehr, 'Article 63: Conference of the States Parties to the Convention', in Rose, Kubiciel and Landwehr, *supra* note 13, 627.

65 UNCAC, *supra* note 1, Art. 63(4)(f), (g).

66 Conference of the States Parties, Resolution 1/4, December 2006.

67 *Ibid.*, para. 2(a), (c).

68 Open-ended Intergovernmental Working Group on Asset Recovery, Revised Draft Non-binding Guidelines on the Timely Sharing of Information in Accordance with Article 56 of the Convention and Improving Communication and Coordination between Various Asset Recovery Practitioner Networks, Doc. CAC/COSP/WG.2/2021/3, 28 June 2021; Open-ended Intergovernmental Working Group on Asset Recovery, Revised Draft Non-binding Guidelines on the Management of Frozen, Seized and Confiscated Assets, Doc. CAC/COSP/WG.2/2019/3, 21 March 2019; Open-ended Intergovernmental Working Group on Asset Recovery, Draft Non-Binding Guidelines on the Management of Frozen Seized and Confiscated Assets, Doc. CAC/COSP/WG.2/2018/3, 26 March 2018.

69 The Organisation for Economic Co-operation and Development's (OECD) Anti-Bribery Convention has been updated through the issuance of non-binding guidance developed by the OECD Working Group on Bribery. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, (1998) 37 ILM 1; OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26 November 2021, especially at xvi, xix (concerning recovering the proceeds of foreign bribery); Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Doc. C(2009)159/REV1/FINAL, C(2010)19, 26 November 2009, amended on 18 February 2010.

confiscated assets in the context of domestic asset recovery, pursuant to Article 31 of UNCAC.[70] The working group produced these guidelines following the conclusion of the first review cycle, which covered the implementation of the chapter on criminalization and enforcement, including Article 31. The document, which is addressed to states parties, includes 14 relatively concise guidelines containing hortatory statements about the administration of assets prior to final confiscation, the enforcement of confiscation orders, the use of confiscated assets and institutional structures for asset management. The guidelines remain in draft form, however, and the WGAR does not appear to have made progress on them since its 2019 meeting.

The WGAR would be in a position to produce a comparable document concerning international asset recovery after 2025 once UNCAC's review mechanism has completed the second review cycle, which covers the asset recovery chapter.[71] Once the second review cycle is complete, the WGAR will have a solid evidentiary basis upon which to draft guidelines on international asset recovery. The country reports that the review mechanism produced through the review cycles can be expected to provide a fairly comprehensive picture of current practices regarding asset recovery. Those states parties that have experience in international asset recovery will have provided the review mechanism with a significant range of information about domestic legislation, court cases, jurisprudence, reports, studies and statistics relating to the various provisions of Article 57.[72]

The slow pace of the second review cycle helps to explain why law reform efforts have been pursued outside of the UNCAC framework. Even though UNCAC came into force in 2005, and the WGAR has been gathering information since it came into existence in 2007, guidelines on asset recovery can only realistically be expected to take shape in the latter half of the 2020s. This is much slower than the UNODC Secretariat expected. In July 2007, the UNODC Secretariat anticipated that the next five to 10 years would be needed for 'identifying and thoroughly analyzing good practices'.[73] In fact, approximately 15 to 20 years, instead of the anticipated five to 10 years, have proved necessary for data gathering. While the UNCAC review process will eventually produce a relatively comprehensive and valuable data set on international asset recovery in law and practice, the delay is problematic from a law reform perspective.

[70] UNCAC, *supra* note 1, Article 31 covers freezing, seizure and confiscation.

[71] Implementation Review Group, Performance of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption: Note by the Secretariat, Doc. CAC/COSP/IRG/2023/CRP.2, 21 March 2023.

[72] Conference of the States Parties to UNCAC, Guidance to Filling in the Revised Draft Self-Assessment Checklist on the Implementation of Chapters II (Preventive Measures) and V (Asset Recovery) of the United Nations Convention against Corruption, Doc. CAC/COSP/IRG/2016/CRP.1, 16 June 2016, at 104–111.

[73] Open-ended Intergovernmental Working Group on Asset Recovery, Innovative Solutions to Asset Recovery: Background Paper Prepared by the Secretariat, Doc. CAC/COSP/WG.2/2007/2, 6 July 2007, para. 24.

B *Legal Change*

1 A Proliferation of Initiatives

While formal law reform remains a largely theoretical possibility to date, a significant number of norm development initiatives have emerged in recent years. The MoUs that have been concluded between requesting and requested states can be considered a form of legal change to the extent that these agreements 'fill in' some of the gaps that have been left by UNCAC, thereby supplementing the treaty and setting the terms in particular asset recovery cases. In addition, states and non-state actors have produced a raft of general guidance, addressing various aspects of asset recovery, though with notably varying levels of detail.

Some of these initiatives have been undertaken within the framework of international organizations or intergovernmental organizations. In 2011, for example, the Group of Twenty (G20) produced the Nine Key Principles of Asset Recovery, which partly focus on G20 countries putting in place the legislation and domestic institutions necessary to facilitate asset recovery. In 2020, the African Union produced a draft Common Position on Asset Recovery at the initiative of Nigeria.[74] The document sets out broad commitments regarding domestic legal systems, international cooperation, processes for identifying assets, asset recovery and the management of recovered assets. In addition, in 2022, the UN Office of the High Commissioner for Human Rights (OHCHR) produced Recommended Principles on Human Rights and Asset Recovery. This document addresses the mutually reinforcing aspects of human rights law and international anti-corruption law and includes best practices regarding the return of assets in a manner that conforms with both bodies of law.[75]

In addition, the three developed states that have the most significant experience as requested states – Switzerland, the UK and the USA – have also pursued the formulation of principles, but they have done so outside of the framework of any international or intergovernmental organization. Switzerland, through its Lausanne Seminars, has produced detailed, step-by-step Guidelines for the Efficient Recovery of Stolen Assets, complete with references to sources of more information, including the limited body of secondary literature on asset recovery.[76] These guidelines, however, do not deal with the return of confiscated assets, which was very much the focus of GFAR, which

[74] African Union, Common Position on Asset Recovery, EX.CL/1213(XXXVI) Add.1 Rev.1. February 2020, preambular para. 6.

[75] Office of the UN High Commissioner for Human Rights (OHCHR), Recommended Principles on Human Rights and Asset Recovery, 2 March 2022, available at www.ohchr.org/en/documents/tools-and-resources/ohchr-recommended-principles-human-rights-and-asset-recovery-2022. The author worked as a consultant for the OHCHR on this project. The opinions expressed in this article are the author's alone and do not represent those of the OHCHR.

[76] Since 2001, Switzerland has been hosting a series of seminars, which bring together practitioners in the field of asset recovery for the purpose of exchanging information and strengthening international cooperation. 'Guidelines for the Efficient Recovery of Stolen Assets', *Basel Governance*, available at https://learn.baselgovernance.org/pluginfile.php/6239/mod_resource/content/4/Asset%20recovery%20guidelines.pdf.

the UK and the USA hosted in 2017. GFAR resulted in the conclusion of the GFAR Principles for the Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases (GFAR Principles), which will be the subject of further analysis in section 5 of this article.[77]

Civil society organizations have also produced sets of principles concerning asset recovery, partly in response to state-led efforts.[78] The GFAR Principles, for example, prompted the UNCAC Coalition to issue a Civil Society Statement that makes seven recommendations to the UNCAC states parties. These recommendations concern, among other things, the underlying causes of asset theft, identifying and overcoming the main obstacles of asset recovery, accountability and transparency in asset recovery, the role of civil society in asset recovery and the allocation of recovered assets. In addition, in 2017, Transparency International France developed 'five key principles' governing the allocation of assets derived from grand corruption.[79] These principles broadly address transparency, solidarity, effectiveness, integrity and accountability. Lastly, in 2021, a coalition of civil society organizations produced the Civil Society Principles for Accountable Asset Return, which includes relatively detailed treatment of transparency and participation, integrity, accountability and victim restitution and other beneficiaries.[80]

This proliferation of initiatives concerning asset recovery evidences a widely perceived need for further normative development concerning asset return. These initiatives have emerged in the absence of any timely initiatives by the WGAR and have partially filled the gap that has been left by its inaction. But this level of proliferation has the potential to give rise to fragmentation as the different sets of principles naturally vary and mostly omit references to the relevant legal framework set out in UNCAC. Principles concerning transparency, participation and accountability in the context of asset recovery processes could be grounded, for example, in UNCAC and human rights law, but this has not been a common approach.[81] The quality of the norms produced by this body of non-binding instruments is arguably weakened where the links to existing legal frameworks are not referenced or explained.

[77] Global Forum on Asset Recovery (GFAR), Principles for the Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases (GFAR Principles), (2017), available at https://star.worldbank.org/gfar-principles.

[78] UNCAC Coalition and Transparency International have also proposed broader norm development in the asset recovery area. See Transparency International and UNCAC Coalition, Proposal for a Multilateral Agreement on Asset Recovery, June 2020.

[79] Transparency International France, Le sort des biens mal acquis et autres avoirs illicites issus de la grande corruption (2017), at 14–15, available at https://transparency-france.org/actu/sortbiensmalacquis-2/#.Yyy2A-yA4-Q. (Transparency International France's proposed five key principles that should govern the allocation of assets derived from grand corruption).

[80] 'Civil Society Principles for Accountable Asset Return', *CiFAR*, available at https://cifar.eu/wp-content/uploads/2020/10/CSO-Principles_EN.pdf.

[81] See, e.g., UNCAC, *supra* note 1, Art. 5. But see OHCHR, *supra* note 75.

2 Evaluating Legal Change in the Context of Asset Recovery: The Concepts of Accountability and Effectiveness

The phenomenon of legal change in the context of asset recovery gives rise to questions of accountability and effectiveness. Informal norm development prompts questions about whether an accountability gap or deficit results from the circumvention of the traditional formalities associated with treaty-making in the context of an international organization. Legal change also gives rise to questions about whether dispensing with such formalities enhances (or detracts from) the effectiveness by minimizing impediments to cooperation.[82] Broadly speaking, the term 'accountability' means responsiveness to people. In a narrow sense, accountability refers to 'a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'.[83] In the norm development context, a given 'actor' exercises public authority in the form of norm-setting. GFAR could be considered an actor exercising public authority in the field of asset recovery. The term 'forum' refers to stakeholders to whom the 'actor' owes accountability. In the asset recovery field, the forum could consist of countries participating in the norm-setting process and other actors who are affected by the norm development, such as victims of corruption or countries not participating in the process. Accountability may operate *ex post* as decisions are being implemented or *ex ante* in the lead-up to decision-making. *Ex post* accountability mechanisms operate in the context of relationships that are institutionalized where rules and procedures allow a forum to hold an actor accountable by imposing sanctions or other consequences. *Ex ante* mechanisms of accountability operate in a broader context, which is not necessarily institutionalized and can involve the establishment of a mandate, information-sharing and participation in decision-making. *Ex ante* accountability mechanisms help to ensure that the actor takes account of the interests and preferences of the forum.

The term 'effectiveness' in the context of legal change has four dimensions.[84] First, it refers to whether norm development enhances the chances of international cooperation or reduces impediments to cooperation. In other words, 'does cooperation materialize' as a result of the norm development process? Second, effectiveness refers to whether the results of such cooperation are implemented or complied with. Third, effectiveness means that the problem at hand is addressed or solved. Finally, effectiveness refers to problem-solving that is cost-effective. In the context of asset return, effectiveness would therefore mean that legal change produces norms that facilitate the conclusion of agreements on asset return and that states comply with the terms of those agreements. Effective norms on asset return would thereby help states to solve

[82] Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 30; Lipson, 'Why Are Some International Agreements Informal?', 4 *International Organizations* (1991) 495, at 500.

[83] Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', 13 *European Law Journal* (2007) 447, at 450.

[84] Pauwelyn, *supra* note 81, at 30.

the problem at hand – namely, the disagreements that arise between destination and origin states at the confiscation stage of the asset recovery process. The resolution of such disagreements would be 'cost-effective' where the norms would reduce the expenditure of diplomatic capital in negotiations between states involved in asset recovery processes.

5 The GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases

The remainder of this article analyses the GFAR Principles from the perspective of effectiveness and accountability. The GFAR Principles are especially relevant to this study because they deal with the last stage of asset recovery, the 'disposition and return of confiscated stolen assets'. In addition, the GFAR Principles appear to hold a particularly authoritative status among the various sets of principles that have been produced thus far. One commentator with decades of experience in the anti-corruption field has referred to the GFAR Principles, for example, as 'the closest the world has come so far to setting some basic rules of the game for asset return'.[85] Since their publication, the GFAR Principles have also been referenced in the preambular language of a number of MoUs.[86] Such references distinguish the GFAR Principles from other sets of principles, which have not been referenced in the available body of MoUs. Moreover, in 2023, GFAR evolved from a one-time event into an 'action series', giving this initiative ongoing importance.[87] The following section describes the process that led to the GFAR Principles and the substantive contents of the principles before analysing them by reference to the concepts of accountability and effectiveness.

A *Process and Substance of the GFAR Principles*

The GFAR Principles are the product of an ad hoc conference hosted in December 2017 in Washington, DC, by the USA and the UK. The purpose of this event was 'to recommit to the global asset recovery agenda; share best practices; provide technical training to asset recovery practitioners; and support capacity building initiatives'.[88] GFAR also facilitated numerous bilateral and multilateral meetings concerning the asset recovery processes of four 'focus countries' – Nigeria, Sri Lanka, Tunisia and Ukraine.[89] A report issued by GFAR following the event suggests that, beyond these

[85] Mason, *supra* note 5, at 9.

[86] Switzerland-Uzbekistan MoU, *supra* note 40, preambular para. 10 (recalling the GFAR Principles, *supra* note 77, 'which neither infringe national sovereignty nor domestic principles of law'); Jersey-Nigeria-USA MoU, *supra* note 39 (reference in preambular para. 22 to GFAR Principle 4); Switzerland-Uzbekistan Agreement, *supra* note 36, preambular para. 12; Luxembourg-Peru-Switzerland MOU, *supra* note 43, preambular para. 8.

[87] 'Deputy Assistant Attorney General Kevin Driscoll Delivers Remarks at the Global Forum on Asset Recovery Action Series in Atlanta', *US Department of Justice*, 12 December 2023, available at www.justice.gov/opa/speech/deputy-assistant-attorney-general-kevin-driscoll-delivers-remarks-global-forum-asset.

[88] GFAR, Summary of Discussions (GFAR Report), 4–6 December 2017, at 16.

[89] *Ibid.*, at 13.

bilateral and multilateral meetings, the event largely resembled an international conference featuring numerous panels on different asset recovery topics. Panellists ranged from government officials and practitioners to members of the press. More than 300 participants from 26 different jurisdictions reportedly participated in this conference, but the exact identity of these participants and jurisdictions is not specified. The government representatives who served as panellists at the conference were almost entirely from Switzerland, the UK, the USA and the four focus countries: Nigeria, Sri Lanka, Tunisia and Ukraine.[90] Representatives from civil society organizations do not appear to have taken part in the conference itself and instead held side events on asset recovery.

Although this was an ad hoc event, a report on the proceedings indicated that GFAR could be reconvened 'when significant and complex asset recovery case coordination efforts are necessary'.[91] The report further indicated that, if GFAR were to reconvene, then the hosts and the organizers would be determined based on the countries in need of assistance and the 'type of assistance identified collectively by financial centers and requesting countries'.[92] When France and the USA launched a follow-up GFAR Action Series in 2023, the two focus countries were Moldova and Zambia. In addition, Algeria, Honduras, Iraq, Seychelles, Nigeria and Ukraine also 'formally joined the GFAR Action Series as focus countries'.[93]

The 2017 conference resulted, in part, in the conclusion of the GFAR Principles in the form of a communiqué. The communiqué and the accompanying report omit information about how these principles were drafted and by whom. Each of the 10 GFAR Principles consists of a brief one-to-three sentences, with almost no supporting references to legal sources. The principles can be clustered into four groups, with the first group dealing broadly with cooperation between requested and requesting states, including the importance of 'strong partnership' and 'early' and 'continuous dialogue' between cooperating states.[94] A second group of principles addresses transparency, accountability and participation in the context of the return and disposition of recovered assets.[95] Transparency in this context means that '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 term 'accountability' is not specified, though it could be interpreted as referring, at least partly, to monitoring mechanisms. The term 'participation' refers to the inclusion of 'individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations' but only 'to the extent appropriate and permitted by law'.[96] According to the principles, non-government stakeholders

[90] *Ibid.*, at 11 (panel included Brazilian official).
[91] *Ibid.*, at 17.
[92] *Ibid.*
[93] World Bank and StAR Initiative, Global Forum on Asset Recovery Action Series, 13 November 2023, available at https://star.worldbank.org/global-forum-asset-recovery-gfar-action-series.
[94] GFAR Principles, *supra* note 79, Principles 1 (partnership) and 3 (early dialogue).
[95] *Ibid.*, Principles 4 (transparency and accountability) and 10 (inclusion of non-government stakeholders).
[96] *Ibid.*, Principle 10.

can participate in asset return 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'.[97]

Another group of principles concerns the 'end-use' and beneficiaries of recovered assets.[98] The GFAR Principles provide that, where possible, consideration should be given to encouraging uses that fulfil 'UNCAC principles of combating corruption, repairing the damage done by corruption, and achieving development goals'. The beneficiaries should be 'the people of the nations harmed by the underlying conduct' (though 'without prejudice to identified victims'), to the exclusion of the persons involved in the commission of the corruption offences that gave rise to the asset recovery process. A final set of principles acknowledges that asset recovery cases are fact specific and should be the subject of case-specific agreements or arrangements, which should be agreed upon by the transferring and receiving states, in keeping with Article 57(5) of UNCAC – the GFAR Principles' sole reference is to UNCAC.[99] Such agreements or arrangements should 'be concluded to help ensure the transparent and effective use, administration and monitoring of returned proceeds'.[100]

B *Accountability and Effectiveness of the GFAR Principles*

The concepts of accountability and effectiveness provide a useful framework for evaluating the implications of developing international asset recovery norms through the GFAR Principles. Regarding accountability, the 'actor' in this context would be GFAR itself, meaning the representatives from 26 jurisdictions and other non-state actors that were present at the conference. The 'forum' includes not only the jurisdictions represented and the other non-state actors present but also other non-participating states and external stakeholders who are affected by the GFAR Principles, such as victims of stolen assets in requesting states. Because GFAR was an ad hoc event, which took place outside of the context of an institution, *ex post* mechanisms of accountability have little relevance here. Instead, the *ex ante* accountability mechanisms of participation and transparency are especially applicable.

GFAR arguably suffers from an accountability deficit partly due to the limited participation in the forum. Participation in the 2017 GFAR event included a relatively small sub-set of states parties to UNCAC, and civil society did not take part in the main event. The 26 jurisdictions that were represented at the conference included at least seven especially interested states parties that have substantial experience either as requested states (Switzerland, the UK and the USA) or as requesting states (Nigeria, Sri Lanka, Tunisia and Ukraine).[101] Because GFAR did not report the identity of the other 19 jurisdictions – in a notable lack of transparency – it is not possible to assess the

[97] *Ibid.*

[98] *Ibid.*, Principles 5 (beneficiaries), 6 (strengthening anti-corruption and development) and 9 (preclusion of benefit to offenders).

[99] *Ibid.*, Principles 7 (case-specific treatment) and 8 (referencing UNCAC Art. 57(5)).

[100] GFAR Principles, *supra* note 77, Principle 8.

[101] Sri Lanka was at the beginning stages of acquiring experience as a requesting state. GFAR Report, *supra* note 88, at 11, 14.

experience or interest of these other jurisdictions in asset recovery. Regardless, GFAR excluded the vast majority of the 189 states parties to UNCAC. As a result, most states parties to UNCAC did not have an opportunity to contribute to the formulation of the GFAR Principles.

In the process of privileging the views of certain especially experienced and interested states parties to UNCAC, GFAR disregarded the views of other states parties to the extent that the excluded states parties had particular views on the return of recovered assets. The excluded states parties may have had less experience or interest in asset recovery, and some may have even been resistant to the basic ideas embodied in the GFAR Principles. Within the UN, less well-informed or contrarian voices would still have been given a platform, whereas, in an informal forum, such as GFAR, it is possible for a few powerful states, like the hosts of GFAR, to proceed without them. In addition, the apparent exclusion of civil society from the main event also meant that GFAR was able to proceed in disregard of what may have been more progressive voices and actors especially focused on representing victims of corruption. The relegation of civil society to side events appears to have resulted in civil society organizations 'countering' the GFAR Principles by issuing their own set of principles.

While GFAR may be critiqued for its exclusive and relatively non-transparent character, the forum fulfils certain effectiveness criteria – namely, cooperation enhancement and implementation or compliance. First, cooperation materialized in this instance insofar as the forum managed to produce guiding principles on asset return in the absence of any consensus or action within the UN. Moreover, while the GFAR Principles have a broad scope, they do advance the normative discussion about asset recovery beyond Article 57 of UNCAC. In other words, GFAR managed to achieve what the WGAR has not, and the exclusive character of GFAR may have enabled this progress. The forum's relative effectiveness could even be seen as inversely related to its inclusiveness (or lack thereof).

Second, the GFAR Principles have been implemented in practice to a limited extent, as states have incorporated references to them in some MoUs that have been concluded since 2017.[102] But whether the GFAR Principles have otherwise influenced the terms of asset return agreements since 2017 is difficult to assess given that only a limited number are made publicly available (though this lack of transparency is itself an indicator that the principles' emphasis on transparency has had a limited impact). Third, the cost-effectiveness of the principles is similarly difficult to assess. The question is whether the principles create a normative framework that helps bring parties closer together, thereby reducing the expenditure of diplomatic capital during negotiations. Any evaluation of this issue would have to be based, at least in part, on interviews with negotiators, which are beyond the scope of this study.

Finally, the GFAR Principles have not sufficiently addressed the problem at hand, meaning the modalities of asset return. GFAR did not produce an optimal set of guiding principles on the return of recovered assets. The sheer brevity of the principles, and the almost total absence of references to the existing legal framework, potentially

[102] See GFAR Principles, *supra* note 77.

limits the capacity of the principles to shape state behaviour. All of the principles included in this document merit more sustained, detailed treatment. If the principles represent just the beginning of the process of legal change led by GFAR, then they could be considered a promising start as they embrace norms that arguably ought to supplement the existing text of Article 57. If, however, the principles represent the beginning and the end of normative development through GFAR, then they are simply insufficient – they lack necessary details, explanations, legal references and best practices. The 2023 GFAR gathering did not result in a revised or expanded version of the GFAR Principles, and it remains unclear whether they will be revisited in the future. At present, normative development regarding asset return therefore has an uncertain future, despite the evident need for further norm-setting in this area.

6 Conclusion

When UNCAC was concluded in 2003, its chapter on asset recovery represented a major accomplishment. States made asset recovery a fundamental principle of the treaty and mandated the return of stolen assets under certain circumstances. But UNCAC's asset recovery provisions are also flawed as they reflect a compromise struck after strident disagreement among delegations. In addition, negotiators lacked a robust evidence base on asset recovery, especially regarding asset return. More than 20 years later, Article 57 neither reflects nor adequately governs the return and disposal of assets. The growing divide between the law and practice concerning asset return calls for further normative development in the form of either binding or non-binding norms that could supplement Article 57. Supplementary norms ought to provide negotiating states with detailed guidance on issues that commonly arise in practice, such as options with respect to the recipients and uses of returned funds, the design and function of monitoring mechanisms and the public disclosure of asset return agreements. Given that asset recovery remains politically sensitive, these norms ought to detail a range of suitable options without requiring states to adopt a particular approach.

The challenges associated with the normative development of UNCAC's asset return provision highlight the difficulties generally associated with supplementing or updating treaties. Flawed or out-of-date provisions may become effectively 'frozen'. Formal law reform within the existing treaty framework may represent a burdensome and unrealistic option, especially if fragile consensus language must be reopened. Informal legal change allows actors to update norms that might otherwise remain frozen but not necessarily in a sufficiently accountable or effective manner. To date, the most significant norm development in the asset recovery context has indeed taken place outside of the UNCAC treaty framework and the associated WGAR. The GFAR Principles demonstrate both the promise and perils of informal legal change in this sphere.

Based on GFAR's record to date, any further norm development through GFAR would likely be premised on the views and practices of a small number of states with

significant experience in asset recovery. Norm development in this setting would be swifter than law reform under the auspices of the WGAR, in part because it would not be necessary to reach a consensus among all states parties to UNCAC. Yet the exclusion of some states parties, and the privileging of certain views and state practices, could have a detrimental effect on the accountability of such a process. As for whether another GFAR meeting could produce effective norms, the existing GFAR Principles suggest that progressive principles are possible but that robust, detailed principles cannot necessarily be expected. While informal legal change through GFAR has enabled some normative progress, this has come at a cost, especially in terms of accountability. GFAR represents an important option for normative development in the asset recovery context, but future iterations ought to entail a more inclusive and transparent process geared towards yielding a more elaborate, persuasive outcome document.

Annex 1**

Agreements Governing Specific Cases of Asset Return

Date of Conclusion	Instrument	Short Reference
April 2008	Amended Memorandum of Understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan	2008 MoU Kazakhstan-Switzerland-United States
December 2017	Memorandum of Understanding among the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association on the Return, Monitoring and Management of Illegally-Acquired Assets Confiscated by Switzerland to Be Restituted to the Federal Republic of Nigeria	2017 MoU Nigeria-Switzerland-World Bank
February 2020	Agreement among the Government of the Federal Republic of Nigeria and the Bailiwick of Jersey and the Government of the United States of America Regarding the Sharing, Transfer, Repatriation, Disposition, and Management of Certain Forfeited Assets	2020 MoU Jersey-Nigeria-United States
August 2020	Memorandum of Understanding between the Government of the Federal Republic of Nigeria and the Government of Ireland Regarding the Return, Disposition and Management of Certain Forfeited Assets	2020 MoU Ireland-Nigeria
December 2020	Accord entre la Confédération Suisse, la République du Perou et le Grand-Duche de Luxembourg sur le transfert d'avoirs saisis	2020 Agreement Luxembourg-Peru-Switzerland

Agreements Governing Specific Cases of Asset Return		
Date of Conclusion	**Instrument**	**Short Reference**
March 2021	Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Government of Nigeria on the Modalities for the Return of Stolen Assets Confiscated by the United Kingdom: Annex 1	2021 MoU Nigeria-United Kingdom
September 2021	Memorandum of Understanding between the United Kingdom of Great Britain and Northern Ireland and the Republic of Moldova on the Return of Funds Forfeited by the National Crime Agency in Relation to Luca Filat	2021 MoU Moldova-United Kingdom
August 2022	Agreement between the Swiss Confederation and the Republic of Uzbekistan on the Modalities for the Return of Illegally Acquired Assets Forfeited in the Swiss Confederation to the Benefit of the Republic of Uzbekistan	2022 Agreement Switzerland-Uzbekistan
August 2022	Agreement between the Government of the Federal Republic of Nigeria and the Government of the United States of America Regarding the Sharing, Transfer, Repatriation, Disposition, and Management of Certain Forfeited Assets	2022 Agreement Nigeria-USA
May 2024	Memorandum of Understanding between the Government of the Republic of Mozambique and the Bailiwick of Jersey regarding the Repatriation and Management of Certain Forfeited Assets	2024 MoU Jersey-Mozambique
General or Framework Agreements		
2016	Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Government of Nigeria on the Modalities for the Return of Stolen Assets Confiscated by the United Kingdom	2016 General MoU Nigeria-United Kingdom
July 2018	Framework for the Return of Assets from Corruption and Crime in Kenya (FRACCK) between Government of the Republic of Kenya and Swiss Federal Council and Government of the United Kingdom and Government of Jersey	2018 Framework Agreement Kenya-Switzerland-United Kingdom
December 2018	Memorandum of Understanding between the Government of the Republic of Kenya and the Government of Jersey on Financial Cooperation	2018 General MoU Jersey-Kenya
September 2020	Memorandum of Understanding on the Framework for the Restitution of Illegally Acquired Assets Forfeited in Switzerland to the Benefit of the Population of the Republic of Uzbekistan between the Swiss Federal Council and the Government of the Republic of Uzbekistan	2020 MoU Switzerland-Uzbekistan

** All documents referenced in Annex can be found here: https://doi.org/10.17026/SS/SSCBXC.