

Confiscated Asset Returns and the United Nations Convention against Corruption

A Net for All Fish

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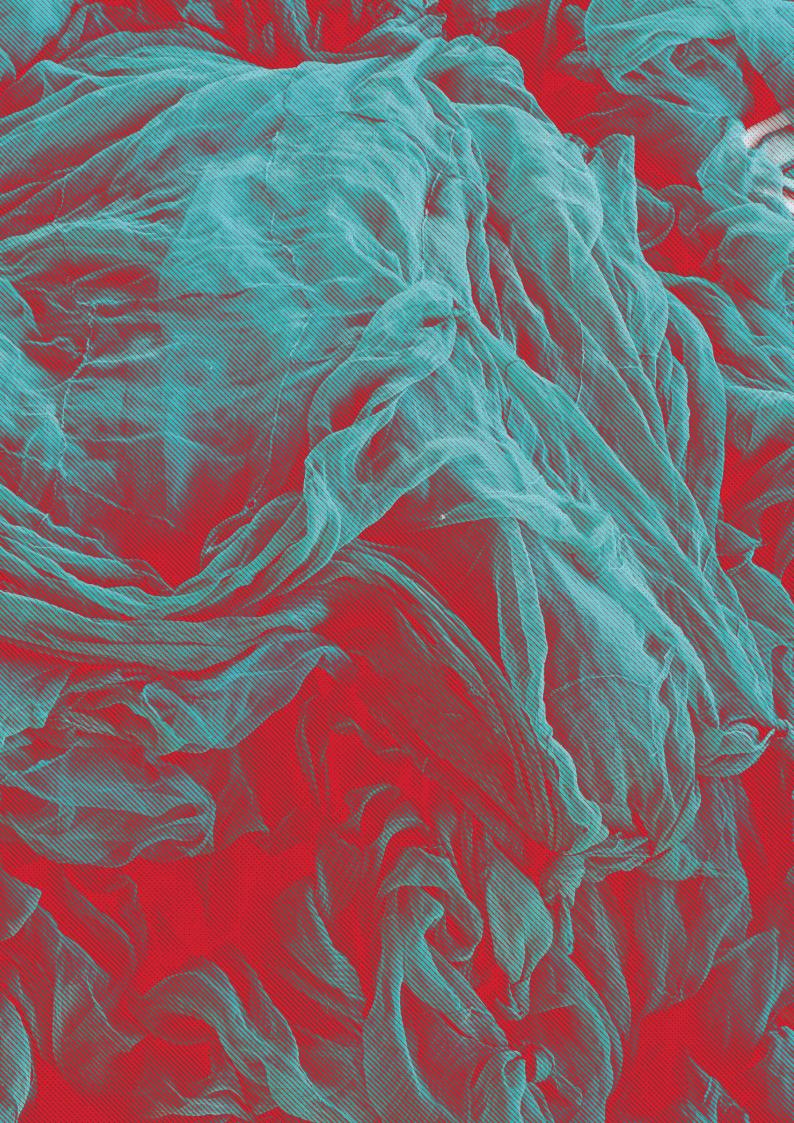
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United Nations Office on Drugs and Crime

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Vienna, 2023



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Glossary

For the purposes of this study, the following definitions apply:

Administrative confiscation: A non-judicial mechanism for confiscating property, usually occurring when no challenge is made by interested parties who have received notice and an opportunity to contest the confiscation; analogous to an abandonment proceeding.

Asset recovery: The overall process by which proceeds of crime transferred abroad are investigated, frozen or seized, confiscated and then returned to the State of origin or to prior legitimate owners or victims.

Asset return: repatriation of confiscated proceeds of crime to the State of origin, to prior legitimate owners or to victims of crime,

Confiscation: permanent deprivation of property by order of a court or other competent authority. It includes forfeiture, where applicable.

Conviction-based confiscation: confiscation dependent on the criminal conviction of a defendant person or entity, often for a crime involving or yielding the property itself. Contrast with definition of non-conviction based confiscation.

Dual confiscation viability: a criminal offence's legal viability as a predicate for confiscation under the domestic laws of both the State hosting criminal assets and the State of origin of those assets. Dual criminality is prerequisite to dual confiscation viability, but the latter also requires that the criminal offense be a predicate offense for confiscation in both States.

Dual criminality: requirement that the criminal offence that serves as the basis for a requesting State's mutual legal assistance or extradition request is also a criminal offence under domestic law in the requested State.

Freezing and seizure: temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

Host State (or country): the State (country or jurisdiction) in which proceeds of crime are located after their transfer from the State of origin.

Kickback: A portion of income given to a person in a position of power or influence as payment for having made the income possible, considered illicit or improper.

Instrumentality: property used to facilitate a criminal offence, such as a conveyance used to transport illegal items or a structure used to conceal, manufacture or trade in them.

Non-conviction based confiscation: Confiscation for which a criminal conviction of a person or entity may not be required. In some States, the asset itself is the defendant in the confiscation proceeding, with focus on its role in the criminal offence.

Politically exposed person: individual who is, or has been, entrusted with prominent public functions, his/her family members and persons or companies clearly related to him/ her (close associates).

Predicate offence: any offence as a result of which proceeds of crime have been generated that may become the subject of a money-laundering offence and/or a confiscation proceeding. It may also be understood as any offence that created a benefit for the offender which may become the subject of a money-laundering or confiscation proceeding.

Prior legitimate owner: natural or legal person, including States, that holds the rightful ownership of the property at the time of the offence.

Proceeds of crime: as any property derived from or obtained, directly or indirectly, through the commission of an offence, as well as instrumentalities.

Property: assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. This term is used interchangeably with assets.

Property-based confiscation: A confiscation action that targets a specific thing or asset found to be the proceeds of crime. Also known as in rem confiscation or a "tainted property" system.

Public official: (i) any person holding a legislative, executive, administrative or judicial office of a State, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State and as applied in the pertinent area of law of that State; (iii) any other person defined as a "public official" in the domestic law of a State.

Requested State: A State that is asked to provide mutual legal assistance, including confiscation and asset return assistance, to another State.

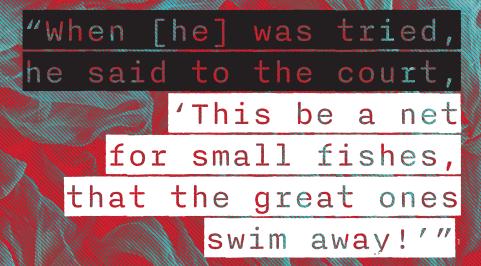
Requesting State: A State that asks for mutual legal assistance, including confiscation and asset return assistance, from another State.

State (or country) of origin: the State (country or jurisdiction) from which proceeds of corruption were expatriated to the host country. The State of origin may also act as a requesting State.

Undue advantage: Entails any benefit, whether tangible or intangible, pecuniary or non-pecuniary.

Value-based confiscation: A confiscation action to recover the value of benefits that have been derived from criminal conduct or to recover the equivalent value of a monetary penalty.

Victim: natural or legal person, including States, that was harmed by an offence.



1. From testimony of Richard Weston in the trial relating to the so-called Overbury Scandal of 1615, cited in Lucy Jago, A Net for Small Fishes (New York, Flatiron Books, 2021), p. 302.

Executive summary

The United Nations Convention against Corruption (UNCAC) shares much of the practical genius found in two of its predecessor UN accords covering narcotics trafficking and transnational organized crime. All three conventions establish worldwide standards for criminalization in the arenas they address. They also establish binding norms for cross-border evidence gathering and exchange, extradition and just prosecution of offenders, and cooperation on the identification and recovery of illicit gains. However, the UNCAC adds a major innovation regarding the proceeds of crimes that States parties to that Convention confiscate within their respective borders in corruption cases with cross-border elements. It mandates the return of those assets as a "fundamental principle" and introduces, for the first time, an international asset recovery and return scheme. Accordingly, ever more UNCAC States parties are now faced with what can be inherently complex processes involved in achieving successful asset returns. This paper analyses asset return complexities, examines how they are addressed by the UNCAC and shares examples of how they are addressed within the domestic legal systems of a diverse group of countries.

The detailed analysis of article 57 of the UNCAC – the Convention's key operational asset return provision – contained in this paper shows that article 57 is a complex provision that sets forth a series of asset return obligations of varying degrees for States parties to the Convention vis-à-vis particular assets once they have been recovered by the host State through some manner of confiscation. The paper breaks these varying return obligations into four distinct categories delineated by the different asset characteristics, predicate offence prerequisites, and processes through which a confiscation has occurred.

The asset return categories themselves range broadly in the degree of return obligations they impose. As just two bookend examples, they range from an *unqualified mandatory obligation* to return any embezzled public funds to a requesting State party to, in the situations specified in the paper, the obligation to *give priority consideration* to returning confiscated property to its prior legitimate owners or compensating the victims of the crime. The analysis is applied to the proceeds and instruments from all twelve of the public corruption offense types defined in early articles of the UNCAC, which are potentially subject to return following confiscation by the host State party in some manner. To support practitioners involved in asset return cases, the paper also illustrates how actual asset returns are carried out. Common patterns are identified by examining how diverse legal systems interact with the UNCAC to authorize and facilitate cross-border returns, either through use of article 57 itself as affirmative, and sometimes sole, legal authority for such returns or through domestic implementing or autonomous laws that give effect to the UNCAC's varying obligations to achieve asset returns. Such patterns and typical differences encountered in domestic legislation can serve as a useful basis for researching and understanding the laws of other countries, from which assets returns may be sought in future cases.

The analysis of article 57, domestic law, and other treaties/ agreements is then applied to a detailed presentation of sixteen illustrative case examples in which assets have either been returned already or in which asset return proceedings are ongoing.

These examples depict real cases of corrupt activities by a range of public officials -in some cases together with complicit private associates and family members - from the lowest to the highest levels of their respective governments, showing the broad range of effectiveness of the UNCAC's cross-border regime for asset recovery and return, i.e., that the regime is indeed "A Net for All Fish". Though these cases are not comprehensive, they are instructive for the diversity and the ingenuity they employ in each of the several asset return categories that are delineated in the UNCAC. The cases serve to illustrate how the UNCAC's various asset return provisions are being applied in practice through the combined efforts of prosecutors, courts, asset management experts, diplomats, and other dedicated government officials in various roles, as well as through the participation of multilateral organizations with expertise in the sustainable development needs of recipient countries.

Finally, this paper outlines in detail a range of strategic and tactical planning approaches, along with an array of complementary research tools that governmental actors in any country may find useful when planning, promoting, and pursing confiscated asset returns in public corruption cases.

The strategic and tactical planning approaches are presented as a series of detailed questions that a host State, a confiscating State (if not the host), and a State of

the assets' origin might wish to consider asking one another to assess and initiate a potential asset return. Each set of questions is aimed to address, either directly or indirectly, the wide array of asset return criteria already detailed in the earlier parts of the paper as they pertain to the UNCAC and article 57, their interplay with a specific country's domestic laws and international commitments relevant to asset returns, and the sixteen case scenarios that are detailed, including those that fall outside of the rubric of article 57. The criteria probed by the questions relate to the legality, feasibility, avenues, vehicles, practicalities and potential safeguards for pursuing a successful cross-border asset return in a specific future case. While the questions potentially can be directly posed by each State to the other most of them can be answered more quickly and efficiently at least in part, as a basis for opening negotiations - through independent research conducted via open sources or through closed sources to which a country may already have access as part of an intergovernmental asset recovery or law enforcement network. The questions' premise is that asset return interchanges between countries invariably go better and faster, and yield greater promise for eventual success when all parties have sufficient information available to anticipate key challenges, concerns, and legal requirements of their counterparts.

For their part, the suggested research tools are offered as tried and true avenues for answering many of the strategic and tactical planning questions suggested above. These tools include four specific open-source tools available on the Internet and two specific closed sources, both online and in-person, to which requested and requesting UNCAC State party officials are likely to have access due to their country's participation in an intergovernmental asset recovery network or a relevant multilateral organization.

Chief among the recommended open-source tools are the detailed, online country-specific executive summaries and, as applicable, country review reports generated through the *Mechanism for the Review of Implementation of the United Nations Convention against Corruption* (IRM), a process that aims to assist UNCAC States parties in their ongoing implementation of the Convention, including article 57 on asset returns. Also recommended is the *Tools and Resources for Anti-Corruption Knowledge* (TRACK) portal, created as a knowledge management portal focused on the implementation of the UNCAC's provisions pertaining to

corruption and economic crime. In addition, as to various countries' current asset recovery and return capabilities more generally, there are the Mutual Evaluation Reports (MERs) generated on a recurring and cumulative basis by the Financial Action Task Force (FATF) and its various FATF-Style Regional Bodies (FSRBs) worldwide. Member countries of these multilateral bodies, often with assistance from the World Bank or other international organizations, conduct detailed peer reviews of fellow member countries for their overall compliance with internationally accepted anti-money laundering (AML) and counter financing of terrorism (CFT) standards, which are embodied in the FATF Forty Recommendations and Eleven Immediate Outcome standards (IOs).

The recommended closed source tools include the human expertise available through the Europol-based Camden Asset Recovery Inter-agency Network (CARIN) and its seven regional Asset Recovery Inter-agency Network (ARIN) offshoots. These networks form interconnected and informal collectives of law enforcement and judicial/prosecutorial contacts from 164 countries. A second recommended closed source tool is the Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE Network). Launched in 2021, the GlobE Network is open to specialized anti-corruption law enforcement authorities from all United Nations Member States and States parties to the Convention. It provides a platform for peer-to-peer information exchange and informal cooperation to better identify, investigate and prosecute cross-border corruption offences and recover stolen assets.

In conclusion, this paper aims first to advance understanding and implementation of the rights, obligations and powers established through collective adoption of the UNCAC's asset return provisions and second, to demonstrate, through many recent precedential cases, the important progress made to date – and the growing potential for future advances – in this critical and culminant area of the Convention.



Introduction

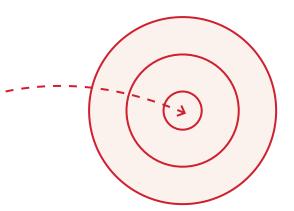
Since the United Nations Convention against Corruption (UNCAC, or the Convention)¹ entered into force in December 2005, much has been written about growing collaborations on the cross-border recovery of proceeds of crime.² Commentary on the UNCAC now generally reflects how States parties to the Convention are jointly casting ever broader nets in an effort to recoup and redress, at least in part, both the loss of public wealth and public trust that is the consequence of public corruption. Corrupt officials and their accomplices still grow rich on bribery, malfeasance and outright theft from public revenues and they launder their illicit gains abroad to disguise, conceal and infiltrate them into legitimate economies. The more crafty and powerful may enjoy impunity for their crimes. But a key antidote provided by the Convention - its global framework for concerted and obligatory action to take back these illegal profits - comes ever more often into play, with increasing effect.

However, more attention still needs to be paid to the fact that collaborative "asset recovery" – by now a phrase of art in the anti-corruption arena – does not automatically equate to the return of stolen assets to their countries of origin. Particularly, more consideration should be given to the often complex processes that yield such asset returns. This paper takes a careful look at those asset return processes by showing how the diverse legal systems of eleven countries interact with the UNCAC to allow for crossborder returns. It also provides a window into how actual asset returns are carried out. It analyses 16 cases from the past decade, most of them quite recent, in which nine UNCAC States parties have acted to return confiscated proceeds of crime (some in vast quantities) to 13 other countries, either directly through or consistent with the Convention's specified asset return framework. The main perpetrators of the corruption offences in these cases included eight Heads of State, six ministerial-level State officials, a big city mayor and a national senator, as well as a spouse, two children, and a sibling of these officials who had access to their privilege and power. In most of these cases, the asset returns are adjuncts to the death, exile or capture and imprisonment of the official perpetrators involved. But even in the few cases covered in which the perpetrators have retained power, the confiscation of their stolen wealth by foreign authorities through open judicial proceedings has both publicly exposed the perpetrators' crimes and set the stage for the eventual return of the stolen assets. The cases presented have been chosen to assist asset recovery practitioners in anticipating and responding effectively to the diverse challenges they may face in charting successful courses for their own asset returns.

The UNCAC is also known as the "Merida Convention" for the Mexican city where it was opened for signature in 2003. The full text of the UNCAC, and the status of its ratification by States parties, can be found at https://www.unodc.org/unodc/en/ corruption/uncac.html.

² For the purpose of this paper, the expression "proceeds of crime" is understood as any property derived from or obtained, directly or indirectly, through the commission of an offence, as well as instrumentalities. The expression "instrumentalities" is understood as property used to facilitate a criminal offence, such as a conveyance used to transport illegal items or a structure used to conceal, manufacture or trade in them.

Structure of the paper



This paper outlines and illustrates asset returns under the UNCAC as one of many essential duties mandated in the Convention. It focuses on the last phase of the process of recovering stolen assets: their return.⁹ However, the paper does not address the important and complex arena of "direct recovery" of assets through the filing of or participation as a litigating party in civil actions in States that host proceeds of crime (as foreseen in article 53^o).⁶

The paper is composed of five parts, a glossary and four appendices. Each part is organized as follows:



- » Part I, "Context", explains the importance of the topic of asset return and provides a brief overview of the Convention as a whole and of its asset return provisions under article 57.
- » Part II, "Overview of the asset return obligations under article 57, paragraph 3", analyses the common elements of all subparagraphs of article 57, paragraph 3 and highlights the components needed for their application. These components include the predicate offences that generate, directly or indirectly, the assets which are to be returned.^o For ease of reference, asset return scenarios are divided into four separate categories, which are then analysed in detail in part IV of the paper.
- » Part III, The interplay of domestic laws and programmes and international agreements with the asset return provisions of the convention", outlines, by way of examples, how the national asset return laws and administrative programmes of various States parties to the Convention work in conjunction with the UNCAC.
- » Part IV, "Illustrative asset return cases and agreements, and a detailed analysis of asset return obligations under article 57, paragraph 3", examines the pertinent provisions of the Convention in detail, using the four categories explained in part II, and illustrates them with 16 case examples of cross-border asset return.
- » Part V, "Approaches and tools for achieving successful confiscated asset returns from abroad", highlights factors that practitioners may wish to consider when defining their strategy with a view to asset return and explains some tools and resources that may assist practitioners in this process.

³ This paper has divided the general process for asset recovery following the division indicated in the Asset Recovery Handbook by the Stolen Asset Recovery (StAR) Initiative: (a) collecting intelligence and evidence and tracing assets; (b) securing the assets; (c) court process; (d) enforcing orders; and (e) return of assets. For details on the StAR Initiative and the Asset Discovery Handbook, see fn. 8 infra.

⁴ All indications of, or references to, specific articles that are not identified as belonging to another convention, treaty or agreement are part of the UNCAC and should be understood as such.

⁵ Direct recovery can be vital, effective and sometimes indispensable when government actors fail to act, fail to act fully or act but fail to achieve asset recovery and return. *Public Wrongs, Private Actions* (StAR, 2014) is a valuable guide to planning and pursing actions relating to article 53 and can be found at https://star. worldbank.org/resources/public-wrongs-private-actions.

⁶ The expression "predicate offence" is understood in this paper as "any offence as a result of which proceeds of crime (defined in fn. 3) have been generated that may become the subject of a money-laundering offence and/or a confiscation proceeding". It may also be understood as any offence that created a benefit for the offender which may become the subject of a money-laundering or confiscation proceeding.



UNCAC enforcement in a nutshell

Among the key strengths of the UNCAC is its global extension of a uniform net for enforcement. Of necessity, this enforcement net is large and multipurposed, and designed to serve both justice and restitution.

Chapter II of the Convention sets forth the preventive measures States parties should take to avoid assets being stolen at the outset. In chapters III to V, the Convention, among other important requirements, sets standards and marshals joint action on the criminalization of corrupt acts, crossborder evidence gathering and exchange, extradition and just prosecution of offenders, and cooperation on identification, recovery and return of illicit gains. Chapter V, entitled "Asset recovery", employs eight articles to outline the range of steps involved in that complex process.

A. A glimpse at the asset recovery scheme

In sum, the articles in chapter V on "Asset recovery" require all UNCAC parties (189 to date) to adopt and apply cooperative measures to detect, trace, freeze or seize, confiscate, and ultimately return, or consider returning, corruption-related assets located within their respective borders. Those assets are to be returned either to their country of origin or, whenever relevant, to their prior legitimate owners or victims of crimes related to the assets who are deserving of compensation.

B. The pivotal role of asset confiscation

As noted in the introduction, most literature on chapter V focuses on the pivotal step of the legal *confiscation*⁷ of proceeds of crime and covers the wide array of efforts by investigators, prosecutors, budget managers, asset management specialists and other public officials in every country that lead to and support confiscations. As expressed in the recently updated *Asset Recovery Handbook:*

An asset confiscation regime is a prerequisite for any jurisdiction that wishes to provide the full panoply of methods for recovering the proceeds of corruption and money laundering. Confiscation involves the permanent deprivation of assets by order of a court or other competent authority. Legal title is acquired by the state or government without compensation to the asset holder.⁸

8 Jean-Pierre Brun et al., Asset Recovery Handbook: A Guide for Practitioners. Second Edition (Washington, DC, Stolen Asset Recovery Initiative, 2021), p. 181 (hereafter

In many, if not most, international asset recovery efforts, it is indeed essential that government actors in the State in which the asset is found (the host State) obtain legal title to the asset in question through a judicial or administrative confiscation proceeding so as to control completely the asset's disposal, including its return to the country of origin. The importance of the host State acquiring legal title to the asset in question is relevant in any of the confiscation systems employed by any country.⁹

C. The ethically imperative role of confiscated asset returns

With the primary focus to date on the critical stage of confiscation of assets, and the myriad complex steps attendant to it, less examination has been given to the requirements, mechanisms, significant challenges and purposes involved in actual returns of confiscated assets to their countries of origin.

The return of stolen assets is the intended conclusion to the asset recovery process. Asset returns are given priority as a "fundamental principle" of the Convention. The first article of chapter V – article 51 – stipulates that States parties "shall afford one another the widest measure of cooperation and assistance" to accomplish asset returns.

In his 2004 foreword to the UNCAC, United Nations Secretary-General Kofi Annan observed that, among all the innovations the Convention introduced, "it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen". This was "a particularly important issue for many developing countries where corrupt high officials have plundered the national wealth and where new Governments badly need resources to reconstruct and rehabilitate their societies".¹⁰

Since then, many countries have learned that effectuating this breakthrough of asset returns, case-by-case, is no small task.

10 UNCAC, pp. iii-iv, https://www.unodc.org/documents/treaties/UNCAC/ Publications/Convention/08-50026_E.pdf.

 $[\]overline{7}$ This paper uses the term "confiscation" just as the UNCAC does (see article 2(g)), t.e., as a generic term for both the conviction-based and non-conviction-based processes. Confiscation will be used even when discussing countries in which these processes. Confiscation will be used even when discussing countries in which these processes are referred to by other terms, such as forfeiture, civil asset recovery, etc. Stated generally, conviction-based confiscation is dependent, in some manner, on the criminal conviction of a defendant person or entity, often for a crime involving or yielding the asset itself. Non-conviction-based confiscation, by contrast, may not require such a criminal conviction; in some countries, the asset itself is the defendant, with focus on its role in the criminal offence. An excellent summary of the different types of non-conviction based confiscation regimes can be found in Annex V of the Camed Asset Recovery Inter-Agency Network (CARIN) Manual, 5th Edition (2020), at https://E205d188-5e8-4e98-9fde-b39bbB14e3.filesuscom/ug/d/d54f05_4ccdfc507cb44d3588354132a68af289.pdf. See also Council of Europe, The Use of Non-Conviction Based confiscation (October 2020).

referred to as the Asset Recovery Handbook). This comprehensive compendium of more than 400 pages is published by the Stolen Asset Recovery (StAR) Initiative, a joint undertaking of the United Nations Office on Drugs and Crime (UNODC) and the World Bank Group. Together, these institutions promote the ratification and implementation of the UNCAC by its States parties, in particular the use of chapter V of the Convention on asset recovery. The Asset Recovery Handbook provides an excellent primer on the UNCAC and on the full array of tasks involved in asset recovery, including, among other topics, asset investigation and tracing, evidence compilation, and asset seizure and freezing using the mutual legal assistance (MLA) process, pre- and post-seizure asset management and disposal, and the prosecution of both conviction-based and nonconviction-based confiscations of assets under a variety of legal systems, as well as several examples of asset returns.

⁹ Common systems include property-based confiscation systems and value-based confiscation systems. Property-based systems are "aimed at assets connected to the proceeds and instrumentalities of the crime." Value-based systems, by contrast, are "focused on the value of benefits derived from a criminal offense." Value-based systems "often impose [...] a monetary penalty equal to that value", which penalty is then "enforceable as a collection of debt or fine against any asset of the defendant, whether or not it has a link to the offense." Ibid. pp. 191, 196; see also UNCAC Art. 31, paras. 1-6.

Purpose: Illustrate application of article 57 to asset returns in law and practice

For government actors, the culminant return phase of the asset recovery process is addressed by article 57, entitled "Return and disposal of assets". This paper's first purpose is to analyse and support the understanding of article 57 and its underlying principles in the context of the diverse challenges posed by cross-border asset returns. Article 57 is a tool that is best understood by breaking it down into several smaller and more easily referenced parts."

A. Article 57, an asset return tool

Article 57 is a complex provision that, upon close consideration, delineates a series of return obligations for States parties to the Convention vis-à-vis assets once they have already been recovered by the host State through some manner of confiscation. Therefore, it is not an asset recovery mechanism - although it is often mistaken as such - and it is applicable only to the several specific confiscation case scenarios contemplated by the Convention. Nevertheless, article 57 is revolutionary in providing the first generally agreed upon international formula for tangibly addressing the return of proceeds of corruption to countries of origin.

The scope of Article 57, elaborated in more detail in several subsequent chapters in this paper, can best be described by tracing and connecting the many tendrils that it extends to multiple preceding provisions of the Convention. These connected pieces can then be organized and presented in a single integrated outline format. Each category factors in different asset characteristics, different predicate offence prerequisites and different processes through which a confiscation has occurred. This paper performs this integrative work for the reader and provides the necessary outlines for each category described.

Throughout this analysis, it is imperative to remember that the overall framework of article 57 has, as its starting point, the prerequisite that any assets it addresses must first be finally confiscated in the State hosting the asset, whether via legal recognition of a prior confiscation by another State, or via an independent confiscation by the host State. It also requires that the confiscation order has been fully executed and is not subject to judicial appeal. It is also critical to consider that, simply because article 57 is specific in what it mandates, it is neither restrictive nor exclusive. Therefore, any country confronting a potential proceeds of crime return is free to apply whichever broader range of legal and programmatic tools it has available to return assets to another country when the equities of the case warrant such a return. In any event, a working knowledge of international asset recovery mechanisms and especially various national confiscation regimes, is useful in fully understanding the asset return mechanisms implicated by article 57.

B. The UNCAC as a legal authority - alone, in concert or as a conceptual guide

After breaking article 57 into several logical subparts, this paper's second purpose is to harness this breakdown for organizing and examining several recent illustrative reallife case scenarios from different countries in which assets have been or are currently being returned successfully to their countries of origin through a variety of means. These cases are instructive for their diversity and the ingenuity they employ in each of the several asset return categories that are delineated in the following sections of this paper.

The case discussions also highlight the varied role that article 57 plays within the context of the domestic legal systems and other treaty relationships of the States parties that apply it. In some countries, article 57 stands alone as an affirmative legal basis for the return of assets. In other countries, domestic laws supplement the mandates of article 57. Still in others, domestic laws that are consistent with the mandates of article 57 substitute for its direct application altogether and may not refer to it when an asset

¹¹ The article in full text provides "Article 57 - Return and disposal of assets

^{1.} Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

^{2.} Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties. 3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of

this article, the requested State Party shall:

⁽a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the

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

 ⁽c) In all other cases, give priority consideration to returning confiscated property;
 (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or

compensating the victims of the crime. 4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property 5. 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."

return is made. Furthermore, the laws of some countries establish guidelines, and even permanent programmes within key government departments, to accommodate flows of asset returns consistent with the provisions of article 57. Ad hoc asset return agreements also play a role. This paper includes texts from several such agreements between host and origin countries that have successfully provided frameworks for the transparent completion of asset returns.

C. Effective use of article 57

As its third and final purpose, this paper draws on the 16 case scenarios described in part IV to emphasize the need for careful preparation by anyone planning to employ article 57 or its principles to their fullest effect. This emphasis, presented in part V, includes an overview of several available research tools and tailored planning considerations that may be employed by any prosecutor, asset programme manager, diplomat or other public official when charged with the responsibility of either seeking the return of confiscated proceeds of crime to their country or of effecting such a return to another country.

Whenever possible, emphasis is placed on easy reference to the UNCAC provisions relevant to article 57 and on practical solutions to asset return challenges, including ways to anticipate and avoid or resolve the many potential tripping points involved in this specialized area.

Part II. Overview of the asset return obligations under article 57, paragraph 3

As discussed further in the following pages, paragraph 3 of article 57 is its central operational provision. To be fully understood, article 57, paragraph 3 (article or art. 57.3 for short), must be read together with other provisions of the Convention that it incorporates by reference either directly or indirectly. Read as such, article 57.3 can be segregated into four separate categories of asset return scenarios. Each of them imposes different levels of obligation upon the country of origin and on the host country.

1. Four applicable asset return categories

The four general asset return categories can be headlined as follows:

- Mandatory obligation to return the confiscated asset to a requesting State party – article 57.3(a)
- Qualified mandatory obligation to return the confiscated asset to a requesting State party – article 57.3(b)
- Priority consideration to return the confiscated asset to a requesting State party or prior legitimate owner or crime victim – article 57.3(c)
- Optional consideration to return the confiscated asset to another State or to a prior legitimate owner or crime victim – article 51 and principles of equity.

The first three categories are explicit in the text of paragraph 3 of article 57. They correspond, respectively, to subparagraphs 57.3(a), 57.3(b), and 57.3(c). The fourth category can be inferred from the general mandate contained in UNCAC article 51, discussed above, for UNCAC States parties to "afford one another the widest measure of cooperation and assistance" regarding asset returns. This inference also is supported by asset return related provisions contained in the United Nations Transnational Organized Crime Convention (2000) (UNTOC) and in the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (hereafter: 1988 Vienna Drug Convention).¹² Additionally, this understanding

is sustained by general equitable principles when applied to the reality posed by various other compelling asset return scenarios that fall outside of the limited terms of subsections 57.3(a)-57.3(c).¹³

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Each of these four asset return categories is elaborated in part IV in outline format and illustrated with case examples. First, however, the paper provides an overview of six elements of the broader Convention that affect article 57.3 and related asset returns as a whole.

¹² As noted in the Asset Recovery Handbook, both the United Nations Transnational Organized Crime Convention (2000) (UNTOC) and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) (hereafter: 1988 Vienna Drug Convention) include discretionary requirements to return assets, either via asset sharing to another country (usually in recognition of confiscation cooperation) (UNTOC art. 14.3(b) and 1988 Vienna Drug Convention art. 5.5 b)ii)) or for purposes of compensating victims of crime or legitimate property owners (UNTOC art. 14.2). Asset Recovery Handbook, p. 318, footnote 9. The UNCAC art. 57, by contrast, sets forth mandatory (albeit varying) requirements on the return of assets, in particular in subparagraph 57.3(a).

¹³ As discussed more fully in parts IV.4 and V of this paper, at least three types of cases might logically fall within the inferred Category 4, in which a State party hosting an asset might give only "optional consideration" to returning it to another country or to a prior legitimate owner or crime victim. These cases include: (1) When a host State party has confiscated an asset on its own initiative and has received no request from the State party of origin, or any request by or on behalf of a prior owner or victim, for confiscation assistance or return of the asset; (2) When the assets at issue are now owned by one or more third countries that have, in a summary enforcement proceeding or otherwise, each recognized and domesticated the extraterritorial confiscation order of the State party being asked to return the asset; and (3) When the country requesting the asset's recovery and return – whether through enforcement of its own confiscation judgement or not – is not a State party to the UNCAC.

2. UNCAC elements affecting all four asset return categories

A. Applicable Offences

One perimeter set by article 57.3 is the limited group of criminal offences to which it applies and how it applies to them. In countries observing the rule of law, the confiscation process is based, either directly or indirectly, upon an underlying illicit activity or predicate offence.¹⁰ This predicate offence either yielded, involved or draws upon – as a recompense for damage or as a penalty for illegal gain – the particular asset that is being confiscated. Article 57.3 recognizes only a limited list of predicate offences for confiscation, including:

- embezzlement, misappropriation or other diversion by a public official of public or private property (art. 17);
- (2) bribery related to a national public official ("active" and "passive" bribery) (art. 15);
- (3) bribery of a foreign or international organization public official ("active" bribery) (art. 16.1);¹⁰
- (4) bribe seeking/taking by a foreign or international organization public official ("passive" bribery) (art. 16.2);"
- (5) trading in influence (art. 18)
- (6) abuse of functions (art. 19)
- (7) illicit enrichment (art. 20)

(*) laundering [as per (8) below] and "derivative offences" [as per (9) and (10) below] (art. 23), including:

- (8) money laundering, i.e., knowing concealment or disguising, or conversion or transferring for purposes of concealment or disguising, property that is directly or indirectly the proceeds of crime (art. 23.1(a));
- (9) participation in, or a conspiratorial, accessorial, attempted or aiding and abetting role in, any of the foregoing offences (arts. 23.1(b)(i) and 27.1–3))^a; and

14 Similar to the explanation given in fn. 6 regarding "direct recovery" of assets by private parties under UNCAC art. 53, this paper, consistent with its previously mentioned focus on government actors, will not consider asset returns in connection with the crimes of bribery in the private sector, as provide for by UNCAC art. 21, or embezzlement of property in the private sector, as provide for by UNCAC art. 22. These crimes do not expressly require a role in their commission by a "public official" as it is broadly defined in article 2(a). Consequently, references hereafter to "UNCAC predicate offences" are not intended to include these two private sector offences.

16 See III. 7 on the meanings of predicate offence.
16 UNCAC art. 16.1 relating to a bribe offered, promised, or given (active bribery) to a foreign or public international organization official includes the additional element – beyond those elements of bribery included in arts. 15(a). 15(b) and 16.2 – that the bribe offered, promised or given inter alia." in order to obtain or retain business or other undue advantage in relation to the conduct of international business" [emphasis added]. Note No. 25 of the United Nations General Assembly, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption, 7 October 2003, A/58/422/Add.1 (hereafter, UNCAC Interpretative Notes) clarifies that "the phrase "the conduct of international business" is intended to include the provision of international aid", the activity of which is a vital function of many officials of public international organizations.

17 In contrast to the art. 16.1 active bribery of a foreign or international organization public official discussed in fn. 17, the art 16.2 passive bribery, i.e., *solicited or accepted by* a foreign or public international organization official, does not contain the additional element related to obtaining or retaining international business, and neither do the art. 15 active or passive bribery involving domestic public officials.

18 For reasons not explained in the UNCAC Interpretative Notes, art. 23, entitled "Laundering of proceeds of crime", includes the derivative offenses of criminal acquisition, possession or use of property; and attempt; participatory, conspiratorial, accessorial, or aiding and abetting roles; together with the customary money

- (10) acquisition, possession or use of property, knowing it is the proceeds of crime at the time of receipt (arts. 23.1(b) (ii) and 2(e))
- (11) ex post facto concealment of property involved in any of the foregoing offences (art. 24); and
- (12) obstruction of justice in relation to the commission of any of the foregoing offences (art. 25).

For the remainder of this paper, these 12 offences and offence groups, when referred to collectively, may be denoted as "UNCAC predicate offences" unless they are listed individually. This denotation is used because the relevance of these offences to article 57.3 asset returns lies strictly in their function as predicates to confiscation actions that ultimately must be viable in the State hosting the asset, as will be explained.

The salient aspects of all the foregoing UNCAC predicate offences is further explained in part IV of this paper, where they are discussed sequentially in the context of each of the four respective asset return categories to which they apply. Part IV lists and relists the offences in annotated outline format, category by category for ease of reference.

B. Dual criminality and dual confiscation viability of the offence

In practice, article 57.3 typically entails that the law of the State party hosting the asset, and that of the State of origin of the asset, both recognize two things about the predicate offense for the confiscation of the asset: First, the laws of both States must recognize the offence as a crime, i.e., the predicate offence must fulfil the "dual criminality" requirement. Second, the laws of both States must recognize the offence as one for which confiscation is available as a penalty, i.e., the predicate offence must have "dual confiscation viability". Often, both are required even for a host State to self-initiate its own confiscation proceeding based on a foreign predicate offence. Although many jurisdictions provide for confiscation as a remedy for all "serious" crimes, dual confiscation viability cannot simply be assumed since some jurisdictions(e.g., the United States) allow confiscation only for individually specified offences.¹⁹

Article 43.2 defines dual criminality for purposes of the UNCAC in broad terms – more on this below – but article

laundering activities of concealment, disguising, conversion and transferring of proceeds of crime. For clarity's sake, these three groupings are treated separately in part IV of this paper covering an analytical breakdown of the subparagraphs of art. 57.3.

¹⁹ The Financial Action Task Force (FATF) specifies that "serious offenses" are those crimes with maximum imprisonment penalties of more than one year, or alternatively, those crimes with minimum imprisonment penalties of more than six months. See FATF Methodology (February 2013) at Interpretive Note to Recommendation 3, para. 3.

46.9(b) specifies that "States Parties may decline to render assistance pursuant to this article [governing mutual legal assistance generally under the Convention] on the ground of the absence of dual criminality". However, it also indicates, in article 46.9(c), that each State party "may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality." In addition, article 55.4 provides that "[t]he decisions or actions provided for in...this article [addressing international cooperation for purposes of confiscation] shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party". In practice, it should be anticipated that a country may require dual criminality to apply any compulsory measures on behalf of another country, even with an applicable bilateral assistance agreement, including asset freezing or seizure and confiscation, as well as searches, seizures and compelled testimony. Nevertheless, some jurisdictions may not require dual criminality and dual confiscation viability as elements if confiscation assistance is sought by another country.20

Fortunately, the UNCAC, in article 43(2), employs a broad "conduct-based approach" to determining dual criminality (and, arguably, dual confiscation viability); "that is, looking at the underlying conduct behind the terminology and requiring that the conduct be a criminal offence under the laws of both jurisdictions" rather than the narrower approach of "requiring a match in the names or essential elements of the offense".21 However, as indicated above, the greater flexibility of this conduct-based approach nonetheless remains limited to the 12 UNCAC predicate offence groups covered by article 57. The conduct-based approach to dual criminality/dual confiscation viability is further limited in instances in which a requested State party has opted not to adopt one or more of the UNCAC's seven "shall consider adopting" offences/ offence groups, along with the Convention's five "shall adopt" offences/offence groups. See the adjacent sidebar box delineating the "shall adopt" and "shall consider adopting" subgroups of UNCAC offences and other distinctions attendant to them.

i. Five "shall adopt" offences vs. seven "shall consider adopting" offences

Of the 12 UNCAC predicate offences listed above, the negotiators of the UNCAC ultimately included, or partially included, only five among the "shall adopt" offences under the Convention's obligations to criminalize specific acts. These five "shall adopt" offences are (based on the same numbering system used in the offence list in sub-section A above on "Applicable Offences"):

- embezzlement, misappropriation and other diversion by a public official of public or private property (art. 17)
- (2) bribery (active and passive) related to a national public official (art. 15)
- (3) bribery (active) of a foreign or international public official (art. 16.1)

(*) laundering [as per (8) above], or any derivative offences [as per (9) or (10) above], related only to art. 17, art. 15 and art. 16.1 offences

(12) obstruction of justice related only to art. 17, art. 15 and art. 16.1 offences, or laundering [as per (8) above], and/or any derivative offences [as per (9) or (10) above], related only to obstruction of justice (art. 25).[∞]

The remaining seven offences/offence groups are "shall consider adopting" offences. They include (again based on the same numbering system used in subpart A above on "Applicable Offences"):

- bribe seeking/taking (aka passive bribery) by a foreign or international organization public official (art. 16.2);
- (5) trading in influence (art. 18);
- (6) abuse of functions (art. 19);
- (7) illicit enrichment (art. 20);

(*) laundering [as per (8) above], and/or any derivative offences [as per (9) or (10) above], related only to art. 16.2, art. 18, art. 19 and art. 20 offences;

(11) *ex post facto* concealment of property related only to art. 16.2, art. 18, art. 19 and art. 20 offences or laundering [as per (8) above] and/or any derivative offences [as per (9) or (10) above], related only to ex post facto concealment (art. 24); and

²⁰ See UNODC, State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation, 2d ed. (Vienna 2017), p. 229, in box entitled "Successes and good practices".

²¹ Asset Recovery Handbook, p.248. The conduct-based approach to dual criminality also is required by the Financial Action Task Force (FATF). See FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (Paris, 2012–2022, Updated 2022), pp. 27–28.

²² Note that, while the Convention places the offence of "laundering of proceeds of crime" generally in the category of "shall adopt" offences, because laundering (while still being an autonomous offence not requiring a proven predicate crime (see UNCAC Interpretative Notes)) necessarily must involve "the proceeds of crime" (see art. 23(a)(i) and (ii)), and because only art. 17, art. 15 and art. 16.1 offences are among the proceeds-generating offences that the Convention includes in the "shall adopt" category, the result is that "shall adopt" money laundering is limited only to the proceeds of art. 17, art. 15 and art. 16.1 offences.

art. 16.1 offences. Analogously, "obstruction of justice" as per art. 25, necessarily must involve obstruction affecting "a proceeding in relation to...offences established in accordance with this Convention". Accordingly, while the Convention also places "obstruction of justice" generally in the category of "shall adopt" offences, because only art. 17, art. 15 and art. 16.1 offences, and art. 23 laundering of the proceeds of those offences, are among the obstructable offences that the Convention includes in the "shall adopt" category, the result is that "shall adopt" obstruction of justice is limited only to proceedings related to art. 17, art. 15 and art. 16.1 offences, and art. 23 laundering of proceeds therefrom.

(12) obstruction of justice related *only* to art. 16.2, art. 18, art. 19 and art. 20 offences, or laundering [as per (8] above] and/ or any derivative offences [as per (9) or (10) above], related only to obstruction of justice (art. 25).²³

Because of this division of offences, the question 'whether a particular State party involved in an asset return case has adopted one or more of these "shall consider adopting" offences' may impact potential dual criminality and dual confiscation viability requirements, as discussed in section 2.B.

Only two "shall adopt" sub-offences/offence groups carry the "mandatory obligation" to return assets

Additionally, as a more direct limitation vis-à-vis article 57.3, only two "shall adopt" sub-offences are covered by the first category of return obligations listed above, i.e., the mandatory obligation to return the confiscated assets to a requesting State party, as per subparagraph (a) of article 57.3:

 a public official's embezzlement, misappropriation and other diversion of *public property* (but not private property), a sub-offence of art. 17)^{as}; and laundering [as per (8) above] and/ or any derivative offences [as per (9) and (10) above] related only to "embezzlement of public property" (sub-offences under art. 23).

The more nuanced return obligations imposed by subparagraphs (b) and (c) of article 57.3 involve the remainder of the "shall adopt" and "shall consider adopting" offences and sub-offences. Those nuanced return obligations depend upon various sets of factors that are detailed in the following pages.

iii. A special note regarding article 17 offences and their interplay with article 57.3

Finally, as indicated above, subparagraph (a) of article 57.3 expressly incorporates article 17 and along with it the quirky in-tandem reference of article 17 to "embezzlement, misappropriation or other diversion" of property by a public official. This three-part reference deserves some clarification.

First, readers should be aware that the UNCAC Interpretative Notes, in Note No. 30, point out that, regarding article 17, "the term 'diversion' is understood in some countries as separate from 'embezzlement' and 'misappropriation,' while in others 'diversion' is intended to be covered by or is synonymous with those terms".

That notwithstanding. observation readers should focus more closely on the express mandate of article 17 to States parties that "misappropriation" and "other diversion", together with "embezzlement", are "criminal offences" (in the plural) that each State party "shall adopt". For this reason, this paper employs the former, broader interpretation expressed in Interpretative Note No. 30 and therefore lists all three offences when discussing article 17 or its direct or indirect application to other UNCAC provisions, including to article 57.3, subparagraphs (a) through (c).

Second, readers should note further that article 17 applies identical elements to each of the terms it employs. This means that "embezzlement", "misappropriation" and "other diversion" each are required by article 17 to (1) be committed intentionally by a public official, (2) for his or her benefit or that of another person or entity, (3) and involve public or private property, that (4) has been entrusted to the public official by virtue of his or her position. In a similar vein, *Black's Law Dictionary, 6th Edition*, defines "embezzlement" as follows:

The fraudulent appropriation of property by one lawfully entrusted with its possession. To "embezzle" means wilfully to take, or convert to one's own use, another's money or property, of which the wrongdoer acquired possession lawfully, by reason of some office or employment or position of trust. The elements... are that there must be a relationship such as that of employment or agency between the owner of the money and the defendant, the money alleged to have been embezzled must have come into possession of defendant by virtue of that relationship [,] and there must be an intentional and fraudulent appropriation or conversion of the money.

Given the foregoing definition and the common elements that article 17 applies, when one is determining whether a corrupt person's actions fall within the meaning of "embezzlement, misappropriation or other diversion" as per article 17, emphasis probably should be placed on whether the taking or converting of the property, whatever its nature, also fulfilled the above-mentioned four qualifying elements set forth in article 17.

Third and finally, article 57.3, subparagraph (a) - the 'mandatory obligation' to return assets – has its own peculiarity vis-à-vis article 17. Subparagraph (a) refers only to "embezzlement of public funds" and "laundering of embezzled public funds" as offences requiring mandatory asset returns. However, subparagraph (a) also states that those two offences are "as referred to in articles 17 ..." [emphasis added]. And, as just noted, article 17, in turn, includes "misappropriation" and "other diversion", together with "embezzlement", as "criminal offences" that each State party "shall adopt", and to which it shall apply identical elements. Therefore, all three terms - "embezzlement, misappropriation, or other diversion" are referenced throughout in this paper's discussion of article 57.3(a).

²³ As demonstrated in the lists above, the same logic explained in fn. 23 concerning the application of art. 23 laundering and art. 25 obstruction of justice vis-à-vis the "shall adopt" offences is equally relevant to the application of art. 23 laundering, art. 24 concealment and art. 25 obstruction of justice vis-à-vis the "shall consider adopting" offences.

²⁴ Art. 57.3(a) specifically limits its subject to "public funds" that the public official has "embezzle[d]" or "launder[ed]" (or "misappropriated" or "other[wise] diver[ted]" – see part II, section Aiii below). However, the term "public funds" is not defined by the Convention and the UNCAC Interpretative Notes do not illuminate its specific meaning. Some logical interpretations might include that "public funds" are any "property" [as broadly defined by UNCAC art. 2(d]) that is of pecuniary value [see *Black's Law Dictionary, 6th Edition* ("pecuniary...consist[s] of money or that which can be valued in money"]) which the State party of origin legally [i.e., by title], nominally or beneficially owns, or is legally entitled to (such as evaded taxes or diverted licencing fees] or holds in trust (such as public employee retirement-fund assets) Henry Campbell Black (Westgroup, 1991).

As is further discussed in part V, dual criminality, dual confiscation viability and their respective interplay with the limited range of mandatory and optional offences covered by the Convention, are critical factors that should be fully researched on a country-specific basis, early in any asset recovery process. Preferably, this examination should occur at least at the asset seizure/freezing stage - in any conviction-based or non-conviction-based scenario in which cross-border confiscation assistance might be required.

C. Source of Assets Confiscated

As with the "conduct-based approach" to determining dual criminality, another factor may serve to broaden the reach of some of the predicate offences for confiscation covered by subparagraphs 57.3(b) and (c). That factor is that subparagraphs 57.3(b) and (c) do not address or restrict the source of funds used in several of the UNCAC predicate offences; specifically, those that involve bribery related to a national, foreign or international public official, or those related to a public official's abuse of functions, illicit enrichment, trading in influence, money laundering or other involvement related to those offences. As a result, when the asset involved in those predicate offences is itself the proceeds of crime, the consequences of confiscations based on those offences may have an incidentally extended impact beyond the corrupt act itself, while also perhaps being amenable to return to the State party of origin under subparagraph 57.3(b) or (c).25

An example of cases involving assets that are themselves proceeds of crime are those in which a national public official has accepted a bribe paid in assets traceable to illegal narcotics trafficking, in exchange for preventing or deterring lawful State action against related trafficking activities. In such a case, a State party's confiscation of those assets in accordance with subparagraphs 57.3(b) or (c) may serve a counter-narcotics trafficking effect as well as an anticorruption effect. Such a confiscation might also extend to additional assets linked to an attempt or a broader conspiracy to prevent interference with narco-trafficking.28

A separate consideration regarding an asset involved in corruption is when the asset is drawn from public funds. Several cases discussed in part IV of this paper involve kickback payments to government leaders who have illicitly directed inflated government contracts to particular contractors. When the government leader knows and intends in such cases that a portion of public funds used to pay for the public contracts will certainly fund the kickbacks that eventually devolve to that leader, then the funds the leader received, when confiscated, might arguably warrant treatment as proceeds of "embezzlement, misappropriation or other diversion" by a public official. In that event, the funds would be subject to mandatory return to the country of origin under article 57.3(a), instead of as the proceeds of offences covered by subparagraphs (b) or (c).27

D. Location of Assets Confiscated

Because all the various obligations of article 57.3 to return assets are required to be inter alia "in accordance with article ... 55" of the Convention, those obligations include a key limitation that any assets at issue that could be confiscated must be "situated in [a State party's] territory ..." [emphasis added]. This limitation is stated in article 55.1. By its reference to article 31.1, article 55.1 defines assets that could be confiscated as those including "proceeds of crime [including property of equivalent value]", as well as "property, equipment or other instrumentalities" from "offences established in accordance with this Convention". A guestion thus remains regarding the application of article 57.3 to assets located in a third country that a State party has confiscated, based on extraterritorial jurisdiction.28 The topic of extraterritorial jurisdiction to confiscate assets is addressed in detail in part IV of this paper.

E. Applicable Actors

It is of great importance that article 57.3 also defines a broad scope of predicate-offence actors, who effectively include - in addition to "appointed or elected" officials of the broadest sort -private persons performing a "public function", either directly as a public service or for a public agency or enterprise, whether paid or unpaid.²⁰ Logically applied, this definition of public official might extend directly to government contractors and subcontractors, agents, assignees, volunteers and beyond,

²⁵ Such confiscated assets also may be amenable to return to a "damage[d]" State party under the UNTOC, or a cooperating State party through asset sharing under the 1988 Vienna Drug Convention or the UNTOC. See fin. 13.

Convention or the UNTOC. See fm. 32. 26 A parallel can be drawn here to the broad range of corrupt activities in Peru committed in the 1990s by Vladimiro Montesinos. Torres and his associates. Montesinos, whose case is discussed in detail in part IV, section 2 below, was the former de facto head of the Peruvian national intelligence services under the administration of former Peruvian President Alberto Fujimori, While Montesinos, Thas never been convicted of drug trafficking [In Peru in various trials on a range of charges]... evidence suggests that he played a pivotal role in facilitating the drug trade in the [InetHen] Center of Peru's thriving cocaine industry – charging protection fees from top drug traffickers and even dealing directly with Olombia's most famous kingpin, Pable Escobar, He was, in essence, the underword's broker in Peru's thriving cocaine industry – charging protection fees from top drug traffickers and even dealing directly with Olombia's most famous kingpin, Pable Escobar, He was, in essence, the underword's broker in Peru's thriving cocaine industry – charging protection fees from top drug traffickers and even dealing directly with Olombia's most Brokers Continue Tradition', InSight Crime, 20 oct. 2014. "Method broker in Peru's Entrementary traffickers-political-broker-vladimiro-montesinos'. See also U.S. Department of Justice, Drug Entrementary traffickers-political-broker-vladimiro-montesinos'. See also U.S. Department of Justice, Drug Entrementary tores corrupt activity in a generic way, if a State party to the Convention, for example, were to seize and confiscate such trafficking-sourced protection fees that were laundered to bank accounts within tils borders, the resulting assets might arguably be susceptible to a qualified mandatory obligation to return those assets to a State party of origin, or at least to priority consideration for return to a State party of right, or at least to priority consideration for seum found a State party of may event, confiscation of

²⁷ Note again here that UNCAC article 17 applies identical elements to the offences of "embezzleme "misappropriation" and "other diversion" in the context of article 57.3(a); i.e., they must (1) be committi intentionally by a public official, (2) for his or her benefit or that of another person or entity, and (3) invo public property, (4) that has been entrusted to the public official by virtue of his or her position.

²⁸ When assets are confiscated extraterritorially, and the confiscation is judicially recognized and effected by the country in which the asset is located, the assets quite commonly devolve to the host country's ownership by operation of its domestic law. See part IV of this paper. Case Examples 3, 45, 6, 15 and 16.

²⁹ This broad scope is accomplished through the application of the term "public official" in art. 57 as defined in art. 2(a) both directly via references to arts. I7 and 23, and indirectly through reference to "other offences covered", including bribery [arts. 15 and 16], abuse of functions [article 19] and illicit enrichment [article 20], all of which offences refer to "public official" actors. However, the UNCAC Interpretative Notes state the intention of the negotiators that "each State Party shall determine who is a member of the categories mentioned in subparagraph (a)[1] of art. 2 [on appointed or elected officials] and how each of those categories is applied".

depending upon the facts of the case at issue, as will be shown in part IV. Note that, as with the term "public funds", the term "public function" is not defined by the Convention, and the UNCAC Interpretative Notes do not illuminate its specific meaning. However, logically applied, "public function" can reasonably be construed as meaning functions that are - in a broad sense - governmental in nature.

F. Waiver of final confiscation judgement from requesting **State party**

Finally, subparagraphs (a) and (b) of article 57.3 govern mandatory asset returns and qualified mandatory asset returns respectively, the scope of which is discussed further in part IV, sections 1 and 2. Both of these subparagraphs (unlike subparagraph 57.3(c)) require inter alia that the requesting State party must itself already have legally confiscated the asset that is requested to be returned. In particular, the requesting State party must provide as part of its formal request "a legally admissible copy of an order of confiscation upon which...[its] request is based". This order must be "a final judgement" of ... confiscation, i.e., an order no longer subject to appeal.³⁰ Notably, however, subparagraphs 57.3(a) and (b) also provide that this requirement "can be waived by the requested State Party".

Considered at face value, a requested State party's option to simply waive the need for a final confiscation order from the requesting State party, while still observing a mandatory, or qualified mandatory, obligation to return the asset, potentially is a very significant exception provided by subparagraphs 57.3(a) and (b). In high-level public corruption cases in particular, a variety of circumstances - including ongoing corruption or a long history of corruption - can serve to preclude a State party of origin from obtaining a confiscation judgement against an asset located outside of its borders, even if it has the legal and procedural authorities in place to pursue one.³¹ However, the UNCAC Interpretative Notes, on subparagraphs 57.3(a) and (b), indicate that the UNCAC's negotiators intended only a relatively narrow scope for this waiver. The Notes state:

It was agreed that . . . [t]he requested State party should consider the waiver of the requirement for final judgement in cases where the final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.²²

This interpretation appears to suggest that a waiver might be appropriate only when a criminal prosecution, with a concomitant conviction-based confiscation, is not possible for an offender whose illegal act somehow was linked to the asset at issue. It seems to take no express account of whether a non-conviction based confiscation of the asset might be possible, whether one was pursued by the requesting State party and failed on its merits, or whether one was precluded by other means.

However, even if a requested State party were inclined, based on the Interpretative Note, to take a narrow view of this waiver option contained in subparagraphs 57.3(a) and (b), it nonetheless might rely upon the Interpretative Note's phrase "in other appropriate cases" to include cases in which non-conviction based confiscation of the asset also "cannot be obtained" by the requesting State party, including, in particular, when the requesting State party is known to have not yet adopted non-conviction based confiscation laws, as is still the case in many countries. "[I]n other appropriate cases" also might be construed to cover a situation in which the requesting State party has dismissed pending criminal prosecution and confiscation proceedings in a bargain with entities opposing the asset recovery to withdraw their legal oppositions filed in the host State party's courts, allowing at least the asset return - if not the criminal case - to go forward. Such a scenario is discussed in Case Example 1 in section IV.1. Finally, "in other appropriate cases" might reasonably be construed to address the often encountered circumstance in corruption cases that the offender enjoys some form of immunity from criminal prosecution for acts committed while he or she held public office in a State of origin or enjoys some form of international immunity or the asset itself is deemed to be covered by international diplomatic protections.33 The Asset Recovery Handbook includes a useful discussion of the role that personal immunities and diplomatic asset protections potentially can play in proceeds of crime recovery cases and how they might be overcome.³⁴ In addition, a case involving specific immunity and diplomatic protection claims is discussed in part IV, section 4, Case Example 13.

³⁰ Art. 55.3(b) and art. 57.3(a).

³¹ UNODC has observed in this regard: If the authorities of requested States question the diligence of a requesting State in seeking domestic recovery of the proceeds of corruption from powerful persons, that scepticism may affect their exercise of discretion, ... particularly [as to their] decisions on whether or not to waive insistence upon a final judgement under paragraphs 3 (a) and (b) of article 57 before returning disputed assets. ... However, the lesson ... is not that the wealth and influence of an authoritarian

regime in power for decades may continue to condition the conduct of public affairs for some time after a regime change. Rather the conclusion should be drawn [sic] is that the international community and requested States may need to go beyond the strict legal requirements of the Convention to help and encourage a

State party to overcome those lingering effects. UNODC, Digest of Asset Recovery Cases (New York, 2015), p. 91, para. 244.

³² UNCAC Interpretative Notes, art. 57, para. 3(69).

³³ Note that applying subparagraph 57.3(c) to the case – with its open-ended scope of "in all other cases" – instead of subparagraphs 57.3(a) or (b) would obviate the need for "in all other cases" a waiver in the circumstances listed above, but with a reduced obligation on the host State party to return the asset.

³⁴ Asset Recovery Handbook, pp. 53-54

Part III. The interplay of domestic laws and programmes and international agreements with the asset return provisions of the Convention

Having briefly reviewed the UNCAC's four asset return categories and other elements of the UNCAC that affect all of those categories, we can now move on to a look at how domestic asset return laws and administrative programmes of various UNCAC States parties work in conjunction with the UNCAC, and at how international agreements of various sorts also are often interwoven with the asset return process.

First, to accurately assess the challenges posed by specific asset return scenarios, knowledge of any relevant domestic laws and/or programmes of the States parties involved, and of other relevant international agreements, whether ad hoc or permanent, is necessary to understand the asset return mechanisms implicated by article 57.3. This part discusses how one or more of those factors may be relevant to any State party in its application of this key portion of the Convention.

1. Implementing or complementary domestic laws of the States parties involved

Paragraphs 57.1 and 57.2 of article 57 expressly recognize the critical role that the domestic laws frequently play when carrying out a State party's obligations to return proceeds of crime under subparagraph 57.3(a)–57.3(c). Paragraph 57.1 provides that assets confiscated by a State party "shall be disposed of...by that State Party in accordance with the provisions of this Convention and its domestic law". Paragraph 57.2 further mandates:

Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its own domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

As noted in the Asset Recovery Handbook regarding the interplay of article 57 with domestic implementing legislation:

One issue that practitioners must consider with international conventions...is how, if at all, their relevant obligations have been incorporated into domestic legislation in the [requested] jurisdiction. ...In theory, MLA [mutual legal assistance] requests submitted under a multilateral treaty (such as the UNCAC) can be applied directly as long as both countries have ratified the treaty... Some jurisdictions enact detailed domestic legislation to provide the specifics; others have limited or no legislation domesticating the treaty and rely on direct application through existing criminal laws and procedures, with modifications based on the treaty. ...[Therefore,] it is important for practitioners to consider this issue and review the domestic law for details regarding implementation of the multilateral treaty.35

As this passage suggests, the simple adoption by some countries of the UNCAC renders article 57, among the Convention's other provisions, "positive law" within those jurisdictions. It thereby confers express and affirmative legal authority upon public officials in those countries to return confiscated assets to another State party pursuant to article 57, and often also authority to receive such returns. France, Lebanon, Luxembourg, Liechtenstein, Switzerland and the United Kingdom of Great Britain and Northern Ireland are examples of countries that may employ article 57 as a directly applicable authority to return stolen assets. All but the United Kingdom, however, have adopted or rely upon more specific domestic legislation, in whole or in part, to return proceeds of crime, depending upon the recipient countries involved. The United Kingdom thus far has eschewed an implementing legislation approach, preferring the flexibility afforded through the application of article 57.3 per se. The approaches of each of these UNCAC States parties to proceeds of crime returns will be discussed in detail in the specific case examples summarized in part IV of this paper.

2. Domestic requirement for a case-specific or standing return agreement

Whether or not a country applies article 57 as a direct legal authority to return confiscated proceeds of crime or instead relies upon domestic implementing or complementary laws to do so, its law might nonetheless require that it employ an international agreement with the country of origin to serve as an instrument of conveyance for the return. Such agreements may be either pre-existing permanent agreements, such as bilateral mutual legal assistance treaties with asset transfer provisions, or *ad hoc* agreements when pre-existing agreements either do not exist or do not apply to the recipient country.

In Luxembourg, for example, a case-specific asset return agreement is required by domestic law to serve – in tandem with article 57.3 – as a legal underpinning for Luxembourg to return the asset, at least with regard to recipient countries that are outside of the European Union asset return framework.³⁶ Similarly, the United Kingdom requires that article 57.3 asset returns be accomplished pursuant to a case-specific memorandum of understanding (MOU) or return agreement with the country of origin, unless a bilateral agreement already exists that specifically provides for confiscated asset returns.³⁷ Inversely, Peru – also discussed in part IV, section 2– is an example of a country that requires a case-specific asset return agreement, adopted for its part as a *treaty*, in tandem with article 57, as a legal underpinning for it to *receive* proceeds of crime returns.³⁸

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3. Discretionary casespecific return agreements

Other jurisdictions, such as Lebanon, Liechtenstein and Switzerland, as well as Australia, Germany and the Bailiwick of Jersey, whose asset return laws are discussed below, permit the use of case-specific return agreements as a discretionary matter. The United States of America, also discussed below, requires an international agreement to return assets in some circumstances but not in others.

In addition to domestic laws that allow for the use of casespecific asset return agreements, paragraph 57.5 of the UNCAC provides generally that, "[w]here 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" [emphasis added].

At the outset, it is noteworthy regarding this discretionary provision that, among the States parties to the UNCAC which, to date, have returned the largest sums of assets to other countries with the greatest frequency, discretionary countryto-country case-specific agreements of various types are a regular feature of these returns, whether required or not by domestic laws. These jurisdictions currently include, in descending order of size of returns, the United States, Switzerland, Jersey, Singapore and Liechtenstein.²⁰

Jersey, for example, does not require an international agreement to provide mutual legal assistance in asset recovery, but as a general policy, it makes such assistance conditional upon assurances of reciprocity and considerations of the seriousness of the case. However, Jersey may and has entered into ad hoc asset sharing agreements or arrangements, including in proceeds of crime return cases. Two such cases are discussed in part IV, sections 3 and 5, in Case Examples 10 and 15, respectively.⁴⁰

³⁶ See Luxembourg Code of Criminal Procedure (CCP) Art. 668. (L. 1 August 2007), https://legilux.public.lu/eli/etat/leg/code/procedure_penale/20220705. "The judgment ordering the execution of the foreign confiscation decision entails the transfer, to the State of Luxembourg, of the ownership of the confiscated property, unless otherwise agreed with the State applicant or if", in a given case, an arrangement is reached between the Luxembourg Government and the Government of the requesting State [emphasis added].... The judgment ordering the execution of the foreign restitution decision entails the restitution of the property seized from injured third parties." See also Center for the Study of Democracy, Disposal of Confiscated Assets in the EU Member States: Laws and Practices (Sofia, 2014), p. 83, https://www. files.ethz.ch/isn/185046

files.ethz.ch/isn/186046 /Disposal-of-confiscated-assets-report.pdf. The European Union's Criminal Justice and Data Protection [Protocol No. 36] Regulations 2014, Page 17 of 232 ["CJDP Regulations"], implemented two European Union framework decisions, requiring that 50 per cent of recovered assets of €10,000 or more be shared between EU member countries that cooperated on the recovery. See the *second cycle* [*RM country review report of the United Kingdom*, https://www.unodc.org/documents/treaties/UNCAC/ CountryVisitFinalReports/2020_11_16_UK_Final_Country_Report.pdf, pp. 16–17.

³⁷ See https://www.gov.uk/government/publications/framework-for-transparent-andaccountable-asset-return/framework-for-transparent-and-accountable-asset-return, paras. 26 and 27. The new Framework for transparent and accountable asset return of the United Kingdom specifically provides that "funds can be returned via a variety of mechanisms including direct asset return, an asset return fund, a multilateral/HMGfunded programme or through civil society. The mechanism must be agreed by the recipient country, and we must prioritise transparency and preclusion of the funds benefitting any alleged perpetrators while seeking agreement." Ibid., para. 22.

³⁸ See part IV, section 2, in Case Example 6, discussing a joint-return by Luxembourg and Switzerland to Peru pursuant to a triparty case-specific agreement.

³⁹ See the Conference Room Paper prepared by the StAR Initiative: "Mapping international recoveries and returns of stolen assets under UNCAC: An insight into the practice of cross-border repatriation of proceeds of corruption over the past 10 years" [CAC/COSP/2021/CRP12].

⁴⁰ Second cycle IRM country review report of the United Kingdom, https://www. unodc.org/documents/treaties/UNCAC/Country/VisitFinalReports/2020_11_16_UK_ Final_Country_Report.pdf, Annex II, section 3.3.1 (2020). Jersey also has a permanent bilateral asset sharing agreement with the United States and currently is discussing possible similar agreements with other countries. In addition, the United Kingdom has extended to Jersey application of the European Convention on Mutual Legal Assistance of 1959 and of several other bilateral and multilateral agreements, based upon the status of the United Kingdom as party to those agreements.

4. Indirect legal and programmatic bases for asset returns

Such case-specific asset return agreements are not required by article 57 itself for asset returns. However, many cases of asset returns employ written agreements and often include provisions and mechanisms for ensuring transparency and effective management of the returned assets by the requesting jurisdictions.⁴ Examples for such provisions include specific auditing or monitoring mechanisms, informing civil society organizations and planning to use the returned assets for specific development projects.⁴² References to, and copies of, several actual case-specific asset return agreements that incorporate such transparency provisions are discussed in part IV of this paper, and copies of them are provided in the appendices. In contrast to some UNCAC States parties for which the UNCAC's provisions constitute positive law (see above, part III.1), some other States parties do not follow this approach. For those countries, while article 57 imposes an affirmative obligation to return confiscated assets under the conditions and circumstances that it specifies, it does not concurrently confer an independent legal *authority* to execute that return obligation. Such countries may have domestic laws that are wholly autonomous from the UNCAC, and perhaps predate the UNCAC, but nevertheless effectuate the UNCAC's obligations in different or more specific terms. Consequently, a country's application of such laws to determine proceeds of crime returns may well obscure which category spelled out by article 57.3 corresponds to their return decisions.

A. Autonomous Domestic Asset Return Laws

By contrast to the above-referenced national approaches to asset returns in which UNCAC Article 57.3 has direct legal relevance (see part III.1 above), Australia, the Bailiwick of Jersey, Chile, Germany, and the United States are examples of the UNCAC States parties whose adoption of the UNCAC does not give them direct asset return authority under Article 57. Rather, as detailed later, these latter jurisdictions rely upon their respective domestic legislative and policy frameworks on asset recovery.

While the legal approaches on asset returns of Jersey, Chile, and the United States are all discussed in detail in the context of the case examples contained in part IV of this paper, an overview here of Australia's and Germany's systems provides two other useful examples of autonomous domestic approaches to asset return laws.

⁴¹ Principle 4 of the Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, adopted in 2017 as part of Global Forum on Asset Recovery (GFAR) held at the World Bank, provides in part that "transferring *and receiving* countries will guarantee transparency and accountability in the return and disposition of recovered assets" [emphasis added].

⁴² Ad hoc agreements are also often used to regulate the deduction of reasonable expenses. See Asset Recovery Handbook, p. 269. Such ad hoc agreements are often used to express in writing the joint concurrence of the countries involved in possible "reasonable expense" deductions from assets to be returned by the host State, which deductions are contemplated by paragraph 57.4 of the UNCAC. This paper will not discuss such expense deductions, other than to note that this topic can be complicated and sensitive, is handled by countries in a variety of ways and appears to be increasingly the subject of policy making by countries faced with frequent asset

Australia

Australia is an example of a State party whose adoption of the UNCAC does not give it direct asset return authority under article 57. Rather, Australia relies upon its comprehensive domestic legislative and policy framework on asset recovery. The Proceeds of Crime Act 2002 (POCA), Mutual Assistance in Criminal Matters Act 1987 (MACMA) and Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CFT Act) together provide the legal basis for identifying, seizing/ freezing, confiscating and returning assets derived from the commission of a criminal offence.⁴⁹

In domestic confiscation proceedings, pursuant to the POCA, once an Australian court orders a confiscation, the property is liquidated and credited to the Confiscated Assets Account (section 296). Australia can share with a foreign country a proportion of any proceeds recovered if the foreign country has made a significant contribution to the recovery or to the investigation or prosecution of the unlawful activity (under its "equitable sharing program", section 296(4)(c) POCA). Under section 70 of the POCA, Australian authorities may direct that confiscated property be alternatively disposed of. This section can be used to return property to a country of origin. However, this mechanism is discretionary.⁴⁴

In addition, section 34B(3) of the MACMA provides for a complementary process in which a property that is subject to a foreign final confiscation order may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney General, including return to a requesting country. Australia does not make cooperation for purposes of return and disposal of confiscated assets, including proceeds of crime, conditional on the existence of any treaty.⁴⁶ Australia has published a step-by-step guide for obtaining international confiscation assistance, including asset recovery. The guide notes that Australia can register and enforce both conviction-based and non-conviction-based proceeds of crime orders directed against either persons or assets that are received from any country provided the appropriate legal thresholds are met, including that a foreign order is made in respect of an offence which carries a maximum penalty of death, imprisonment for a period exceeding 12 months, or a fine exceeding A\$51,000. Australia generally will take such enforcement action only upon receipt of a formal mutual assistance request. It may, but is not required to, conclude case-specific return agreements with the recipient country.⁴⁶

43 See the second cycle IRM executive summary of Australia, https://www.unodc.org/documents/ treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries2/V1808730e. pdf. p. 8.

44 Ibid., p. 10.

45 Ibid.

46 https://star.worldbank.org/resources/g20-asset-recovery-guide-australia-2013. Throughout this paper, currencies and values denominated with "\$" represent United States dollar or US dollar equivalences, unless otherwise noted, for ease of evaluation.

Germany

Germany is another example of a State party whose adoption of the UNCAC does not give it direct asset return authority under article 57. Germany has both conviction-based and non-conviction based confiscation powers. German authorities may enforce foreign final confiscation orders, but only when such an order could have been made according to German law (section 49, Gesetz über die internationale Rechtshilfe in Strafsachen (Act on International Mutual Assistance in Criminal Matters (IRG)).47 These measures apply to any country, unless there are international treaties governing these provisions (sect. 1(3), IRG)), such as the European Union Directive on the freezing and confiscation of instrumentalities and proceeds of crime (2014/42/EU). The German authorities may return assets confiscated by another country in full, for all offences, upon request (sect. 56b IRG), if there is an ad hoc agreement with the requesting country providing for the return. The principles of article 57 nevertheless are to be applied in each ad hoc agreement, albeit on a discretionary basis. In the case of a selfinitiated confiscation by a German court, any injured party, including another country, can claim victim compensation during the confiscation proceedings by registering its claim at the public prosecution office; the court judgement determines their status as injured party as well as the damage incurred.48

47 The Act to Reform Criminal Law on Proceeds of Crime of Germany took effect in 2017. The act transposed the EU Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime (2014/42/EU) into German law. It codified two parts relating to non-conviction based confiscation. Section 76(a)(4) of the German Criminal Code was amended so that property can be independently confiscated even if a person cannot be convicted on criminal charges. Listed offences in the act are organized orime, terrorist financing and money laundering (sec. 764(4) no. 1(f)). The act also codifies the common law principle of "non-conviction based confiscation or forfeiture". In connection with investigations regarding enumerated offences – organized orime, terrorism, drug trafficking, human trafficking and tax evasion – evidence of an individually committed oriminal offence is not required for confiscation if it is convinced that the source of the specific asset in question was a criminal offence. See "Germany: New law makes confiscating proceeds of orimes easier". CMS Law-Now, 11 July 2017, https://www.cms-lawnow.com/ealerts/2017/07/germany-new-law-makes-confiscating-proceeds-of-crimes-easier.

48 Second cycle IRM country review report of Germany, https://www.unodc.org/documents/treaties/UNCAC/ CountryVisitFinalReports/2020_11_06_Germany_ Final_Country_Report.pdf, pp. 12, 211 and 251.

B. Domestic asset return programmes

As noted above, the United States is one example of a State party whose method of adopting and implementing the UNCAC does not give it direct authority under article 57 to execute international proceeds of crime returns.49 To conduct asset returns to other countries, the United States has consistently relied upon three older, statutebased programme authorities, not specific to foreign public corruption, all of which it has adapted in part to accommodate UNCAC-motivated asset returns. These programmes are detailed in a sidebar and in several case examples in part IV.

However, domestic programmatic approaches to asset return are not confined to countries, such as the United States, that lack direct asset return authority under the UNCAC. Switzerland, for example, with authority under both the UNCAC and its domestic legislation to return proceeds of crime, also has established a dedicated programme for this purpose. The Asset Recovery Section within Switzerland's Federal Department of Foreign Affairs (FDFA), discussed in more detail in part IV, focuses specifically upon returns to other countries of confiscated assets attributable to foreign Politically Exposed Persons (PEPs).

Similarly, France adopted new legislation in August 2021 that specifically allows confiscated foreign proceeds of crime to be applied as supplemental funding for French foreign assistance programmes, administered by France's Ministry of Europe and Foreign Affairs, in cases in which the French authorities consider a direct asset return to the country of origin to be practically untenable under France's pre-existing asset return mechanisms, which also are summarized in part IV.

49 This is despite constitutional provision of the United States that holds treaties to which it is party to be equivalent in authority with legislative enactments of law. See US Constitution, Article VI., Section 2 (Supremacy Clause). The US Senate generally considered the UNCAC to be "non-self-executing," meaning that its provisions require implementing legislation by Congress to be directly enforceable, rather than being by themselves directly equivalent to an act of the legislature. United States Senate Executive Report No. 109-18, at 6, 8 and 22 (2006), https://www.govinfo.gov/content/plkg/CRPT-IO9erpt18/html/CRPT-IO9erpt18/htm. See United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001), citing Whitney v. Robinson, 124 U.S. 190, 194 (1888); see also Sanchez-Lamas v. Oregon, 548 U.S. 331, 373 (2006), for case law distinguishing self-executing and non-self-executing treaties. However, the US Senate provided exceptions for UNCAC articles 44 (on extradition) and 46 (on mutual legal assistance). the provisions of which it regards to be "selfand 46 (on mutual legal assistance), the provisions of which it regards to be "self-executing," Ibid.

As a more general consideration, a number of jurisdictions with active asset confiscation records in the counternarcotics, counter-organized crime and major theft and fraud areas have been involved in both international asset sharing and/or the return of confiscated assets to victims of financial loss located abroad for many years prior to their adoption of the UNCAC. Such jurisdictions often are home to significant international banking and financial sectors. Some examples include the United States, Switzerland, Liechtenstein, the Cayman Islands, the English Channel Islands, Australia, the Hong Kong Special Administrative Region (SAR) of China and Singapore. Since the mid-2000s, the member States of the European Union also have engaged, at least among themselves, in confiscated asset sharing.⁵⁰ These jurisdiction's respective laws, protocols and programmes regarding non-corruption related assets can be expected to have influenced, and sometimes to govern, the manner in which they might now respond to asset return requests presented under the UNCAC.

See fn. 37 regarding 2014 EU framework decisions requiring that 50 per cent of recovered assets of €10,000 or more are to be shared between EU member countries that cooperated in the recovery.

5. Alternative reliance on other treaties or agreements or reciprocity for asset returns

6. Breaching the national divides

Finally, some UNCAC States parties, when dealing with foreign public corruption cases, employ their general mutual legal assistance treaties and/or other binding international agreements – which are usually bilateral or regional in scope – instead of the Convention. This is particularly true if the bilateral or regional instruments offer confiscation assistance and asset return provisions that are more specific than those contained in UNCAC articles 55 and 57. Examples of such bilateral-based returns are provided in part IV. However, these accords typically provide for the exercise of discretion and/or limit their obligations to the extent they are permitted by domestic law, and are limited to two, or just a few, signatory countries.^a

By contrast, some jurisdictions have laws allowing for confiscation-related assistance, including asset returns, based solely on a reciprocity representation by the requesting country that it can and will extend comparable assistance itself in a potential future case.[®] However, as the *Asset Recovery Handbook notes*, "[u]nlike treaty arrangements, such legislation does not create an international obligation to provide requested assistance; hence, such flexibility raises the uncertainty of whether the request will be acceptable".[®]

53 Asset Recovery Handbook, p. 247.

The discussion of the many variables governing crossborder asset returns from any given country – delineated in parts II, III and V of this paper – are intended to highlight the unavoidable need to conduct careful country-specific research as a foundation for undertaking such returns. Whether seeking or assisting an asset transfer, knowledge of the specific domestic terrain involved on all sides – legal, programmatic and treaty/agreement related – can only enhance the likelihood of success in overcoming the traditional obstacles to cooperation between nations, as intended by UNCAC in matters of corruption.

Part IV of this paper analyses article 57.3 provision by provision and shows recent examples in which Chile, France, Jersey, Lebanon, Liechtenstein, Luxembourg, Switzerland, the United Kingdom and the United States have returned or are working to return proceeds of crime, either directly or indirectly, to 13 other jurisdictions. The jurisdictions that have, will or would receive direct asset returns are Colombia, Curacao, Honduras, Indonesia, Kyrgyzstan, Macao SAR, Moldova, Nigeria, Peru and Tunisia. The countries that have received indirect asset returns through either equipment procurements or funding provided for their benefit to international organizations include Equatorial Guinea, Kenya and Mauritania. The eight jurisdictions mentioned above returning the assets use their own respective applications of article 57 and/or related or comparable treaty or domestic law authorities to do so. As already noted, the cases covered, while not comprehensive, are instructive for their diversity and the ingenuity they employ. They are selected to assist practitioners in the asset recovery field to actualize the challenges they will face in charting successful courses for their own asset return cases.

Part V then identifies and explains a series of useful tools for analysing, researching and coordinating specific asset returns. These are presented as part of a broader set of suggested considerations and approaches that public officials in any country may employ to structure their approaches to asset returns.

⁵¹ See Asset Recovery Handbook, pp. 246–247. Such domestic law-based caveat provisions nonetheless can be quite useful between countries that face frequent and ongoing asset return dynamics because they allow for the automatic application of developments in each of the respective parties' laws that permit additional asset return assistance. An example is given when both countries adopt non-conviction based confiscation provisions, or at least provisions allowing for the recognition of other countries' non-conviction based confiscations, thereby potentially extending asset return assistance to such cases. Another example is constituted when compulsory assistance of all types covered by a bilateral agreement is based on dual criminality, allowing for new criminal offence provisions adopted in either country to be automatically covered by the agreement if the other country already has a corollary offence.

⁵² E.g., "Jersey does not require a treaty to provide mutual legal assistance in asset recovery. However, as a general policy, the provision of assistance would be conditional on assurances of reciprocity and considerations of the seriousness of the case". Second cycle IRM country review report of the United Kingdom, https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_11_16_UK_ Final_Country_Report.pdf, Annex II, section 3.3.1.

Part IV.

Illustrative asset return cases and agreements and a detailed analysis of asset return obligations under article 57, paragraph 3

> With the preceding contextual information on article 57 in mind, one can turn to a more detailed look at each of the subparagraphs of article 57.3 in outline format and consider some recent cases and agreements that illustrate their respective applications.

Mandatory obligation to return assets to a requesting State party

Article 57.3(a)

Article 57.3(a) provides:

- 3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:
- (a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

This provision can be broken down into its component parts, incorporated with other specific provisions of the UNCAC on which it relies, as follows:

Article 57.3(a)

Scenario covered: When a requested State party enforces a requesting State party's confiscation judgement that is based on a specific predicate offence, and:

Asset prerequisites: The confiscated asset (as per art. 57.3(a), art. 17 and art. 55.1(a) elements and art. 2(a) definition)):

- 1. Constitutes "public funds"54
- Was entrusted to a "public official" (which term includes also a private person performing a public function, either directly as a public service or for a public agency or enterprise, whether paid or unpaid);
- 3. ls:₅
 - a. the proceeds of crimes of the predicate offence; or
 - b. equal in value to such proceeds; or

- c. a penalty representing the pecuniary value of the benefits derived from the predicate offence;
- 4. Is located in a requested State party's territory (art. 55.1)

AND

5. Is the subject of a request under art. 55.1(b)57 and compliant with art. 55.3(b) from the State-party owner to enforce that State party's final confiscation order and return of the asset.

N.B. – The requested State may waive on limited grounds the requirement of a final confiscation judgement from the requesting State.

Predicate offence prerequisites: The predicate offence to the confiscation constitutes one or more of the following UNCAC predicate offences (and typically has dual criminality under both State parties' laws and their mutual recognition of the predicate offence as a viable predicate for confiscation):

1. The Entrusted Public Official's:

- a. Embezzlement (art. 17),
- b. Misappropriation (art. 17) or
- c. Other Diversion, for the benefit of the public official or another person or entity; or
- d. Laundering of such asset or of proceeds directly or indirectly derived from it (as per art. 23.1(a) and art. 2(e)); or

2. Any Person's:

- a. Participation in or conspiratorial, accessorial, attempted or aiding and abetting role in one of the above predicate offences (art. 23.1.(b) and art. 27.1– 3)); or
- b. Acquisition, possession or use of such asset, knowing it is the proceeds of one of the above predicate offences at time of receipt (art. 23.1(b) and art. 2(e)).∞

Note that, by incorporating all of the foregoing prerequisites, article 57.3(a) prescribes a confined set of circumstances under which a requested State is mandated to return the

⁵⁴ As already noted in fn. 25, but worth repeating here, art. 57.3(a) specifically limits its subject only to "public funds" that the public official has "embezzle[d]" or "launder[ed]" (or "misappropriated" or "other[wise] diver[ted]"). However, the term "public funds" is not defined by the Convention, and the UNCAC Interpretative Notes do not illuminate its specific meaning. Some logical interpretations might include that "public funds" are any "property" (as broadly defined by UNCAC art. 2(d)) that is of pecuniary value (see Black's Law Dictionary 6th ed. ("pecuniary ... consist[s] of money or that which can be valued in money"]) which the State party of origin legally (i.e. by title), nominally or beneficially owns, or is legally entitled to (such as evaded taxes or diverted licensing fees) or holds in trust (such as public employee retirementfund assets).

⁵⁵ Article 31

⁵⁶ For the purpose of this paper, the expression "proceeds of crime" is understood as any property derived from or obtained, directly or indirectly, through the commission of an offence, as well as instrumentalities. The expression "instrumentalities" is understood as property used to facilitate a criminal offence, such as a conveyance used to transport illegal items or a structure used to conceal, manufacture or trade in them.

⁵⁷ Compliance here with article 55.3(b) means, among other things, that all the grounds for refusing mutual assistance that are listed in article 46(21) also apply to asset return assistance under article 57, as they do to confiscation assistance more generally under article 55.

⁵⁸ Inclusion of these inchoate, participatory, accessorial and aiding and abetting offences is indicated by their placement within art. 23.1 defining the offence of money laundering and by the admonition of art. 23.2(a) that "[e]ach State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences".

confiscated assets. Consequently, research for this paper has identified only a few actual cases involving asset returns that are either expressly, or apparently, within this category. This is not because public officials are not committing the included offences of embezzlement, misappropriation or other diversion of public funds, and money laundering related to the same, but rather because of the challenges often involved in securing final, non-appealable confiscation judgements in either the requested or requesting States parties. However, progress continues to be made in this arena.

The following four cases, with asset returns made between 2013 and 2022, illustrate article 57.3(a) in application. These cases are subdivided into (1) those for which the requested State party has expressly stated that its asset return directly applied article 57.3(a) as its legal authority for the return; and (2) those for which the requested State party has applied other authorities, such as domestic law and/or bilateral mutual legal assistance treaties, to its return, without reference to article 57.9(a).

A. Asset Returns Directly Under Article 57.3(a)

Case Example 1 Liechtenstein to Nigeria: €174.5 million returned in 2013–2014

Article 57.3(a) applied directly; no case-specific agreement used; host State made *de facto* waiver of requirement for foreign confiscation order and used its own domestic confiscation proceeding to recover laundered public funds that had been diverted by and kicked back to a public official of the State of origin; host State then returned the funds and World Bank monitored their final disposition in State of origin. Liechtenstein's approach to asset returns

In Liechtenstein, the UNCAC is an integral part of the country's domestic law. As an international treaty, it has at least the status of statutory law in the domestic legal order and takes precedence over earlier laws. Foreign court orders for confiscation, freezing and seizing can be enforced pursuant to article 64 of the Mutual Legal Assistance Act (MLAA), unless otherwise provided for by international conventions. Liechtenstein also can issue domestic freezing and confiscation orders without a foreign court order, on the basis of a request for mutual legal assistance or media report, and such requests need not be submitted through diplomatic channels. The provisions of the UNCAC are directly applicable, and article 57 provides a legal basis for Liechtenstein to return confiscated property to countries of origin. Consistent with UNCAC article 57.5, Criminal Procedure Code article 253a permits Liechtenstein to conclude an international agreement on the transfer of confiscated proceeds of crime to the country where the offence was committed.59

59 See the Second Cycle IRM evaluation report of Liechtenstein, https://www. un od c. org/do cum ents/treaties/UN CAC/ Country/VisitFinalReports/2017 09 12 Liechtenstein_ Final_Country_Report.pdf, pp. 16–17.

In late 2013, the Government of Liechtenstein returned €7.5 million to the Government of the Federal Republic of Nigeria in direct reliance on article 57.3(a) of the UNCAC. Both countries are parties to the UNCAC. In mid-2014, Liechtenstein returned an additional €167 million to Nigeria under the same authority. The returned assets stemmed from corrupt activities by the late Nigerian military dictator General Sani Abacha, who died in June 1998. As previously noted, Liechtenstein is among the UNCAC States parties that can employ article 57 as a directly applicable authority to return assets, and article 253a of its Criminal Procedure Code permits, but does not require, it to conclude a casespecific asset return agreement with the State party where the offence occurred, with the option of including specific provisions to govern the return in the agreement.⁶⁰ As to the assets returned to Nigeria:

Criminal investigations and confiscation proceedings in that country and in Liechtenstein established that the Li[e]chtenstein funds originated from bribes paid by Germany's Ferrostaal AG to companies whose ultimate beneficiary was Gen. Abacha. They related to a grossly inflated contract for the construction [in Nigeria] of an aluminium smelter. ...General Abacha was the penultimate and most brutal dictator of Nigeria's military rulers. He and what Switzerland's Supreme Court dubbed the 'Abacha family criminal enterprise' amassed a fortune estimated at \$3bn-\$5bn from misappropriation of public funds during his 1993–1998 rule. ...[As of mid-2014] Nigeria ha[d] recovered \$1.3bn, the largest tranche of which – \$500m – came from

⁶⁰ lbid., pp. 17 and 152–153. When Liechtenstein confiscates assets pursuant to its domestic mutual legal assistance law, their ownership devolves to the Principality of Liechtenstein.

Switzerland in 2005. A further \$1.1bn – in France, the UK, Luxembourg and the Channel Island of Jersey – [was] still tied up in legal proceedings. The US...froze more than \$458m linked to Abacha in Jersey and France.[®]

The events leading to the confiscation of Abacha's funds in Liechtenstein are chronicled in both news accounts and in the Liechtenstein country review report in the second cycle of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (second cycle IRM country review report).[∞] The Liechtenstein Public Prosecutor's Office launched a criminal investigation of the Abacha-related assets in 2000 and froze them provisionally based on suspicious activity reports submitted to its Financial Intelligence Unit. The same year, the Nigerian Government requested the assistance of Liechtenstein in recovering and returning the assets. Subsequent criminal charges in Liechtenstein linked five companies attributable to the Abacha family to the payment of the assets to bank accounts in Liechtenstein, and evidence showed the assets to have been taken from the national budget of Nigeria.83

In 2008, the Liechtenstein Criminal Court convicted the five Abacha companies and sentenced them to pay the Liechtenstein Government the €174.5 million the court found to be Nigerian public funds. The Liechtenstein Constitutional Court affirmed the conviction in 2012, finalizing the asset recovery judgement. As a result, in late 2013, the Government of Liechtenstein returned to Nigeria the first €7.5 million held by one of the companies.⁸⁴ The four other companies refused to surrender their assets as ordered, requiring Liechtenstein to initiate non-conviction based confiscation proceedings to collect them. The four companies subsequently filed a complaint against Liechtenstein, regarding the confiscation action against them, with the European Court of Human Rights (ECtHR), further delaying return of the remaining €167 million in assets. As the ECtHR suit was pending, in early 2014, officials from Liechtenstein and Nigeria commenced talks in response to the need of Liechtenstein for Nigeria to guarantee to cover any losses that Liechtenstein might incur from a near-term return of the remaining confiscated assets to Nigeria, in the event the ECtHR subsequently were to rule against Liechtenstein in the suit. At the same time, the World Bank agreed to the request of Nigeria, with the concurrence of Liechtenstein, that the World Bank would monitor the use of the confiscated funds for transparency purposes upon their eventual return.⁶⁵

In May 2014, the Abacha companies unexpectedly withdrew their complaint to the ECtHR, reportedly due at least in part to a decision by the Nigerian Government to dismiss its own pending criminal corruption charges against Sani Abacha's eldest son, Mohammed Abacha, a move that was widely criticized internationally. Mohammed Abacha had been charged with receiving stolen assets that his father embezzled while he was in power. The Nigerian criminal proceedings apparently included a conviction-based asset confiscation component, as indicated by a statement made by the Attorney General and Minister of Justice of Nigeria, Mohammed Adoke, who was quoted as saying that the aim of "prosecution of corruption cases [in Nigeria] is the deprivation of the criminal offender of the proceeds of crime. This is achieved by the taking away of such proceeds of crime by the State."®

The second cycle IRM country review report of Liechtenstein notes that withdrawal of the ECtHR complaint

clear[ed] the path for the immediate return of the [remaining] assets in accordance with article 57 subparagraph 3 (a) of the UNCAC. This surprise move by the [Abacha companies] left Liechtenstein no time to finalize an agreement on the monitoring and use of the assets. ... In the Abacha case, Nigeria was not interested in concluding such an arrangement.^{er}

Nigeria received the remaining €167 million in July 2014.

Regarding the reliance of Liechtenstein on article 57.3(a) to accomplish the asset return, its IRM report indicates that its domestic confiscation proceedings found the assets "involved the embezzlement of funds in Nigeria". This finding suggests that Liechtenstein construed the kick-back payments that Abacha received, in exchange for the letting of highly inflated government contracts,

^{61 &}quot;Liechtenstein agrees to return Abacha's stolen €167m to Nigeria", *Financial Times*, 10 October 2013, https://www.ft.com/content/c9d922ee-f6e2-11e3-b271-00144feabdc0. This paper, in part IV.4, will discuss the case in which the Bailiwick of Jersey has returned Abacha assets to Nigeria. It also will provide a summary regarding a 2014 return of assets by Switzerland and continuing efforts by the United States, the United Kingdom, Luxembourg and France to return additional Abacha assets to Nigeria.

⁶² For more information on the Implementation Review Mechanism, see part V, 2.A of this paper.

⁶³ See the second cycle IRM country review report of Liechtenstein, pp. 16–17 and 152– 153. See also "Nigeria fights to recover Abacha funds from Liechtenstein", Financial Times, https://www.ft.com/content/2dac07c8-31bd-11e3-a16d-00144feab7de.

⁶⁴ Presumably, this initial return of assets by Liechtenstein also was done directly pursuant to Article 57.3(a), employing a waiver of the requirement for a final confiscation order from Nigeria. However, this is unclear from the second cycle IRM country review report of Liechtenstein.

⁶⁵ See the second cycle IRM country review report of Liechtenstein, , p. 153.

⁶⁶ *Premium Times*, [27 June 2014], https://www.premiumtimesng.com/news/163976nigerian-government-acted-right-dropping-corruption-charges-abacha-adoke.html. 67 Second cycle IRM country review report of Liechtenstein, pp. 153 and 157.

to constitute embezzlement of public funds, which funded the kickback payments. The IRM report also indicates that, because Liechtenstein lacks a domestic legislative basis to waive the requirement of subparagraph 57.3(a) that Nigeria supply it with a final confiscation judgement to enforce on the behalf of Nigeria, Liechtenstein had nonetheless waived that requirement in effect, if not formally. This is because, when Liechtenstein employs "a domestic confiscation order, then the money can be returned also in the absence of a foreign final judgment".[®] It is notable regarding this waiver both that the deceased Sani Abacha, the principal in perpetrating the corruption underlying the assets laundered to Liechtenstein, was never susceptible to conviction-based confiscation proceedings in Nigeria due to his death, and that Nigeria did not have non-conviction based confiscation authority available for use at the time of the asset return from Liechtenstein. However, Nigeria does appear to have adopted such authority since then.[®]

Case Example 2 United Kingdom to Kenya and Mauritania: £345,000 and £50,000 returned in 2017

Highlights: Article 57.3(a) applied directly; Memorandum of Understanding (MOU) used; host State waived requirement for a foreign confiscation order; host State used a domestic value-based confiscation proceeding to recover for return to the State of origin corrupt commissions paid to public officials; the MOU applied alternative indirect measures to govern the asset return.

In 2015, a court in the United Kingdom found a UK-based firm, Smith & Ouzman, and two of its principal officers, guilty on criminal charges in connection with corrupt payments totalling £395,000 that the firm made to public officials in Kenya and Mauritania in exchange for inflated government contracts to provide printing supplies to those countries. All three countries are parties to the UNCAC. The payments were made in the form of putative commissions to the officials. The court ordered the defendants to pay £881,158 under a confiscation order, the amount equivalent to the value of benefits the defendants derived from their crime, in addition to fines and court costs. At the urging of the United Kingdom Serious Fraud Office (SFO),

United Kingdom's approach to asset returns

In the United Kingdom, the direct application of article 57.3 is detailed in the Home Office's newly issued Framework for transparent and accountable asset return (January 2022).⁷⁰ However, to help it meet its obligations under the UNCAC, the United Kingdom also has adopted the Crime (International Co-operation) Act 2003 (CICA) and Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (POCA Order).⁷¹ All assets recovered in the United Kingdom under asset recovery orders are paid to the UK's central government, which then makes decisions on the return and disposal of these assets, guided by the letter and spirit of the obligations of the United Kingdom under international law, including the UNCAC. This includes returning assets to prior legitimate owners. However, in relation to asset return, there is no explicit provision in the United Kingdom domestic law.

70 The United Kingdom's Home Office, International and Operational Asset Return Policy International and Operational Asset Return Policy Unit, in January 2022 issued a comprehensive policy paper entitled Framework for transparent and accountable asset return. The Framework explains concisely the gamut of domestic inter-agency authorities and mechanisms for effecting foreign proceeds of crime returns stemming form confiscations conducted in England, Wales, and Northern Ireland. See https://www. gov.uk/government/publications/framework for-transparent-and-accountable-asset-return/ for-transparent-and-accountable-asset-return/ framework-for-transparent-and-accountable-asset-return, in the Introduction and paras. 3–8.

71 The UK Home Office is the Central Authority for A The UK Home Uffice is the Central Authority for formal mutual legal assistance (MLA) requests for the United Kingdom. In Scotland, the Crown Office International Co-operation Unit (ICU) performs a similar function, where the requesting State recognizes the central authority of Scotland.

72 Second cycle IRM country review report of the

V2 Second Cycle New Country Teview Teport of the United Kingdom, p. 16, https://www.unodc.org/documents/treaties/ UNCAC/Country/VisitFinalReports/2020_11_16_UK_ Final_Country_Report.pdf.

⁶⁸ Ibid., p. 154. The implication here is that the needs of Liechtenstein in this case to employ domestic nonconviction based confiscation proceedings, to collect the assets that its criminal court had ordered the Abacha companies to pay to the Liechtenstein Government, opened the avenue for Liechtenstein to return the assets pursuant to its domestic law upon completion of that confiscation.

⁶⁹ See Inter-governmental Action Group against Money Laundering in West Africa (GIABA), Follow Up Report Mutual Evaluation Nigeria", [May 2015], https://www.giaba.org/media/f/932_7t/%20 FUR%20Nigeria%20-%20English.pdf, p. 6, and GIABA, Anti-money laundering and counter-terrorist financing measures: The Foderal Republic of Nigeria, (August 2021), https://www.giaba.org/media/f/1151_Second%20 Mutual%20Evaluation%20Report%20of%20the%20Federal%20Republic%20of%20Nigeria.pdf, p. 94, para. 288.

which investigated and prosecuted the case, the court also directed that \pm 345,000 of the confiscated assets be paid in compensation to the Kenyan Government and that \pm 50,000 be paid to the Mauritanian Government.²³

The second cycle IRM country review report of the United Kingdom states that it relied upon subparagraph 57.3(a) to return the confiscated assets to Kenya and Mauritania. The United Kingdom may have elected in this case to waive the requirement of subparagraph 57.3(a) for a final confiscation order from both countries of origin, as no confiscation action in either country is referenced in the IRM country review report or in news reports.

The evaluation report notes that the Government of the United Kingdom worked with both recipient governments and the World Bank to craft a transparent arrangement for the returns of the funds. In the case of Kenya, the UK authorities used the funds to directly purchase seven ambulances for the country as part of a domestic development project. In the case of Mauritania, the report notes that, because a "relevant corrupt official ha[d] been promoted" (presumably instead of being dismissed and/or prosecuted by the Mauritanian authorities), its £50,000 were added to a World Bank fund for essential infrastructure projects in the country.⁴⁴

B. Asset Returns Consistent with Article 57.3(a)

Case Example 3 Lebanon to Tunisia: \$28.8 million

returned in 2013

Highlights: Article 57.3 applied in general, asset return was consistent with subparagraph 57.3(a) provisions; no case-specific agreement was used for the return; the host State enforced the State of origin's confiscation order to recover public funds diverted by, and kicked back to, a public official, then laundered by his spouse.

In April 2013, the Republic of Lebanon returned the equivalent of \$28,800,818 in confiscated assets to the Republic of Tunisia. Both countries are States parties to the UNCAC. The confiscated assets had been laundered years before into an account at the Lebanese Canadian Bank S.A.L. in Lebanon by Leila Bent Mohamed Bent Rhouma-al-Trabelsi, the wife of President Zine El Abbedine Ben Ali of Tunisia. Ben Ali, formerly the security chief of Tunisia, had

Lebanon's approach to asset returns

In Lebanon, international treaties to which the country is State party, including the UNCAC, are given supremacy over the domestic laws according to article 2 of the Code of Civil Procedure. The Lebanese domestic legal framework against corruption includes provisions from the Lebanese Criminal Code (LCC), Criminal Procedure Law and the Law No. 318 of 20 April 2001, modified by Law 44 of 24 November 2015, on the fight against money laundering, and the Civil Servants Regulations and the Labor law.⁷⁵ Articles 69 and 98 of the Criminal Code of Lebanon and article 14 of Law 44 of November 2015 authorize confiscation domestically, and Lebanon recognizes both object and value-based confiscation of assets resulting from or used for committing a crime. These provisions also allow for confiscation of items that were destined to be used in offences, and of transformed or intermingled property. Although Lebanon has no law on international mutual legal assistance, it can provide MLA based upon a treaty, and, in the absence of a treaty, on the basis of reciprocity. In 2020, a guide to international cooperation with the Lebanese Republic to recover money derived from corruption was issued. Lebanon also has used the UNCAC as legal basis for MLA, including in the asset recovery and the asset return context.76

⁷³ See the second cycle IRM country review report of the United Kingdom, https://www.unodc.org/documents/ treaties/UNCAC/Country/VisitFinalReports/2020_11_16_UK_Final_Country_Report.pdf, pp. 195 and 225. See also Max Goldbart, "E2m Smith & Ouzman fine funds African development" Printweek, 21 March 2017, https:// www.printweek.com/news/article/2m-smith-ouzman-fine-funds-african-development.

⁷⁴ Second Cycle IRM evaluation report of the United Kingdom, supra, p. 225.

⁷⁵ See the First Cycle IRM country review report of Lebanon (2015), pp. 2–4,

https://www.unodc.org/documents/treaties/ UNCAC/Country/VisitFinalReports/2016_03_08_ Lebanon_Final_Country_Report.pdf. Details on the criminalization by Lebanon of the UNCAC predicate offences are outlined on pp. 3–5.

⁷⁶ Ibid, pp. 5, 10 and 107. Lebanon has bilateral MLA agreements with Bulgaria, Greece, Italy and Tunisia and is party to the Arab Convention on the Suppression of Terrorism. The first cycle IRM report of Lebanon states, regarding international asset recovery and asset return assistance, that, after the seizure and freezing procedures of the crime-related assets are finalized, an execution order must be obtained for the foreign judgements and seizure decisions. Obtaining an execution order is a summary procedure, given that the issuance of such execution order is only requested after confirming that the decision requiring it is legitimate and that the decision conforms to the terms and conditions contained in the domestic law. Ibid, p. 107.

run Tunisia for 23 years taking power when, as prime minister in 1987, he declared president-for-life Habib Bourguiba medically unfit to rule. He was ousted from office in January 2011 and subsequently fled into permanent exile in Saudi Arabia along with Leila Trabelsi and their three children.

After Ben Ali's fall in February 2011, Tunisian authorities established a special committee for recovery of assets stolen by Ben Ali, his family and other public officials. As a result, the same year, an array of assets – including more than \$80 million in foreign bank accounts, as well as several aircraft and boats – were frozen or seized by officials in Belgium, France, Italy and Switzerland based on requests from investigators in Tunisia. Also frozen by the Lebanese Special Investigation Commission (SIC) in March 2011, at the request of the Tunisian SIC, was Leila Trabelsi's bank account at Lebanese Canadian Bank S.A.L., with a balance of just under \$28.8 million.

An interim Tunisian Government also criminally charged Ben Ali and Trabelsi. Ben Ali was convicted in absentia and sentenced to life imprisonment in 2011 for inciting violence and murder, and for wide scale theft of public funds. In June 2011, the Fifth Criminal Circuit of the Court of First Instance in Tunisia also convicted Trabelsi for wide scale theft of public funds. In a supplemental decision issued in December 2011, based upon Trabelsi's conviction, the Tunisian court ordered the confiscation of the funds in her bank account in Lebanon." The Tunisian Ministry of Justice submitted the Tunisian court's confiscation order to the Lebanese authorities in early 2012, with a request to enforce the confiscation order and return the balance of the account to the Tunisian authorities. Reportedly, in a December 2012 decision by the Fifth Chamber of the Beirut Court of Appeals, that court granted a writ of execution enforcing the Tunisian confiscation decision and ordered that the balance of the account be returned to Tunisia. As a result, the funds were "handed over in the form of a check to Tunisia's current

President Moncef Marzouki by Ali bin Fetais-al-Marri, at the time Qatari Attorney-General and UNODC Special Advocate on Stolen Asset Recovery", who assisted in this matter at the request of the Tunisian Minister of Justice.

Because the Beirut Appellate Court's decision, issued in Case No. 893, 12 December 2012, is an unpublished decision, it is not known whether that court, or other Lebanese documents, made reference to UNCAC article 57.3, or to subparagraph 57.3(a) in particular, as the legal basis for, or as being consistent with, the decision of Lebanon to return the confiscated assets to Tunisia.⁷⁹

However, as already noted, Lebanon's international treaty obligations, including the UNCAC, have supremacy over its domestic laws. While Lebanon has no domestic MLA law it does have a bilateral MLA treaty with Tunisia, and the first cycle 2016 IRM country review report of Lebanon notes that Lebanon "has also used UNCAC as legal basis for MLA". This may have been the case for the return of the Ben Ali assets to Tunisia, because a section in the report listing specific examples of the "freezing, seizure, and confiscation" assistance of Lebanon to other countries lists, among others:

The Tunisian Case: A sum resulting from corruption and embezzlement of public funds claimed to have been obtained by the previous President of Tunisia was frozen and recovered, in accordance with the UN Resolutions.⁴⁰

In addition to the foregoing, the authorities of Lebanon confirmed in a recent interview that UNCAC article 57 generally was the basis for the country's return of the assets to Tunisia and confirmed the IRM reports characterization of the confiscated assets stemming from "embezzlement" of Tunisian public funds by Ben Ali.⁴¹ Consequently, this paper categorizes this case as an asset return under UNCAC article 57.3(a).

⁷⁷ See Jean Pierre Brun, "Tracking Tunisia's stolen assets : the balance sheet three years on", World Bank Blogs, 22 January 2014, https://blogs.worldbank.org/arabvoices/ tracking-tunisias-stolen-assets-balance-sheet-three-years. See also https://star. worldbank.org/sites/default/files/2021-01/StAR ARW database_0.xlsx and ANNEX I - Timeline of Sequence of Events Related to the Asset Recovery of the Lebanese / Tunisian Case, EGMONT BECA 2017 (courtesy of Lebanon SIC).

⁷⁸ This information comes from a blog published by the World Bank Stolen Asset Recovery Initiative's Asset Recovery Watch (Source: Jean Pierre Brun and Richard Miron, "Tunisia's cash back: The start of more to come?", *World Bank Blogs*, 15 April 2013.), https://blogs.worldbank.org/arabvoices/tunisias-cash-back-start-more-come. 79 lbid.

⁸⁰ See first cycle IRM country review report of Lebanon, https://www.unodc.org/ documents/treaties/UNCAC/CountryVisitFinalReports/2016_03_08_Lebanon_Final_ Country_Report.pdf, pp. 107, 110.

⁸¹ Interview of 28 February 2022, with Lebanese authorities

United States' approach to asset returns

As noted earlier, the United States is a State party whose method of adopting and implementing the UNCAC does not give it direct authority under article 57 to execute international proceeds of crime returns.²² In addition, the United States is an example of a State party that also has not adopted any specific implementing legislation vis-à-vis the UNCAC, including article 57, based on a legislative determination that, as stated in a United States Senate Executive Report:

[C]urrent United States law [as of 2006], including the laws of the States of [the] United States, fulfils the obligations of the Convention for the United States. Accordingly, the United States of America does not intend to enact new legislation to fulfil its obligations under the Convention.83

The result is that, to conduct confiscated proceeds of crime returns to other countries, the United States has effectively and consistently relied upon three older, statute-based programme authorities, not specific to foreign public corruption, all of which it has adapted in part to accommodate UNCAC-motivated asset returns.

82 This is despite the constitutional provision of the United States that holds treaties to which it is party to be equivalent in authority with legislative enactments of law. See United States Constitution, Article VI., section 2 (Supremacy Clause). The United States Senate generally considered the UNCAC to be a "non-self-executing" treaty under US law, meaning that its provisions require implementing legislation by Congress to be directly enforceable, rather than being themselves directly equivalent to an act of the legislature. United States Senate Executive Report No. 109-18, pp. 6, 8 and 22 (2006), https://www.govinfo.gov/content/ pkg/CRPT-109erpt18/html/CRPT-109erpt18.htm. See United States v. Emuegbunam, 268 F.3d 377, pkg/CRPT-109erpt18/html/CRPT-109erpt18.htm. See United States v. Emuegbunam, 268 F.3d 377, 389 (6th Cir. 2001), citing Whitney v. Robinson, 124 U.S. 190, 194 (1888); see also Sanchez-Llamas v. Oregon, 548 U.S. 331, 373 (2006), for case law distinguishing self-executing and non-self-executing treaties. However, the Senate provided exceptions for UNCAC articles 44 (on extradition) and 46 (on mutual legal assistance), which provisions it regards to be "self-executing" and therefore directly enforceable. Ibid.

enforceable. Ibid.

83 United States Senate Executive Report No. 109-18, section 3, Declarations, para. (a) (2006), approving the UNCAC for ratification by the US President, subject to this reservation.

These United States programmes – which notably are wholly discretionary to that Government's executive branch - are:

- (1) the international confiscated asset sharing program, based on recognizing confiscation-related cooperation of all types provided by any other countries in connection with the full array of criminal offences;84
- (2) the confiscated asset remission program; and
- (3) the related confiscated asset restoration program, both of which compensate victims including foreign countries - with demonstrable pecuniary losses resulting directly from the crime underlying the confiscation (most commonly theft and fraud offences involving private persons and entities) or a related offence. The remission programme also compensates innocent owners or secured lien holders of confiscated property.85

84 Title18, United State Code § 981(i)(1), and Title 21, United States Code § 981(e)(1)(E), authorizes the United States Attorney General to transfer forfeited (i.e., confiscated) personal property, or the proceeds of the sale of personal or real property, whether criminally or civilly forfeited, to any foreign country that participated directly or indirectly in the seizure or forfeiture of that property. Such transfers must be inter alia (1) agreed to by the US Secretary of State and (2) authorized by an international agreement between the United States and the recipient country. Section 981(i) (1), Title 19, United States Code § 1616a (c)[2)(B), and Title 31, United States Code § 9703(1)(2), give comparable international sharing authority to the Secretary of the Treasury for forfeited assets handled by Department of Treasury components. 85 It should be noted that the US confiscated-asset

85 It should be noted that the US confiscated-asset "remission" process is an administrative authority of the US Department of Justice and various US federal law enforcement agencies, which may be applied to assets confiscated in conviction-based applied to assets confiscated in conviction-based and non-conviction based proceedings, whether judicial or administrative in nature. By comparison, the "restoration" process is a more targeted mechanism used by the Department of Justice to apply already-confiscated assets, over which the US federal courts have no direct disposition authority, to fund some US court-mandated victim restitution orders, in whole or in part, that are entered at sentencing upon criminal convictions. See The U.S. Department of Justice https://www. justice.gov/im/jm-9-121000-remission-mitigation-and-restoration-forfeited-properties . d https:// www.justice.gov/criminal-vns/restitution-process. Consequently, foreign countries, like other victims or owners, who suffer pecuniary losses due to public corruption offences that result in US asset confiscations, may be eligible – as an alternative confiscations, may be eligible – as an alternative to direct administrative remission of confiscated

Any of these three programmes, or a combination thereof, are employed for US proceeds of crime returns to other countries, depending upon various circumstances presented by individual cases.88 Examples of these US programmes in application to foreign public corruption cases are discussed at Case Examples 4, 7, 11, 12 and 16 below.

Of final note, since 2010, the United States Department of Justice has operated its Kleptocracy Asset Recovery Initiative, under which a team of federal prosecutors in the Criminal Division's Money Laundering and Asset Recovery Section is dedicated, in partnership with US federal law enforcement agencies and foreign counterparts, to the confiscation of proceeds of foreign official corruption and, when appropriate, to the return of those confiscated proceeds, consistent with the United States' obligations under the UNCAC and other relevant law enforcement conventions and treaties. These asset returns are accomplished using the discretionary programmes and litigation settlement means.

assets from the US executive branch for US court-ordered restitution, funded in whole or part by confiscated assets, in appropriate criminal prosecutions. Note that the restoration process extends only to victims and not to innocent owners and secured lien holders, because only victims are eligible to obtain compensation via court-ordered restitution.

86 While the US victim remission and restoration 86 While the US victim remission and restoration programmes do not require any treaty, convention or separate case-specific international agreement with the recipient country, the asset sharing process, by contrast, does require that the United States have an international agreement of some sort with the recipient country that specifically provides for asset sharing. While this latter requirement often is fulfilled by one of the more than 50 bilateral mutual legal assistance treaties (MLATs) and/or the 21 permanent bilateral asset sharing agreements to which the United States is a party (though it is not fulfilled by the provisions sharing agreements to which the United States is a party (though it is not fulfilled by the provisions of any multilateral conventions, including the UNCAC), case-specific agreements often are used alone, in conduction with these accords, or are used alone, in conducting kleptocracy asset returns.

⁸² This is despite the constitutional provision of

Case Example 4

United States to Colombia: No recovered assets returned in 2021 due to asset depreciation and disposition expenses

Highlights: Asset returned via host State's domestic asset sharing programme and bilateral MLA treaty would have been consistent with article 57.3(a); host State enforced confiscation order of State of origin for substitute asset; but the asset's value had depreciated, leaving no value to return after host State paid the required asset disposition costs.

In February 2022, the United States Department of Justice notified the Office of the Attorney General of the Republic of Colombia that its enforcement of a Colombian court's final confiscation order against a condominium apartment in Miami, Florida, had regrettably yielded no net assets available for return to Colombia. Both countries are parties to the UNCAC. The apartment represented "a replacement, substitute, or equivalent asset" under the Colombian criminal code for Colombian public funds that were embezzled as part of a broad-ranging public corruption scheme in that country known as "the Carousel of Contracts"." Almost three years elapsed between the first actionable request of Colombia to the United States regarding this apartment, made under the UNCAC in September 2018 seeking the apartment's provisional freezing, and the entry of the US federal court's final order of confiscation in the case in July 2021. During that time, the apartment's net value had diminished by more than 50 percent due to unpaid taxes, mortgage fees and other expenses related to securing, settling, marketing and liquidating the property by US authorities on Colombia's behalf, exacerbated by a real estate slump in the South Florida region during the time of liquidation.

Despite the lack of net confiscated assets to return to Colombia, the Miami aspect of the Carousel of Contracts case nevertheless marked a significant advance in confiscationrelated cooperation between Colombia and the United States, as well as an important first instance of public corruptionrelated asset recovery cooperation. The broader case in Colombia involved corrupt activities by the former Mayor of Bogotá and his brother, a Colombian national senator, among many others. The Urban Development Institute (IDU), a Colombian government authority, awarded contracts to many companies for extensive repairs to public roads in Bogotá, as well as for the construction of new lanes for a rapid bus transit system under development in the late 2000s. Upon signing the contracts, IDU made advance payments to the companies to cover the initial costs of construction. These advance payments constituted public funds. Two of the companies subcontracted with Grupo Nule, a construction conglomerate whose owners were subsequently investigated and prosecuted for fraud, bribery of government officials and embezzlement of public funds in connection with those contracts.

The Colombian courts found that Grupo Nule's principals had controlled the companies involved in the IDU infrastructure contracts, and that they ultimately embezzled the equivalent of more than \$22 million (in 2018 US dollars) of the public funds received as advance payments under those contracts. The Nule defendants pleaded guilty, were convicted of Embezzlement of Public Funds in violation of article 397 of the Colombian Criminal Code, and their convictions were affirmed on appeal in 2012. According to financial investigators at the Colombian Attorney General's Office, the Nule defendants laundered their criminal proceeds through the US financial system by transferring funds from Colombia to US accounts nominally held by their relatives and/or by companies affiliated with Grupo Nule. Following the criminal convictions, as is customary in Colombia, prosecutors initiated non-conviction based confiscation proceedings to recover assets traceable to the contract crimes and, in lieu of such, other assets of the defendants to serve as substitute confiscations.

Of particular note is that, prior to 2018, Colombian prosecutors had made several unsuccessful attempts to get US assistance to freeze the Miami apartment as a substitute asset.⁴⁶ Consistent with Colombian law at the time, the Colombian restraining order provided for enforcement in the United States was issued by a Colombian prosecutor, while the US law permitting the enforcement of a foreign freezing/seizing order requires that such an order must be issued by "a *court* in the foreign country", i.e., by a judge.⁴⁰ This is a common, but critical, discrepancy between the laws of the United States and some other common law countries and the laws

⁸⁷ See, generally, Daniel Medendorp Escobar, "Ex-Bogota council member sentenced to 3 years for Bogota works corruption scandal", *Colombia Reports*, 9 June 2014, https://colombiareports.com/ex-bogota-council-member-sentenced-3-years-bogotaworks-corruption-scandal/amp/ and "Nule Group corruption scandal", *DBpedia*, https://dbpedia.org/page/Nule_Group_corruption_scandal.

⁸⁸ Note that, while United States law permits the confiscation of substitute assets only in the context of US conviction-based proceedings in domestic cases, its laws on enforcement of foreign confiscation orders can accommodate their application to substitute assets, and assets of equivalent value, which are confiscated in foreign non-conviction based proceedings, if provided for by the requesting State's confiscation regime.

⁸⁹ See Title 28, United States Code, Section 2467(d)[3](B)[2]. This judicial oversight requirement, which also applies to United States authorities in their own seizure/ freezing of assets, is intended to ensure a foreign court's independent and objective evaluation of the sufficiency of evidence adduced by the foreign prosecuting authority in support of the foreign freezing/seizure order to be enforced in the United States.

of many civil law jurisdictions, such as Colombia, with regard to preliminary seizures and freezes of assets for purposes of eventual confiscation. However, a 2017 amendment in Colombia added a new provision regarding "Precautionary Measures for Property Abroad." The amended law provides:

The Office of the Attorney General will be entitled to request the competent authority in the cooperating country for the implementation of asset freezing related to property overseas subject to asset forfeiture. These measures will be subject to corresponding legal review before the asset forfeiture judges in order that they have full legal effect in the foreign country [emphasis added].⁴⁰

This amendment provides for both Colombian judicial oversight, limited to cases involving assets abroad, and an express grant of extraterritorial jurisdiction over such assets. Both of these authorities are useful to countries that have judicial review requirements similar to those in the United States and that are seeking to assist Colombia, or any civil law country, in asset recovery cases.

Based on this statutory amendment and a new freezing/ seizing order issued by the Colombian court, US prosecutors obtained a freezing order for the Miami property on behalf of Colombia in January 2019, allowing the Colombian authorities sufficient time to obtain a final Colombian confiscation order against the asset. In July 2021, the US court issued its amended final order of forfeiture on behalf of the Colombian court.

While, as noted, the US enforcement actions failed to return assets to the Government of Colombia due to asset depreciation and liquidation expenses, the US authorities nonetheless successfully deprived the apartment from the ownership of persons associated with the underlying corruption crimes in Colombia, while also laying a sound basis for cooperation with Colombia, including asset returns, on similar cases in the future. In notifying the Colombian authorities of the ultimate outcome of the case, the US Department of Justice emphasized that, had it recovered any net value from the apartment's forfeiture, it would have returned that value to Colombia through the victim asset return provision of the United States-Colombia permanent bilateral asset sharing agreement of 2016, and in accordance with its obligations under article 57.3(a) of UNCAC.^{an}

2. Qualified mandatory obligation to return assets to a requesting State party

Article 57.3(b)

Article 57.3(b) provides:

- 3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall: ...
- (b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property.

This provision can be broken down into its component parts, incorporated with other specific provisions of the UNCAC on which it relies, as follows:

Article 57.3(b)

Scenario covered: When a requested State party enforces a requesting State party's confiscation judgement that is based on a specific predicate offence, and with the following:

Asset prerequisites: The confiscated asset (as per (art. 57.3(b), art. 55.1(a) and art. 15–19 and 23 elements and art. 2(a) definition)):

- 1. Was owned by the requesting State party, OR
- Is the object of "damage" to the requesting State party; i.e., represents a pecuniary loss to the requesting State party, which loss was proximately caused by the predicate offence for the confiscation or a directlyrelated offence³²

⁹⁰ Article 208A of Colombian Law 1708 of 2014, enacted and amended by Law 1849 of 2017.

⁹¹ That provision, article 5, para. e) of the bilateral sharing agreement, in reference to the countries' joint obligations under UNTOC art. 14, para. 2, prioritizes the return of confiscated assets to the requesting country "for purposes of effecting the rights of identifiable victims" over "asset sharing between the [countries]".

⁹² Article 57.3(b) provides for the return of a confiscated asset when *inter alia* "the requested State Party recognizes *damage* to the requesting State Party as a basis for returning" the asset [emphasis added]. The UNCAC does not define the "damage" per se. However, article 57 addresses the return of "property", defined as "assets of every kind" [art. 2(d)]", implying pecuniary loss from a property-related orime as integral to the meaning of "damage" in this context. See Black's Law Dictionary 6th ed. ("pecuniary...consist[s] of money or that which can be valued in money"). Consequently, "damage" is construct here generally as a pecuniary loss proximately caused by the predicate offence to the confiscation or a directly related offence. This construction is taken in view that the Interpretative Notes for the official records of the negotiation of the UNCAC provide no guidance or insights regarding the negotiators' intended meaning of the term "damage" in context of article 57.

AND

- 3. ls:93
 - a. the proceeds of crime³⁴ of the predicate offence; or
 - b. equal in value to such proceeds; or
 - c. a penalty representing the pecuniary value of the benefits derived from the predicate offence;
- 4. Is located in a requested State party's territory (art. 55.1); and
- 5. Is the subject of a request under art. 55.1(b) and compliant with art. 55.3(b) from the State party owner to enforce that State party's confiscation order and return of the asset.

N.B. – The requested State party may waive on limited grounds the requirement of a final confiscation judgement from the requesting State party.

Predicate offence prerequisites: The predicate offence to the confiscation constitutes one or more of the following UNCAC predicate offences (and typically has dual criminality under both State-parties' laws and their mutual recognition of the predicate offence as a viable predicate for confiscation):

1. A Public Official's:

- a. Embezzlement (art. 17),
- b. Misappropriation (art. 17)
- c. or Other Diversion (art. 17))
 of *private* property, funds or securities entrusted to him or her by virtue of his or her position, for his or her benefit or that of another person or entity

2. Bribery related to a national public official (art. 15), i.e.:

- a. Any Person's (active bribery) promising, offering or giving an "undue advantage" to a national public official, for the official, any other person or entity, to prompt the official to execute or refrain from executing his or her official duties (art. 15(a)); or
- b. A national Public Official's (passive bribery) solicitation or acceptance of an "undue advantage"

for the official or another person or entity, so that the official execute or refrain from executing his or her official duties. (art. 15(b));)

- 3. Bribery (active) of a foreign public official or an official of a public international organization (art. 16.1), i.e., any person's promising, offering or giving an "undue advantage" to a foreign public official or an official of a public international organization, for the official or another person or entity, to prompt that official to execute or refrain from executing his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business. [art. 16.1];¹⁶
- 4. Bribe (passive) seeking or taking by a foreign public official or an official of a public international organization; i.e., the official's solicitation or acceptance of an "undue advantage", for the official or another person or entity, so that the official execute or refrain from executing his or her official duties (art. 16.2);
- A public official's intentional "abuse of functions" (art. 19), i.e., acting or failing to act in the discharge of his or her functions in violation of laws to obtain an "undue advantage" for himself/herself or others;
- 6. A public official's "illicit enrichment" (art. 20), i.e., the official's significant increase in assets that he or she cannot reasonably explain vis-à-vis the official's lawful income;∞
- 7. Any Person's "trading in influence" (art. 18); i.e.:
 - Promising, offering or giving to a public official or another person an "undue advantage" in exchange for the official or person "abusing" his or her real or supposed influence to obtain an "undue advantage" for anyone from a State party's public authority or administration. (art. 18(a)); or
 - Solicitation or acceptance by a public official or another person of an "undue advantage" for himself/

⁹³ Article 31

⁹⁴ As indicated above, for the purpose of this paper, the expression "proceeds of crime" is understood as any property derived from or obtained, directly or indirectly, through the commission of an offence, as well as instrumentalities. The expression "instrumentalities" is understood as property used to facilitate a criminal offence, such as a conveyance used to transport illegal items or a structure used to conceal, manufacture or trade in them.

⁹⁵ Noting again that this additional element in art. 16.1 includes "the provision of international aid" among "the conduct of international business." See fn. 17.

⁹⁶ The introductory clause of article 20 states that "each State Party shall consider" the offence of illicit enrichment, "[S]ubject to its constitution and the fundamental principles of its legal system". This clause indicates the UNCAC recognition that some of its States parties may have no direct corollary offence to illicit enrichment in their domestic law. However, a requested State's application of the "conduct-based approach" to the specific facts presented by the requesting State party may onortheless allow the requested State to find dual criminality in an offence by a different name and/or with somewhat different elements.

herself or another person in exchange for the official or person "abusing" his or her real or supposed influence to obtain an "undue advantage" for anyone from a State party's public authority or administration (art. 18(b));

- Any Person's laundering of the proceeds directly or indirectly derived from any UNCAC predicate offences listed above (as per art. 23.1(a) and art. 2(e));
- 9. Any Person's participation in or conspiratorial, accessorial, attempted, or aiding and abetting role in any UNCAC predicate offence listed above (art. 23.1.(b) (ii) and art. 27.1–3); or
- 10. Any Person's acquisition, possession or use of an asset, knowing it is the proceed of any UNCAC predicate offence listed above at time of receipt (art. Art. 23.1(b) (i) and art. 2(e));
- 11. Any Person's "concealment or continued retention of property", knowing that the property results from any UNCAC predicate offences listed above (art. 24); or
- 12. Any Person's obstruction of justice (art. 25) in a proceeding (art. 25(a)), or interfering with the exercise of official duties by a justice or law enforcement official (art. 25(b)), in relation to the commission of any UNCAC predicate offence listed above.

Note that subparagraph 57.3(b), like subparagraph 57.3(a), is relatively straightforward in what it requires, once it is cross-referenced to all of the other Convention provisions to which it pertains. A requirement that should be emphasized, however, is the qualification of subparagraph 57.3(b) that the requesting State party must reasonably establish either its "prior ownership" of the confiscated asset, or "damage to the requesting State party" vis-à-vis the asset to warrant the mandatory obligation of an asset return from the requested State party. It is for this reason that the subtille of this subsection of the paper is "*Qualified* mandatory obligation to return the confiscated asset to a requesting State party", to differentiate it from the unqualified (albeit narrower) obligation for asset return imposed by subparagraph 57.3(a).

The following three cases with asset returns from 2015 to 2022 illustrate article 57.3(b) in application. As before, these cases are subdivided into (1) those for which the requested State party has expressly stated its legal basis for the asset

return was direct application of article 57.3(b); and (2) those for which the requested State party has applied other authorities – such as domestic law and/or bilateral mutual legal assistance treaties – to its return, without reference to article57, but for which all factors indicate a consistency with the provisions of subparagraph 57.3(b) – and in one case, also an arguable consistency with the provisions of subparagraph 57.3(a).

A. Asset Returns Directly Under Article 57.3(b)

Case Example 5

United Kingdom to Macao SAR: £28,718,752.63 returned in 2015

Highlights: Article 57.3(b) directly applied; a Case Specific Agreement used only for expense recovery; the host State enforced the value-based confiscation order of the jurisdiction of origin to recover assets equivalent to bribes and kickbacks received by a foreign public official, which assets the host country then returned.

In November 2015, the United Kingdom Home Office returned £28,718,752.63 to the jurisdiction of the Macao Special Administrative Region (SAR) of the People's Republic of China.[®] The United Kingdom is a party to the UNCAC, and the UNCAC provisions apply to the Macao SAR.[®]

The asset retum, accomplished by the United Kingdom authorities directly under article 57.3(b) of the Convention, stemmed from a 2008 conviction-based confiscation ordered by a Macao SAR court following its initial criminal trial of Ao Man Long, Macao SAR's former Secretary of Transport and Public Works, on public corruption charges. Ao's corruption extended to a broad array of public works projects. Some involved public contract tender offers, for which Ao ordered his subordinates to select a particular company in exchange for a kickback payment. Others involved a direct selection of a contractor whose financial gain was repaid in part to Ao

⁹⁷ Second cycle IRM country review report of the United Kingdom, https://www. unodc.org/documents/treaties/UNCAC/Country/VisitFinalReports/2020_11_16_UK_ Final_Country_Report.pdf, p. 198. See also https://macaonews.org/politics/macauformer-secretary-transport-public-works-ao-man-long-gets-28-years-prison/.

⁹⁸ In accordance with the provisions of Article 153 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and Article 138 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, the Government of the People's Republic of China decided that the Convention should apply to the Hong Kong Special Administrative Region and the Macao Special Administrative Region of the People's Republic of China. See https://treaties.un.org/ Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&clang=_ en#EndDec

or the acceleration of inspections and approvals of private works projects in exchange for bribes. Ao reportedly built up a personal fortune estimated at \$100 million as a result of these crimes.⁴⁰ Numerous other defendants involved in the corruption were tried separately from Ao.⁴⁰⁰

Ao's 2008 trial – the first of three – resulted in his conviction on 40 counts of bribe-taking, two counts of abuse of office, 13 counts of money laundering and one count of unjustified wealth. The Macao SAR court's ensuing value-based confiscation order extended to Ao's assets located in the United Kingdom, consisting of a London residence valued at £9.3 million and bank accounts valued at £18 million, which Ao controlled directly, through his family and through five British Virgin Island companies that he beneficially owned.

Prior to the 2008 trial, the Macao SAR authorities had requested mutual legal assistance from the United Kingdom, pursuant to the UNCAC, to freeze/seize, confiscate and ultimately return Ao's assets to the Macao SAR. In March 2013, a UK court ordered the registration of the Macao SAR court's confiscation order, commencing enforcement actions by the UK authorities. Those actions concluded in 2015, with nearly £29 million recovered from the London residence and UK bank accounts. The UK Home Office repatriated those assets to the Macao SAR under a case-specific return agreement. The UK authorities were reimbursed £116,603 in expenses they had incurred in litigating oppositions before the UK court to the confiscation of part of the assets.¹⁰ The reliance of the United Kingdom on Article 57.3(b) as a basis for the asset return indicates its focus on Ao's bribe-taking and abuse of office as the offences predicating the Macao SAR court's confiscation judgement.

B. Asset returns consistent with article 57.3(b)

Case Example 6

Switzerland and Luxembourg to Peru return of approximately \$26 million in 2020

Highlights: Two host States applied their domestic laws, without reference to article 57.3, to return assets consistent with subparagraph 57.3(b) (and arguably with subparagraph 57.3(a)) provisions; the return was based on a three-party case-specific agreement; the host States enforced the State of origin's confiscation order to recover public funds diverted by a public official to a government contractor in exchange for bribes/ kickbacks paid to the official; the host States returned the funds subject to prudential measures included in the return agreement.

Switzerland's approach to asset returns

In the case of Switzerland, treaty or convention provisions have direct application and are considered as "positive" national law, insofar as they are precise enough to be implemented.¹⁰² Switzerland gives effect to article 57 of the UNCAC through complementary domestic laws. In particular, Switzerland's national law on Mutual Legal Assistance, the Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (IMAC), provides, in article 74a, a legal basis to freeze or seize assets for a requesting State "and then hand over the assets for the purpose of forfeiture or return to the person entitled.¹⁰³

In addition to the Swiss IMAC, two other Swiss acts may become relevant when considering asset returns by Switzerland: the Division of Forfeited Assets Act (DFAA) 2004,¹⁰⁴ and the Foreign

⁹⁹ See the second cycle IRM country review report of the United Kingdom, https:// www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_11_16_ UK_Final Country_Report.pdf, pp. 198, 222 and 226–229. See also https://f3magazine. unicri.it/?p=462.

¹⁰⁰ https://macaonews.org/politics/macau-former-secretary-transport-public-worksao-man-long-gets-28-years-prison/.

¹⁰¹ Second cycle IRM country review report of the United Kingdom, https://www. unodc.org/documents/treaties/UNCAC/Country/VisitFinalReports/2020_116_UK_ Final_Country_Report.pdf, pp. 198 and 226-229. See also Paulo Barbosa, "UK Returns over MOP350 Million of Ao Man Long's Illicit Assets", Macau Daily Times, 4 November 2015, https://macaudailytimes.com.mo/uk-returns-over-mop350-million-of-ao-manlongs-illicit-assets.html.

^{102 &}quot;[1]nternational treaties ratified by the Swiss Federal Council form part of Swiss domestic law and are applicable from the time of its entry into force without need for it to be incorporated in the internal legal system through the adoption of a special law. ... Article 5, paragraph 4 of the Federal Constitution requires the Confederation and the cantons to abide by international law. However, this does not imply that the supremacy of international law over domestic law is guaranteed in all circumstances. This provision does not resolve the potential conflict between a norm of international law and the majority of the authors accept in principle the primacy of international law, but they admit some exceptions." See the first cycle IRM country review report of Switzerland, https://www.unodc.org/documents/treaties/UNCAC/ Country/VisitFinalReports/Switzerland_final_country_review_report_ENG.pdf, p. 13.

¹⁰³ IMAC article 74a. This provision of Swiss law is explained more fully at https://www.bj.admin.ch/dam/rhf/en/data/strafrecht/wegleitungen/assetrecovery-e.pdf.download.pdf/asset-recovery-e.pdf. IMAC Article 74a is the main provision in the Swiss legal framework to effect foreign proceeds of crime returns.

¹⁰⁴ The Federal Act on the Division of Forfeited Assets of Switzerland 2004 (DFAA) provides the legal basis for the conclusion of asset sharing agreements between Switzerland and foreign states, as well as for the domestic division of assets between the Federal Government and the cantons. https://www. bj.admin.ch/bj/en/home/sicherheit/rechtshilfe/strafsachen/sharing. html#:~:text=The%20Federal%20Act%20on%20the,Federal%20Government%20 and%20the%20cantons.

Illicit Assets Act (FIAA) 2015.¹⁰⁵ The FIAA at article 18 permits the use of casespecific agreements as a discretionary matter.

Switzerland also has established a dedicated programme, the Asset Recovery Section within its Federal Department of Foreign Affairs (FDFA), which focuses specifically upon returns to other countries of confiscated assets attributable to foreign Politically Exposed Persons (PEPs).¹⁰⁶ This Section, which was made permanent in 2020, works in conjunction with the Swiss Development Agency, also within the FDFA, in negotiating case-specific restitution agreements with the countries to receive such asset returns.¹⁰⁷

105 One of the functions of the Swiss Foreign Illicit Assets Act 2015 (FIAA), https://www.fedlex. admin.ch/eli/sc/2016/322/en, is a preventive measure that makes it possible – in exceptional situations – to freeze potential illicitly acquired assets of foreign politically exposed persons (PEPs) and their close associates to support future cooperation within the framework of mutual legal assistance proceedings with the country of origin aiming at clarifying the origin of the assets. In the event of a request meeting the legal requirements, a seizure can be applied under the IMAC. In the event mutual legal assistance proceedings fail, the FIAA provides – in exceptional situations – for a possibility of administrative confiscation proceedings. Section 5 of the FIAA sets out the principles to be followed when returning assets that were confiscated by the Swiss courts based on administrative proceedings. The principles of transparency and accountability should be respected irrespective of the local people or to strengthen the rule of law, thereby helping to combat impunity, in the state of origin. As a rule, an agreement between the Swiss government and the government of the State of origin regulates the practical arrangements for returning assets. Non-governmental organizations may also be involved. See the December 2016 FATF Mutual Evaluation Report of Switzerland, https://www.fatf-gafi.org/ media/fatf/content/images/mer-switzerland-2016.pdf, p. 72, para. 217, and pp. 225–228, paras 371, 38.2 and 38.3. On the FIAA, see also https://www.nodc.org/documents/treaties/UNCAC/ WorkingGroups/workinggroup2/2016-August-26-26/N1605154e.pdf.

106 The Financial Action Task Force (FATF) defines a politically exposed person (PEP) as a person who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognized that many PEPs are in positions that potentially can be abused for the purpose of committing money laundering offences and related predicate offences, including corruption and bribery, as well as for conducting activity related to terrorist financing. https:// www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf, p. 3, para. 1.

107 See https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/unrechtmaessigerworbene-gelder.html. See also Swiss Foreign Illicit Assets Act of 2015, articles 17–19, https://www. fedlex.admin.ch/eli/cc/2016/322/en, and Federal Department of Foreign Affairs, "No Dirty Money: The Swiss Experience in Returning Illicit Assets",

The Swiss Experience in Returning Illicit Assets", https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edasbroschuere-no-dirty-money_EN.pdf, p. 29. While the Swiss judiciary is responsible for the seizure and subsequent return of assets by way of mutual legal assistance, the negotiation of asset return agreements, when employed, is the responsibility of the FDFA.

Luxembourg's approach to asset returns

As to Luxembourg, while the provisions of UNCAC Article 57.3 are directly applicable, their mode of execution is subject to Luxembourg's Code of Criminal Procedure (CCP) at article 659 et seq. CPP article 660 designates Luxembourg's Attorney General to receive and evaluate mutual legal assistance requests for the execution of foreign confiscation orders, and to present them, pursuant to article 666, to the local criminal court where the property is located for adjudication and enforcement. Article 666 specifies that the foreign court's findings of facts are binding.

Luxembourg has long had conviction-based confiscation authority and the authority to enforce such confiscation orders of foreign courts. It has more recently adopted provisions allowing for non-conviction based confiscation of unexplained wealth and in certain cases in which a criminal defendant has been acquitted.¹⁰⁰ In addition, at least one Luxembourg court has recognized the non-conviction based confiscation order of a foreign court.¹⁰⁰

109 See Jugt. No 1310/2015, of the Tribunal of the district of and in Luxembourg, twelfth chamber.

In December 2020, officials of Luxembourg, Peru and Switzerland concluded a trilateral case-specific asset return agreement, pursuant to article 57.5 of the UNCAC, through which the European signatories returned to the Government of Peru approximately \$26 million in proceeds of crime. The assets represented the proceeds from three bank accounts in Switzerland and two bank accounts in Luxembourg, which prosecuting authorities in those countries first froze in 2002, based on an MLA request issued by the competent authorities in Peru investigating corrupt activities in Peru committed by Vladimiro Montesinos Torres and his associates.

Montesinos was the former *de facto* head of the Peruvian national intelligence services under the administration of former Peruvian President Alberto Fujimori, and also served as Fujimori's close personal adviser.^{mo} Based on freezing of the bank accounts and assistance granted by Switzerland and Luxembourg, Peruvian prosecutors were able to confiscate the contents of the blocked bank accounts through a firsttime extra-territorial application by the Peruvian courts of a non-conviction based confiscation authority against assets located outside the Peruvian borders.^m In response to subsequent mutual confiscation assistance requests by Peru seeking enforcement of its judicial confiscation

¹⁰⁸ See art. 31 of the Criminal Code.

¹¹⁰ Both Fujimori and Montesinos fled Peru after Fujimori was deposed for corrupt activities in 2000, but both were later returned in custody to Peru (Montesinos from Venezuela in 2001, and Fujimori from Chile in 2007), where they were criminally convicted and sentenced to prison. See Rick Vecchio, "Deported Fugitive Spymaster Lands in Peru", ABC News, 25 June 2001, https://abcnews.go.com/ International/story?id=80872&page=1 and Jonathan Franklin, "Chile orders Fujimori back to Peru", The Guardian, 21 September 2007, https://www.theguardian.com/world/2007/sep/21/chile. jonathanfranklin.

¹¹¹ Note that, while the Pérdida de Dominio process of Peru is a nonconviction based confiscation process, in this case, it was initiated as an independent action following the criminal convictions of Montesinos and several of his high-level military co-defendants. The Pérdida de Dominio process, also known as Extincion de Dominio, is much more commonly used in Latin America than is the conviction-based confiscation process and it may, in some cases, also be used post-conviction as a separate proceeding. See Gilmar Giovanny Santander, Naturaleza jurídica de la extinción de dominic: fundamentos de las causales extintivas, Universidad de Salamanca (Bogota, 2018), https://repository.usta.edu.co/bitstream/ handle/11634/13246/2018gilmarsantander.pdf?sequence=1, p. 2, fn. 2 (PDF p.16). In another first for the Peruvian authorities, the Asset Recovery

In another first for the Peruvian authorities, the Asset Recovery Handbook notes that they also applied the recently passed plea bargaining authority to obtain cooperation from and convictions of key defendants, who provided useful information and evidence and also signed waivers authorizing foreign banks that held assets, which the defendants controlled to transfer those assets voluntarily to the Peruvian authorities. Asset Recovery Handbook, p. 28, Box. 2.3.

order, the Swiss and Luxembourg authorities, respectively, recognized and enforced the order on behalf of Peru and finally recovered the funds for purposes of being returned to Peru.¹⁰ The Swiss prosecutor employed the International Mutual Assistance Act of Switzerland article 74a to summarily enforce the confiscation order of Peru. A Luxembourg court applied articles 659 through 668 of the Luxembourg Criminal Procedure Code on the enforcement of foreign confiscation judgements.¹⁰

In 2016, the former Peruvian Minister of Justice and Human Rights offered to enter into talks with Switzerland on how the assets would be put to use after their return. In 2017, Peru set up a multi-sectorial working group comprising representatives of the various national authorities involved in the return. Its mission was to ensure the internal coordination required for the negotiations about the return of assets located in Switzerland and Luxembourg. The working group significantly enhanced the negotiation process aimed at ensuring that crime does not pay and that the population affected ultimately benefits from the returned assets. While Switzerland already had experience with returning proceeds of crime to Peru and other countries, the 2020 return of the assets to Peru marked the first time that the Government of Luxembourg made such a return.114 The case-specific agreement between the three countries, in addition to providing a legal basis for Peru to receive the returned funds, specifies a mutually agreed and binding framework pursuant to which Peru will use the funds to finance specified domestic development projects - subject to specific transparency and accountability measures - aimed at strengthening the rule of law and the fight against public corruption in the country. The Swiss Federal Department of Foreign Affairs negotiated the case-specific agreement on Switzerland's behalf in analogy to the asset return provisions of the Swiss Foreign Illicit Assets Act (FIAA) of 2015.11 In accordance with Peruvian law, Peru adopted the agreement as a treaty, as did Luxembourg (whose law requires a case-specific agreement for such non-EU returns but not necessarily in treaty form). Because the agreement in this case is trilateral, and more extensive in length and scope than many such case-specific asset return agreements, it took the parties more than two years to negotiate and conclude. It provides an illustrative example of a broad range of prudential provisions that returning and receiving countries can employ in such an international instrument. Consequently, a copy of the complete English language text of the agreement is included as Appendix 1 to this paper.

As to which subparagraph of UNCAC article 57.3 was applied to this case by the Luxembourg and Swiss authorities is open to conjecture, because both countries decided their asset returns to Peru based upon provisions of their domestic law, without specific reference to article 57.3.

According to an unofficial translation of an April 2017 Luxembourg court decision in the case,¹⁰ the request of Peru for enforcement of its confiscation order pertained to accounts held by two nominee companies [designated by the Luxembourg court only as (B) and (C)] held by a Luxembourg bank [designated (D)] whose signatories [designated as (F) and (G)] had been convicted in Peru for participating in a criminal organization headed by Montesinos [designated as (A)]. Of Montesinos [i.e., (A)], the Luxembourg court wrote that

(A)hadbeenprosecuted in Peruforactive bribery offences [i.e., paying bribes¹¹⁷] and passive [i.e., accepting] illicit enrichment and participated in a criminal organization for having fraudulently received, in his capacity as head of the Peruvian intelligence service, and adviser to the former President of Peru...bribes arising from arms sales contracts between Russia, Israel and the Peruvian State. ...(F) and (G) admitted their complicity in the crimes of corruption, criminal organization, and...collusion. ...[The Peruvian court] ordered the confiscation of assets related to accounts [that nominee companies] (B)...and (C)...opened with (D)...whose beneficial owner is the convict (A) [Montesinos]. The [Peruvian] confiscation decisions are based on the convictions... of (A) [Montesinos]...in connection with the offences of illicit enrichment of and corruption committed by (A) [Montesinos], in this case the payment of bribes collected by (A) [Montesinos] in connection with arms contracts signed by the Peruvian authorities, the assets [in] the Luxembourg accounts being the proceeds of offenses committed by the convicted person. ... Both the [Peruvian] request for *exequatur* [i.e., enforcement]

¹¹² See fn. 104 regarding Swiss IMAC art. 74a. Had enforcement of the Peruvian confiscation order been contested in Switzerland, the case would have been decided by the Swiss Criminal Court and subsequently the Swiss Supreme Court.

¹¹³ See Luxembourg Court decision referenced above in fn. 110.

¹¹⁴ See https://chronicle.lu/category/abroad/35001-luxembourg-switzerland-toreturn-illicitly-acquired-assets-to-peru?utm_source=pocket_mylist and https://www. eda.admin.ch/eda/en/fdfa/foreign-policy/financial-centre-economy/illicit-assetspep/rueckgabe-unrechtmaessigerworbenervermoegenswerte.html#; see also https:// www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf, pp. 70–72.

¹¹⁵ See Swiss Foreign Illicit Assets Act (FIAA) of 2015, Article 18, https://www. fedlex.admin.ch/eli/cc/2016/322/en. More information can be found at Switzerland, Non-paper on Switzerland's Experience in Repatriating Illicitly Acquired Assets by Politically Exposed Persons (PEP), https://www.eda.admin.ch/content/dam/eda/en/ documents/aussenpolitik/finanzplatz-wirtschaft/09-cas-de-restitution_en.pdf. See also fn. 106 above.

¹¹⁶ See Luxembourg, Court of Appeals, No. 149, 17 V., 4 April 2017, https://anon. public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/05_Chambre%20correctionnelle/2017/20170404_149-accessible.pdf. This appellate decision upheld a prior Luxembourg trial court's order granting enforcement of a 2015 request from a Peruvian court for enforcement of the Peruvian court's confiscation order. The appellate case came about because one of the account holders initially opposed the lower court's decision granting enforcement, but the opposition was later withdrawn.

¹¹⁷ This reference to bribe-paying by Montesinos probably refers to an instance in September 2000 in which he was caught on videotape paying a Peruvian congressman \$15,000 while asking him to join President Fujimori's government coalition. See Asset Recovery Handbook, p. 21, Box 1.3.

and the foreign decision confiscating the bank assets ... would meet the conditions of articles 662(1) and 662(2) of the [Luxembourg] Code of Criminal Procedure. ...The facts giving rise to the [Peruvian court's] request and committed by (A) [Montesinos] constitute offenses punishable under Luxembourg law, in...violations of articles 246 [Passive Bribery & Trading in Influence¹¹⁸], 322 [Criminal Association], 324bis [Criminal Organization], and 324ter [Participation in, Leadership of, Criminal Organization] of the Criminal Code.

In Switzerland, the Peruvian court's request for enforcement of its order confiscating the bank accounts in Zurich was enforced by a Swiss prosecutor in application of article 74a IMAC. However, similar to the Luxembourg case, the Peruvian court's request to Switzerland also involved assets held in accounts whose signatories were cohorts in Montesinos' misappropriations of Peruvian public funds through the illicit letting of defence procurement contracts in exchange for bribes/kickbacks of those public funds.¹⁰

The predicate offences underlying the Peruvian confiscation orders - i.e., "passive [accepting] illicit enrichment and participat[ion] in a criminal organization for having fraudulently received, in his capacity as [a Peruvian public official], bribes arising from arms sales contracts between Russia, Israel, and the Peruvian State"120 - clearly appear to fall within the rubric of subparagraph 57.3(b), which includes inter alia "bribery" and "trading in influence". However, given Montesinos' apparent puppet-master control over the Peruvian defence procurement apparatus at the time he was in power, these offences might arguably qualify as activity covered, at least in part, by subparagraph 57.3(a) (specifically, misappropriation and other division of public funds), rather than under subparagraph 57.3(b). Clearly, Montesinos qualified as a "public official" of Peru under the definition in UNCAC article 2(a). It also is apparent that the source of the funds Montesinos received as "bribes" and "illicit enrichment" emanated from the Peruvian public treasury.

In the Liechtenstein-Nigeria case discussed above, similar circumstances of government contract kickbacks paid with public funds resulted in an asset return pursuant to subparagraph 57.3(a). While, as noted, neither the Luxembourg nor Swiss authorities relied upon or referenced as relevant a particular portion of article 57.3 in returning assets to Peru, countries making similar requests for confiscated asset returns based on analogous contract kickback activity may wish to consider invoking subparagraph 57.3(a), perhaps together with subparagraph 57.3(b), when preparing their mutual assistance requests for such returns.²⁰

Case Example 7 United States to Indonesia return of \$5.95 million in 2022

Highlights: The host State applied its domestic law and victim remission programme consistent with article 57.3(b) to return the assets; it *de facto* waived the requirement for a confiscation order from the State of origin; it self-initiated domestic confiscation used to recover profits that a private contractor gained from bribes paid to public officials; no case-specific agreement to accomplish the asset return was used.

In January 2022, the United States Department of Justice returned \$5,956,356 to Indonesia through the independent Corruption Eradication Commission of the Republic of Indonesia (Komisi Pemberantasan Korupsi, or KPK), using the department's discretionary administrative confiscated asset "remission" programme.[™] The returned assets derived from the US-located property belonging to Johannes Marliem, a US-Indonesian dual-national citizen. In the late 2000s, Marliem worked for the US-based company Biomorf,

¹¹⁸ Luxembourg Criminal Code article 246 provides: "Will be punished by imprisonment of five to ten years and a fine of 500 euros to 187,500 euros, the fact, by a person, depositary or agent of the authority or the public force, or charged of a public service mission, or vested with a public elective mandate, to solicit or receive, without right, directly or indirectly, for itself or for others, offers, promises, donations, presents or any benefits or to accept the offer or the promise:

Perform or refrain from performing an act of his function, mission or mandate or facilitated by its function, mission or mandate;
 2° Either to abuse his real or supposed influence in order to obtain from an authority.

^{2°} Either to abuse his real or supposed influence in order to obtain from an authority or a public administration of awards, jobs, contracts or any other favourable decision." [unofficial translation] https://sherloc.unodc.org/cld/uploads/res/document/lux/2014/ criminal_code_of_luxembourg_html/cp_L2T04.pdf.

¹¹⁹ Switzerland, the Federal Council, "Montesinos case: Switzerland transfers 77 million US dollars to Peru", https://www.admin.ch/gov/en/start/documentation/mediareleases.msg-id-23237.html. See also Asset Recovery Handbook, pp. 21–22, Box 1.3, and pp. 37–38.

¹²⁰ https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/CSJ/05_ Chambre%20correctionnelle/2017/20170404_149-accessible.pdf (unofficial translation)

¹²¹ It should be noted that the \$16.38 million in assets returned by Switzerland to Peru in 2020 via the trilateral return agreement – which specific return was made possible only by the application of Peru of its recent non-conviction-based confiscation authority – comprised only a portion of the total Montesinos-related assets returned by Switzerland to Peru. Between 2002 and 2006, Switzerland returned an additional \$93 million in assets to Peru. Part of these assets were ordered to be directly repatriated by the Zurich Cantonal Examining Magistrate handling the case, while additional sums were returned voluntarily with the consent of defendants and targets who were cooperating with Peruvian prosecutors in the case under a then recently adopted plea-bargain law. Reportedly, these initially returned assets from Switzerland (as well as some similar funds confiscated by the United States and returned to Peru) "were channelled through the normal budget with a board of representatives determining the allocation of the funds. The board was composed of representatives determining the allocation of the funds. The board was composed of representatives determining the allocation of the funds. The board was composed of representatives determining the allocation of the funds. The board was composed of representatives detarming the allocation of the funds. The board was composed of representatives detarming the allocation of the funds. The board was composed of representatives detarming the allocation of the funds was composed of representatives detarming the allocation of the funds. The board was own were to a degree by civil society, and that projects were to be funded that would directly benefit the rule of law and the fight against corruption. In addition, the concerned funds would undergo the standard controls implemented by the Peruvian Ministry of Economy and Finance as part of the country's public financial management system. Interviewees from Peru have admitted that some of the projects funded through this arrang

¹²² See fn. 86 for a discussion of US remission.

whose Indonesian affiliate, PT Biomorf Lone Indonesia, in 2009 received a \$50 million portion of a \$400 million Indonesian Government contract to produce the Indonesian national biometric identity card (Kartu Tanda Penduduk or "e-KTP"). To secure the contract, Marliem paid a series of sizable bribes to ministerial-level Indonesian public officials and politicians, including Indonesia's Secretary General, two former directors of the Ministry of Home Affairs and the Speaker of the Indonesian Parliament. An investigation by the KPK in 2014 determined that those officials had themselves conspired and acted to inflate the e-KTP contract by more than \$100 million, and possibly by as much as \$200 million, to allow them to receive kickbacks and other personal benefits from the contract. Of the \$50 million that Biomorf received from its e-KTP contract award, it paid \$12 million to Marliem,¹²³ who used it in part to purchase assets in the United States, including a luxury lakeside vacation home in rural Minnesota, an array of valuable artworks and two high-value life insurance policies on himself, with his family as beneficiaries.

The KPK's investigation, which involved extensive witness and suspect interviews and property searches in Indonesia, revealed Marliem's role in the e-KTP contract scheme. It also initiated the KPK's close collaboration with the FBI. The FBI soon opened a domestic US case, resulting in analyses of Marliem's financial records and searches of his luxury homes in Minnesota and West Hollywood, California, and of his electronic devices, employing warrants based largely on evidence the KPK had informally provided. The electronic devices were found to contain extensive digital recordings of Marliem's conspiratorial discussions with the Indonesian officials and politicians implicated in the case. By mid-2017, Marliem reportedly was on the verge of cooperating with Indonesian investigators. However, in August 2017, within days of being questioned by the FBI as a principal suspect in the US investigation, Marliem committed suicide after a standoff with Los Angeles city police at his West Hollywood home.124

Marliem's death precluded his possible rendition from the United States to Indonesia to stand trial,¹⁶ and along with it, the possibility of an Indonesian conviction-based confiscation order that might have extended to his US assets.⁴⁶⁰ Indonesia also did not have legislation providing for non-conviction based confiscation.⁴⁷⁰ Instead, in September 2017, US federal prosecutors in Minnesota commenced a selfinitiated non-conviction based confiscation action against those of Marliem's US assets that were directly traceable to profits from his Indonesian bribes.⁴⁶⁰ In March 2018, the US District Court for the District of Minnesota ordered a default judgement of confiscation of Marliem's Minnesota residence and his artwork, as well as the death benefits paid by his life insurance policies following his suicide. Additional months were required for US authorities to market and liquidate the tangible assets.

In November 2021, with the liquidation complete, the KPK submitted a formal request to the Department of Justice seeking the return of the net proceeds of the US confiscation to the Indonesian Government through the KPK. At the department's recommendation, Indonesia specifically requested asset "remission", which the United States granted in recognition of the direct pecuniary losses of Indonesia resulting from the e-KTP bribery scheme in which Marliem had played a material part. Consequently, the Department of Justice returned 100 per cent of the net confiscated assets to the KPK in January 2022. The return, while legally based upon US domestic law and its asset remission programme, was consistent with the obligation of the United States under article 57.3(b) of the UNCAC. Because the US remission programme has no requirement that the requesting country has itself confiscated the assets being returned and, given the impossibility of an Indonesian confiscation following Marliem's death, the US remission to Indonesia constituted a de facto waiver of that requirement of subparagraph 57.3(b).

¹²³ See generally "Top Indonesian Official, Long Seen as Untouchable, Gets Prison for Graft", The New York Times, 24 April 2018, https://www.nytimes.com/2018/04/24/ world/sais/indonesia-setya-novanto-corruption.html. See also "Tyrany of Secrecy, The E-KTP Mega-Corruption Case Money, Power and Greed, Independent Observer, 30 March 2018, https://observerid.com/tyrany-of-secrecy-the-e-ktp-mega-corruptioncase-money-power-and-greed/

¹²⁴ See Stefanno Reinard, "Indonesia graft witness worried about safety before his death", Reuters, 14 August 2017, https://www.reuters.com/article/us-indonesiacorruption-witness/indonesia-graft-witness-worried-about-safety-before-his-deathidUSKONIAUIE1 and Stephen Montemayor, "Embroiled in massive Indonesian draft probe, Minnesotan took own life after FBI standoff", StarTribune, 30 September 2017, https://www.startribune.com/embroiled-in-massive-indonesian-graft-probeminnesotan-took-own-life-after-fbi-standoff/448708163/.

¹²⁵ If Marliem had lived, US authorities, even if inclined to do so, likely would have encountered significant difficulty in rendering him to Indonesia to face prosecution, because there is no bilateral extradition treaty between Indonesia and the United States,

which US law requires as a basis for extradition. See Title 18, US Code, Sections 3184 and 3181(a)-(b).

¹²⁶ The Criminal Code of Indonesia provides generally for value-based asset confiscation for all crimes in Indonesia, upon a criminal defendant's conviction and as part of his sentence and expanded confiscation authority is available in relation to public corruption offences. See the September 2018 Asia/Pacific Group on Money Laundering - FATF-Style Regional Bodies (FSRBs) Fourth Round Mutual Evaluation Report of Indonesia, https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/ APG-Mutual-Evaluation-Report-Indonesia.pdf, pp. 124–125, paras. 54–56, 58 and 61.

¹²⁷ See UNODC, G20 Anti-Corruption Working Group: Responses to the 2020 Accountability Report Questionnaire (2020), https://www.unodc.org/documents/ corruption/G20-Anti-Corruption-Resources/Accountability-and-Monitoring-Reports/2020_Accountability_Report_Annex.pdf, p. 174, Box A.10. But see Indonesia's September 2018 Asia Pacific Group FSRB Fourth Round Mutual evaluation report, above, p. 52, para. 162, stating that "Indonesia can pursue civil confiscation [related to corruption] where there is a loss of state revenue and criminality cannot be proven". However, this statement is not further explained in the report, and no underlying legal authority is cited.

¹²⁸ The predicate offences for the US confiscation were Marliem's bribe-paying in violation of the US foreign anti-corruption law (Foreign Corrupt Practices Act (FCPA, Title 15, United States Code, Sections 78dd-1, et seq.)), which prohibits any US person or company from offering, paying or promising to pay money or anything of value to any foreign official for the purpose of obtaining or retaining business; as well as money laundering violations under Title 18, United States Code, Section 1957.

3. Priority consideration to return assets to a requesting State party or prior legitimate owner or crime victim

Article 57.3(c)

Article 57.3(c) provides as follows:

- 3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:
- (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

This provision can be broken down into its component parts, incorporated with other specific provisions of the UNCAC on which it relies, as follows:

Article 57.3(c)

Scenario covered: When a domestic confiscation judgement is obtained by a State party based on another State party's UNCAC request for asset recovery assistance (not involving enforcement of a requesting State party's own confiscation order) OR on a host-State party's determination of loss to a prior legitimate owner or crime victim, with the following:

Asset prerequisites: The confiscated asset (as per art. 55.1(a) and art. 46.14 elements and art. 2(e) definition):

1. Is:129

- a. the proceeds of crime¹⁰⁰ of the predicate offence; or
- b. equal in value to such proceeds; or
- c. a penalty representing the pecuniary value of the benefits derived from the predicate offence;
- Is located within a requested State party's territory (art. 55.1);

AND

3. Is the subject of a request under art. 55.1(a) and compliant with art. 55.3(a) from the requesting State party for confiscation and return of the asset;

OR

4. Is the object of:

- i. i. loss to a prior legitimate owner of the asset; or
- ii. loss to a victim or victims' due compensation from the predicate offence or a related offence (as recognized by the confiscating State partyy^(a));

Predicate offence prerequisites: The predicate offence to the confiscation constitutes one or more of the following UNCAC predicate offences (and typically has dual criminality under both State-parties' laws and their mutual recognition of the predicate offence as a viable predicate for confiscation):

- 1. A Public Official's:
 - a. Embezzlement (art. 17)
 - b. Misappropriation (art. 17); or
 - c. other diversion (art. 17))

of *private* property, funds or securities entrusted to him or her by virtue of his or her position, for his or her benefit or that of another person or entity;

2. Bribery related to a national public official (art. 15), i.e.:

- a. Any person's (active bribery) promising, offering or giving an "undue advantage" to a national public official, for the official, any other person or entity, to prompt the official to execute or refrain from executing his or her official duties. (Art. 15(a)); or
- b. A national Public Official's (passive bribery) solicitation or acceptance of an "undue advantage" for the official or another person or entity, so that the official executes or refrain from executing his or her official duties (art. 15(b));
- 3. Bribery (active) of a foreign public official or an official of a public international organization (art. 16.1), i.e., any Person's promising, offering or giving an "undue advantage" to a foreign public official or an official of a public international organization, for the official or another person or entity, to prompt that

¹²⁹ Article 31

¹³⁰ As indicated above, for the purpose of this paper, the expression "proceeds of crime" is understood as any property derived from or obtained, directly or indirectly, through the commission of an offence, as well as instrumentalities. The expression "instrumentalities" is understood as property used to facilitate a criminal offence, such as a conveyance used to transport illegal items or a structure used to conceal, manufacture or trade in them.

¹³¹ That the loss involved must be recognized by the requested State party seems implicit, as at least some State parties have domestically defined legal or policy limits as to the types of losses for which they will allow compensation to be paid from confiscated assets. See, e.g., fn. 86, discussing the United States' oriteria governing its victim remission and restoration programmes (pecuniary losses resulting directly from the crime underlying the confiscated orffence, as well as innocent owners or secured lien holders of confiscated property).

official to execute or refrain from executing his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business (art. 16.1);

- 4. Bribe (passive) seeking or taking by a foreign public official or an official of a public international organization, the official's solicitation or acceptance of an "undue advantage", for the official or another person or entity, so that the official execute or refrain from executing his or her official duties (art. 16.2);
- 5. A public official's intentional "abuse of functions" (art. 19), i.e., acting or failing to act to discharge his or her functions in violation of laws to obtain an "undue advantage" for himself/herself or others;
- A public official's "illicit enrichment" (art. 20), i.e., the official's significant increase in assets that he or she cannot reasonably explain vis-à-vis the official's lawful income;
- 7. Any Person's "trading in influence" (art. 18); i.e.:
 - Promising, offering or giving to a public official or another person an "undue advantage" in exchange for the official or the person "abusing" his or her real or supposed influence to obtain an "undue advantage" for anyone from a State party's public authority or administration. (art. 18(a)); or
 - a. Solicitation or acceptance by a public official or another person of an "undue advantage" for himself/ herself or another person in exchange for the official or person "abusing" his or her real or supposed influence to obtain an "undue advantage" for anyone from a State party's public authority or administration (art. 18(b));
- Any Person's laundering of the proceeds directly or indirectly derived from any UNCAC predicate offence listed above (as per art. 23.1(a) and art. 2(e));
- Any Person's participation in or conspiratorial, accessorial, attempted or aiding and abetting role in any UNCAC predicate offence listed above (art. 23.1.(b) (ii) and art. 27.1–3);

- Any Person's acquisition, possession or use of such asset, knowing it is the proceeds of any UNCAC predicate offence listed above at time of receipt (art. 23.1(b)(i) and art. 2(e));
- 11. Any Person's "concealment or continued retention of property", knowing that the property results from any UNCAC predicate offence listed above (art. 24); or
- 12. Any Person's obstruction of justice (art. 25) in a proceeding (art. 25(a)), or interfering with the exercise of official duties by a justice or law enforcement official (art. 25(b)), in relation to the commission of any UNCAC predicate offence listed above.

Subparagraph 57.3(c) states that it applies "[i]n all other cases" – those "other cases" being distinguished from the "case[s]" described more fully in subparagraphs 57.3(a) and (b).

The terms of subparagraph 57.3(c) imply that subparagraph 57.3(c) also contemplates a *self-initiated* confiscation of the asset by the host State party. This is in contrast to the prior subparagraphs 57.3(a) and (b), which both require that the requested State party has received a final confiscation judgement to effectuate for the requesting State party (unless the requested State waives this requirement).

Second, as to the scope of confiscation predicate offences to which it pertains, subparagraph 57.3(c) would appear to include all of the UNCAC predicate offences "covered by" or "established in accordance with" the Convention. This is because subparagraph 57.3(c) is subject to the chapeau language of paragraph 57.3, providing that it be "[i]n accordance with" articles 46 [on mutual legal assistance] and 55 [on confiscation-related assistance], both of which denote their application to offences "covered by" or "established by" the Convention.

Third, as to the requirement to give "priority consideration" to returning the confiscated asset to the requesting State party, it is noteworthy that subparagraph 57.3(c) does not include the qualifications of subparagraph 57.3(b) that the requesting State party must reasonably establish either its "prior ownership" of the confiscated asset or "damage to the requesting State party" vis-à-vis the asset.

The Asset Recovery Handbook notes that the self-initiated confiscation proceedings in a requested State may be limited

¹³² Noting again that this additional element in art. 16.1 includes "the provision of international aid" among "the conduct of international business." See fn. 17.

to money-laundering offences that do not necessarily involve foreign predicate or related offences, thereby attenuating or removing a justification for an asset return. This may be of particular relevance when the requested State party employs a "value-based" confiscation system that places a value on the overall benefits derived from a criminal offence and then imposes a monetary penalty on the defendant equal to that value that is collectable from any assets of the defendant. In contrast, the property-based confiscation systems target direct proceeds and instrumentalities of the predicate offence and assets traceable thereto.

Fourth, subparagraph 57.3(c) provides for a possible return of a confiscated asset held by the host State party either to non-States parties who are "prior legitimate owners" of the asset, or to non-States parties who are "victims" of the confiscation predicate crime for purposes of compensating those victims, presumably for pecuniary losses they have suffered. Here, too, the terms of subparagraph 57.3(c) state that such a return or compensation payment must be given "priority consideration". Additionally, it may suggest that such a return or compensation payment could occur without a request from the State party of origin that such return or payment be made.134

Below are five cases with asset returns from 2019 to 2022 that illustrate article 57.3(c) in application. As before, these cases are subdivided into (1) those for which the requested State party has expressly stated its asset return directly applied article 57.3(c), or 57.3 more generally; and (2) those for which the requested State party has applied other authorities, such as domestic law and/or bilateral mutual legal assistance treaties, to its return, without reference to article 57, but for which the facts indicate a consistency with article 57.3(c) provisions.

A. Asset Returns Directly Under Article 57.3(c)

Case Example 8 United Kingdom to Moldova return of £456,068 in 2021

Highlights: Article 57.3(c) applied directly by the host State for the asset return; the host State self-initiated a domestic non-conviction based confiscation order to recover private funds stolen by foreign public official; an MOU with prudential measures governed the return.

In September 2021, the United Kingdom Home Office announced its agreement with the Government of the Republic of Moldova to return to Moldova £456,068 in funds that a UK magistrates court had ordered confiscated in February 2019 in a self-initiated UK non-conviction based confiscation proceeding. The asset return was executed pursuant to an MOU signed by the UK Ambassador to Moldova and the Minister of Labour and Social Protection of Moldova.¹³⁵ Both countries are parties to the UNCAC.

Vladimir Filat was imprisoned in Moldova based on his 2016 conviction for corruption, abuse of power and embezzlement of an estimated \$260 million from three Moldovan banks that Filat then laundered through inter alia the financial system of Latvia. His embezzlement was part of a much broader fraudulent scheme that reportedly, among other damage, bankrupted the three Moldovan banks requiring oversight and massive loan infusions by the National Bank of Moldova to keep the national economy from collapsing.³⁸ He was released on parole in 2019.

No freezing or confiscation proceedings were initiated against the assets by Moldova. A UK court had blocked the three HSBC accounts in May 2018 under an account freezing order pursuant to the UK Criminal Finance Act 2017.

135 See United Kingdom, Home Office, Return of funds forfeited by the National Crime

¹³³ Asset Recovery Handbook, pp. 59–60 and 196–199.

legitimate owners or victims due compensation as a result of the confiscation predicate crime

¹³⁴ As previously mentioned, while subparagraph 57.3(c) is subject to the chapeau language of paragraph 57.3 that it is '[i]n accordance with' articles 46 (on mutual legal assistance) and 55 (on confiscation-related assistance), neither of those provisions addresses or refers to indirectly to asset returns to benefit non-States parties prior

Agency [Luca Filat]: agreement between UK and Moldova, 22 September 2021, https:// www.gov.uk/government/publications/return-of-funds-forfeited-by-the-national-crime-agency-luca-filat-agreement-between-uk-and-moldova. The United Kingdom applies the term "forfeiture" or "civil asset recovery" to its non-conviction based confiscation proceedings, through which the assets were taken, and uses the term "confiscation" for its conviction-based proceedings. 136 See "UK court confiscates nearly £500.000 from son of jailed former Moldovan

PM", EU-OCS, 8 February 2019, https://www.eu-ocs.com/uk-court-confiscates-nearly-500000-from-son-of-jailed-former-moldovan-pm/; Daniela Castro, "Moldova: Former PM Sentenced in Billion-Dollar Bank Fraud Case", *Organized Crime and Corruption* ren semenced in Billion-Dollar Bank Fraud Case", Organized Crime and Corruption Reporting Project, 30 June 2016, https://www.occrp.org/en/daily/5424-moldova-former-pm-sentenced-in-billion-dollar-bank-fraud-case; and David Pegg, "Court orders son of Moldova's former PM to pay £466,000", The Guardian, 7 February 2019, https:// www.theguardian.com/world/2019/feb/07/court-orders-son-moldova-former-pm-pay-466000.

The accounts' contents were forfeited based on evidence gathered by the UK National Crime Agency showing that the accounts were funded by large deposits from foreign companies based mainly in Turkey and the Cayman Islands. The accounts also had received a number of large cash deposits, including £98,000 deposited within three days. The court found on the balance of probabilities that Luca Filat was unable to demonstrate a legitimate source for the money, and it concluded that the funds had derived from Vladimir Filat's criminal conduct in Moldova.⁴⁹⁰

The three-page MOU between the United Kingdom and Moldovan Governments specifically notes the commitment of the United Kingdom as a State party to the UNCAC "to preventing and tackling corruption, including through confiscation and return of stolen funds to victim states under UNCAC definitions". The MOU references the UK court's confiscation in the Filat case, as well as "the passive corruption and trading in influence committed by Vladimir Filat". While the MOU does not itself specify the provision of article 57.3 upon which the asset return is based, a Home Office official has reported that the MOU is "an UNCAC article 57[.3]c application".

The MOU's terms ensure the return of the confiscated funds based upon the Moldovan Government's commitment to use them "to fund social assistance that will benefit vulnerable people in Moldova", which specifically includes the employment of 566 social workers for four months to support severely disabled people in Moldova. The project is to be managed by the Moldovan National Social Assistance Agency and monitored by a specified Moldovan civil society organization appointed by the Moldovan Government for that purpose. The MOU further includes transparency and accountability provisions and a joint "anticorruption statement" by the United Kingdom and Moldovan Governments, which specifies investigative, reporting and possible reimbursement measures by the Moldovan authorities. A copy of the complete English language text of the MOU is included as Appendix 2 to this paper.188

Case Example 9 Chile to Honduras return of \$152,683 in 2019

Highlights: Article 57.3 was applied directly by a host State's court, which did not specify subparagraph 57.3(c) in its return order, but the return was consistent with that subparagraph's provision; no case-specific agreement was used for the return; the host State self-initiated a domestic conviction-based confiscation, based upon a money laundering predicate offence, to recover bribes and public funds diverted by a State of origin public official.

Chile's approach to asset returns

Chile has implemented the UNCAC - as well as the other major United Nations law enforcement conventions - "by incorporating the necessary provisions into its domestic legal system, in particular Law 20.000, Law 19.913, CPC, CP, Law 20.393 and Law 19.906 amending Law 18.314".139 Chile does not have non-conviction based confiscation authority, and while it can provide international cooperation in cases of foreign conviction-based confiscations, it may have difficulty doing so with foreign non-conviction based confiscations. Chile's domestic legal framework allows for the sharing of confiscated assets with other countries, including as a result of coordinated actions between law enforcement authorities. However, it does not have a statutory mechanism to return proceeds of crime per se. But, in one instance, discussed in the present case example, a Chilean court has relied upon UNCAC article 57 as a basis for returning to Honduras corruption assets that Chile confiscated in a self-initiated proceeding. No case-specific asset return agreement was used in that case.

In 2019, the Republic of Chile ordered the return to the Republic of Honduras, pursuant to article 57.3 of the UNCAC, of the equivalent of \$152,683 in assets that Chilean prosecutors had confiscated in a self-initiated convictionbased proceeding in 2016.¹⁴⁰ Both countries are parties to UNCAC. The assets represented the remaining proceeds from bribes and diverted Honduran public funds that were laundered to Chile between 2011 and 2014 by Mario Roberto

¹³⁷ See "UK court confiscates nearly £500,000 ...",https://www.eu-ocs.com/uk-courtconfiscates-nearly-500000-from-son-of-jailed-former-moldovan-pm/. The Guardian and Balkan Insight newspapers reported at the time of the forfeiture that Luca Filat came to the United Kingdom as a minor in 2016 to begin studies following his father's arrest in Moldova. The youth paid £400,000 in advance for rent of a penthouse in one of the UK's most expensive residential areas, and he spent £200,000 on a Bentley SUV, among other extravagant outlays. In 2019, he argued to the UK court that deposits to his HSBC accounts were gifts he had received from friends. See Pegg, 7 February 2019, https://www.theguardian.com/world£/2019/fb/07/court-orders-son-moldovaformer-pm-pay-466000 and Madalin Necsutu, "Britain Sends Back Illicit Cash Seized from Moldovan Ex-PM's Son", Balkan Insight, 22 September 2021, https://balkaninsight. com/2021/09/22/britain-sends-back-illicit-cash-seized-from-moldovan-ex-pmsson/?utm_source=pocket_mylist.

¹³⁸ Find the MOU text also at https://www.gov.uk/government/ publications/return-of-funds-forfeited-by-the-national-crimeagency-luca-filat-agreement-between-uk-and-moldova/

mou-between-uk-and-moldova-on-the-return-of-funds-forfeited-by-the-national-crimeagency-in-relation-to-luca-filat.

¹³⁹ The Financial Action Task Force of Latin America (GAFILAT), Mutual Evaluation Report of the Republic of Chile, September 2021, https://www.fatf-gafi.org/media/fatf/ documents/reports/mer-fsrb/GAFILAT-Mutual-Evaluation-Report-Chile-2021,pdf, p. 218, para. 349.

¹⁴⁰ Based on April 2021 UNODC staff interview with Chilean Public Prosecutors (hereafter "Chilean PPO interviews"). See also the 2021 GAFILAT *Mutual Evaluation Report of the Republic of Chile*, https://www.fatf-gafi.org/media/fatf/documents/reports/ mer/strb/GAFILAT-Mutual-Evaluation-Report-Chile-2021.pdf, pp. 68–69, Box No. 8, and p. 148, Box No. 11. The asset return to Honduras was ordered by the Chile Directorate General of Collateral Credit (DICREP), which, among other responsibilities, administers seized and confiscated assets in Chile and publicly auctioned them upon court order to liquidate them. Ibid., p. 66, para. 289.

Zelaya Rojos. Zelaya was appointed in 2010 as the Executive Director of the Honduran Institute of Social Security (IHSS) and served in that position until January 2014. IHSS is a Honduran government agency that provides social security services, including workers' compensation, retirement, maternity and death benefits to approximately 1.6 million Honduran citizens.⁴⁴

Shortly after taking office, Zelaya stopped regular contract payments owed to a Honduran firm under its existing \$19 million contract with IHSS to provide information-technology services, then solicited and accepted \$2.08 million in bribes from the firm in exchange for restarting its payments. Zelaya also instructed the firm to make bribe payments to two members of the IHSS board of directors who were responsible for overseeing the firm's contract. To conceal the illicit payments, the firm sent bribes through an affiliate company.¹⁴² Zelaya's corruption soon expanded to heading a broad criminal enterprise of Honduran Government officials and their relatives, who diverted an estimated \$300 million in Honduran public funds by creating front companies to receive an array of fraudulent government contracts. The contacts involved overvalued construction projects and equipment and materials procurements.^{M3} Zelaya used his portion of the illicit proceeds in part to buy about \$7 million worth of homes, apartments and vehicles in Honduras, and he also laundered a portion of them abroad.¹⁴⁴ An estimated 2,800 Honduran patients died due to poor medical treatment and lack of medication, equipment and other materials as a result of the diversions of social security resources led by Zelaya.145

In 2013, the Honduran Public Prosecutor's Office began investigating Zelaya and his cohorts for corruption.⁴⁴ By

2014, they had found evidence that, among other laundering activities, Zelaya had, since 2011, gradually transferred more than \$700,000 to Chile for the benefit of a paramour, Natalia Ciuffardi Castro, a Chilean national he had met during a trip to Santiago.⁴⁷ According to the Chilean authorities, from whom the Honduran authorities requested assistance upon learning of these transfers,

[Ciuffardi], together with her father, ...who was directly aware of the illicit origin of the funds obtained by [his] daughter's partner [Zelaya], ...participated directly and consciously in the concealment and disguise of the proceeds of illicitly obtained funds. [Zelaya], taking advantage of his senior position in a foreign public institution...accept[ed]multiple bribes. With the purpose of distorting the illicit origin of their wealth, [Zelaya and Ciuffardi] created a series of fictitious companies, through which they channeled the funds, thus distorting their illicit behaviour. Thus, [Ciuffardi] received a series of wire transfers and electronic payments from bribes... [and] signed several false contracts to provide services with front companies... The services contracted by [Ciuffardi] were never carried out and were merely a screen to justify their increase in wealth. The funds received by [Ciuffardi] came mainly from accounts associated with shell companies... Among the means used...were wire transfers and international on-demand vouchers, given the bank accounts that the couple held in the United States and Panama. Likewise, for the direct channelling of funds, cash drafts were used, for which an exchange office registered in Chile was used. These resources were invested by [Ciuffardi] in the acquisition of real estate; among them, two apartments in Santiago and a[n oceanside] plot in the [Chilean] commune of [El] Tabo. She also acquired a vehicle for her father... [who] directly asked the couple for money to invest in the purchase of a truck for their recently created transport company. The funds were sent through money orders channelled by the same exchange office.¹⁴⁸

Zelaya's association with Ciuffardi ended in early 2014, when a Honduran criminal court ordered Zelaya's arrest on charges of fraud, bribe-taking, abuse of public funds and money laundering. Zelaya fled but was captured in September 2014 in southern Honduras near the Nicaragua border. After his arrest,¹⁶⁰ Honduran prosecutors became

¹⁴¹ Ibid. See also U.S. Department of Justice, Office of Public Affairs, "Department of Justice Seeks Recovery of Approximately \$1,528,000 in Bribes Paid to Honduran Official, 13 January 2015, https://www.justice.gov/opa/pr/department-justice-seeksrecovery-approximately-1528000-bribes-paid-honduran-official.

¹⁴² Ibid. Mario Zelaya then laundered these bribe proceeds into the United States, where his brother, Carlos Alberto Zelaya Rojas, used them to acquire real estate properties for rental in the New Orleans area. Some of these properties were titled in the name of companies nominally controlled by Carlos Zelaya in an effort to conceal the illicit source of the funds as well as the beneficial owner. Prosecutors of the US Department of Justice's (Reptocracy Asset Recovery Initiative, with help from Honduran authorities, have confiscated these properties and related rent incomes and recently liquidated those assets to yield approximately \$1.3 million. See US. Department of Justice, Office of Public Affairs, "Honduran Man Indicted for Conspiring to Launder Over \$1 Million in Bribes and Funds Misappropriated from The Honduran-man-indicted-conspiring launder-over-1-million-bribes-and-funds. At the time of drafting the present paper, the US Department of Justice was negotiating with Honduran Government authorities to return 100 per cent of the net confiscated assets to Honduras via its international asset sharing programme.

¹⁴³ See Combatting Impunity: Evaluating the Extent of Cooperation with the Mission to Support the Fight against Corruption and Impunity in Honduras", Central America Monitor, September 2019, Series 1, https://www.wola.org/wp-content/uploads/2019/10/ Impunidad-HN-ENG-10.17,pdf; see also "Honduran Ex-Officials, Entrepreneurs Arrested for Corruption", teleSUR, 27 August 2021, https://www.telesurenglish.net/news/ Honduran-Ex-Officials-Entrepreneurs-Arrested-for-Corruption-20210827-0009.html.

¹⁴⁴ See "Fugitive Honduran government official arrested" BBC News, 10 September 2014, https://www.bbc.com/news/world-latin-america-29137408. See also fn. 150.

 ¹⁴⁵ See Combatting Impunity, https://www.wola.org/wp-content/uploads/2019/10/ Impunidad-HN-ENG-10.17.pdf.
 146 Ibid.

¹⁴⁷ See https://honduprensa.wordpress.com/tag/natalia-ciuffardi/;

¹⁴⁸ Chile's 2021 GAFILAT Mutual Evaluation Report of the Republic of Chile, https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GAFILAT-Mutual-Evaluation-Report-Chile-2021.pdf, pp. 68–69, Box No. 8.

¹⁴⁹ Following a series of criminal convictions beginning in 2016, Zelaya was sentenced as of May 2021 to prison terms totaling 102 years. See https://www. wola.org/wp-content/uploads/2019/10/Impunidad-HN-ENG-10.17.pdf and https:// www.telesurenglish.net/news/Honduran-Ex-Officials-Entrepreneurs-Arrested-for-Corruption-20210827-0009.html.

aware of his extensive real estate and vehicles in Honduras and began pursuing confiscation proceedings against those assets, as well as those of Zelaya's Honduran conspirators, employing both conviction-based and non-conviction based proceedings.⁵⁰

The Honduran prosecutors also uncovered evidence of Zelaya's laundering of illicit assets to Chile in coordination with Ciuffardi and her father. In response, in 2014, Honduran prosecutors sent a formal request to Chile seeking Ciuffardi's extradition to Honduras to face prosecution and asked, as part of the extradition process, that the Chilean authorities restrain the assets in Chile held by Ciuffardi that were attributable to Zelaya. Chilean prosecutors complied by freezing/seizing the assets pursuant to Honduras' pending extradition request. But in March 2015, the Chilean Supreme Court (of first instance in Chile regarding international extradition requests), in application of the principle aut dedere aut judicare, refused to surrender its own national.102 Instead, the Chilean prosecutors acted upon the investigation of Ciuffardi and her father carried out by Honduras, both charging them under Chilean law with money laundering from Honduras, and initiating conviction-based confiscation proceedings based on those charges. The 9th Court of Guarantee of Santiago convicted Ciuffardi and her father on the charges and, in mid-2016, the court sentenced her to five years of supervised release from custody. The court also ordered the confiscation of Ciuffardi's assets attributable to the funds she had received from Zelaya, including the contents of a bank account, the two apartments and the El Tabo home, referenced above, and several vehicles. These assets later were liquidated after having depreciated significantly in value.¹⁵³

In mid-2018, the Honduran Commissioner of the IHSS formally requested the Chilean authorities to return to Honduras the liquidated proceeds from confiscated assets. The request confronted the Chilean prosecutors with a quandary, in that Chilean law provided for proceeds of crime confiscated by Chilean authorities in cases of drug trafficking and money laundering to be used for social rehabilitation and preventative projects. However, the Chilean court adjudicating the confiscation and disposition of the assets chose in that case to give precedence to the Chilean Government's obligation as a State party to the UNCAC which Chile has implemented through domestic legislation - to return the assets to the Honduran Government pursuant to article 57.3.155 As noted above, Chile ordered the return of the assets in 2019; no specific reference is apparent as to which particular subparagraph of article 57.3 was applied.156 However, given that Honduras did not present to Chile a final Honduran confiscation order to enforce in the case, and the Chilean authorities confiscated the assets in a self-initiated conviction-based proceeding based upon underlying Chilean money laundering offences, article 57.3(c) would appear to be the applicable provision to this asset return.

Regarding this return, Chilean prosecutors involved in the case have cautioned that the UNCAC is not covered by the provision of the Chilean Constitution on precedence of international treaties over domestic law, which provision relates only to international human rights treaties, a limitation they said is quite common in Latin American countries. As noted, the return of the liquidated proceeds by Chile to Honduran Government custody was without restrictions and without the need for a case-specific asset return agreement between the two countries. Given the damage suffered by Honduras from the offences underlying the Chilean confiscation, the nature of the underlying offences and the Honduran request for return of the assets absent Honduran domestic efforts at confiscation of the same, the return by Chile in this matter was consistent with the requirements of subparagraph (c) of article 57.3.

¹⁵⁰ By October 2015, Honduran prosecutors had completed the confiscation of one property, the Torre Sky building Tegucigalpa, which yielded the equivalent of \$694,934.60. As of October 2016, they had restrained for confiscation the equivalent of \$11.2 million in assets in 38 ongoing non-conviction based proceedings. See Honduras' 2016 GAFILAT Mutual Evaluation Report, https://www.fatf-gafi.org/media/fatf/ documents/reports/mer-fsrb/GAFILAT-MER-Honduras-2016-English.pdf, pp. 39, 46, 56 and 110; and Sirst Cycle IRM country review eeport of Honduras C, p. 60.

¹⁵¹ Honduras apparently made its extradition request pursuant to the Montevideo Convention on Extradition of 1933, as per Chilean PPO interviews. See also the 2016 GAFILAT Mutual Evaluation Report of the Republic of Honduras, https://www.fatf-gafi. org/media/fatf/documents/reports/mer-fsrb/GAFILAT-MER-Honduras-2016-English.pdf, p. 99, para. 578, and the 2021 GAFILAT, Mutual Evaluation Report of the Republic of Chile, https://www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GAFILAT-Mutual-Evaluation-Report-Chile-2021.pdf, p. 99, and p. 137, para. 628. It is not clear whether Honduras's intention in seeking Cluffardi's extradition was to pursue conviction-based confiscation as part of her prosecution in Honduras, or whether a resulting convictionbased confiscation order would have applied extra-territorially in 2014 to the laundered assets located in Chile. The 2016 GAFILAT Mutual Evaluation Report of the Republic of Honduras indicates that, as of that time, Honduras's non-conviction based confiscation law (referred to as "asset forfeiture law") might have extended to assets located outside of Honduras, noting that while "the [NCB] asset forfeiture measure has been really effective at a national level, ...there exists a limitation at an international level to cooperate on the matter, as few countries in the region have this type of legislation and inclusion of international cooperation regarding goods was not considered. However, Section 80 of the Special Anti-Money Laundering Law [of Honduras] allows a greater scope to cooperate at an international level as regards goods, including the sharing and repativation of goods". Bid., p. 59, para. 320 (emphasis added). However, the Special Anti-Money Laundering Law did not enter into force until 30

However, the Special Anti-Money Laundering Law did not enter into force until 30 May 2015. Ibid., p. 9, para. 19. The report does not discuss extraterritoriality as to the conviction-based authority of Honduras.

¹⁵² Chilean PPO interviews and "Chilean justice denies extradition of Natalia Ciuffardi", Honduprensa, 5 March 2015, https://honduprensa-wordpress-com.translate. goog/2015/03/05/justicia-chilena-niega-extradicion-de-natalia-ciuffardi/?_x_tr_ sl=es&_x_tr_tl=en&_x_tr_pto=sc.

¹⁵³ Chilean PPO interviews and "Court recognizes sentence in the case o Natalia Ciuffardi", LaPrensa, Tegucigalpa, 19 September 2016, https://www-laprensa-hn. translate.goog/honduras/corte-reconoce-sentencia-en-el-caso-de-natalia-ciuffardi-EWLP1001410?__tr_sl=es&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc

^{154 2021} GAFILAT, Mutual Evaluation Report of the Republic of Chile, https://www.fatfgafi.org/media/fatf/documents/reports/mer-fsrb/GAFILAT-Mutual-Evaluation-Report-Chile-2021.pdf, p. 218, para. 349.

¹⁵⁵ Chilean PPO interviews. See also American University Center for Latin American & Latino Studies, The MACCIH Monitor, Issue 5, 30 August 2018. https://www.american.edu/centers/latin-american-latino-studies/upload/maccih-monitor-5-english.pdf, and Chile, Office of the Comptroller General of the Republic International Cooperations and Relations Unit, https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2018-June-6-7/Contributions_NV/Chile_EN.pdf.

¹⁵⁶ See the 2021 GAFILAT, Mutual Evaluation Report of the Republic of Chile, https:// www.fatf-gafi.org/media/fatf/documents/reports/mer-fsrb/GAFILAT-Mutual-Evaluation-Report-Chile-2021.pdf, p. 148, Box No. 11.

B. Asset returns consistent with article 57.3(c)

Case Example 10 Jersey to Kenya: £3 million returned in 2022

Highlights: The host jurisdiction's asset return was consistent with article 57.3(c); the host jurisdiction self-initiated domestic convictionbased confiscation, based on a money-laundering predicate offence, to recover bribes and public funds diverted by a foreign public official; case-specific agreements were used in the context of broader framework agreements for identifying appropriate State of origin public projects to which returned assets were directed.

In late March 2022, Her Majesty's Attorney General for the Bailiwick of Jersey and the High Commissioner of Kenya to the United Kingdom signed a bilateral asset return agreement under which Jersey agreed to return to Kenya £3 million in corruption proceeds. Both countries are States parties to the UNCAC.¹⁰⁰ Prosecutors in Jersey confiscated the assets in a self-initiated conviction-based proceeding in February 2016.¹⁰¹ The defendant in the 2016 case, Windward Trading Limited, a Jersey registered company, pleaded guilty to four counts of money laundering before the Royal Court of Jersey. The Royal Court imposed a confiscation order of £3,281,897.40 and \$540,330.69, thereby stripping the company of all its assets.¹⁰²

Windward admitted in the case to laundering into Jersey, between July 1999 and October 2001, the proceeds from corrupt activities by Windward's beneficial owner, Kenyan national Samuel Gichuru. Gichuru was the Chief Executive of Kenya Power and Lighting Company (KPLC), the Kenyan Government's public electrical utility company. At Gichuru's direction, KPLC awarded an array of valuable contracts to a number of engineering and energy companies worldwide, all of which paid bribes/kickbacks to Windward for Gichuru's benefit. The scale of Gichuru's public contract-related corruption in Kenya was extensive, as indicated by the Jersey Royal Court's February 2016 order convicting and sentencing Windward and by news accounts related to the case. The Jersey court found that Windward "knowingly enabled Gichuru to obtain substantial bribes paid to him while he held public office in Kenya. The company played a vital role without which corruption on a grand scale is impossible: money laundering".

Windward's conviction stemmed initially from a Suspicious Transaction Report (STR) filed with the Jersey Financial Intelligence Unit in May 2002 by Walbrook Trustees (Jersey) Limited. Walbrook, a company formed by Gichuru's Jersey accountants, served as Windward's administrator in Jersey,

Bailiwick of Jersey's approach to asset returns

The Bailiwick of Jersey, a self-governing dependency of the British Crown, has no direct asset return authority under the UNCAC, relying instead on domestic legislation. The ratification of the United Kingdom of the UNCAC has been extended to Jersey, including its components relating to mutual legal assistance and asset returns. However, when a request is made based on a multilateral convention, domestic law gives the Jersey Attorney General discretion in providing such assistance.157 Jersey's national legal framework against corruption includes, principally, the Corruption (Jersey) Law 2006, Financial Services Commission (Jersey) Law 1998 and the Proceeds of Crime (Jersey) Law 1999 (POCL), as well as the regulations made under it. Jersey can enforce foreign conviction-based orders, even if the defendant has died or absconded, provided the Jersey Royal Court is satisfied that the defendant was notified of the proceedings, and also can enforce foreign non-conviction based confiscation orders. In the absence of a foreign order, the Royal Court can pay compensation or damages based on claims for restitution, unjust enrichment or equitable compensation based upon proprietary tracing claims, among others.158

Regarding asset returns, Jersey may enter into case-specific asset sharing agreements or apply existing bilateral asset sharing agreements, such as the one with the United States. However, in the absence of such an agreement, "the binding provisions of the [UNCAC] on mandatory return of assets will be considered by the Minister [for Treasuries and Resources] when exercising his discretion in appropriate cases."

159 Ibid., pp. 11–12.

¹⁶⁰ See https://www.gov.je/news/2022/pages/JerseyKenyaCOVID-19.aspx.

^{161 5} June 2021, UNODC staff interview with authorities of Jersey.

 ¹⁶² See The Attorney General v. Windward Trading Limited (24 Feb. 2016), https://justis.vlex. com/#vid/792609453 and https://allafrica.com/stories/202108310745.html.
 163 See https://allafrica.com/stories/202108310745.html.

¹⁵⁷ MONEYVAL Report on Fourth Assessment Visit of Jersey, December 2015, https://mc.oce.int/report-on-fourth-assessment-visit-anti-money-laundering-and-combating-/1680716452, p. 238, para. 1151.

¹⁵⁸ Second cycle IRM country review report of the United Kingdom, https://www.unodc.org/documents/treaties/ UNCAC/Country/VisitFinalReports/2020_11_16_UK_ Final_Country_Report.pdf, annex II, sections 2.2.1 and 3.3.1 (2020).

provided Windward's directors and secretary, and served as signatories to Windward's Jersey bank accounts with HSBC Bank Plc and the Royal Bank of Scotland International Limited. Gichuru was the beneficial owner of Windward, and various Walbrook entities held Windward's shares as nominee for him. Beginning in 1986, Walbrook had received funds transfers resulting from Gichuru's activities and made payments on his behalf.

When Walbrook filed its STR in 2002, the Jersey police authorities blocked Walbrook from making any additional payments and, accordingly, Walbrook suspended payments by Windward to Gichuru from that date forward. The Attorney General of Jersey then commenced a criminal investigation in August 2003. Ultimately, Windward's conviction in the case rested on extensive evidence, including documents and witness statements secured from 12 other countries and jurisdictions, that were required to prove the complex cross-border money laundering techniques used in the case.¹⁶⁴ At the time of drafting, the Jersey authorities were in the process of seeking the extradition of Gichuru, as well as that of former Kenyan Minister Chris Okemo, to stand trial on criminal charges before the Jersey Royal Court in connection with the case.¹⁶⁵

The case-specific asset return agreement between Jersey and Kenya enabled the first asset return to be accomplished under a pre-existing general *Framework for Return of Assets from Corruption and Crime to Kenya* (FRACCK),¹⁵⁰ which Kenya and Switzerland had initially signed in 2016 and which Jersey had joined in December 2018.¹⁵⁷ The FRACCK is aimed to serve as an umbrella structure that is consistent with the principles of the *Global Forum on Asset Recovery* (GFAR). A third agreement, signed simultaneously with the FRACCK in December 2018, is a bilateral MOU between Kenya and Jersey on Financial Cooperation. That MOU included a provision for the eventual return of assets to Kenya based on decisions of a "steering committee...of international partners", including government representatives from Kenya and Jersey, "for the identification of appropriate development projects that will receive funds via the FRACCK". The fourth agreement, between Jersey and Kenya signed in March 2022, fulfilled the 2018 MOU's asset return pledge. It earmarks the returned funds to support the ongoing response of Kenya to the COVID-19 pandemic. With the assistance of Jersey Overseas Aid, two third-party suppliers were selected to deliver the COVID-19 response programmes. Ninety per cent of returned funds are allocated to the procurement of essential medical equipment, including intensive care units and hospital beds. The remaining ten per cent will support community-based projects that will strengthen healthcare worker capacity and enhance home-based care.⁶⁶

As with the previously reviewed Chile-to-Honduras asset return, given the damage suffered by Kenya from the offences underlying the Jersey confiscation, the nature of the underlying offences, and the Kenyan request for return of the assets absent of a Kenyan confiscation, the asset return of Jersey in this matter is consistent with the requirements of subparagraph 3(c) of article 57, notwithstanding that the Jersey authority for the return is its domestic law, and not the UNCAC *per se.*

Case Example 11 United States to Peru Return of \$600,000 in 2022

Highlights: The host State's asset return was consistent with article 57.3(c); the host State self-initiated domestic non-conviction based confiscation, based on a violation of US anti-bribery law, to recover foreign public funds accepted as bribes/kickbacks by a foreign head of State in connection with government contract letting, and then laundered to the host State; the host State's case-specific agreement with the State of origin specified jointly pre-agreed application of the returned assets to the State of origin's ongoing international proceeds of crime recovery efforts.

In August 2022, the Government of the United States returned \$686,505 to the Government of the Republic of Peru under a case-specific asset sharing agreement signed in February 2022. The assets were transferred, as required by Peru's 168 Ibid.

¹⁶⁴ Ibid. See also Jersey, Information and public services, "Jersey confiscates £3.6 million proceeds of corruption", 25 February 2016, https://www.gov.je/News/2016/ pages/jersey-confiscates-proceeds-of-corruption.aspx and https://justis.vlex. com/#vid/793412653.

^{165 &}quot;Green light for Kenyan officials accused of corruption to be extradited to Jersey", Baltwick Express, 8 November 2021, https://www.baltiwickexpress.com/jsy/news/watchgreen-light-kenyan-officials-accused-corruption-be-extradited-jersey/#/N1GavnMl2x. Jersey authorities issued arrest warrants for Gichuru and Okema in 2011, but their extradition proceedings were delayed by legal challenges until the Kenyan Supreme Court ruled on it in November 2021 that the Public Prosecutor's Office of Kenya has the authority to continue with their extradition proceedings "on a priority basis".

¹⁶⁶ Kenya, Framework for the Return of Assts 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, https://www.gov.je/ SiteCollectionDocuments/Government%20and%20administration/FRACCK.pdf.

¹⁶⁷ See Jersey, Information and public services, "Confiscated funds to return to Kenya", 12 December 2018, https://www.gov.je/News/2018/pages/kenyafunds.aspx.

law, to the National Programme for Seized Assets (Spanish acronym PRONABI), part of the Ministry of Justice and Human Rights of Peru. As previously noted, both countries are parties to the UNCAC. The funds transferred under the agreement represented 100 per cent of the net assets confiscated by the United States Department of Justice in its self-initiated non-conviction based case against assets in the United States formerly held by the Havenell Trust and its beneficiaries, Alejandro Celestino Toledo Manrique and Eliane Chantal Karp-Toledo.¹⁰⁰ Toledo and Karp-Toledo, respectively, served as President and First Lady of Peru from 2001 to 2006. Toledo was the first elected President of Peru, following the self-exile of former President Alberto Fujimori in early 2001.¹⁰⁰

The US case determined that the confiscated assets were traceable to multi-million dollar bribes that Toledo had solicited and received while in office from Odebrecht S.A. Odebrecht is a Brazilian holding company that, through its subsidiaries and companies, in which it was a majority shareholder, conducted business in multiple industries, including engineering, construction, infrastructure, energy, chemicals, utilities and real estate. Between approximately 2001 and 2016, Odebrecht, together with some of its employees, agents and other co-conspirators, engaged in a massive bribery scheme, in which they agreed with others to corruptly provide more than \$700 million in payments and other items of value to and for the benefit of foreign officials in numerous countries, including Peru

In exchange for his bribe, Toledo was to use his influence to favour Odebrecht in its bid for contracts to construct the Southern Interoceanic Highway, a Peruvian Government infrastructure project. After Odebrecht was awarded the contracts, the company paid Toledo approximately \$25 million between 2006 and 2010 through accounts used and/or controlled by Josef Maiman, a long-time friend and associate of Toledo. In 2007, Toledo used about \$1.2 million of the bribe money to buy a house for himself and his wife in the Washington, DC, metro area, the title to which was first held by an entity established by Maiman and was later transferred to the Havenell Trust. Toledo and his wife sold the house in 2015 for \$1.2 million and deposited \$1.1 million of that amount into a Bank of America account held by the Havenell Trust. In July 2016, Toledo deposited an additional \$700,000 in bribe money from Odebrecht in the same account, after which, at Toledo's direction, most of the funds were transferred out of the account for Toledo's benefit.

In December 2016, Odebrecht S.A. pleaded guilty in the US federal court in Brooklyn, New York, to conspiracy to violate the anti-bribery provisions of the United States Foreign Corrupt Practices Act (FCPA), at which time it admitted to its bribery of Toledo in connection with the Peruvian highway project.[™] In June 2018, the Government of Peru formally requested Toledo's extradition to Peru on charges of influence peddling, collusion and money laundering in connection with the Odebrecht bribery scheme. Two months later, in August 2018, US federal agents seized the \$639,583 remaining in the Havenell Trust's Bank of America account. In July 2019, they arrested Toledo at another home he owned in California, pursuant to the extradition request of Peru. They also seized an additional \$44,261 and €2,550 in currency found inside a suitcase in the home's master bedroom.

In October 2019, and again in January 2020, US federal prosecutors filed non-conviction based confiscation actions, also in US federal court in Brooklyn, New York, against, respectively, the funds recovered from the Bank of America account and the funds seized during the search of Toledo's home, alleging that they derived from bribery proceeds that Toledo received from Odebrecht. No claims were filed in either action, and in February and April 2020, the US federal court entered two default judgements of confiscation. Thereafter, in late September 2021, a US federal court in San Francisco found Toledo to be extraditable to Peru. Toledo was extradited to Peru in April 2023 after he unsuccessfully challenged the lower court's decision allowing for his extradition before the US Court of Appeals for the Ninth Circuit.¹⁷²

Beginning in early 2017, the Peruvian Government provided important assistance in connection with the US investigation of Odebrecht and the confiscation actions against Toledo's assets in the United States. This included extensive bank records and other documents, diagrams and witness statements, among other evidence. Based on this assistance, and in furtherance of the significant US interest in

¹⁶⁹ The United States applies the term "civil forfeiture" to its non-conviction based confiscation proceedings, through which Toledo assets were taken, and uses the term "criminal forfeiture" for its conviction-based proceedings.

¹⁷⁰ International Foundation for Electoral Systems, "Election for Peruvian Presidency", Election Guide Democracy Assistance and Election News, 8 April 2001, https://www. electionguide.org/elections/id/1840/.

¹⁷¹ See United States, Attorney's Office, Eastern District of New York, "Odebrecht And Braskem Plead Guilty And Agree To Pay At Least \$3.5 Billion In Global Criminal Penalties To Resolve Largest Foreign Bribery Case In History", 21 December 2016, https://www. justice.gov/usao-edny/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35billion-global-oriminal

Dation globac of mininal 172 See Dar Collyns, "Peru: former president Alejandro Toledo arrives to face corruption charges", The Guardian, 23 April 2023, https://www.theguardian.com/world/2023/ apr/23/peru-former-president-alejandro-toledo-arrives-to-face-corruption-charges, and Joe Schneider, "Peru's Ex-President Wins a Short Reprieve of Extradition From US", Bloomberg, 25 February 2023, https://www.google.com/url?sa=t&rct=j&a=&serc=s&s ource=web&cd=&cad=rja&uact=&&vd=2ahUKEwjlkcKYs5P-AhUcj20FHRZ-CjwQFno ECAKQAQ&url=https%3A%2F%2Fwww.yahoo.com%2Fnow%2Fperu-ex-president-winsshort-024749391.html&usg=A0vVaw28VBYIZWOCCRx9VEtubmGp

ensuring that the recovered proceeds of crime were returned to Peru, the US Government approved the return to Peru of 100 per cent of the net amount confiscated by US authorities. Because the US confiscation action was self-initiated, this asset return was consistent with the obligations of the United States under article 57.3(c) of the UNCAC.

The United States relied upon the above-referenced casespecific sharing agreement with Peru to fulfil a US statutory requirement that US sharing be conducted pursuant to an international agreement with the recipient country, whether permanent or ad hoc., that specifically provides for asset sharing.¹⁷³ The two-page agreement summarizes the confiscation actions of the United States in the case and the vital evidence and assistance that Peru provided to the US criminal and confiscation proceedings. The agreement also notes that the PRONABI, upon receipt of the shared funds, would transfer them to the Ministry of Foreign Affairs of Peru, which, based upon a prior exchange of letters with the Ministry of Justice and Human Rights, would apply the funds in total to the Foreign Ministry's Office of Judicial Cooperation, which is instrumental in the Peruvian Government's ongoing efforts to recover from abroad proceeds of public corruption committed against the Republic of Peru. A copy of the complete English language text of the case-specific sharing agreement can be found in Appendix 3 to this paper.

Case Example 12 United States to Kyrgyzstan return of \$4.56 million in 2019

Highlights: Assets returned under the host State's victim remission law and programme was consistent with article 57.3(c); the host State self-initiated domestic conviction-based confiscation, based on a domestic fraud predicate offence, to recover public funds embezzled by a foreign head of State; no case-specific agreement was used for the asset return; rather, the governments' joint public statement commits the recipient government to fund social programmes and anti-corruption efforts.

In February 2019, the United States Department of Justice repatriated \$4.56 million in confiscated proceeds of crime to the Government of the Kyrgyz Republic. Both countries are

parties to UNCAC. The asset return, which was conducted under the Department of Justice's victim remission laws and programme, was marked by a joint public statement issued by the United States and Kyrgyz Governments. The assets were traceable to the corruption and theft of millions of dollars of Kyrgyz Government funds during the Kyrgyz regime of Kurmanbek Bakiyev, in particular to his son Maxim Bakiyev.

Kurmanbek Bakiyev came to power in Kyrgyzstan in 2005 after what was known as the "Tulip Revolution". In 2010, after protesters had taken control of the capital, Bakiyev resigned and fled the country with his wife and two adult children. When a new government took power, it launched investigations into Bakiyev and his family. The former president's son, Maxim Bakiyev, was eventually charged by Kyrgyz officials with embezzlement and abuse of power. He was convicted in absentia and sentenced to twenty-five years in prison. One of his close friends and advisers, Eugene Gourevitch, was also convicted but fled to the United States.

Following the Bakiyevs' flight from Kyrgyzstan, Gourevitch undertook the management of Maxim Bakiyev's stolen assets, and from March through July 2012, Gourevitch engaged in a scheme to defraud Maxim Bakiev. He told Bakiyev to transfer \$6 million dollars to an account that Gourevitch controlled, so Gourevitch could make a legitimate investment in Facebook's initial public offering. The funds were transferred; however, Gourevitch never made the investment. US FBI agents seized \$4.56 million of the funds as part of a US investigation of Gourevitch for insider trading of securities, and US prosecutors in Brooklyn, New York, subsequently charged Gourevitch with wire fraud and obstruction of justice in connection with that case. As a result, Gourevitch began cooperating with the US investigation and, in February 2014, he entered a guilty plea to the wire fraud charge and agreed to a \$6 million money judgement of forfeiture, to which the prosecutors applied the \$4.56 million that they had earlier seized from his accounts. In June 2014, Gourevitch was sentenced. United States prosecutors also had attempted to have Maxim Bakiyev extradited to the United States in connection with an unrelated insider trading scheme, but they later dropped their charges against him, and the United Kingdom granted him political asylum in 2017.174

¹⁷³ In this case, the relevant asset sharing statute was Title 18, United States Code, Section 981(i). The United States and Peru have no bilateral MLA treaty but cooperate on criminal cases principally through the several Organization of American States and United Nations law enforcement conventions, including the UNCAC, to which both countries are States parties. However, those conventions do not provide for asset sharing in the manner required by US law.

¹⁷⁴ See https://www.chathamhouse.org/2021/12/uks-kleptocracy-problem/02-supplyand-demand.

As part of the US criminal proceedings against Gourevitch, Maxim Bakiyev made a motion to the US federal court in Brooklyn, New York, for restitution to recover the \$4.56 million in confiscated funds he had lost to Gourevitch. The Court found that Bakiev had not provided evidence of ownership of the account from which the funds were derived. Consequently, the US court declined to enter a restitution order. Maxim Bakiyev later filed a petition for administrative remission of the confiscated assets with the US Department of Justice, claiming to be both an owner of the funds and a victim of the crime underlying the forfeiture. In September 2016, the Government of the Kyrgyz Republic - with the assistance of an American law firm representing the country pro bono - also filed a petition for remission, claiming that the confiscated funds were part of a much larger sum of State assets stolen by Bakiyev through accounting fraud, correspondent accounts and layered transactions conducted in the Kyrgyz Republic and then transferred to accounts held by shell corporations in Europe and the United States.¹⁷⁵

United States prosecutors helped to link the forfeited funds to the corruption offences in Kyrgyzstan. They were assisted by the Kyrgyz Republic Ministry of Finance, the Central Bank and the Office of the Prosecutor General. Ultimately, the Department of Justice recommended granting the remission petition of the Kyrgyz Republic and denying Maxim Bakiyev's petition. It found that Bakiyev did not have a valid, good faith and legally cognizable interest in the seized funds as required by Department of Justice regulations, nor had he demonstrated a pecuniary loss of a specific amount. Although the Kyrgyz Republic did not itself qualify directly as a victim, since it was not a victim of the specific crime underlying the US forfeiture, it was granted remission in the interests of justice because of the traceability of the funds.

Ultimately, it was determined that the Kyrgyz Republic had sufficient transparency and oversight measures in place and the Department of Justice granted the remission of the confiscated assets in February 2019. At the time of drafting this paper, additional efforts were being made by the United States and Kyrgyz Republic Governments to locate and return the remainder of the stolen assets covered by the \$6 million US confiscation order. The asset return, while conducted under US domestic law and programme, was consistent with article 57.3(c).

In its joint statement with the Government of the United States, the Government of the Kyrgyz Republic confirmed that the confiscated and remitted assets will be used for the benefit of the Kyrgyz people, with a focus on social projects and anti-corruption and transparency, as specified in the joint statement. The projects include improvements to the healthcare system, the construction of clean water supply facilities and the strengthening of government anticorruption programmes, particularly in its justice sector. The joint statement was intended in part to provide a basis upon which civil society organizations operating in the Kyrgyz Republic could monitor the implementation of the social projects and transparency efforts. A copy of English and Kyrgyz language texts of the joint statement can be found as **Appendix 4** to this paper.

¹⁷⁵ See United States Department of Justice, Office of Public Affairs, "Justice Department Repatriates Forfeited Funds to the Government of the Kyrgyz Republic", 26 February 2019, https://www.justice.gov/opa/pr/justice-department-repatriates-forfeitedfunds-government-kyrgyz-republic#:~:text=February%2026%20%202019-,Justice%20 Department%20Repatriates%20Forfeited%20Funds%20to%20the%20Government%20 of%20the_and%20his%20son%20Maxim%20Bakiyev: https://www.akingump.com/en/ news-insights/akin-gump-assists-kyrgyz-republic-in-securing-repatriation-of.html; and "Eugene Gourevitch sentenced to over 5 years in prison for \$6 million fraud – report", AKIpress, 17 June 2014, https://m.akipress.com/news:543263:Eugene_Gourevitch_ sentenced_to_over_5_years_in_prison_for_\$6_million_fraud_-_report/.

4. Optional consideration to return a confiscated asset to another State or to a prior legitimate owner or to crime victims

There are several types of foreign corruption case scenarios that arguably fall outside of the three asset return categories covered in part IV, sections 1–3, which correspond respectively to subparagraphs (a) through (c) of article 57.3. This paper considers these other, outside cases as part of a separate fourth asset return category, under which a State party that is hosting the confiscated assets might consider the *option*, rather than the mandate, of returning the assets to their country of origin, either directly or indirectly, to benefit that country's government, citizenry, prior legitimate owners, and/or victims, that have been affected by the underlying corruption crime.

Such optional consideration to return an asset is based on the spirit, rather than the letter, of the UNCAC and article 57. This option is grounded in the fact that article 57 is not restrictive or exclusive, such that any country confronting a potential proceeds of crime return is free to apply whatever broader range of treaty, legal and/or programmatic tools available to it to return assets to another country when the equities of the case warrant such a return.³⁸ Between States parties to the UNCAC, this option is also particularly grounded, as already noted, in the admonition of article 51 that States parties "shall afford one another the widest measure of cooperation and assistance" in regard to the return of assets.

A non-exclusive list of circumstances that arise in such fourth category cases includes the following, which either alone or in combination may present challenges to asset returns:

- (1) When a host State party has confiscated an asset on its own initiative but has received no request from the State party of origin, or any request on behalf of a prior owner or victim, for confiscation assistance or return of the asset, while it nonetheless recognizes prior ownership or damage to the State party of origin, loss to a non-State prior legitimate owner, and/or loss to a victim or victims due compensation in the State party of origin;
- (2) When the asset at issue is now owned by a third country that has, in a summary enforcement proceeding or otherwise, recognized and domesticated the extraterritorial confiscation order of the State party being asked to return the asset; or

(3) When the country requesting the asset's recovery and return – whether through enforcement of its own confiscation judgement or not – is not a State party to the UNCAC.

This section summarizes cases involving direct and alternative means to return proceeds of crime that present one or more of the foregoing sets of circumstances that fall outside of article 57.3. First, however, the section provides a proposed breakdown of how the general principles framed by the UNCAC, and by article 57.3 in particular, might be used to analyse these cases.

Cases outside of Article 57.3

Scenarios covered: When a State party:

 has self-initiated an asset confiscation within its territory, not having waived another State party's confiscation;

OR

2. confiscates extraterritorially an asset that is located and remains in a third country;

AND

- 3. another country with potential damage as to the asset, or prior owner-loss or victim claims:
 - a. has not requested the asset's confiscation or return;
 - b. requests the return of the asset located in the third country; and/or
 - c. requests the asset's direct return but is not an UNCAC State party.

Asset prerequisites: The confiscated asset:

- 1. Is:177
 - a. the proceeds of crime⁷⁷⁸ of the predicate offence; or
 - b. equal in value to such proceeds; or
 - c. a penalty representing the pecuniary value of the benefits derived from the predicate offence;

¹⁷⁶ See, e.g., the UNTOC and the 1988 Vienna Convention provisions discussed in footnote 13, and the other domestic law, programmatic and treaty authorities covered in part III, sections 1 and 4 above.

¹⁷⁷ Article 31.

¹⁷⁸ As indicated above, for the purpose of this paper, the expression "proceeds of orime" is understood as any property derived from or obtained, directly or indirectly, through the commission of an offence, as well as instrumentalities. The expression "instrumentalities" is understood as property used to facilitate a criminal offence, such as a conveyance used to transport illegal items or a structure used to conceal, manufacture or trade in them.

- 2. Is the object of:
 - a. prior ownership or damage to the country of origin;
 - b. loss to a prior legitimate owner of the asset;

OR

 c. loss to a victim or victims due compensation from the predicate offence or a related offence (as recognized by the confiscating State party);

AND

- 3. Is legally amenable, if necessary with the assistance of a third country holding or owning the asset:
 - a. to direct return to the country of origin, to a prior legitimate owner, or to a victim or victims due compensation, respectively; OR
 - b. to indirect return via transparent alternative means intended to benefit one or more of those entities and/ or persons;

under the domestic laws or programmes, and/or Convention, treaty or other international agreement, of the State party that confiscated the assets, and of an assisting third country when relevant.

Predicate offence prerequisites: The predicate offence to the confiscation constitutes an UNCAC predicate offence (and typically has dual criminality under the laws of the host State party and the country of origin, as well as possible mutual recognition of the predicate offence as a viable predicate for confiscation), which include:

1. A Public Official's:

- a. Embezzlement (art. 17)
- b. Misappropriation (art. 17) or
- c. Other Diversion (art. 17))

of *public or private* property, funds or securities entrusted to him or her by virtue of his or her position, for his or her benefit or that of another person or entity;

- 2. Bribery related to a national public official (art. 15), i.e.:
 - a. Any Person's (active bribery) promising, offering or giving an "undue advantage" to a national public

official, for the official, any other person or entity, to prompt the official to execute or refrain from executing his or her official duties (art. 15(a)); or

- b. A national Public Official's (passive bribery) solicitation or acceptance of an "undue advantage" for the official or another person or entity, so that the official execute or refrain from executing his or her official duties (art. 15(b));
- 3. Bribery (active) of a foreign public official or an official of a public international organization (art. 16.1); i.e., Any Person's promising, offering or giving an "undue advantage" to a foreign public official or an official of a public international organization, for the official or another person or entity, to prompt that official to execute or refrain from executing his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business (art. 16.1);"
- 4. Bribe (passive) seeking or taking by a foreign public official or an official of a public international organization; i.e., the official's solicitation or acceptance of an "undue advantage", for the official or another person or entity, so that the official execute or refrain from executing his or her official duties (art. 16.2);
- 5. A Public Official's intentional "Abuse of Functions" (art. 19); i.e., acting or failing to act to discharge his or her functions in violation of laws to obtain an "undue advantage" for himself/herself or others;
- A Public Official's "Illicit Enrichment" (art. 20), i.e., the official's significant increase in assets that he or she cannot reasonably explain vis-à-vis the official's lawful income;
- 7. Any Person's "Trading in Influence" (art. 18); i.e.:
 - a. Promising, offering or giving to a public official or another person an "undue advantage" in exchange for the official or the person "abusing" his or her real or supposed influence to obtain an "undue advantage" for anyone from a State party's public authority or administration (art. 18(a)); or

¹⁷⁹ This additional element in art. 16.1 includes "the provision of international aid" among "the conduct of international business". See fn. 17.

- b. Solicitation or acceptance by a public official or another person of an "undue advantage" for himself/herself or another person in exchange for the official or person "abusing" his or her real or supposed influence to obtain an "undue advantage" for anyone from a State party's public authority or administration (art. 18(b));
- 8. Any Person's laundering of the proceeds directly or indirectly derived from an UNCAC predicate offence (as per art. 23.1(a) and art, 2(e));
- Any Person's participation in or conspiratorial, accessorial, attempted or aiding and abetting role in an UNCAC predicate offence (art. 23.1.(b)(ii) and art. 27.1–3); or
- Any Person's acquisition, possession or use of such asset, knowing it is the proceeds of an UNCAC predicate offence at time of receipt (art. 23.1(b)(i) and art. 2(e));
- 11. Any Person's "concealment or continued retention of property", knowing that the property results from an UNCAC predicate offence (art. 24); or
- 12. Any Person's obstruction of justice (art. 25) in a proceeding (art. 25(a)) or interfering with the exercise of official duties by a justice or law enforcement official (art. 25(b)), in relation to the commission of an UNCAC predicate offence.

Following are four cases, involving an indirect asset return completed in 2022 and three asset return efforts still ongoing in 2023, that illustrate the foregoing analysis in application. These cases are subdivided into those (1) in which a State party confiscated the assets and has or will apply them to programmes for the benefit of the State party of origin in lieu of a direct return; (2) in which the assets were confiscated extraterritorially and then returned by a third UNCAC State party; and (3) in which the country requesting the asset return is not an UNCAC State party.

A. Assets applied to programmes for benefit of a state party in lieu of direct return

Case Example 13

France to Equatorial Guinea New law for assistance programming of €150 million subject to prudential measures

Highlights: The State of origin did not submit an asset return request and litigated against the host State self-initiated conviction-based confiscation, which recovered assets allegedly embezzled by the head of the State of origin and his son; the assets were confiscated, and the host State adopted a new law to use the recovered assets to fund domestic foreign assistance programmes for the benefit of the State of origin in lieu of direct return.

France's approach to asset returns

In France, ratified international treaties are an integral part of the French law and take precedence over any contravening domestic legal provisions. Convictionbased confiscation is available in France, and conviction-based orders issued by other countries of the European Union (EU) are enforceable there. Such orders issued by foreign non-EU judicial authorities also are enforceable under Code of Criminal Procedure article 713-36 to 713-41, which applies in the absence of an international convention providing otherwise. As to nonconviction based confiscation, French Law No. 2016-731 of 3 June 2016 introduced a domestic mechanism for non-restitution without prior conviction, which has the material and legal effects of non-conviction based confiscation. Since 2003, France has enforced foreign non-conviction based confiscation orders provided that they concerned property that could be confiscated under French law.180

Requests to France under international conventions, including the UNCAC, for confiscated asset returns are executed in line with those conventions, which take precedence over French domestic law. In the absence of an international convention providing otherwise, the return of confiscated assets is governed by the Code of Criminal Procedure (art. 713-36), under which ownership of the asset devolves to the French State, unless otherwise agreed with the requesting State.181 Under French law, when illegal assets, including foreign proceeds of crime, are confiscated in France, the country of origin may request their restitution or seek other compensation through the MLA process. In addition, if the assets are the subject of an independent French investigation - in particular, for money laundering and/or corruption - the State of origin may join that action as a partie civile, or it may bring an independent civil action in the French courts. Until recently, absent a request, the assets devolved to the general State budget of France – this is no longer the case at the time of drafting this paper, as a general principle of asset return was enshrined in new legislation adopted in

¹⁸⁰ Article 55 of the French Constitution. See second cycle IRM executive summary. https://www.unodc. org/documents/treaties/UNCAC/WorkingGroups/ ImplementationReviewGroup/ExecutiveSummaries2/ V2005000e.pdf, pp. 2, 11–12.

¹⁸¹ Ibid.

August 2021.182 This legislation specifically allows confiscated foreign corruption assets to be applied as supplemental funding for French foreign assistance programmes, administered by the Ministry for Europe and Foreign Affairs of France, in cases in which the French authorities consider a direct asset return to the country of origin to be practically untenable under the pre-existing asset return mechanisms of France. This programmatic approach, according to the Ministry, will allow for "improving the quality of life of the population [of the country of origin]...in compliance with the principles of transparency and accountability, in particular to avoid the funds in question being used in corruption channels".183 The new legislation - Law No. 2021-1031 of 4 August 2021, in article 2, section XI - and the foreign assistance programmes it authorizes, is discussed further in part IV, section 4.A infra, in the context of Case Example 13, the French prosecution and confiscation proceeding that inspired its adoption.

182 Article 2.XI of Law No 2021-1031 of 4 August 2021.
183 France, Ministry for Europe and Foreign Affairs, "France has a new recovery mechanism for "illicit assets", October 2021, https://www.diplomatie.gouv. fr/en/french-foreign-policy/development-assistance/ france-has-a-new-recovery-mechanism-for-illicitassets/. In late July 2021, a ruling of the *Cour de Cassation* of France, the French Judicial Supreme Court, concluded a successful French prosecution, having lasted several years, of Teodoro Nguema Obiang Mangue, a Vice President of Equatorial Guinea, and son of the President of Equatorial Guinea, for large-scale embezzlement and money laundering. The tribunal's ruling upheld a French court's 2017 conviction of Obiang Mangue, already once affirmed on appeal, along with the court's imposition of a three-year suspended prison sentence and a fine of €30 million. It also upheld the court's conviction-based confiscation of €150 million, enforceable against Obiang Mangue's assets in France, that the court found he had stolen from his home country's public funds. The French case against Obiang Mangue was initiated in 2008 by a suit filed in the French court by Transparency International, a global civil society organization focused on countering corruption, and Sherpa, a French environmental and human rights law association, and was subsequently joined by French prosecuting authorities.¹⁹⁴

Equatorial Guinea and France are parties to UNCAC. Obiang Mangue was appointed by his father, President Obiang Mbasogo, as his deputy in 2012 and as Vice President in 2016. He received an official government salary of less than \$100,000, but it is alleged that he used his position and influence as a high-level government official to amass more than \$300 million worth of assets through corruption and money laundering in violation of the laws of Equatorial Guinea. Through intermediaries and corporate entities, he acquired numerous assets abroad, including in France and the United States. From 2000 until the time of Obiang Mangue's conviction in France in 2017, he reportedly purchased luxury assets and properties across France that included a $\in 25$ million mansion on Paris's Avenue Foch, many luxury cars, art, jewellery and designer fashions. In November 2020, the International Court of Justice ruled in favour of France by rejecting Obiang Mangue's collateral appeal to the tribunal, in which he claimed that the Paris mansion was a protected diplomatic mission.¹¹⁶

Less than a week after the decision of the Cour de Cassation in July 2021 in Obiang Mangue's case, the National Assembly of France voted on 2 August to adopt new legislation to apply – in cases such as Obiang's – "[a]n innovative mechanism aimed at returning assets directly to the people" in lieu of a direct return to an UNCAC State party posing circumstances analogous to those currently affecting Equatorial Guinea.^{®®} As reported on the website of the French Ministry of Europe and Foreign Affairs, the new Law No. 2021-1031 of 4 August 2021, at article XI,^{®®} provides for the return of assets under programmes for

¹⁸⁴ https://www.hrw.org/news/2021/07/28/france-equatorial-guinea-vice-presidents-conviction-upheld?gcli d=EAIaIQobChMImout4tvI9gIVI4CGCh2mZQNcEAAYASAAEgIT6fD_BwE#.

¹⁸⁵ See https://www.bbc.com/news/world-europe-51449951; https://www.hrw.org/news/2021/07/28/franceequatorial-guinea-vice-presidents-conviction-upheld?gclid=EAlalQobChMImout4tv19gIVI4CGCh2mZQ NcEAAYASAAEgIT6FD_BwE#; and https://data.worldbank.org/indicator/SI.POV.NAHC?locations=60. See also https://www.france24.com/en/africa/20201211-un-court-rules-for-france-in-paris-mansion-row-withequatorial-guinea and https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agreesrelinguish-more-30-million-asset-purchased.

 ¹⁸⁶ See France has a new recovery mechanism..., https://www.diplomatie.gouv.fr/en/french-foreign-policy/development-assistance/france-has-a-new-recovery-mechanism-for-illicit-assets/.
 187 For the text of article XI, see https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043898536/.

improving guality of life for the populations...in compliance with the principles of transparency and accountability, in particular to avoid the funds in guestion being used in corruption channels. The recovery of funds will be implemented through cooperation and development actions, but these will not be registered as official development assistance in the declarations made by France to the Organisation for Economic Cooperation and Development (OECD). ...the Ministry for Europe and Foreign Affairs, which will allocate the credits corresponding to the confiscated sums, after they are incorporated into the State's overall budget. These sums will then be allocated to cooperation and development actions. Several organizations, including the Agence Française de Développement (French Development Agency/AFD), can then use these funds to implement cooperation and development actions with the populations concerned.188

The French Ministry's website further explains that the Ministry itself will define the terms and conditions for the restitution on a case-by-case basis so as to guarantee the returned funds will contribute to improvement of the living conditions of the populations of their countries of origin. The Ministry clarified that it would seek the agreement of the country of origin with its programming decisions and will conduct follow-up evaluations after disbursal of programmed funds. No details were available at the time of drafting of this publication about any specific plans to programme the confiscated Obiang assets for the benefit of Equatorial Guineans.

The programming of confiscated Obiang assets through French foreign assistance programmes for the *benefit* of Equatorial Guineans falls clearly outside of the prescribed scheme of article 57.3 for direct *returns* of confiscated assets, either to a requesting State party or to prior legitimate owners or victims deserving of compensation. However, as the French authorities have recognized with their new legislation, exceptional circumstances can warrant exceptional means; in this case, means that are in the *spirit* of article 57, if not within its specific terms.

This case is notable as the French courts found that Obiang Mangue had embezzled his country's public funds in large quantities and laundered them to France, providing the basis for the return of these assets, as per subparagraph 57.3(a). However, Equatorial Guinea never sought to confiscate the assets in France itself, as required by subparagraph 57.3(a), and never requested that the assets in France be confiscated for purposes of return, as required by subsection 57.3(c), but instead actively opposed the assets' confiscation.⁴⁶⁹

Case Example 14 United States to Equatorial Guinea \$26.6 million litigation settlement for beneficial programming

Highlights: The State of origin did not submit an asset return request and litigated against the host State's self-initiated non-conviction based confiscation; the host State confiscated the assets and obtained a court approved settlement providing for international organization programming assistance for the benefit of State party of origin in lieu of direct return.

In late September 2021, two months after the French high court confirmed the confiscation of Obiang Mangue's French assets, a United States federal trial judge in Los Angeles, California, also ruled to set in motion the application of \$26.6 million in assets, confiscated by US prosecutors from Obiang Mangue, toward international programmes to benefit the people of Equatorial Guinea. The US court's ruling authorized an agreement between the US prosecutors and Obiang Mangue's attorneys in the United States to distribute \$19.25 million in confiscated assets to the United Nations for the purchase and distribution of COVID-19 vaccines in Equatorial Guinea, as well as \$6.35 million to Medical Care Development International (MCDI) for the purchase and distribution of medicines and medical supplies throughout that country.¹⁸⁰

Similar to the steps taken by France, the agreement by the parties in the US litigation to fund third-party procurements and distributions likewise shows the application of innovative means to apply the *spirit* of article 57, if not its specific terms.

The 2021 agreement on disbursing Obiang Mangue's assets followed seven years of negotiations between US prosecutors

¹⁸⁸ France has a new recovery mechanism..., https://www.diplomatie.gouv.fr/ en/french-foreign-policy/development-assistance/france-has-a-new-recoverymechanism-for-illicit-assets/#sommaire_1

¹⁸⁹ On 29 September 2022, Equatorial Guinea instituted proceedings against France before the International Court of Justice regarding a dispute concerning the alleged violation by France of its obligations under the Convention. See https://www.icj-cij.org/ public/files/case-related/184/184-20220930-PRE-01-00-EN.pdf

¹⁹⁰ United States Department of Justice, Office of Public Affairs, Press Release Number 21-899, 20 September 2021, https://www.justice.gov/opa/pr/266-millionallegedly-illicit-proceeds-be-used-fight-covid-19-and-address-medical-needs [United States v. One Michael Jackson Signed Thriller Jacket, No. 2:11-CV-03582 (C.D. Cal. 2011)].

and Obiang's attorneys about the disbursement details. The US court had ordered the assets to be confiscated in 2014 after lengthy non-conviction based proceedings that ended in a litigation settlement. Under the settlement agreement, Obiang Mangue was required to sell a mansion in Malibu, California, that he had purchased for \$30 million, a Ferrari automobile and various valuable items of Michael Jackson memorabilia, and to contribute \$1 million representing the value of other property. The settlement also provided for \$10.3 million of the settlement funds to be forfeited to the United States, with the remaining settlement funds to be distributed to a charity or other organization for the benefit of the people of Equatorial Guinea.¹⁰

B. Extra-territorially confiscated asset return by third State party

Case Example 15

Jersey via United States to Nigeria \$312 million returned in 2020; and United Kingdom via United States to Nigeria: \$20.6 million returned in 2022

Highlights: Two indirect asset returns outside of the provisions of article 57 were nonetheless consistent with its principles; a self-initiated extra-territorial non-conviction based confiscation was used by one jurisdiction to recover assets hosted in two other jurisdictions, to recover assets for return to the State of origin; a three-party case-specific agreement, and a subsequent two-party case-specific agreement, both containing prudential measures, governed the return to the State of origin.

In May 2020, the Government of the Bailiwick of Jersey provided \$311,797,876.11 to the United States for return to the Government of the Federal Republic of Nigeria under a trilateral asset sharing agreement between Jersey, the United States, and Nigeria. In September 2022, the Government of the United Kingdom provided an additional approximately \$20.6 million to the United States for return to Nigeria under a separate bilateral agreement between the United States and Nigeria. All of these assets, totalling \$332.4 million, were traceable to the corrupt acts committed in Nigeria by former Nigerian Head of State Sani Abacha and his co-conspirators from 1993 to 1998 (described in part IV, section 1.A. in Case Example 1).

The assets provided by both Jersey and the United Kingdom were ordered to be confiscated in the United States in 2014 under the non-conviction based order issued by a US federal trial judge in Washington, DC.¹⁰² The court's order was based on its extra-territorial forfeiture jurisdiction under US law over assets located abroad that are the proceeds of foreign public corruption crimes and that were laundered to or through the United States banking system to foreign jurisdictions.⁴⁰⁰ Abacha's funds in Jersey were laundered through the US banking system and then held in bank accounts in Jersey in the name of Doraville Properties Corporation, a British Virgin Islands company, and in the name of the son of the former General Abacha.⁴⁰⁴ The funds in the United Kingdom were also laundered through the US banking system and forfeited from two UK banks.⁴⁰⁵

The US Department of Justice's Kleptocracy Asset Recovery Initiative made this confiscation action public in March 2014, seeking the recovery of \$550 million in Abacha-related assets. Shortly thereafter, through mutual legal assistance from authorities in Jersey, the United Kingdom and France, the department secured the freezing of more than \$458 million of those assets on deposit in accounts in those three countries.¹⁰⁸ The US court ordered the frozen assets to be forfeited in August 2014, and its order became final in 2018 following unsuccessful appeals. Notably, none of the assets seized and later forfeited

¹⁹¹ See U.S. Department of Justice, Office of Public Affairs, 10 October 2014, https://www.justice.gov/opa/pr/second-vice-president-equatorial-guinea-agreesrelinquish-more-30-million-assets-purchased. Swiss prosecutors reportedly closed their investigation of Obiang Mangue in 2019 after he agreed to forfeit automobiles and raised \$27 million at auction, while in July 2021, United Kingdom authorities reportedly sanctioned him with asset freezes and a travel ban on the basis of evidence uncovered in these cases. See Human Rights Watch, 28 July 2021 https://www.hrw. org/news/2021/07/28/france-equatorial-guinea-vice-presidents-conviction-upheld# .

¹⁹² The US confiscation order was issued in United States v. All assets held in account number 80020796, in the name of Doraville Properties Corporation, at Deutsche Bank International Limited in Jersey, Channel Islands, And All interest, benefits, or assets traceable thereto, ET AL., 13-cv-1832 (JDB) (D.D.C.).

¹⁹³ The United States extraterritorial jurisdiction for non-conviction based confiscations dates to 1992 and is found in Title 28, United States Code (U.S.C.), which contains statutory law governing the US federal judiciary and judicial procedure. Title 28, U.S.C., Section 1355(a) provides in pertinent part that "[t]he [US federal] district [trial] courts shall have original jurisdiction ... of any action or proceeding for the recovery or enforcement of any...forfeiture...[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government...".

¹⁹⁴ See United States Department of Justice, Office of Public Affairs, Press Release Number 20-428, 4 May 2020, https://www.justice.gov/opa/pr/us-repatriates-over-3117million-assets-nigerian-people-were-stolen-former-nigerian-dictator and Jersey, "Repatriation agreement between Jersey, Nigeria and USA, 04 February 2020, https:// www.gov.je/news/2020/pages/RepatriationAgreementNigeria.aspx.

¹⁹⁵ Taiwo-Hassan Adebayo, "The men who helped Abacha launder \$23 million recently recovered by UK govt", *Premium Times*, 16 May 2022, https://www.premiumtimesng. com/news/headlines/530083-exclusive-the-men-who-helped-abacha-launder:23million-recently-recoverd-by-uk-govt.html. The US Department of Justice also has reported that it continues to seek the forfeiture of millions in additional laundered funds held in trusts that name Abacha associate Abubakar Atiku Bagudu, the current Governor of Kebbi State and his relatives as beneficiaries.

¹⁹⁶ French authorities seized \$144 million based on a U.K. seizure warrant, and the United Kingdom seized \$30 million through litigation brought pursuant to the UK Civil Jurisdiction and Judgments Act. The US confiscation complaint, which remains pending, also seeks to forfeit five corporate entities registered in the British Virgin Islands. See United States Department of Justice, Office of Public Affairs, Press Release Number 14-230, 5 March 2014, https://www.justice.gov/opa/pr/us-freezes-more-458million-stolen-former-nigerian-dictator-largest-kleptocracy-forfeiture

in the US action were located in the United States.¹⁹⁷

With regard to the assets recovered from Jersey, the Royal Court of Jersey registered and enforced the 2014 US confiscation order in 2019, shortly after the resolution of the US appeals. Upon the Jersey court's enforcement ruling, the funds became Jersey's property and were deposited into its Civil Asset Recovery Fund, in accordance with Jersey law.¹⁰⁸ Thereafter, in accordance with the trilateral agreement, Jersey transferred the assets to the US Department of Justice as asset sharing, in recognition that the confiscation of Jersey stemmed from the US confiscation. The US Department of Justice, in turn, after depositing the shared assets into its Assets Forfeiture Fund, employed its own international asset sharing authority and programme to complete the asset return to the Nigerian Government, pursuant to the trilateral agreement.¹⁰⁹

As to the assets recovered from the United Kingdom, the UK National Crime Agency (NCA) enforced the 2014 United States forfeiture judgement in the UK courts, pursuant to a formal mutual legal assistance request from the United States, obtaining a civil asset recovery order in July 2021. The NCA then transferred the funds to the UK Home Office, which shared the assets with the US Department of Justice in September 2022 under the standing forfeiture cooperation provisions of the US-UK bilateral Mutual Legal Assistance Treaty (MLAT).²⁰⁰ The Department of Justice, in turn, after depositing the shared assets into its Assets Forfeiture Fund, employed its own international asset sharing authority and programme to effect the asset return to the Nigerian Government, pursuant to the case-specific bilateral asset sharing agreement with Nigeria, signed in August 2022.²⁰¹

Under the trilateral sharing agreement, the United States and Jersey pledged to transfer 100 per cent of the net forfeited assets to Nigeria to support three critical infrastructure projects in key economic zones that previously were authorized by the Nigerian Government: construction of the Second Niger Bridge, the Lagos-Ibadan Expressway and the Abuja-Kano Road. The subsequent 2022 bilateral agreement between the US and Nigeria also pledged the transfer of 100 per cent of the net forfeited assets to Nigeria to support the same three infrastructure projects. Both agreements include key measures to ensure transparency and accountability, including administration of the funds and projects by the Nigeria Sovereign Investment Authority (NSIA), financial review by an independent auditor and monitoring by an independent civil society organization with expertise in engineering and other areas. The agreements also preclude the expenditure of funds to benefit alleged perpetrators of the corruption or to pay contingency fees for lawyers.202 A complete text of the 58-page trilateral agreement and attached schedules is available at https://www.justice.gov/ opa/press-release/file/1273556/download.

The US trial court, in ordering the confiscation of the Abacha assets in 2014, determined, as the US Department of Justice had alleged, that the conduct of Abacha and his coconspirators regarding the blocked assets

[c]onstitute[ed] theft; conversion; fraud; extortion; and the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official [which were] criminal offenses under Nigerian law, as enumerated in the Nigerian Criminal and Penal Codes, including but not limited to Nigerian Criminal Code Act 1990, CAP.77, Part 3, chapters 12 and 34, and the Nigerian Penal Code Law 1963, CAP. 89 (1987), chapters X, and XIX.

These findings supported the US court's legal basis for confiscating the assets, i.e., that the assets were the laundered proceeds of *foreign* criminal activity specifically recognized by US law as a basis for a US money laundering conviction – and consequently, for non-conviction based forfeiture by the United States – because such proceeds had transited

¹⁹⁷ As to the legal efficacy in a foreign country of a US federal court's extra-territorial confiscation order, one US court has held that the requested State "may be expected to live up to its treaty obligations, even if it would not otherwise be required to effectuate the [forfeiture] judgments of United States courts. But [the requested State's] compliance and cooperation determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders." *United States v. All Funds in Account Nos.* 747.004, 747.009/278, & 747.714/278 Banco Espanol de Credito, Spain, 141 F. Supp. 2d 548 (D.D.C. 2001), affd 295 F.3d 23 (D.C. Cir. 2002).

¹⁹⁸ See fns. 158 to 160 and the accompanying text above regarding Jersey's domestic authorities to enforce foreign confiscation orders; and https://www.unodc.org/ documents/treaties/UNCAC/Country/visitFinalReports/2020_11_16_UK_Final_Country_ Report.pdf, Annex II, Country Review Report of the Bailiwick of Jersey, p. 11, concerning the return by Jersey of confiscated proceeds of crime following mandatory deposit into its civil or criminal assets forfeiture funds.

¹⁹⁹ See fn. 87 regarding the US Department of Justice's Assets Forfeiture Fund and its international asset sharing programme. But for the prudential measures on the asset return that the three countries agreed to in the trilateral agreement, the Department of Justice could have returned the assets to Nigeria pursuant to its bilateral MLAT with Nigeria, which entered into force in 2003 and which contains a confiscated asset transfer provision.

²⁰⁰ Article 16, para. 3, https://www.congress.gov/104/cdoc/tdoc2/CDOC-104tdoc2. pdf. See also https://www.nationalcrimeagency.gov.uk/news/abacha-millionsrecovered-by-nce?highlight=WyJhYmFjaGEiXQ==; and Adebayo 16 May 2022 https:// www.premiumtimespi.com/news/headlines/530083-exclusive-the-men-who-helpedabacha-launder-23-million-recently-recovered-by-uk-govt.html.

²⁰¹ United States Department of Justice, Office of Public Affairs, Press Release Number 22-898, 23 August 2022, https://www.justice.gov/opa/pr/united-states-entersagreement-nigeria-repatriate-over-23-million-assets-stolen-former. As to the assets

seized in France, the US Department of Justice continues its efforts to enforce its extraterritorial confiscation order against them, in cooperation with French authorities. The BBC reportedoin 28 January 2021 that a Swiss attorney who has long represented Nigeria in its efforts to recover Abacha's asset said that he "is still expecting \$144m in France and a further \$18m in Jersey". "Sani Abacha – the hunt for the billions stolen by Nigeria's ex-leader", https://www.bbc.com/news/world-africa-54929254.

²⁰² The agreement reflects the principles for ensuring transparency and accountability in the return and disposition of recovered assets adopted at the Global Forum on Asset Recovery (GFAR).

financial institutions located within the United States.203

This case is instructive in several respects in regards to UNCAC article 57.3. To begin, the Convention is applicable to all three jurisdictions involved in the case - Nigeria, the United States, Jersey and the United Kingdom. It therefore was relevant that the US confiscation action was based upon foreign offences (i.e., embezzlement, theft, conversion and misappropriation by a public official of public funds for the public official's benefit) that clearly would fall under the mandatory obligation for an asset return of subparagraph 57.3(a). In addition, although Nigeria itself never confiscated the assets involved, it might well have been granted a waiver from this condition - an option that subparagraph 57.3(a) expressly provides to the requested State party because, as was noted in Case Example 1 involving the asset return of Liechtenstein to Nigeria, Sani Abacha was never susceptible to conviction-based confiscation proceedings in Nigeria due to his death in 1998, and Nigeria did not have non-conviction based confiscation at the time of the US court's confiscation order in August 2014. In the absence of such a waiver, any consideration of an asset return under article 57.3 would necessarily fall under the lesser asset return obligation of subparagraph 57.3(c) related to "other cases" warranting only "priority consideration to returning" the assets upon confiscation by the requested State party. As it happened, however, the lack of its own confiscation order by Nigeria was not a factor in the case because the autonomous asset sharing law the United States used to accomplish the asset return to Nigeria - while consistent with the provisions of article 57.3 in effect - does not necessitate a confiscation order from a country of origin.204

Despite the above, a number of additional factors in the case are not considered by article 57.3 or the UNCAC generally, i.e., an extraterritorial confiscation by the requested State party of assets located in third countries, which confiscation the third countries legally enforced, resulting in the third countries becoming the legal title holders of the assets. Further, as is evident from a detailed sequence of events that are memorialized in the preliminary passages of the trilateral agreement, the Nigerian Attorney General made two written requests for eventual return of the assets to Nigeria: the first in 2012, citing UNCACas the general ground for confiscation of the assets, and the second in 2016, following the US confiscation, but prior to its finalization and subsequent recognition in Jersey. However, both of these requests were addressed to the US Department of Justice and not to authorities in Jersey. Nevertheless, prompted by Nigeria, the United States and Jersey joined Nigeria in late 2018 and early 2019, in signing a "Declaration of Intent" specifically invoking UNCAC article 57.5 (as well as GfAR Principle 4), and essentially agreeing that the then-finally confiscated assets would be repatriated to Nigeria, subject to an agreement specifying the uses to which the returned assets would be put, and providing for transparency, accountability, monitoring and oversight measures to ensure the legitimacy of their disposition. Then, as noted, the assets were in fact returned in 2020, not directly, as article 57.3 would seem to suggest, but rather indirectly, in a manner tacitly recognizing that the confiscation in Jersey was derivative of the confiscation by the United States, and in direct accordance with the laws of both Jersey and the United States requiring assets confiscated under their respective jurisdictions to be deposited into their respective confiscated assets funds before they could be shared.205 The same tacit recognition occurred in connection with the UK's enforcement of the US judgement, and with its use of asset sharing under its bilateral MLAT with the United States to transfer the assets from Home Office to the Department of Justice.

Viewing these circumstances broadly, the foregoing case well illustrates the overall premise of the present section of this paper, i.e., that, through an *ultra vires* application

²⁰³ Title 18, United States Code, Section 1956(c)(7)(B)(iv), specifies that "an offence against a foreign nation...[including] bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official", as a "specified unlawful activity" constituting a possible prerequisite to a money laundering offence when other statutory elements of money laundering are satisfied. The US complaint in rem alleged violations of both 18 U.S.C. Sections 1956 (Laundering of monetary instruments) and 1957 (Engaging in monetary transactions in property derived from specified unlawful activity), which, in this case, both constitute forfeitable offences under 18 U.S.C. 981(a)(1)(A).

offences under 18 U.S.C. 981(a)(1)(A). The specific conduct alleged and proven included, in summary, that General Abacha and his co-conspirators systematically embezzled billions of dollars in public funds from the Central Bank of Nigeria on the false pretence that the funds were necessary for national security. The conspirators withdrew the funds in cash and then moved the money overseas through US financial institutions. General Abacha and his finance minister also caused the Government of Nigeria to purchase Nigerian government bonds at vastly inflated prices from a company controlled by Bagudu and Mohammed Abacha, generating an illegal windfall of more than \$282 million. General Abacha and his associates also extorted more than \$11 million from a French company and its Nigerian affiliate in connection with payments on government contracts. Funds involved in each of these schemes also were laundered through the United States. See United States Department of Justice.gov/opa/pr/us-freezes-more-458-million-stolenformer-nigerian-dictator-largest-kleptocracy-forfeiture.

²⁰⁴ It should be noted that Switzerland has also returned Abacha-related assets to the Federal Republic of Nigeria. In an order dated 11 October 2014, the prosecution authority of the Canton of Geneva confiscated some \$380 million from various companies controlled by the Abacha family, which has been deemed by Switzerland to be a criminal organization. These funds had been seized in 2006 in Luxembourg by order of the prosecution authority in Geneva. The repatriation of the funds to Geneva and their confiscation followed the conclusion in July 2014 of a comprehensive agreement between the Federal Republic of Nigeria and the Abacha family. This agreement set out the principle of confiscating the assets seized and allocating them to Nigeria. It also provided for Nigeria to drop its complaint against Abba Abacha. Among other things,

the confiscation order stipulates that the returned funds would be monitored by the World Bank. Until the monitoring system is operational, the funds will remain in the hands of the Geneva justice system. Based on article 53 CP, which provides for charges to be dropped when the accused repairs the damages as far as possible, the prosecution authority subsequently dismissed the proceedings, which had been in progress since 1999 and, in the end, were focused solely on Abba Abacha. The latter, who served 561 days in detention awaiting trial between 2004 and 2006, was denied any compensation on this account because of the proven existence of a criminal organization. See FATF, https://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf, p. 70, Box 10 - Example 2.

²⁰⁵ Title 28, United States Code, Section 524(c)(4)(A) requires that "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice ... shall [with minor irrelevant domestic exceptions not] be deposited into the [Assets Forfeiture] Fund". See also fn. 199 regarding the Civil Asset Recovery Fund of Jersey.

of the *principles* of article 57.3 to foreign corruption case scenarios lying outside of its technical boundaries, States that are hosting confiscated foreign proceeds of crime, if so motivated, can effect an *optional*, rather than a mandated, return of confiscated assets to the State party of origin, based on the spirit, rather than the letter, of article 57.

The next and final case example speaks to a similar *ultra vires* application of the spirit of article 57 to a country that is not, or is not yet, a State party to the Convention.

C. Asset return to a non-state party to the UNCAC

Case Example 16 United States to Curaçao \$21.9 million [Expected] return in progress

Highlights: The host State applied its domestic law to freeze assets, and later recognized and enforced a final corruption-related confiscation order from a requesting State of origin that is not party to UNCAC; Return of the confiscated assets is anticipated without reference to, but consistent with, article 57.3 based on the host State's asset sharing law and programme; the host State and State of origin are negotiating a case-specific return agreement to supplement an existing permanent confiscation cooperation accord that covers the State of origin.

On 8 March 2023, a U.S. federal trial court in Washington, D.C. entered a final order recognizing and enforcing a 2016 confiscation order from a Curaçao court, aimed at returning approximately \$29.78 million in public corruption proceeds to the Caribbean country that were laundered into several Miami, Florida, investment accounts in the mid- and late-2000s.⁴⁰⁰ The 2016 confiscation order, issued by the Court of First Instance of Curaçao, stems from that court's April 2016 criminal conviction of Robertico Alejandro dos Santos, the beneficial owner of the Miami investment accounts, on charges under Curaçao law of falsification of official records related to dos Santos' public lottery operations, as well as money laundering in furtherance of those offences.⁴⁰⁰ mentioned in Case Example 4, US trial courts are authorized to recognize and summarily enforce foreign courts' restraining orders and final confiscation orders pursuant Title 28, United States Code, Section 2467, adopted in 2000 and amended in 2011. US authorities originally froze the Miami accounts on the behalf of Curaçao in August 2011.

Curaçao is not presently covered by the UNCAC.208 The Curaçao Public Prosecutor sought enforcement of the Curaçao court's order via a formal mutual legal assistance request to the Department of Justice under the United Nations Transnational Organized Crime Convention (UNTOC), under which Curaçao is covered as a constituent country of the Kingdom of the Netherlands.200 Specifically, the prosecutor sought enforcement under the UNTOC's confiscation cooperation provisions in articles 12 and 13. As an alternative, the Curaçao prosecutor might also have sought enforcement of the Curaçao court's confiscation order under a 1992 supplemental mutual confiscation cooperation agreement between the Kingdom of the Netherlands and the United States, which also has provisions for the reciprocal enforcement of asset restraining orders and confiscation orders.

The Curaçao Public Prosecutor's case alleged that dos Santos - half-brother of the former Curaçao Finance Minister George Jamaloodin²¹⁰ - engaged in a large-scale illegal gambling operation on the islands of Curaçao and Sint Maarten between 2004 and 2011. Sint Maarten also is a constituent country of the Netherlands, over which the Curaçao-based regional Attorney General also has criminal jurisdiction. Operating under the trade name "Robbie's Lottery", dos Santos was among a group of private lottery purveyors in those jurisdictions to whom government regulators sell legal lottery licenses. The licenses give the regulators the exclusive right to issue "number lots" to the licensees consisting of officially printed, numbered tickets with identically numbered stubs. The licensees sell the tickets to the public and then return the numbered stubs to the regulators for inspection and record keeping. The types of tickets vary between instant-win scratch-offs and others that allow the buyers to select a multi-digit combination

²⁰⁶ The US enforcement case was styled In re: All Assets Contained or Formerly Contained in Investment Account Numbers R2 67045 37 and R2 61787 at UBS Financial Services, Inc., Held in the Names of Ponsford Overseas Limited and Tula Finance LTD. for the Benefit of Robertico Alejandro dos Santos, et al., 11-Misc.-452 (D.D.C.)(CKK). See "NAF 72.5 Million of Lottery Boss Seized", The Daily Herald, 1 April 2016, https://www.sxmtalks.com/the-daily-herald/naf-72-5-million-of-lottery-boss-seized/ and "Curacao Court Seizes \$40 Million From Lottery Boss", ZIZ News, 3 April 2016, https://zizonline.com/ curacao-court-seizes-40-million-from-lottery-boss/.

²⁰⁷ In the Case Against the Defendant: Robertico Alejandro DOS SANTOS, Public prosecution service office no. 500.00430/12, Judgment given on 1 April 2016 (Judge W.P.M. ter Berg LL.M).

²⁰⁸ According to the Curaçao Attorney General's Office, Curaçao advised the Kingdom of the Netherlands' Council of Ministers that it seeks coverage by the UNCAC, but Curaçao's government must first implement sufficient legislation to comply with the UNCAC's obligations. Once this occurs, the Kingdom can ratify the UNCAC on behalf of Curaçao.

²⁰⁹ See U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs, 2016 International Narcotics Control Strategy Report [INCSR], (Washington, D.C., 2016), https://2009-2017.state.gov/j/inl/rls/nrcrpt/2016/vol2/253394. htm

²¹⁰ See "Insufficient evidence against Robbie dos Santos", *StMaartenNews.com*, 20 December 2019, https://stmaartennews.com/judicial/insufficient-evidence-robbie-dos-santos/.

and wait for a later drawing. Winning ticket holders collect a prize payment from the licensees, who pay from their revenues. The regulator guarantees payment of prize money if a licensee is unable to pay. Licensees pay the regulators a value-added tax and licensing fees, while keeping their profit after paying salaries, rents and expenses.

The Robbie's Lottery trade name was registered to three companies solely owned by dos Santos on Curaçao and Sint Maarten that employed hundreds of workers. Investigators found that, in 2009, dos Santos owned more than \$70 million in cash and assets, vastly exceeding his tax-declared annual income \$67,500. Records showed that dos Santos had laundered a sizeable portion of those assets to the Miami accounts, the nominal owners of which were several companies that dos Santos controlled. The Curaçao prosecutor suspected that dos Santos used the legal lottery structure of Robbie's Lottery to sell large quantities of forged tickets on which he paid no taxes or licensing fees. This yielded substantial illegal profits while violating the government's gambling licensing laws, defrauding the government of its licensing fees and value-added-tax revenues, and defrauding the ticket buyers of their right to a guaranteed payout on their winnings if the lottery purveyor was unable to pay.

The Curaçao court ultimately found dos Santos guilty of falsification of tax forms and bookkeeping records related to his lottery operations, as well as money laundering, including through the use of the accounts he beneficially owned in the United States. The court acquitted dos Santos on one charge of forgery/falsification of lottery tickets. Dos Santos was sentenced upon conviction to two years in prison, and the court ordered numerous of his assets confiscated, including the four investment accounts in Miami.

The US court's March 2023 enforcement order cleared the way for United States and Curaçao to negotiate the return of the assets to Curaçao. Because, as mentioned above, Curaçao is not presently covered by the UNCAC, it might once again rely upon, the UNTOC in seeking return of the dos Santos assets. The UNTOC's asset return provision in article 14, paragraph 2, states that the requested State party,

[w]hen acting on the request made by another State Party in accordance with article 12 [on confiscation and seizure] article 13 [on international confiscation cooperation], shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party, so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

However, as noted earlier, the UNTOC requirements to return assets are discretionary, either via asset sharing to another country in recognition of confiscation cooperation given by that country (in UNTOC art. 14.3(b)), or to compensate victims of crime or legitimate property owners (as per art. 14.2). By contrast, UNCAC article 57 sets forth *mandatory* (albeit varying) requirements on the return of assets *directly to the requesting State party* when appropriate, in particular in subparagraph 57.3(a).^{an} Curaçao might also rely upon the above-mentioned 1992 US-Netherlands confiscation cooperation agreement, which also covers Curaçao.^{an} In its article 7, the bilateral accord provides for discretionary asset sharing between the countries but it does not address victim compensation issues.

In this particular case, it is noteworthy that, if the UNCAC provisions were to apply, the broad definition of "public official" discussed in part II, section E might well encompass Robertico dos Santos based on his role as a licenced purveyor for the Curaçao Government's public lottery. This along with dos Santos' fraudulent appropriation - through his falsification of public records and money laundering - of the Curaçao Government's rightful value-added tax revenues and licensing fees, which were entrusted to dos Santos by virtue of his licensing arrangement, might arguably place his crimes under the rubric of UNCAC article 17 and thereby warrant a mandatory asset return under article 57.3(a). Even if not, given the financial damage the Curaçao Government suffered from its losses of taxes and fees, dos Santos' offences might reliably fall under article 57.3(b), also warranting an asset return.

Given that the UNCAC does not apply directly in this case because the territorial scope of UNCAC has not been extended to Curaçao, Curaçao might nonetheless urge the United States to act in the *spirit* of article 57.3 by returning the confiscated assets to Curaçao through the US domestic asset sharing programme.²⁰ At the time of drafting, U.S. and Curaçao authorities had already commenced discussions about the return of the dos Santos assets to Curaçao.

²¹¹ See also Asset Recovery Handbook, p. 318, fn. 9.

²¹² Agreement regarding mutual cooperation in the tracing, freezing, seizure and forfeiture of proceeds and instrumentalities of crime and the sharing of forfeited assets. TIAS 12482; 2029 UNTS 189 (1992).

²¹³ Foreign confiscation orders that are legally sufficient to warrant summary enforcement by US prosecutors and courts under 28 US Code 2467 provide a strong basis for the US authorities to justify asset sharing pursuant to US international sharing statutes and guidelines, including shares of up to 100 per cent of net confiscated assets in foreign public corruption cases.

Part V.

Approaches and tools for achieving successful confiscated asset returns from abroad

> As is evident in the 16 Case Examples, when dealing with cross-border confiscated asset returns, there are many facts one needs to know about the other State or States involved, no matter on which side of the asset return one happens to be placed.

1. Approaches for country specific research on asset return regimes

In cases in which the requesting State already has sought the enforcement of its confiscation, the requested State usually can draw upon the requesting State's prior assistance requests for much, but not all, of the needed information.24 (For a step-by-step guideline of the asset recovery process up until the confiscation of the asset, see the Lausanne Guidelines: https://learn.baselgovernance. org/course/view.php?id=20) However, in many cases, the requested State confiscates the asset in a self-initiated action, possibly without any prior formal request for asset recovery assistance.²¹⁵ In such cases, both States may well be starting from scratch in researching whether a self-initiated confiscation by the requested State is viable under its laws, and if it is, what legal, procedural, programmatic and international agreement pathways can lead the parties to an eventual asset return.216

In either situation, UNCAC article 57.2 requires a requesting State party to submit – and the host State party to consider – a formal request for the asset's return that must comply with the basic requirements set forth in articles 46 and 55.²⁰⁷ As a practical matter, however, the requested State may have a range of additional valid questions, the answers to which could help determine its legal and diplomatic pathway to an asset return. And for its part, the requesting State party may have its own important questions about the willingness, legal and programmatic capacity, and track record of the requested State party to comply with an asset return request. Starting with the assumption that a foreign asset is already confiscated - whether through joint or self-initiated means - and is otherwise ready to be considered for return,218 - the following are examples of some common questions that a host State, a confiscating State - if not the host - and a State of origin might wish to consider. Both sets of questions aim to address, either directly or indirectly, the array of asset return criteria already detailed in parts II and III of this paper, and the case scenarios detailed in part IV, section 4, that are outside of article 57.3. These criteria relate to the legality, feasibility, avenues, vehicles and potential safeguards for a return. While the guestions potentially can be put by each State to the other, most of them probably can be answered more quickly and efficiently - at least in part, as a basis for opening negotiations - through independent research conducted via open Internet sources, or through closed sources to which a State may already have access as part of an intergovernmental asset recovery or law enforcement network. Negotiations invariably go better and faster when all parties have done some homework to anticipate key questions and concerns of their counterparts.

The following questions start with the assumption that one or more of the States involved in the asset return may not be a State party to the UNCAC, and/or that the circumstances presented by a potential return might fall outside the rubric of article 57.3.

²¹⁴ This is because UNCAC article 46 on mutual assistance and article 55 on confiscation assistance, as well as most other mutual assistance tratises or arrangements, require the requesting country to provide a complete (and preferably concise) account of the factual, legal, procedural and treaty-related background of its case and of how the requested country can assist in the matter. Specifically, article 46, paragraphs 2(G) and 41–16, and article 55, paragraphs 2(G) and 41–16, and article 55, paragraphs 2, 3(G) and 4, collectively require that the request must: [1] be in writing and in translation, if needed; [2] identify the requesting authority and the name and function of the authority conducting the case in the requesting State; [3] describe the subject matter and nature of the case and the facts relevant to it; [4] describe the assistance sought and details of any particular procedure requested to be followed; [5] give the identity, location and nationality of any person concerned; [6] describe the subject for the available, a legally admissible copy of any order upon which the request based. In addition, because article 46, paras. 2[N] and 9[D] permit the requested State to decline assistance, including asset returns that involve the use of its compulsory processes, on the basis of a lack of dual criminality (and dual confiscation viability), the complete texts of any criminal laws violated also should be supplied.

²¹⁵ A review of proceeds of crime return cases, published by the UNODC in its Digest of Recovery Cases in 2015, stated: "In reviewing the cases examined for the Digest, the scarcity of requests for international cooperation based on confiscation orders from the State whose resources were diverted or that suffered harm is notable." p. 82, paragraph 223.

²¹⁶ Starting from scratch may be the case particularly if the requesting State party is confiscating based on a domestic money laundering violation that does need to specify the exact nature of the foreign crimes that generated the assets that were laundered.

²¹⁷States parties that have made prior requests for asset freezing/seizure and/ or confiscation usually can incorporate by reference those prior requests in their supplemental requests for asset returns.

Supplemental requests for asset returns. The only deviation from the request requirement seems to be for cases of "returning [confiscated] property to its prior legitimate owners or compensating the victims of the crime". See article 67.3(c). But even for these cases – as a practical matter – an actionable request from either the owners/victims themselves, or from the State party on their behalf, would be strongly advisable.

²¹⁸ Readying a confiscated asset for return to another country frequently involves any or all of the following, depending upon the exact nature of the asset: liquidating the asset; deducting from the liquidated proceeds the costs of fees paid to external contractors for services including freezing/seizing, returning, maintaining, securing, repairing, renting, assessing, marketing, selling and other tasks related to tangible assets; and identifying, notifying, litigating with and compensating third parties with innocent and viable property claims to the asset.

Potential question from a requested State

1. Is the requesting State a State party to the UNCAC?

- a. If so, has it declared exceptions or reservations to any of the article 15–28, 46, 55 or 57 requirements? If so, what are those exceptions and/ or reservations?
- b. If not, is the requested State a State party to the UNTOC or the 1988 Vienna Drug Convention, in the event the confiscated assets might be eligible for return under the relevant asset return provisions of those conventions.

2. Is the requesting State a party to any bilateral or regional mutual legal assistance and/or confiscation assistance agreement or treaty with the requested State that contains confiscated asset transfer provisions?

3. Does the requesting State's law require an international agreement of some sort with the requested State as a basis for receiving a confiscated asset return? If the requested State requires such an agreement, is the requesting State open to negotiating one?

4. If yes to Question 3 by either State, if a permanent agreement providing for a confiscated asset return is not already in place, what are the requesting State's requirements for an *ad hoc* agreement's contents, negotiation, conclusion and entry into force? Who is/ are the requesting State's appropriate negotiating authority(ies)?

5. As to a specific asset return requested:

- a. Is the asset located in the territory of the requested State?
- b. If not, is the third State that hosts the asset an UNCAC State party?
- c. If not, is/are the third State(s) that host(s) the asset:
 - i. a State party to the UNTOC and/ or the 1988 Vienna Convention?

- a Party to any bilateral or regional mutual legal assistance and/ or confiscation assistance agreement or treaty with the requested and/or the requesting State that contains confiscated asset transfer provisions?
- d. What was the crime committed under the requesting State's jurisdiction that prompts the asset return request?
- e. What are that crime's elements, and possible penalties?
- f. What are the facts of the crime?
- g. Who perpetrated the crime? Is he or she employed by or associated with the requesting State or an international organization; and if so, how?
- h. How do the facts/crime/perpetrator relate to the asset sought for return?
- i. What is the nature of any loss or damage from the crime, as it relates to the asset sought to:
- i. the requesting State?
- ii. any innocent prior owner located in the requesting State? and/or
- iii. any victim(s) of the crime located in the requesting State?
- j. Is the asset sought:
 - i. the proceeds of the crime in the requesting State?
 - ii. an instrument of the crime?
 - a substitute for, or of equivalent value to, such proceeds or instrument? or
 - iv. for application to a value-based judgement of confiscation?
- k. Was any criminal prosecution, conviction or sentencing of the perpetrator conducted in the requesting State, what was the outcome, and were any aspects conducted in the absence of the perpetrator or his or her legal counsel?

- If a conviction occurred as per k. above, was a related convictionbased confiscation ordered for the asset sought for return?
- m. If there is no conviction per k. above, was the asset sought for return confiscated in a non-conviction based proceeding?
- If a confiscation was ordered for the asset sought for return, is that order currently final and no longer subject to appeal?

6. Do the crime, the perpetrator and the asset, considered together, fall within one or more of the offences set forth in UNCAC articles 15 to 25? If so, which one(s), and how?

7 Do the crime, the perpetrator and the asset, considered together, qualify under one or more subparagraphs of UNCAC article 57.3(a) though (c)? If so, which one(s), and how?

8. Which entity(ies) or agency(ies) in the requesting State will receive, control and dispose of a returned asset:

- a. The general treasury, by law?
- b. A legally designated management entity or fund for confiscated assets?
- A government agency(ies) and/or other entity(ies) legally designated for predetermined shares? or
- d. Another agency, entity, official or person, and under what legal authority?

9. What are the accounting and audit controls employed by the entity(ies), agency(ies), and/or person(s) identified in Question 8?

10. Is the requesting State amenable to mutually agreeable measures that differ from those listed above for the receipt, disposition, accounting and/or auditing of the returned assets, based on an unusual quantity or nature of an asset to be returned?

Potential additional questions from a requesting State

1. Is the requested State a State party to the UNCAC?

- a. If so, has it declared exceptions or reservations to any of the requirements of articles 15–28, 46, 55 or 57? If so, what are those exceptions and/or reservations?
- b. If not, is the requested State a State party to the UNTOC or the 1988 Vienna Drug Convention, in the event the confiscated assets might be eligible for return under the relevant asset return provisions of those conventions?

2. If an UNCAC State party, how does the law of the requested State adopt and apply the asset return obligations prescribed by article 57?

- a. As direct and overarching legal authority?
- b. Through implementing or complementary domestic legislation?
- c. Through pre-existing and/or autonomous legislation?
- d. Through programmes authorized via any of the above?

3. What are the requirements and criteria of those laws and/or programmes, if different from, and/or more extensive than, those in article 57?

4. Is the requested State a party to any bilateral or regional mutual legal assistance and/or confiscation assistance agreement or treaty with the requesting State that contains confiscated asset transfer provisions?

5. Does the requested State's law require an international agreement of some sort with the requesting State as a basis for returning a confiscated asset? If the requesting State requires such an agreement, is the requested State open to negotiating one? 6. If yes to Question 5, by either State, if a permanent agreement providing for a confiscated asset return is not already in place, what are the requested State's requirements for an ad hoc agreement's content, negotiation, conclusion and entry into force? Who is the requested State's legally authorized negotiating authority?

7. What is the requested State's record for cross-border confiscated asset returns generally, and proceeds of crime as defined by UNCAC, specifically?

8. For any third State that is hosting an asset requested for return:

- a. What are the answers to Questions 2 through 7 above?
- a. Is the third State amenable to a potent direct return of the asset to the requesting State?

9. As to a specific asset return requested:

- a. If the criminal offence underlying the requesting State's asset retum request is among the seven "shall consider adopting" offences delineated in chapter III of the UNCAC, has the requesting State adopted such an offence?
- b. If so, what is/are the name, elements and possible penalties of the criminal offence in the requested/ confiscating State that most closely corresponds to the facts and criminal law violated in the requesting State?

10. Does the criminal offence described in Question 9 above fall within one or more of the offences set forth in UNCAC articles 15 to 25? If so, which one(s), and how?

11. Is the requested State amenable to mutually agreeable measures that differ from those already established in the requesting State for the receipt, disposition, accounting and/or auditing of the returned assets, based on the quantity or nature of an asset to be returned?

2. Tools for country specific research on asset return regimes

A. UNCAC IRM reports

Probably the best starting point for researching UNCAC States parties is through the detailed written reports generated by the *Mechanism for the Review of Implementation of the United Nations Convention against Corruption* (IRM).²⁰

The IRM is a peer review process among 188 (to date) UNCAC States parties that began in 2009 with the aim of assisting States parties in their implementation of the Convention.200 In its current second review cycle, which began in 2016, the IRM examines the implementation of chapters II (Preventative measures) and V (Asset recovery) of the Convention, and therefore, as to chapter V, provides the most comprehensive overview of measures taken by States parties to recover and return assets. But information contained in reports from the IRM first review cycle, which examines the implementation of chapters III (Criminalization and law enforcement) and IV (International cooperation), can also be of great assistance in answering questions of foundational or contingent importance to asset returns, such as those as to dual criminality and amenability to mutual legal assistance, among others.

The information on both the first and second review cycles and any published documents, including all executive summaries and selected full country review reports, is available for each State party under review at https://www. unodc.org/unodc/en/corruption/country-profile/index. html.²⁰ Note that for the second cycle of the IRM, 77 executive summaries – of an eventual total of 188 – were completed at the time of writing.²⁰ More reviews are being finalized each year and those scheduled for upcoming review in each review year of the second cycle can be identified online.²⁰

Based on 59 executive summaries completed at the time of drafting a thematic report on the implementation of chapter V of the Convention, the general observations of the UNODC include the following regarding article 57:

Some provisions on the return or disposal of assets were in place in most States, although the mandatory and unconditional return in cases of embezzlement of public funds or the laundering of those embezzled funds (art. 57, para. 3 (a)) was not foreseen under domestic legislation in any State. Only one State, from the Group of African States, was found to have legislation stipulating the mandatory transfer to the requesting State of any amount recovered in terms of a final and binding foreign confiscation order, albeit "subject to any agreement or arrangement with the requesting State." In several States, confiscated property could be returned by direct application of the Convention. In all other States, return was usually at the discretion of the competent authorities, while those States in which the Convention was applicable directly indicated that discretion was bound by article 57, paragraph 3(a).224

B. Tools and Resources for Anti-Corruption Knowledge (TRACK) portal

The Tools and Resources for Anti-Corruption Knowledge (TRACK) portal was created as a knowledge management portal focused on the implementation of the Convention.225 It is a unique gateway for accessing information related to corruption and economic crime. TRACK offers a variety of resources arranged by chapter of the Convention (preventive measures, criminalization and law enforcement, international cooperation and asset recovery), as well as by thematic area, including sports, gender, the environment and others. The portal is also conceptualized as a repository for all contributions submitted on a voluntary basis by States parties on the implementation of the Convention and the political declaration adopted at the special session of the General Assembly against corruption, such as on good practices and progress made in the use of international cooperation mechanisms under the Convention. A key element of the TRACK portal is its legal library, which brings together more than 70,000 pieces of anti-corruption legislation from over 180 jurisdictions worldwide. This increased geographical coverage serves to enable judges, prosecutors, policymakers, legal practitioners, researchers and other interested parties to consult legislative provisions

²¹⁹ See https://www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html.

²²⁰ The IRM so far consists of two cycles: the first cycle started in 2010 and reviewed the implementation of chapters III and IV of the Convention; the second cycle started in 2016 and is reviewing the implementation of chapters II and V of the Convention, therefore including information on the implementation of article 57. Each State party – with the exception of the Holy See – undergoes peer review once per cycle, and each review has two outcome documents: a full country review report and an executive summary of the country review report. The Holy See, acting also in the name and on behalf of Vatican City State, specifically reserved the right to consent in each particular case, and on an ad hoc basis, to be subject to any mechanism or body to review the implementation of the Convention which has been established, or which may be established in the future, by the Conference of the States Parties.

²²¹ The full report is confidential unless the State party under review opts to publish it; the executive summary is published in all six official languages of the United Nations when completed.

²²² Notably, financial-centre countries for which IRM second cycle executive summaries, and for some, full review reports, are now available include: Australia, Belgium, France, Germany, Ireland, Liechtenstein, Malaysia, Mauritius, Panama, Saudi Arabia, South Africa, Thailand, the United Kingdom and Uruguay.

²²³ See 2022.11.25 -- Country_pairings_for_the_second_review_cycle.pdf (unodc. org). The IRM first cycle is almost complete, with 175 executive summaries currently available. The second cycle, while ongoing, has been extended to June 2024 due to delays cause in part by the Covid-19 pandemic.

²²⁴ Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption: Thematic report prepared by the Secretariat (CAC/COSP/2021/6), p. 16, para. 60, https://www.unodc.org/documents/treaties/UNCAC/COSP/session9/ CAC-COSP-2021-6/V2107584_E.pdf.

²²⁵ Available at https://track.unodc.org

in different jurisdictions to identify good practices and challenges and to develop model legislation. Currently, the Sharing Electronic Resources and Laws on Crime (SHERLOC)²⁰⁶ and TRACK teams are working together to make the legislation collected through the Mechanism for the Review of Implementation of the United Nations Convention against Corruption accessible in the SHERLOC legislation database under the crime type "Corruption".

SHERLOC also includes an online directory of UNCAC competent national authorities, which allows for easy access to the contact information of competent national authorities designated under the United Nations Convention against Corruption.

C. FATF and FSRB MERs and Follow-Up Reports

Another tool that often can be useful for researching the details of how specific countries are conducting international asset returns, including those covered by UNCAC article 57, are the Mutual Evaluation Reports (MERs) generated by the Financial Action Task Force (FATF)227 and its various FATF-Style Regional Bodies (FSRBs) worldwide.228 Member countries of these multilateral bodies, often with assistance from the World Bank or other international organizations, conduct detailed peer reviews of fellow member countries for their overall compliance with internationally accepted antimoney laundering (AML) and counter financing of terrorism (CFT) standards, which are embodied in the FATF 40 Recommendations²²⁹ and 11 Immediate Outcome standards (IOs).200 These MER reports normally can be easily found by placing "[name of country] Mutual Evaluation Report" into an Internet search engine, which will direct the researcher to the full, searchable text of the reports maintained on either the relevant FATF or FSRB websites.

Among the several FATF recommendations relevant here is Recommendation 36, which admonishes countries to "take immediate steps to become party to and implement fully" the UNCAC [emphasis added], including the asset return provisions of article 57.231 Also directly relevant are Recommendations 4 and 38 and IOs 2 and 8, which each relate in whole or in part to a country's asset confiscation and preliminary freeze or seizure laws and how a country exercises those laws. As explained below in more detail, Recommendations 4 and 38 spell out, among other requirements, threshold legal and procedural standards for asset confiscation and provisional seizure/freezing authorities, both for application in a country's domestic criminal cases and in response to international mutual legal assistance requests in foreign criminal cases. These authorities include a country's mechanisms to provide restitution, international asset sharing, or repatriation of confiscated crime proceeds in appropriate cases. For their part, IOs 2 and 8 spell out criteria for evaluating the effectiveness of a country's application in practice, both domestically and internationally, of the foregoing confiscation and seizure/freezing laws called for by Recommendations 4 and 38.

Because the FATF and FSRBs now assess - beginning with their most recent round of evaluations - the effectiveness of their respective member countries in meeting the AML/CFT standards of FATF, in addition to the traditional assessment of countries' basic technical compliance with the standards, this combined approach can make for particularly helpful findings regarding asset recovery and restoration capabilities of individual countries. These evaluations can be especially valuable when researching countries for which UNODC IRM second cycle executive summaries have not yet been published. Because large portions of MERs are by and large superfluous to asset recovery and restoration topics, readers should look in particular at:

- » Recommendation 4: on a country's legal capabilities to confiscate and dispose of assets located internally and in other countries in their own cases;
- » Recommendation 36: on a country's accession to and degree of implementation of the major United Nations law enforcement conventions and other relevant international conventions;

²²⁶ SHERLOC is another knowledge management portal maintained by the United Nations Office on Drugs and Crime (UNODC) to facilitate the dissemination of information regarding the implementation of the United Nations Convention against Transnational Organized Crime, the three Protocols thereto and the intermational legal framework against terrorism. It is available at: https://sherloc.unodc.org/cld/en/st/ home.html

²²⁷ See generally www.fatf-gafi.org.

 ²²⁸ See generally:
 1. Asia/Pacific Group on Money Laundering (APG) (See also: APG website);
 2. Caribbean Financial Action Task Force (CFATF) (See also: CFATF website);
 3. Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) (See also: Moneyval website);
 4. European Course (FAD) (See also: FAD) (See also: Honeyval website);

 ^{4.} Eurasian Group (EAG) (See also: EAG website);
 5. Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) (See also: ESAAMLG website);
 6. Financial Action Task Force of Latin America (GAFILAT) (See also: GAFILAT website);
 7. Inter Governmental Action Group against Money Laundering in West Africa (GIABA) (See also: GIADA website); (See also: GIABA website);

²²⁹ For the specific FATF recommendations, see FATF, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations (Paris, 2012; Updated 2022).

²³⁰ For FATF "Immediate Outcomes", see https://www.fatf-gafi.org/publications/ mutualevaluations/documents/effectiveness.html

²³¹ Countries also are required by Recommendation 36 to adopt and fully implement the UNTOC and the 1988 Vienna Drug Convention, including their provisions related to proceeds of crime freezing or seizure, confiscation and disposition, including asset sharing and asset return.

- » Recommendation 38: on a country's legal capabilities to give confiscation-related assistance to other countries – including those employing non-conviction based (NCB) confiscation – regarding assets located internally and in other countries; also on a country's capabilities and criteria for sharing confiscated assets with other countries;
- » Immediate Outcome (IO) 8: on a country's effectiveness in bringing and successfully concluding confiscation actions for assets located internally and in other countries; also on a country's capabilities to pay restitution to victims via court proceedings and/ or to repatriate or share confiscated assets with other countries; and
- » Immediate Outcome (IO)2: on a country's effectiveness in facilitating foreign confiscation actions against assets located internally and in other countries; also on a country's ability to manage and to repatriate or share assets confiscated via foreign actions with the confiscating country and other countries.

It is important to note when researching FATF and FSRB Mutual Evaluation Reports that they are limited in scope to a particular country's compliance status at the time of its evaluation within a particular evaluation round. Countries are fully evaluated only once during each round, and each round can last for up to ten or more years depending upon the number of countries that require evaluation within that round, among many other factors. Also, as noted above, only the most recent evaluation rounds (for example, the current fourth round for the FATF itself) assesses a country's effectiveness within the various Immediate Outcomes, in addition to its technical compliance with the 40 Recommendations. This means that a country's most current MER may be as much as ten years old. However, if a country, during its latest mutual evaluation, is rated as either "Non-Compliant" (NC) or "Partially Compliant" (PC) for any of the 40 recommendations, or as "Low" or "Moderate" on any of its effectiveness ratings, it often will need to submit annual "follow-up" reports to the FATF or its respective FSRB Secretariat, noting its progress (or lack thereof) on that particular recommendation or IO. Consequently, researchers interested in a country's more current ratings status on Recommendations 4, 36, or 38, or IOs 2 or 8 specifically, beyond its most recent full MER, can look for any annual follow-up reports the country may have filed noting its progress on these aspects of its compliance. Such followup reports usually are listed together with the MERs on the FATF and FSRB websites. Note that, for those exploring a country's asset recovery and its asset return capabilities in hopes of obtaining the country's assistance in an active and potentially pressing conviction-based or non-conviction based confiscation case, it is the details to be gleaned about those capabilities that are most important, not the evaluative ratings themselves.

Recent FATF focus on asset recovery

In June 2021, the FATF Secretariat issued an unpublished report of findings from its first focused look in a decade at the topic of asset recovery and how it is evaluated under the FATF process. Entitled *Operational Challenges Associated with Asset Recovery*,²²² the report is based on evaluation findings of 106 countries and jurisdictions and emphasizes the importance of jurisdictions having necessary instruments in place – as part of full compliance with the three specific FATF Recommendations and two Immediate Outcomes referenced above – to support the practice of cross-border confiscation and repatriation. With specific regard to asset returns, the report noted that, even in the presence of domestic legislation implementing the requirements of multilateral law enforcement conventions:

Sometimes jurisdictions refuse to acknowledge and execute confiscation orders, or lack the authorization to do so, if bilateral agreements are not in place. Having a bilateral agreement in place can be particularly important for the repatriation phase, when issues arise such as the proportion of assets returned to respective jurisdictions, how the costs associated with property management will be attributed, and what happens should victims or third parties seek compensation. At the same time, a case-specific agreement covering these points is also often necessary... UNTOC[,] and UNCAC for corruption offenses[,] provide a legal basis for the repatriation of confiscated property in cross-border cases involving jurisdictions that do not have bilateral agreements in place. Submissions by jurisdictions during the first phase of [the current FATF Fourth Round of] evaluations found that this can be a useful basis for asset sharing and repatriation in cross-border cases, but additional case-by-case agreements are generally necessary to cover specificities such as how the costs associated with legal challenges and asset management may be covered.233

 ²³² Operational Challenges Associated with Asset Recovery, FATF Risks, Trends, and Methods Group 16 June 2021, Virtual Meeting, FATF/RTMG (2021)17/REV2 (4 June 2021), (hereafter: FATF Operational Challenges Report).
 233 FATF Operational Challenges Report, p. 18.

D. Asset recovery guides

The StAR Initiative referred to in part I, section B also has compiled to date a series of concise Asset Recovery Guides for 29 countries, some of which address details of the respective countries' asset disposition and restoration processes as well as other useful information in this regard. Some of these reports are provided in multiple languages, and some have supplemental materials that can be relevant to asset return procedures. These reports can be found at https://star.worldbank.org/publications.

E. Other open publications sources

There are other open online information sources that are less targeted than those above but are nonetheless helpful, particularly those published by many national governments. More and more, governments are publishing online full texts of their criminal codes and criminal procedure codes, among other laws, sometimes in several languages. These sources also increasingly provide texts of regulations, programme descriptions, policy guides, listings of a country's treaty and international agreement relationships, expert policy and analysis papers and many other useful official publications. Multilateral governance bodies, such as the EU and the Council Europe, to name just two, also share official publications online akin to those provided by national governments.

Likewise, international organizations, such as the United Nations, the World Bank Group, the Organization of American States, as well as non-governmental organizations, such as Transparency International, provide highly useful online publications on asset recovery and return, a number of which are referenced in this paper. And finally, academic and law journal publications worldwide are now easily accessed via the Internet and often can provide targeted materials on trends and developments in the asset recovery realm.

F. Law enforcement informal cooperation networks

i. Asset Recovery Interagency Networks (ARINs)

The June 2021, FATF Operational Challenges Report referenced above has observed:

While there is no acute need for new legal instruments on international co-operation on asset recovery, there is room for a **strengthened**, **more expeditious way of executing the existing agreements and exchanging information...** Several informal practitioner networks exist to support informal co-operation and facilitate MLA requests on asset recovery... The primary group of networks involved in this work is [the] CARIN, and the ARINs, which bring together both law enforcement and judicial contact points.²³⁴

The Western Europe-based Camden Asset Recovery Interagency Network (CARIN) and its seven regional Asset Recovery Inter-agency Network (ARIN) offshoots, form interconnected and informal collectives of law enforcement and judicial/prosecutorial contacts from 164 countries. ²³⁵Each participating country provides two representatives to its network: one from law enforcement and one a judicial or prosecutorial official, both with direct, working level experience in cross-border proceeds of crime recovery investigations and prosecutions. These two-person teams assist their network partners with information and other expert contacts on investigations, asset freezing or seizure and management, confiscation proceedings, asset disposal and other related topics. They also serve as their respective countries' points of contact for enabling their domestic colleagues to obtain timely asset recovery assistance through the various networks. The eight networks are interlinked through their respective secretariats, allowing

²³⁴ Ibid. pp. 68-70.

²³⁵ Ibid. The CARIN has 61 participating jurisdictions covering most of Europe and Canada, Russia and the United States. The offshoots, ARINs, cover Southern, Eastern and Western Africa, Asia Pacific, West and Central Asia, the Caribbean and Latin America. Some jurisdictions are members of more than one network based on their regional priorities. The eight networks include:

America. Some jurisdictions are members of more than one network based on their regional priorities. The eight networks include: 1. Camden Asset Recovery Inter-agency Network [CARIN] [https://www.carin.network] 2. Asset Recovery Interagency Network – Asia Pacific (ARIN-AP) [http://www.arin-ap. org]

org) 3. Asset Recovery Inter-Agency Network for the Caribbean (ARIN-CARIB) (https://arincarib.org/)

Asset Recovery Inter-Agency Network for East Africa (ARIN-EA) (https://eaaaca.com/ about-arinea)
 Red de Recuperación de Activos de GAFILAT (RRAG) (https://www.aafilat.org/index.

php/es/espanol/18-inicio/gafilat/49-red-de-recuperacion-de-activos-del-gafilat-rrag) 6. Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) [https://new. arinsa.org/]

armsa.org/) 7. Asset Recovery Inter-Agency Network for West Africa (ARIN-WA) [https://www.unodc. org/westandcentralafrica/en/launch-the-asset-recovery-network-arinwa.html); and 8. Asset Recovery Inter-Agency Network in West and Central Asia (ARIN-WCA) https:// www.unodc.org/rpanc/en/Sub-programme-2/the-asset-recovery-inter-agencynetwork-in-west-and-central-asia-is-becoming-real.html].

their participants to share their knowledge and exchange case-specific intelligence, operational details and litigation information and strategies through established means.

The CARIN and ARIN judicial and prosecutorial representatives, in particular, often have direct access to information and domestic contacts on confiscated asset return options by their respective countries for the full range of criminal cases, including foreign public corruption. They therefore can provide an important resource or initial point of contact for obtaining such country-specific information.

ii. The Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE Network)

UNODC's Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE Network) provides a platform for peer-to-peer information exchange and informal cooperation to better identify, investigate and prosecute cross-border corruption offences and recover stolen assets. Launched in 2021, the GlobE Network is open to specialized authorities as referred to in article 36 of the Convention (anti-corruption law enforcement authorities) from all United Nations Member States and States parties to the Convention.²⁰⁰

G. Examples of asset return agreements

This paper provides as examples three actual bilateral corruption asset return agreements and one trilateral agreement, in addition to a link for a second trilateral agreement. An additional example of a trilateral agreement between the Governments of Switzerland, the United States and Kazakhstan - can be found at https://2009-2017.state. gov/documents/organization/108887.pdf. These agreements have been intentionally selected for inclusion in this paper because they range in their terms from relatively simple to very complex. Such past agreements can be very useful for those tasked with drafting the terms of future agreements of this kind. Because countries that are parties to such agreements often either choose to make them public or are required by their laws to do so, Internet searches are likely to be increasingly useful in the future for locating a range of appropriate additional agreement texts.

²³⁶ See https://globenetwork.unodc.org/globenetwork/index.html.

Concluding observations

The Convention provides States parties with a sound basis for cooperation and for successful asset recovery and return. With article 51 establishing the return of assets as a fundamental principle of the Convention, the crucial importance of asset return to successfully fighting corruption has been underscored. By examining article 57 in detail, the present paper aims to contribute to a better understanding of the rights and obligations established through the Convention. By highlighting recent asset returns, it showcases successful examples of cooperation and highlights the progress made in asset return since the entry into force of the Convention. In addition, the detailed case reports enable practitioners to draw on past experiences and apply lessons learned, examining whether any of the approaches used in the past in similar situations would be beneficial in their cases.

While asset return is the last phase of asset recovery, it is important to take asset return considerations into account from the very outset. By doing so, reviewing the host State's legislative framework in detail, and examining the options available for international cooperation, practitioners are able to adjust their case strategy to give themselves the best chance for successful asset return.

Practitioners will be able to use the list of questions and resources provided in part, V, section 1, of this paper as a starting point, thereby giving themselves the best chance at successful asset return is at the front and centre of their efforts right from the start.

It is the sincere hope that the information and analysis in this paper, along with the many useful resources on which it relies, will help to advance a key mission of the United Nations Convention against Corruption – to return confiscated proceeds of crime to their countries of origin to best serve the welfare of the citizens of those countries.

Appendix 1.

Agreement between the Swiss Confederation, the Republic of Peru and the Grand Duchy of Luxembourg on the transfer of seized assests

237 Available at: https://www.newsd.admin.ch/newsd/message/attachments/65249.pdf

The Swiss Confederation, the Republic of Peru and the Grand Duchy of Luxembourg (hereinafter the "Parties")

WELCOMING their cooperation in the fight against corruption at the national and international levels;

UNDERLINING that this cooperation has led between 2002 and 2006 to the restitution from the Swiss Confederation to the Republic of Peru of assets illicitly acquired by the criminal organisation led by Vladimiro Montesinos Torres totalling USD 93 million;

CONSIDERING that the authorities of the Grand Duchy of Luxembourg and of the Swiss Confederation have offered judicial cooperation to the Peruvian State in the seizure of further assets which were deposited in their territories and which were derived from acts of corruption in Peru committed by members of the criminal organisation led by Vladimiro Montesinos Torres;

RECALLING the letter dated 16th June 2016 of the Peruvian Minister of Justice and Human Rights manifesting the interest of the Peruvian State in conducting a dialogue with the Swiss Confederation within the framework of Article 57, paragraph 5, of the United Nations Convention against Corruption, as well as the letter dated 4th July 2016 of the Head of the Federal Department of Justice and Police indicating the willingness of the Swiss Confederation to conduct such a dialogue;

RECALLING that, by judgment number 1754/2016 of 9th June 2016, the 18th Criminal Court of the Luxembourg District Court ordered enforceable in the Grand Duchy of Luxembourg the decision of 25th June 2015 of the first criminal court charged to conclude procedures followed under the old Code of Criminal Procedures (ref.: TRA No. TS0145.15) to the extent that it orders confiscation of assets (balances and interests) specified therein;

WELCOMING the creation, by the Supreme Resolution No. 120-2017-RE dated 20th April 2017 of the Republic of Peru (Annex 1 to this Agreement), of the Multisectorial Working Group in Charge of the Repatriation of Assets Derived from Unlawful Activities in the Swiss Confederation and in the Grand Duchy of Luxembourg, whose mandate was extended in its duration by the Supreme Resolution No. 102-2019-RE dated 22nd June 2019 (Annex 2 to this Agreement); **RECOGNISING** the Parties' common goal of recovering the assets on behalf of those affected by the criminal conduct that motivated the seizures, including the Peruvian State and its population;

UNDERTAKING to use the recovered assets in a transparent and proper manner for the benefit of the Peruvian State and its population, in accordance with Article 57 of the United Nations Convention against Corruption, with the Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases of the Global Forum on Asset Recovery, which neither infringe national sovereignty nor domestic principles of law, as well as with Goals 16.4, 16.5 and 16.6 of the 2030 Agenda for Sustainable Development;

have agreed the following:

Article 1

- The Grand Duchy of Luxembourg shall transfer to the Peruvian State, through a sole payment to the Programa Nacional de Bienes Incautados (National Seized Property Program; hereinafter: "PRONABI"), fund manager of the Republic of Peru, the sum of EUR 9'719'670.74 which represents one hundred per cent of the assets plus the interest accrued available for restitution derived from two bank accounts confiscated by authorities of the Grand Duchy of Luxembourg in connection with the criminal organisation led by Vladimiro Montesinos Torres.
- 2. The Swiss Confederation shall transfer to the Peruvian State, through a sole payment to the PRONABI, fund manager of the Republic of Peru, the sum of USD 16'380'538.54 which represents one hundred per cent of the assets available for restitution derived from three bank accounts seized by authorities of the Swiss Confederation in connection with the criminal organisation led by Vladimiro Montesinos Torres, plus the interest accrued over time.
- 3. The assets shall be transferred by the Grand Duchy of Luxembourg and the Swiss Confederation to the PRONABI account No. 06-068-002166 "MEF-DGETP-PRONABIOTRAS REPATRIACIONES", opened at the Banco de la Nación, within ten weeks from the entry into force of this Agreement for the Swiss Confederation and the Grand Duchy of Luxembourg respectively.

Article 2

Once the Republic of Peru has received the transferred assets, it shall dispose of them in accordance with the following priorities:

- A. The Peruvian State and its population shall benefit from the transferred assets through the financing of projects in the sectors of the protection of the Rule of Law, the fight against corruption and the fight against transnational organised crime;
- B. The institutions involved in the protection of the Rule of Law, the fight against corruption and money laundering, the seizure of assets, the fight against organised crime, and international judicial cooperation shall be strengthened. To this end, the assets transferred in accordance with Article 1 of this Agreement shall finance initiatives in these sectors, through the following projects, or as otherwise agreed upon by the Parties through formal communication by diplomatic channels:
- » Strengthening the Fight of the Judiciary against Corruption and Organized Crime (see the Fact sheet; Annex 3 to this Agreement);
- » Strengthening the Fight of the Public Prosecutor against Corruption and Organized Crime (see the Fact sheet; Annex 4 to this Agreement); and,
- » Strengthening the Fight of the Ministry of Justice and Human Rights (MINJUSDH) against Corruption and Organized Crime (see the Fact sheet; Annex 5 to this Agreement).
- C. The institutions which shall benefit from the projects financed by the transferred assets are the following: the Judiciary, the Public Prosecutor (the Public Prosecutor Office of Peru), and the Ministry of Justice and Human Rights.
- D. The focal point of each project, complemented by a PRONABI collaborator, form a technical working group. The mission of the technical working group is to accompany the implementation of the projects. In this sense, the technical working group shall contribute to ensuring quality, effectiveness, efficiency and sustainability, as well as to identifying and taking

advantage of possible synergies and complementarities. The technical working group also facilitates and harmonises, where possible and appropriate, reporting in accordance with Article 6 of this Agreement. The technical working group shall hold regular internal meetings as well as regular exchanges with the Parties at least once per year.

E. At the request of the Republic of Peru, the Swiss Confederation may support the entities implementing the projects in accordance with Article 2 of this Agreement or the technical working group with technical assistance.

Article 3

Without prejudice to the provisions of this Agreement, once the transfer has been carried out, the Grand Duchy of Luxembourg and the Swiss Confederation shall renounce all rights, titles and legal claims, and shall not assume any liability, with respect to the transferred assets. All rights, titles and legal claims rest with the Peruvian State which assumes all responsibilities with respect to the transferred assets.

Article 4

The Parties recognise that all rights, titles and legal claims to the transferred assets have already been adjudicated and that, therefore, no legal proceedings are necessary to that effect.

Article 5

The Parties agree that the transferred assets shall not be released in favour of, or made available to:

- a. any person whose assets have been seized or confiscated, or
- b. any person who is linked to crimes committed by the criminal organisation led by Vladimiro Montesinos Torres, or
- c. the heirs, associates or assignees of the abovementioned persons.

Article 6

1. The Parties share a common interest in good governance

and transparency of public affairs, as well as in the proper use of the transferred assets.

- 2. The transferred assets, which finance the projects in accordance with Article 2, paragraph B, of this Agreement, shall be treated as Peruvian public funds. All provisions of Peruvian law applicable to public funds shall apply to the transferred assets.
- 3. The entities implementing the projects in accordance with Article 2, paragraph B, of this Agreement shall prepare periodic annual reports for each project, consisting of a financial utilisation report, as well as a narrative report, detailing the activities undertaken and describing the progress made in relation to the objectives of the project, including challenges and constraints.
- 4. The entities implementing the projects in accordance with Article 2, paragraph B, of this Agreement shall submit their periodic reports to PRONABI within the first fifteen days of each calendar year. Once these periodic reports have been examined, PRONABI shall consolidate them into annual reports, which shall be published on the PRONABI website within the first four months of each calendar year.
- 5. The Comptroller General Office of the Republic of Peru shall exercise its governmental control functions, in accordance with Peruvian law, with respect to the entities implementing the projects in accordance with Article 2, paragraph B, of this Agreement, and the implementation of the projects as such, as well as with respect to PRONABI. The beneficiary entities shall request the Comptroller General Office of the Republic of Peru to designate an auditing firm for an annual financial audit. Within the framework of Peruvian law, the Comptroller General Office of the Republic of Peru may also commission an external audit ex officio or at the suggestion of one of the Parties.

The Comptroller General Office of the Republic of Peru shall propose preventive and corrective actions that are necessary for a good implementation of the projects so that the beneficiary entities adopt them, in accordance with Peruvian law.

The Comptroller General Office of the Republic of Peru shall

publish in due time on its website the annual financial audits and its reports concerning the projects in accordance with the provisions of the Peruvian national control system.

Article 7

This Agreement is concluded for the sole purpose of cooperation between the Parties. It does not create any rights in favour of any natural or legal person.

Article 8

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by consultations between the Parties through diplomatic channels.

Article 9

- In accordance with this Agreement and Peruvian law, the Republic of Peru shall make public the projects selected for the use of the transferred assets referred to in Article 2 of this Agreement.
- 2. This Agreement may be made public by the Parties in accordance with the conditions set forth in their national law.
- 3. Annexes 1 to 5 are an integral part of this Agreement.

Article 10

- The Swiss Confederation expresses its consent to be bound by this Agreement by affixing its signature. The consents of the Republic of Peru and the Grand Duchy of Luxembourg are subject to the completion of the procedures required by their respective legal systems.
- 2. The Republic of Peru and the Grand Duchy of Luxembourg shall notify the other two Parties, by diplomatic note, of the completion of their respective procedures. Upon receipt of each of these notifications, the two receiving Parties shall confirm the date of receipt, by diplomatic note, to the other two Parties.
- 3. This Agreement shall enter into force on the thirtieth day following the last date of receipt of the notifications of the Republic of Peru and the Grand Duchy of Luxembourg.
- 4. Notwithstanding paragraph 3, this Agreement shall already enter into force for the Swiss Confederation

and the Republic of Peru on the thirtieth day following the date of receipt by the Swiss Confederation of the notification of the Republic of Peru, if this date of receipt is earlier than the last date of receipt of the notifications of the Republic of Peru and the Grand Duchy of Luxembourg. In this case, the Agreement shall enter into force for the Grand Duchy of Luxembourg on the thirtieth day following the last date of receipt by the other Parties of the notification of the Grand Duchy of Luxembourg.

5. The Republic of Peru shall confirm to the other two Parties, by diplomatic note, the date of entry into force of this Agreement.

IN WITNESS THEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Signed in three originals, each in the English, Spanish and French languages, all versions being equally authentic.

For the Swiss Confederation

Bern, _____[dated]_____

_____[signed]_____

For the Republic of Peru

Lima, _____[dated]_____

_____[signed]_____

For the Grand Duchy of Luxembourg

Luxembourg, _____[dated]_____

____[signed]_____

Annexes:

- » Annex 1: Supreme Resolution No. 120-2017-RE dated 20th April 2017
- » Annex 2: Supreme Resolution No. 102-2019-RE dated 22nd June 2019
- » **Annex 3:** Fact sheet (Strengthening the Fight of the Judiciary against Corruption and Organized Crime)
- » Annex 4: Fact sheet (Strengthening the Fight of the Public Prosecutor against Corruption and Organized Crime)
- » Annex 5: Fact sheet (Strengthening the Fight of the Ministry of Justice and Human Rights (MINJUSDH) against Corruption and Organized Crime)

Annex 1

Supreme Resolution No. 120-2017-RE dated 20th April 2017 [Only available in Spanish]

Annex 2

Supreme Resolution No. 102-2019-RE dated 22th June 2019 [Only available in Spanish]

Annex 3

Fact sheet - Project of the Judiciary

Project title	Strengthening the Fight of the Judiciary against Corruption and Organized Crime
Country	Peru
Lead	·

In Peru, the identification, investigation and timely punishment of cases of corruption and organized crime has become increasingly complex. This weakens the State and causes distrust and dissatisfaction among citizens towards the public institutions.

In this context, the project will contribute to strengthening the institutional capacity of the Judiciary (Poder Judicial), as well as increasing the level of interoperability and coordination in the Justice Administration System (Sistema de Administración de Justicia), in order achieve greater effectiveness in the fight against corruption and organized crime in the country.

the country.	
Context	Overall goal
There is insufficient institutional capacity in the Judiciary and little articulation between the entities of the Justice Administration System to implement effective policies in the fight against corruption and organized crime.	Citizens have access to modern, efficient and predictable justice
Baseline	Outcomes
In the ranking of the Corruption Perception Index 2018, developed by the NGO Transparency International, Peru dropped 9 positions and figures on place 105 of 180 countries.	The Judicial Organs (Órganos Jurisdiccionales) of the National Superior Court of Specialized Criminal Justice (Corte Superior Nacional de Justicia Penal Especializada) operate more effectively and efficiently to resolve cases involving corruption and organized crime.
Key outputs	Target groups
 The judges (jueces) and judicial auxiliaries (auxiliares de justicia) of the National Superior Court of Specialized Criminal Justice have the knowledge to try and resolve complex cases in the fight against corruption and organized crime. The judges and judicial auxiliaries of the National Superior Court of Specialized Criminal Justice have informative and analytical material in the fight against corruption and organized crime. The judges of the National Superior Court of Specialized Criminal Justice have an electronic catalog of criteria (judgments) to resolve their cases (systematization). The judges and judicial auxiliaries of the National Superior Court of Specialized Criminal Justice work with a standardized process management model. The Judicial Organs of the National Superior Court of Specialized Criminal Superior Court of Specialized Criminal Justice work with a standardized process management model. 	 Users (usuarios) of the Justice Administration System in matters of corruption and organized crime. Operators (operadores) of the System of Administration of Justice in matters of corruption and organized crime, of the Judiciary, the Public Prosecutor (Ministerio Público) and the National Police of Peru (Policía Nacional del Perú). Professors, university students and researchers in the field of the fight against corruption and organized crime. Judges and judicial and administrative auxiliaries (auxiliares jurisdiccionales y administrativos) of the Judiciary. Citizens in general.

Or antication and surrouting with other ansiests and		
Contract partner/s	Coordination and synergies with other projects and actors	
1. Ministry of Justice and Human Rights (Ministerio de Justicia y Derechos Humanos) – MINJUSDH.	Other cooperation agencies: World Bank (WB) and Inter-	
2. Public Prosecutor – Prosecutor of the Nation (Ministerio	American Development Bank (IADB).	
Público – Fiscalía de la Nación, MP – FN), particularly	Other national actors: Ministry of Economy and Finance	
the Office of International Judicial Cooperation and Extraditions (Unidad de Cooperación Judicial	(Ministerio de Economía y Finanzas, MEF), Academy of the Magistrates (Academia de la Magistratura, AMAG), National	
Internacional y Extradiciones) and Prosecutor's	Board of Justice (Junta Nacional de Justicia, JNJ),	
Offices Specialized in Crimes of Corruption of Officials	Constitutional Court (Tribunal Constitucional, TC).	
(Fiscalías Especializadas en Delitos de Corrupción de Funcionarios).		
Start of project	End of project	
As from the first installment delivered to the Judiciary.	Four years after the first installment delivered to the Judiciary.	
Budget		
The total estimated budget for the Project corresponds to the sum of the following amounts:		
» USD 5'460'179		
» EUR 3'239'890		
For information purposes only:		
The approximate equivalent in Peruvian soles of the total estimated budget for the Project is:		
» Approximately PEN 30'147'312		

238 Amount estimated in consideration of the exchange rate PEN/USD: 3.33 (Source: "Marco Macroeconómico Multianual 2020-2023" of the Ministry of Economy and Finance of Peru) and the exchange rate PEN/EUR: 3.693 (Source: Average for the month of January 2020 as calculated by the Central Reserve Bank of Peru).

Annex 4

Fact sheet – Project of the Public Prosecutor

Project title	Strengthening the Fight of the Public Prosecutor against Corruption and Organized Crime
Country	Peru
Lead The Public Prosecutor (Ministerio Público) contributes to strengthening the rule of law of the country and executes criminal action in crimes of corruption and organized crime. The Project will contribute to the timeliness of investigation processes, improving the technical and professional capacities of the prosecutors (fiscales), experts and administrative staff (peritos y personal administrativo) of the Public Prosecutor, modernizing the organizational management.	
Context	Overall goal
The Corruption Perceptions Index of 2018, prepared by Transparency International, placed Peru in the 105th position of 180 countries1. Since the entry into force of the Criminal Procedure Code, the Public Prosecutor has strengthened its leadership in the task of fighting corruption and organized crime, thus improving institutional management.	The Public Prosecutor shall have strengthened institutional capacities in the criminal process, in order to have modern and quality organizational management.
Baseline	Outcomes
Baseline [2018]: 94% of files handled ²⁰⁰ by the Specialized Prosecutors (Fiscalías Especializadas) Against Organized Crime, Corruption of Officials, Money Laundering, Non- Conviction Based Forfeiture and Human Trafficking Crimes, present difficulties in complying with the deadlines established by the Criminal Procedure Code. ²⁰⁰	The Specialized Prosecutors Against Organized Crime, Corruption of Officials, Money Laundering, Non-Conviction Based Forfeiture and Human Trafficking Crimes will investigate claims in the fight against corruption and organized crime with greater effectiveness and efficiency.
Key outputs	Target groups
 Specialized Prosecutors shall have adequate information systems and technological support to deal with claims in the fight against corruption and organized crime. 	 Main actors: i. Specialized Prosecutors in Money Laundering; ii. Specialized Prosecutors in Nonconviction based forfeiture;
2. The Specialized Prosecutors (Fiscales Especializados) in the fight against organized crime and corruption of officials increase their capacities concerning investigation against organized crime, corruption of officials, money laundering, nonconviction based forfeiture and human trafficking crimes.	 iii. Specialized Prosecutors in Crimes of Corruption of Officials; iv. Specialized Prosecutors in Organized Crime; v. Specialized Prosecutors in human trafficking crimes.
 3. The Office of Forensic Analysis (Oficina de Peritajes) has adequate logistical capacity to carry out its functions. 4. The Office of International Judicial Cooperation and Extraditions (Oficina de Cooperación Judicial Internacional y Extradiciones) has adequate facilities 	vi. Office of International Judicial Cooperation and Extraditions; vii. Office of Forensic Analysis; viii. Public Prosecutor School (Escuela del Ministerio Público).
and specialized capacities for asset recovery.	Secondary Actors:
5. The personnel of the Specialized Prosecutors in the fight against organized crime and corruption of officials, and administrative personnel of the management (personal administrativo de las gerencias), have appropriate capacities to carry out their functions.	 i. Judiciary (Poder Judicial). ii. Ministry of Justice and Human Rights (Ministerio de Justicia y Derechos Humanos).

239 Statistical Yearbook of the Public Prosecutor 2018 - ORACE.240 Approved by Legislative Decree 957.

Contract partner/s	Coordination and synergies with other projects and actors	
1. Ministry of Justice and Human Rights (Ministerio de Justicia y Derechos Humanos) – MINJUSDH.	- Inter-American Development Bank	
 Public Prosecutor – Prosecutor of the Nation (Ministerio Público – Fiscalía de la Nación, MP – FN), particularly the Office of International Judicial Cooperation 	- Judiciary	
	- Ministry of Justice and Human Rights	
and Extraditions (Unidad de Cooperación Judicial Internacional y Extradiciones) and Prosecutor's Offices Specialized in Crimes of Corruption of Officials (Fiscalías Especializadas en Delitos de Corrupción de Funcionarios).	- Basel Institute on Governance / International Center for Asset Recovery (ICAR)	
Start of project	End of project	
As from the first installment delivered to the Public Prosecutor.	Three years after the first installment delivered to the Public Prosecutor.	
Budget		
The total estimated budget for the Project corresponds to the sum of the following amounts:		
» USD 5'460'179		
» EUR 3'239'890		
For information purposes only:		
The approximate equivalent in Peruvian soles of the total estimated budget for the Project is:		
» - Approximately PEN 30'147'312		

241 Amount estimated in consideration of the exchange rate PEN/USD: 3.33 (Source: "Marco Macroeconómico Multianual 2020-2023" of the Ministry of Economy and Finance of Peru) and the exchange rate PEN/EUR: 3.693 (Source: Average for the month of January 2020 as calculated by the Central Reserve Bank of Peru).

Annex 5

Fact Sheet – Project of the Ministry of Justice and Human Rights

Project title	Strengthening the Fight of the Public Prosecutor against Corruption and Organized Crime
Country	Peru
Lead	
Corruption and organized crime generate a high level of distrust and dissatisfaction amongst the citizens toward political institutions and their representatives. This distrust and lack of commitment of State policies erode the State's legitimacy and cause severe institutional weakness in Peru. The Project will improve the MINJUSDH's capacities to arrange and coordinate with entities involved in the fight against corruption and organized crime, in order to achieve effective interoperability. This goal will be achieved by strengthening the capacities of public servants (servidores públicos), improving information, and applying strategies under a systematic approach and the optimization of the institution's operational capacity.	
Context	Overall goal
Coordination between justice operators is scarce. As a consequence, the work of the entities in charge of preventing, overseeing, investigating and sanctioning corruption are not adequately articulated. The degree of information on corruption is uneven. It has not been standardized or systematized, which hinders the design and implementation of policies, plans, programs and projects with impact. Moreover, the mechanisms of control, transparency and access to information on corruption are inefficient. Capacities must be developed to strengthen the fight against corruption by means of far-reaching, specialized training programs.	To ensure the availability of systematized information and enable the development of efficient and effective strategies to fight corruption and organized crime by means of an articulated approach of the State with the actors of the Justice Administration System (Sistema de Administración de Justicia). To implement a comprehensive training system in public ethics, as well as in prevention and anticorruption processes, aimed at consolidating a culture of values within the Justice and Human Rights Sector (Sector Justicia y Derechos Humanos).
Baseline	Outcomes
 Corruption Perceptions Index 2018 by the Transparency International NGO. Peru drops 9 points in the ranking and ranks 105th out of 180 countries. Global Competitiveness Index 2018 by the World Economic Forum. Peru ranks 63rd out of 140 countries 	The MINJUSDH strengthens its operational and technical capacities to design and implement strategies for the prevention and fight against corruption and organized crime, with the aim of improving Peru's position in the Corruption Perceptions

Key outputs

- 1. The MINJUSDH promotes the implementation and monitoring of anticorruption policies, disciplinary control and ethics within the framework of the Council for the Reform of the Justice System (Consejo para la Reforma del Sistema de Justicia).
- 2. The National Seized Property Program (Programa Nacional de Bienes Incautados, PRONABI) manages and disposes of property seized on grounds of crimes of corruption in a more effective manner by strengthening its operational capacities.
- 3. The Office for Integrity and Fight against Corruption (Oficina de Integridad y Lucha contra la Corrupción, OILC) has established a culture of integrity and ethics to prevent and fight corruption, and has implemented institutional processes and controls suitable for an Integrity and Compliance Model (Modelo de Integridad y Cumplimiento), and has promoted the Internal Control System by implementing transparency measures.
- 4. The Technical Secretariat for the Implementation of the New Code of Criminal Procedures (Secretaría Técnica de Implementación del Nuevo Código Procesal Penal, STNCPP) optimizes, provides methodological tools and strengthens the capacities of the operators (operadores) of the Justice Administration System (the Judiciary (Poder Judicial), the Public Prosecutor (Ministerio Público), the National Police Forces (Policía Nacional) and Public Defense (Defensa Pública)) on matters related to criminal justice, with focus on crimes of corruption committed by public officials and organized crime.
- 5. The Center for Studies on Justice and Human Rights (Centro de Estudios en Justicia y Derechos Humanos, CEJDH) improves its training services and promotes a culture of values in the Justice and Human Rights Sector.
- 6. The State Attorney General's Office (Procuraduría General del Estado) strengthens the technical and operational capacities of the State Attorney's Office (Procuraduría Pública) specialized in Crimes of Corruption, the State Attorney's Office specialized against Organized

Crime and the Attorney General's Office specialized in Extinction of Ownership.

Target groups

- 1. Users (usuarios) of the Justice Administration System in matters related to corruption and organized crimes.
- 2. Operators of the Justice Administration System in matters related to corruption and organized crime, of the Judiciary, the Public Prosecutor, and the National Police Forces.
- 3. Operators of the Justice Administration System in matters related to corruption and organized crime, of the MINJUSDH: the PRONABI, the State Attorney's Office Specialized in Crimes of Corruption, the Office for Integrity and Fight against Corruption, and the Center for Studies on Justice and Human Rights.
- Professors, university students and researchers on matters related to the fight against corruption and organized crime.
- 5. MINJUSDH officials (servidores).
- 6. Other public and private institutions.
- 7. Citizens in general.

Contract partner/s	Coordination and synergies with other projects and
As part of the joint efforts made at State level, and to seek interoperability, the strategic partners will include the National Superintendence of Tax Administration (Superintendencia Nacional de Administración Tributaria, SUNAT), the Superintendency of Banks and Insurance (Superintendencia de Bancos y Seguros, SBS), the National Registry of Identification and Civil Register(Registro Nacional de Identificación y Estado Civil, RENIEC) and, for training activities, the Academy of Magistrates (Academia de la Magistratura), as well as other national and international entities that contribute to achieve the objectives of this Project. Agreements will be signed between the Project's participating entities.	actors Cooperation institutions: Coordination with the Inter-American Development Bank and the World Bank will ensure that this Project adequately complements the projects funded by such institutions to modernize the justice administration services. National actors: The Judiciary, the Public Prosecutor – Prosecutor of the Nation (Ministerio Público – Fiscalía de la Nación, the National Police Forces, the Ministry of Foreign Affairs (Ministerio de Relaciones Exteriores), the Ministry of Economy and Finance (Ministerio de Economía y Finanzas), centers for research and investigation, the High-Level Anticorruption Commission (Comisión de Alto Nivel Anticorrupción, CAN), SUNAT, SBS, RENIEC, Academy
Start of project	of Magistrates, etc. End of project
As from the first installment delivered to the MINJUSDH.	Four years after the first installment delivered to the MINJUSDH
Budget	
The total estimated hudget for the Project corresponds to the sum of the following amounts:	

The total estimated budget for the Project corresponds to the sum of the following amounts:

» USD 5'460'179

» EUR 3'239'890

For information purposes only:

The approximate equivalent in Peruvian soles of the total estimated budget for the Project is:

» Approximately PEN 30'147'312

242 Amount estimated in consideration of the exchange rate PEN/USD: 3.33 (Source: "Marco Macroeconómico Multianual 2020-2023" of the Ministry of Economy and Finance of Peru) and the exchange rate PEN/EUR: 3.693 (Source: Average for the month of January 2020 as calculated by the Central Reserve Bank of Peru).

Appendix 2.

MOU between UK and Moldova on the return of funds forfeited by the National Crime Agency in relation to Luca Filat

243 Available at https://www.gov.uk/government/publications/return-of-funds-forfeited-by-the-national-crime-agency-luca-filat-agreement between-uk-and-moldova/mou-between-uk-and-moldova-on-the-return-of-funds-forfeited-by-the-national-crime-agency-in-relation-to-luca This Memorandum of Understanding relates to the return of funds ("the Returned Funds") forfeited by order of the magistrates court dated 14 November 2019 from Luca Filat.

1. This Memorandum of Understanding does not constitute an international treaty under the international public law and Vienna Convention on the Law of the Treaties (1969) and does not produce legally-binding commitments for the parties.

2. The Returned Funds total £456,068.38, the full amount which will be returned to the Republic of Moldova to fund social assistance that will benefit vulnerable people in Moldova.

Use of returned funds

3. The Government of the Republic of Moldova and the UK Government have decided that the Returned Funds will be used to support social assistance. The Returned Funds will finance additional personnel of the Personal Assistant social service included in the minimum social package ("the Service"), which is financed by the National Agency for Social Assistance, a subordinate of the Ministry of Labour and Social Protection. The Returned Funds will be transferred from the UK Government to the National Agency for Social Assistance, which will manage the Returned Funds throughout the life of the project, under the terms of Government Decision No 800/2018 approving the minimum package of social services and amending the Regulation on how to establish and pay material aid.

4. The Returned Funds will be used to benefit people with severe disabilities. Local authorities will hire full-time personal assistants whose role is to provide support with all daily tasks, from personal hygiene to running the household. The Returned Funds will provide funding for approximately 566^{set} personal assistants for a period of four months.

5. During the period of implementation and within the framework of this project no additional costs, other than those mentioned in this Memorandum of Understanding, will be accepted.

6. None of the Returned Funds may be disbursed, expended or used for the benefit of any of the alleged perpetrators of, or participants in the offences (passive corruption and trafficking of influence committed by Vladimir Filat) giving rise to the recovery of the Returned Funds, including as appropriate: family members, heirs, assignees, successors, privies, corporations, trusts, or legal entities of such alleged perpetrators or participants; or any person or entity barred from contracting with any party or international financial institution or from otherwise undertaking projects in Moldova.

Transparency and accountability

7. The Government of the Republic of Moldova has appointed Keystone Moldova, a civil society organisation, which will monitor and evaluate the expenditure of the Returned Funds and will ensure that the Returned Funds are fully put towards the intended use of the Service.

8. Keystone Moldova will monitor and evaluate the use of the Returned Funds and, the process of delivering the Service, including the applications for personal assistants to ensure that the most urgent needs are met, and that assistants are allocated in a transparent way.

9. Keystone Moldova will provide three intermediate monitoring reports ("Monitoring Reports") during the period of the Service (from the MOU being signed until 31 May 2022). These Monitoring Reports will be provided to the Governments of Moldova and the United Kingdom within one month of completion.

10. The costs of monitoring the project will not be provided by the Moldovan National Agency for Social Assistance.

11. Within one month of the conclusion of the project (31 March 2022), a final report ("the Final Report") will be provided by the Government of the Republic of Moldova to the UK Government, setting out the use of the Returned Funds.

12. By 30 April 2022 Keystone Moldova will provide a final report ("the Final Monitoring Report") to both the Government of the Republic of Moldova and the UK Government setting out their findings throughout the monitoring period, including their review of the Final Report.

13. Both the Final Report (from the Government of the Republic of Moldova) and the Final Monitoring Report (from Keystone Moldova) will be made available on the websites of the Governments of Moldova and the UK.

²⁴⁴ This figure is subject to change and the Government of Moldova will publish the final numbers when they are available.

14. The Government of the Republic of Moldova and the UK Government will be given a further three months (until 31 July) to raise any further business.²⁴⁶

Anti-corruption statement

15. The Government of the Republic of Moldova and the UK Government will collaborate in a commitment to ensure that no offer, donation, payment, remuneration or advantage in any form whatsoever that may be considered as an illicit act or a form of corruption, has been or will be granted to anyone, directly or indirectly, with the aim of obtaining a benefit in relation to projects or the Returned Funds.

16. The Government of the Republic of Moldova will inform the UK Government immediately in the event that any credible allegation or other indication of fraud or corruption in connection with the project, the Returned Funds or this Memorandum of Understanding comes to its attention.

17. The Government of the Republic of Moldova will:

- a. take timely and appropriate action to investigate such allegations or other indications, commencing an investigation within thirty days of any credible allegation being received;
- b. report promptly and regularly to the UK Government on the progress of such investigations and, promptly after their conclusion, report to the UK Government the actions that the Government of the Republic of Moldova takes in response to the findings; and
- c. in the event that the investigation substantiates that fraud or corruption has occurred, promptly reimburse the National Agency for Social Assistance in full for any funds that may have been lost, misappropriated or inappropriately disbursed, expended or used, and take such other action as may be necessary or appropriate to remedy the damage caused by the fraudulent or corrupt act(s).

18. The Government of the Republic of Moldova will ensure that the National Agency for Social Assistance financing the service in according to the Government Decision No 800/2018. 19. Contact details for the Government of the Republic of Moldova:

Ministry of Labour and Social Protection 2 Vasile Alecsandri Street Chisinau secretariat@msmps.gov.md

20. Contact details for the UK Government:

Criminal Finances Unit 6th Floor, Peel Building 2 Marsham Street London SW1P 4DF International-assetrecovery@homeoffice.gov.uk

Commencement of operation and signature

21. This Memorandum will come into effect on signature and will continue in operation until 30 April 2022. The Memorandum may be extended by a decision taken by the Government of the Republic of Moldova and the Government of the United Kingdom.

22. The foregoing record represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Moldova upon the matters referred to therein.

23. This Memorandum is signed in duplicate in the English and Romanian languages, both texts having equal validity.

For the Government of the United Kingdom of Great Britain and Northern Ireland

Steven Mark Fisher, Her Majesty's Ambassador to Moldova

For the Government of the Republic of Moldova

Marcel Spatari, Minister of Labour and Social Protection

Signed at the British Embassy, Chisinau on the 21st day of September, 2021

²⁴⁵ The UK Government will publish the reports on GOV.UK.

Appendix 3.

Agreement between the Government of the United States of America and the Government of the Republic of Peru regarding the transfer of forfeited assets The Government of the United States of America and the Government of the Republic of Peru (the Parties);

CONSIDERING that the Government of the Republic of Peru provided assistance to the Government of the United States of America in the matters of United States v. \$639,583.07. More or Less, Formerly on Deposit in Bank of America Account Number XXXXXX1655, with a Beneficiary Identified as the Havenell Trust, and All Funds Traceable Thereto (E.D.N.Y. 19cv-5652) (CATS No. 18-FBI-005886); and United States v. \$44,261 and €2550, More or Less, Seized from 1370 Trinity Drive, Menlo Park, California, and All Proceeds Traceable Thereto (E.D.N.Y. 20-cv-0161-RJD) (CATS No. 19-FBI-006685);

CONSIDERING, in connection with these matters, that the Government of the Republic of Peru assisted U.S. authorities over a period of three years by providing critical evidence that facilitated the U.S. forfeiture of assets [the forfeited assets] laundered into the United States;

CONSIDERING, that the forfeited assets were traceable to bribe monies paid to former Peruvian President Alejandro Celestino Toledo Manrique by Brazilian holding company Odebrecht S.A. in connection with construction contract for the Peru-Brazil Southern Interoceanic Highway, a Peruvian government infrastructure project, to the detriment of the Republic of Peru;

CONSIDERING that the evidence Peru provided included extensive documentary evidence, including bank records and diagrams, and summaries of interviews conducted by Peruvian prosecutors of key witnesses in a Peruvian prosecution of former President Toledo, and that absent this evidence, the forfeited assets likely could not have been traced to Odebrecht bribery payment without extensive and additional international evidence gathering;

CONSIDERING that the liquidation of the forfeited asset has yielded a net amount of approximately USD \$686,505.14 available for asset sharing;

Have agreed as follows:

1. The Government of the United States of America shall share with the National Program for Seized Goods of Peru (PRONABI), a program of the Ministry of Justice and Human Rights of Peru, approximately \$686,505.14 (the shared funds), which comprise approximately 100 percent of the net forfeited assets recovered in this matter. The transfer of funds shall occur pursuant to Title 18, United States Code, Section 981(i), and is in accordance with Peruvian law.

2. By written agreement between the Minister of Justice and Human Rights of Peru and the Minister of Foreign Affairs of Peru, reflecting the concurrence of the Government of the Republic of Peru, the shared funds shall be applied in total to the operation of the Office of Judicial Cooperation within the Ministry of Foreign Affairs, which Office is instrumental in ongoing efforts by the Government of the Republic of Peru to recover from abroad the laundered proceeds of public corruption committed against the Government of the Republic of Peru.

3. This Agreement is intended solely for the purpose of mutual assistance between the Parties. It does not give rise to any rights on the part of any private person, and it is not intended to benefit third parties.

4. This Agreement shall enter into force on the date of a Diplomatic Note of the Government of the United States of America in which the Government of the Republic of Peru communicates the fulfilment of its international procedures for that purpose.

Signed, in duplicate, in the English and Spanish languages, both texts being equally authentic.

For the Government of the UnitedStates of America

Deborah L. Connor Chief Money Laundering and Asset Recovery Section United States Department of Justice Washington, DC, 2/25/2022

For the Government of the Republic of Peru Dr. César Rodrigo Landa Arroyo *Minister of Foreign Affairs* Republic of Peru Lima, February 11, 2022



247 Available at https://kg.usembassy.gov/joint-statement/

The Governments of the United States of America and the Kyrgyz Republic are pleased to announce the repatriation of stolen assets to the Government of the Kyrgyz Republic arising from the corruption and theft of government funds by the prior regime of Kurmanbek Bakiyev and his son Maxim Bakiyev. These funds were identified in the United States in the criminal prosecution of Eugene Gourevitch for insider trading in the United States District Court for the Eastern District of New York and a \$6 million forfeiture order was subsequently entered by the Court. Following the conviction, the Government of the Kyrgyz Republic, through its attorneys, Akin Gump Strauss Hauer & Feld, filed a Petition for Remission with the United States Department of Justice, claiming that the funds subject to the forfeiture order traced back to monies stolen by Maxim Bakiyev from Kyrgyz state authorities and banking institutions. On October 4, 2018, the United States Department of Justice granted the Remission Petition.

At this point, of the \$6 million ordered forfeited, approximately \$4,560,700 has been recovered and approved for repatriation to the Government of the Kyrgyz Republic. These funds are to be deposited in the account of the Government of the Kyrgyz Republic ("current account of the Central Treasury of the Ministry of Finance of the Kyrgyz Republic in the National Bank of the Kyrgyz Republic") and additional efforts are planned by the Government of the United States of America and the Government of the Kyrgyz Republic to locate and return the remainder of the stolen assets covered by the forfeiture order.

The Government of the Kyrgyz Republic confirms its commitment to use the repatriated assets for the benefit of the Kyrgyz people, with a focus on social projects and anticorruption and transparency efforts. These include:

1. Improving public access of the rural population to the healthcare system by buying and installing medical equipment (X-ray, diagnostics equipment, etc.) for regional hospitals to deliver better medical services to the rural area population.

2. Construction of water supply facilities in order to expand access to clean drinking water for the rural population through upgrades of drinking water systems and expansion of the scope of ongoing construction of large-scale water supply facilities (water pipes, water pumps, water purification facilities) currently under way with financial support of the World Bank and other IFIs. 3. Strengthening Kyrgyz institutions responsible for anticorruption programs and promoting the transparency of court proceedings, and financial integrity of state organs, including the purchase and installation of audio and video equipment for projects in district courthouses to increase transparency and public control in the justice sector.



