

# RECOMMENDATIONS FOR ACCELERATING AND STREAMLINING THE RETURN OF ASSETS STOLEN BY CORRUPT PUBLIC OFFICIALS

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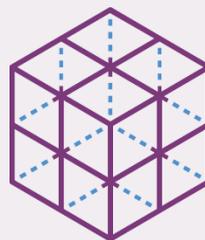
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FACTI PANEL BACKGROUND PAPER 7

FATIMA KANJI and RICHARD MESSICK

This background paper was commissioned to support the FACTI Panel's deliberations and will be used to inform the Panel's interim and final reports. The paper benefited from comments and contributions from the FACTI Panel members, the FACTI Panel secretariat, staff at the UN Office on Drugs and Crime and the FATF secretariat. The views expressed in this paper are those of the authors and do not necessarily represent the views of the FACTI Panel, its members, the FACTI Panel Secretariat or the United Nations.

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**FINANCIAL  
ACCOUNTABILITY  
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# ABSTRACT

The paper provides estimates of assets government officials in less developed states have stolen through corrupt means and the effect the thefts have had on these states' ability to meet the Sustainable Development Goals. It explains how corrupt officials use offshore vehicles to hide the assets in other nations, and the role of lawyers, real estate agents, and others in enabling their concealment. It summarizes the provisions of the United Nations Convention Against Corruption that require States Parties to make it difficult to hide stolen assets and to assist in locating and recovering them.

Recommendations are offered to streamline and accelerate the asset recovery process. To reduce barriers to the exchange of information, an international focal point to resolve disputes over Mutual Legal Assistance requests is proposed; states are urged to regularly disclose how long it takes to respond to these requests. Recognizing that some victim states may lack the capacity to comply with Convention's asset recovery procedures, the paper recommends states where assets are hidden do more to see they are returned. To this end, the paper proposes these states enact legislation modeled on the Swiss Foreign Illicit Assets Act and the U.K. Unexplained Wealth Order law and establish units like the U.S. Kleptocracy Initiative.

All UN Member States should make lawyers, real estate agents, and other professionals who enable asset hiding subject to their anti-money laundering laws, severely penalize violations, and prevent enablers from refusing to disclose their activities on the grounds of privacy or professional privilege. To reduce the costs of recovery, limits should be put on the use of frozen assets to pay legal fees, and states hiring private firms to help with recovery efforts should avoid fees arrangements based on a percentage of what is recovered. States where assets are held should employ anti-money laundering laws to confiscate and return them to victim states. Victim states should ensure any asset realized through corrupt is subject to confiscation under the Convention. All states should have laws permitting assets confiscation through non-criminal proceedings.

There will be opposition to several of these reforms, but the case for making them is compelling. With good will and the support of the international community the opposition can be overcome.

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# 1 INTRODUCTION

To end poverty, preserve the environment, and create a peaceful world for future generations, United Nations Member States have committed to meeting 17 Sustainable Development Goals (SDGs) by 2030. Achieving them requires all members to increase public and private investment in infrastructure, manufacturing, and other tangible goods as well as in the health, education, and welfare of their citizens. Each Member State must also strengthen their accountability institutions and ensure legal institutions provide justice for all. For less developed states, financing the required investments will be a major challenge. Not only do their economies generate less investment capital than older, more developed ones, but existing trade and investment rules work against them. They countenance if not encourage the outflow of large amounts of investment capital from their economies. They also make it costly and time consuming to locate and return “stolen assets,” monies obtained through corruption and hidden in other states.

Trade and investment rules must be changed for developing states to meet the SDGs. In March, the President of the United Nations General Assembly and the President of the United Nations Economic and Social Council launched an initiative to do so. They created the High-level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda for Sustainable Development and charged it with identifying measures to staunch capital flight and speed the return of stolen assets.

The panel is to produce an interim report by September 2020 and a final report by February 2021 in time for the UN General Assembly’s April 2021 Special Session on Corruption. This paper was commissioned by the UN Department of Economic and Social Affairs to assist the panel with its mandate. It explains current laws governing the return of assets stolen through corruption and hidden abroad, describes the obstacles states have encountered when invoking these laws to recover the assets, and recommends reforms to streamline and accelerate the asset recovery process.

The paper addresses three audiences. To the international community it offers changes to deepen and further transnational cooperation in locating and repatriating the proceeds of corruption. To states where the proceeds are hidden, it recommends new laws and practices to reduce the cost and speed their return to the states from which they have been stolen. To the states seeking their return, states whose citizens have been victims of corruption, the paper identifies measures to ease their task of locating assets and to improve the chances the assets will be promptly returned and dedicated to achieving the SDGs.

## 2 Asset Recovery and Development

Capital leaves developing states in numerous ways. Some are clearly unlawful: embezzlement, theft, customs duties and taxes evaded through bribery, monies generated from trafficking in illegal drugs, persons, and other criminal activities. Other methods, notably questionable tax practices, fall into a grey area. They may not be illegal. But they are illicit, for they violate norms of fairness and honest dealing.

### 2.1 Amounts lost through illicit financial flows and corruption

Estimates of the amount lost from illegal and illicit financial flows (IFFs) are shown in table 1. The U.S. NGO Global Financial Integrity, the first to warn of the impact of IFFs on development, calculates that developing states lose anywhere between \$620 and \$970 billion a year through



questionable tax practices, customs fraud, corruption, and other illegal or illicit activities. The United Nations Office on Drugs and Crime (UNODC) puts total IFFs from criminal activities for all countries at over \$2 trillion per year. The Economic Commission for Latin America and the Caribbean and a joint African Union/UN Commission for African each provided IFF estimates for their regions. In the case of the AU/UNECA, the figure is limited to estimated losses from questionable or illegal trade practices alone.

These total losses are derived from estimates of the losses caused by different practices that give rise to an IFF.<sup>1</sup> The methods for determining each are the subject of scholarly debate, and the estimates' authors acknowledge that they are rough approximations at best. Reliable data awaits the development of country-level calculations, an effort the United Nations Conference on Trade and Development and UNODC launched in 2019.<sup>2</sup>

Table 1. Estimates of Illicit Financial Flows (IFFs)

Source	Amount	Period	Region
UNODC	\$2.1 trillion	2009	Global IFFs from criminal proceeds
Global Financial Integrity	\$620 to \$970 billion	2014	All developing nations IFFs
Economic Commission for Latin America and the Caribbean	\$765 billion	2004 – 2013	Total IFFs from Latin America & Caribbean for period
African Union/United Nations Economic Commission for Africa	\$30 to \$60 billion	Annually	Africa illicit trade practices
United Nations	\$1.26 trillion	Annually	All developing nations IFFs

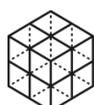
*Source:* Global Finance Integrity 2017; Economic Commission for Latin America and the Caribbean 2017; High Level Panel 2015; UNODC 2011.

While the precise numbers are controversial, the estimates' authors and their critics agree on one point: Whatever the actual amount, the investment capital lost from IFFs is substantial and staunching the outflow will help meet the development finance gap less wealthy states now face.

A portion of that gap could be filled immediately were all stolen assets promptly returned to victim states. How much has been stolen is again hard to pin down precisely. An early estimate, compiled by Transparency International and published at the launch of the joint World Bank/UNODC Stolen Asset Recovery Initiative (StAR), shows that ten kleptocrats from nine countries (two were Philippine presidents) may have robbed citizens of somewhere between \$29 and \$58 billion. The countries were chosen to emphasize the impact of corruption on the world's most vulnerable. The nine are listed along with the estimated amounts stolen and the leader responsible in table 2. Four of the countries – the DRC, Haiti, Nicaragua, Ukraine – are

1 Reuter 2017.

2 Inter-Agency Task Force 2020, p.48.



among the world’s poorest, and the other five – Indonesia, Nigeria, Peru, the Philippines, Serbia—contain large numbers citizens who remain mired in poverty.

Table 2. Estimates of Assets Stolen by Political Leaders of Nine Countries

Leader	Period in office	Country	Assets stolen
Mohamed Suharto	1967 – 1998	Indonesia	\$15 - \$35 billion
Ferdinand Marcos	1972 – 1986	Philippines	\$5 - \$10 billion
Mobutu Sese Seko	1965 – 1997	DRC (former Zaire)	\$5 billion
Sani Abacha	1993 – 1998	Nigeria	\$2 - \$5 billion
Slobodan Milosevic	1989 – 2000	Serbia/Yugoslavia	\$1 billion
Jean-Claude Duvalier	1971 – 1986	Haiti	\$300 - \$800 million
Alberto Fujimori	1990 – 2000	Peru	\$600 million
Pavlo Lazarenko	1996 – 1997	Ukraine	\$114 - \$200 million
Arnoldo Aleman	1997 – 2000	Nicaragua	\$300 million
Joseph Estrada	1998 – 2000	Philippines	\$70 - \$80 million

Source: StAR 2007, p. 11.

These estimates provide a first approximation of corruption’s impact on developing countries. Starting with these figures and using additional data sources, court cases, and other accounts of corruption, StAR believes the total amount stolen by all corrupt officials in the world’s less developed states could run from \$20 billion to as much as \$40 billion annually.<sup>3</sup> In 2007 the U4 Anti-Corruption Resource Centre estimated that 25 percent of the GDP of African states, some \$148 billion, was lost to corruption each year. An early World Bank effort to estimate bribes paid to developing countries is widely (though incorrectly) cited as totaling \$1 trillion per year.<sup>4</sup> As with IFFs, the precise amounts are controversial, and as box 1 explains there are reasons to overstate the total. But there is little doubt the total is very large and return of even a portion would help many victim states meet the SDGs.

<sup>3</sup> UNODC/World Bank 2007.

<sup>4</sup> Stephenson 2014.



## 2.2 Impact of the losses on development

Corruption is not a new problem. Three centuries before the Common Era the author of the Arthaśātra advised the Maurya Empire’s rulers on ways to prevent corruption.<sup>5</sup> In the Middle Ages the English Parliament made it a crime for public servants to demand a bribe,<sup>6</sup> and Dante condemned those who accepted one to the eighth circle of hell.<sup>7</sup>

What is new is the ease with which corrupt money can be spirited out of the victim state. Before there were wire transfers, offshore vehicles, or other means for money to cross national boundaries, corrupt officials spent their ill-gotten gains at home. Cardinal Richelieu used the monies he stole from the French treasury as First Minister to build a luxurious Paris mansion; it today houses the Conseil d’Etat. With wealth earned as a “Robber Baron,” Andrew Carnegie built over 1600 libraries which continue to serve communities across the United States.

By contrast, much of the money the kleptocrats shown in table 2 stole ended up in offshore financial centers, mansions in third countries, luxury yachts, private jets, and other assets that in no way advanced their nation’s development. Gulnara Karimova, daughter of a former president of Uzbekistan and now imprisoned for corruption, has over \$1 billion in assets in banks in Belgium, Ireland, Luxembourg, and Switzerland. As long as it sits there, it cannot be used to finance investments Uzbekistan needs to meet the SDGs.

Governments that have ratified the United Nations Convention Against Corruption (UNCAC) have long recognized the role returned assets can play in financing sustainable development. In their 2009 Doha meeting, they emphasized the importance of “the restitution of [stolen] assets for development.”<sup>8</sup> In their 2013 Panama meeting, they stressed the global community must take “into account . . . the recovery of [stolen] assets for sustainable development,”<sup>9</sup> and at the

### Box 1. Estimates of Total Bribes Paid, Assets Stolen: Helpful or Harmful?

The anticorruption community is divided about the wisdom of producing estimates of the total amount of bribes paid, assets stolen, and other figures on corruption. Advocates insist such estimates are critical. During a recent exchange, a TI International staff member explained: “We need that mind boggling number so we can ... talk to business and government about the policy change we seek, the institution we want to see better resourced or fixed, or the corruption case we care about....”

On the other hand, estimates, particularly very large, eye-popping ones, can be harmful, for they can undermine confidence in the progress being made in curbing corruption. Reports put the amount Daniel arap Moi stole while president of Kenya in the billions, but information the Kenyan anticorruption agency received from accomplices, intercepted communications, and other sources suggested the figure was far less. When the agency announced the return of \$20 million, the reaction of many was that this was “peanuts” or “a drop in the bucket,” meant simply to give the illusion the agency was doing something. Not only did the comparison between the \$20 million real dollars the agency recovered and the estimates of billions stolen fuel cynicism within Kenyan civil society, it demoralized those in the Kenyan anticorruption agency involved in the recovery.

Source: Messick 2016; Stephenson 2016.

5 Kautilya 1969, bk. 2, chs. 26-27.

6 First Statute of Westminster 1275, ch. 30.

7 The Inferno canto XXI.

8 COSP Resolution 3/3, 2009

9 COSP Resolution 5/3, 2013.



2017 Vienna meeting they implored states which had recovered assets to “consider the Sustainable Development Goals in their use and management.”<sup>10</sup>

Governments of the nations where corrupt officials hide assets have also recognized the importance of their return for sustainable development. Those hiding money in Switzerland, its government says, “rob their people of development prospects.”<sup>11</sup> In its order freezing money stolen by deposed Tunisian strong man Ben Ali and associates, the European Union declared that the theft had deprived “the Tunisian people of the benefits of the sustainable development of their economy and society and undermin[ed] the development of democracy in the country.”<sup>12</sup>

IFFs and the recovery of stolen assets presents complex challenges. SDG 16.4 demands that Member States tackle them; it requires that states “significantly reduce illicit financial... flows [and] strengthen recovery and return of stolen assets” by 2030. Doing so will provide resources governments need to provide for the welfare of their citizens, create effective, accountable and transparent institutions of government, and ensure responsive, inclusive, participatory and representative decision-making at all levels as envisioned in SDG 16.7. A critical corollary of strengthening asset recovery and return frameworks is the contribution it will make to stronger, independent rule of law institutions, greater technical capacity, and more robust accountability institutions.

**Table 3. Offenses Proscribed by UNCAC**

*Mandatory*

- 1) bribery of national or foreign public officials (articles 15 and 16);
- 2) embezzlement, misappropriation, or diversion of property by public official (article 17);
- 3) money laundering (article 23);

*Optional*

- 1) obstruction of justice (article 25);
- 2) trading in influence (article 18);
- 3) abuse of functions (article 19);
- 4) illicit enrichment (article 20);
- 5) bribery and embezzlement in the private sector (article 21 and 22);
- 6) concealment or retention of the proceeds of an offence established in accordance with the convention (article 24);

## 3 Hiding corruptly acquired assets

### 3.1 Acquiring assets by corruption

The most widely publicized thefts of government assets are those resulting from embezzlement and bribery. Examples include the billions of dollars Nigerian autocrat Sani Abacha stole simply by writing drafts drawn on the national treasury and the hundreds of millions in bribes Uzbekistan’s Gulnara Karimova accepted for approving tele-communications licenses. Bribery and embezzlement are not the only ways corrupt officials can steal assets. They can abuse their authority to award lucrative government contracts to companies they secretly own. After leaving office they can trade on their influence with former colleagues to secure tax breaks for companies they represent.

UNCAC’s drafters recognized that the theft of assets occurs in many ways, and the asset recovery provision is thus broadly drawn. Article 55 mandates return of the proceeds of “any offense established in accordance with this Convention.” There are nine; they are listed in table 3. Three – bribery, embezzlement, and money laundering – all States Parties must make a crime under their domestic law; the other six are optional, ones the parties should “consider”

<sup>10</sup> COSP Resolution 7/1, 2017.

<sup>11</sup> Government of Switzerland n.d.

<sup>12</sup> European Union 2011.



criminalizing. What is critical, as explained below, is that once a party has criminalized these offenses, UNCAC requires other States Parties to assist in locating and returning all assets realized from their violation. All are deemed stolen assets under UNCAC.

The theft of a large amount of money or of a valuable asset creates two problems for dishonest public officials. The public display of illegally gained wealth immediately raises suspicions. How could a modestly paid public official afford a luxurious home, expensive car, or a private school abroad for his or her children? Second, if the official keeps the stolen asset in their home country, there the risk domestic authorities will move to seize it, a risk that can suddenly increase significantly if the government they serve loses power.

## 3.2 Hiding the assets

The solution for those who steal vast quantities of government assets is to stash them abroad: in a bank account or in investments in securities, real estate, fine art, expensive vehicles or yachts in another country. A common ruse is to conceal the fact that the official is the actual, or “beneficial,” owner of the assets by depositing stolen money into a friend or relative’s bank account or by having securities or property acquired with stolen funds titled in the friend or relative’s name. Trinidadian Prime Minister Basdeo Panday did exactly this, hiding stolen money in his wife’s London bank account. He was only found out when his name was inadvertently added to the account.<sup>13</sup> An investigation in a South Asian state uncovered an account a minister’s young daughter had in a foreign bank with £10 million on deposit.

A more complex way, and according to investigative journalist reports and court cases a more common way, is for the official to create an “offshore vehicle.” The “vehicle” will be a corporation, trust, or other legal person. It is termed “offshore” because it is organized and registered under the laws of another country. Once created, the stolen assets are shown as owned by the newly created entity.

How the scheme works is diagrammed in figure 1. The individual wanting to hide assets, a public official in country A, hires someone with expertise in creating offshore vehicles and disguising ownership. Commonly a lawyer, other individual professional, or firm specializing in providing offshore services, the anticorruption community has dubbed these intermediaries “enablers,” for they enable corrupt officials to hide assets.<sup>14</sup>

As figure 1 shows, the enabler will most often be located in another country, typically an OECD country or one of those considered a tax haven. From their office in Country B, the enabler will establish a corporation in still another country, C in the diagram. Country C will be chosen because its law will not require the enabler to disclose who the corporation’s owner is. Indeed, in more complex schemes and in countries with particularly lax laws, the enabler can avoid knowing who the corporation’s owner is.

After the corporation is formed, the enabler will arrange for the corporation to open a bank account, many times in still another country, D in the diagram. Anti-money laundering laws require banks to ensure a corporation opening a bank account is legitimate and that the account will not be used to hide funds or facilitate other crimes. If the enabler is a lawyer, the bank may accept his or her representation that the corporation’s activities are legitimate as the case described in box 2 illustrates. Otherwise, the enabler will need to enlist a second enabler in Country D, another professional, or possibly a corrupt banker, to get an account opened.

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<sup>13</sup> Trinidad and Tobago 2006.

<sup>14</sup> Judah and Sibley 2018.



Once the corrupt official has a corporation with a bank account, he or she can hide money acquired illegally in the account. One way, as figure 1 illustrates, is to have bribe payers deposit the bribe directly into the account. The official accesses the money by writing checks on the corporate account, withdrawing cash using a corporate ATM card, or charging expenses on a credit card issued to the corporation.

As authorities have realized the ease with which offshore corporations can be abused, not only to hide corruptly acquired assets but to evade taxes or facilitate organized crime, lawmakers have begun requiring the disclosure of the person behind the corporation, the actual or beneficial owner. A “service” many enablers offer is to conceal the identity of the beneficial owner by providing a “nominee owner,” someone who agrees to have their name appear as the owner on the incorporation documents.

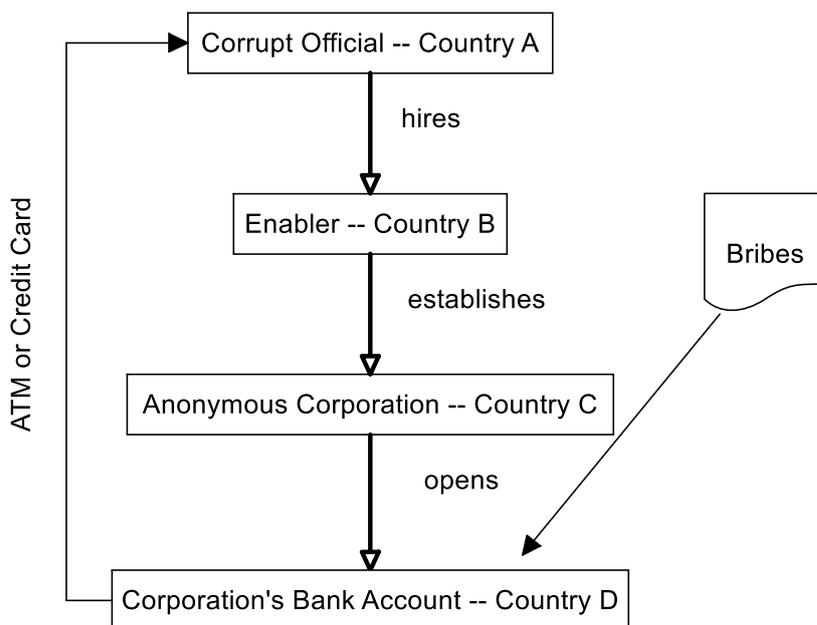
There are many variations on the scheme shown in figure 1. Instead of creating one corporation between the official and the assets, the enabler can create a chain of corporations in different states. In figure 1, the corporation in country C could create a corporation in Country D that would then create one in Country E and so forth. An investigator examining the records of a

**Box 2. Lawyer-Enabler Concealing Corrupt Officials’ Bank Deposits**

Teodoro Nguema Obiang Mangué, former Minister of Agriculture and now Vice President of Equatorial Guinea, employed two American attorneys to form anonymous corporations to launder millions of dollars through bank accounts opened in the names of the corporations. When the banks learned of Obiang’s connection to the companies, they closed the corporate accounts. Obiang’s attorneys then opened new accounts for the corporations at different banks, again concealing Obiang’s ownership.

*Source: FATF 2013.*

**Figure 1. Use of Anonymous Corporation to Hide Asset Ownership**



corporation in Country E would find only that it is owned by a corporation in Country D. How many corporations and how complex the chain will be will depend upon the ingenuity of the enabler and the amount the official is willing to pay to hide assets. While president of the Philippines, Ferdinand Marcos constructed an extraordinarily complex web of offshore corporations and trusts in multiple jurisdictions to distance himself from the billions he stole from the Philippine people.<sup>15</sup>

<sup>15</sup> Chaikin 2000.



The lengthier and more complex the corporate chain, the more nominee owners, the more time and effort investigators must invest to determine whether assets titled in the corporate name can be traced to a corrupt official. To find out who owns a corporation organized in a particular nation, especially if there is a nominee owner, requires a search of private, non-public company and bank records, interviews with individuals compelled by law to answer questions truthfully, and other measures that require the exercise of police powers. All United Nations Member States protect their national sovereignty – that includes barring authorities from another state from conducting police operations on their soil. Referring to figure 1, were authorities in country A seeking to determine if an official from their country owned the corporation in Country C or had access to the bank account in Country D, they would have to request help from the authorities in the two countries. Authorities in C and D would have to require the banks to produce nonpublic records and might have to require them to compel bank employees or nominee owners or other individuals to answer questions about private matters.

To exercise their power to compel the production of documents and witness testimony in aid of an investigation in another state, law enforcement agencies require a request for Mutual Legal Assistance (MLA). In the best of circumstances, the preparation, transmittal, and validation of an MLA takes time. When authorities in the requested state are busy, short-staffed, or lack political will, it can take months to respond to a request. If victim state investigators are tracking assets that have passed through several countries, it may take years to obtain the information needed to locate and recover assets.

### 3.3 Employing an accomplice or enabler

Hiding assets is easy work for a knowledgeable professional. It is also quite remunerative, for those seeking to hide assets will spend significant sums to protect the remainder from seizure, and they are hardly in a position to shop for low prices. For reasons explained below, enablers also run little chance of being caught. Given these conditions, one would expect it would not be hard to find a dishonest individual willing to act as an enabler. Independent research confirms this intuition. A team of academics specializing in anti-money laundering laws and the international NGO Global Witness both ran experiments to see what it would take to find an enabler. Neither had any difficulty locating a professional willing to help conceal assets.

The academics emailed corporate service providers in 182 countries asking if the provider would establish a corporation for them; and if the provider would whether it would require, as the anti-money laundering rules require, a notarized identity document. Of the providers that responded – a mix of lawyers, trust and company service providers, and others who advertise corporate services on the internet – about half said they would accept any form of documentation the academics provided while a quarter said they would not need any identity document. To their surprise, the researchers found service providers in developed countries less likely to require a notarized document showing the client’s identity than those in developing countries and developed country providers three times less likely to require such documentation than those in countries considered tax havens. Among all nations, the United States ranked second only to Kenya in the percentage of service providers willing to establish an anonymous, untraceable company.<sup>16</sup>

Global Witness conducted a similar experiment limited to American lawyers.<sup>17</sup> A GW employee visited the offices of 13 prestigious New York law firms pretending to be an agent for the minister of mines of an unnamed West African country. The GW “agent” said the

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<sup>16</sup> Findley, Nielson, and Sharman 2014. An earlier study with similar results appears in Sharman 2010.

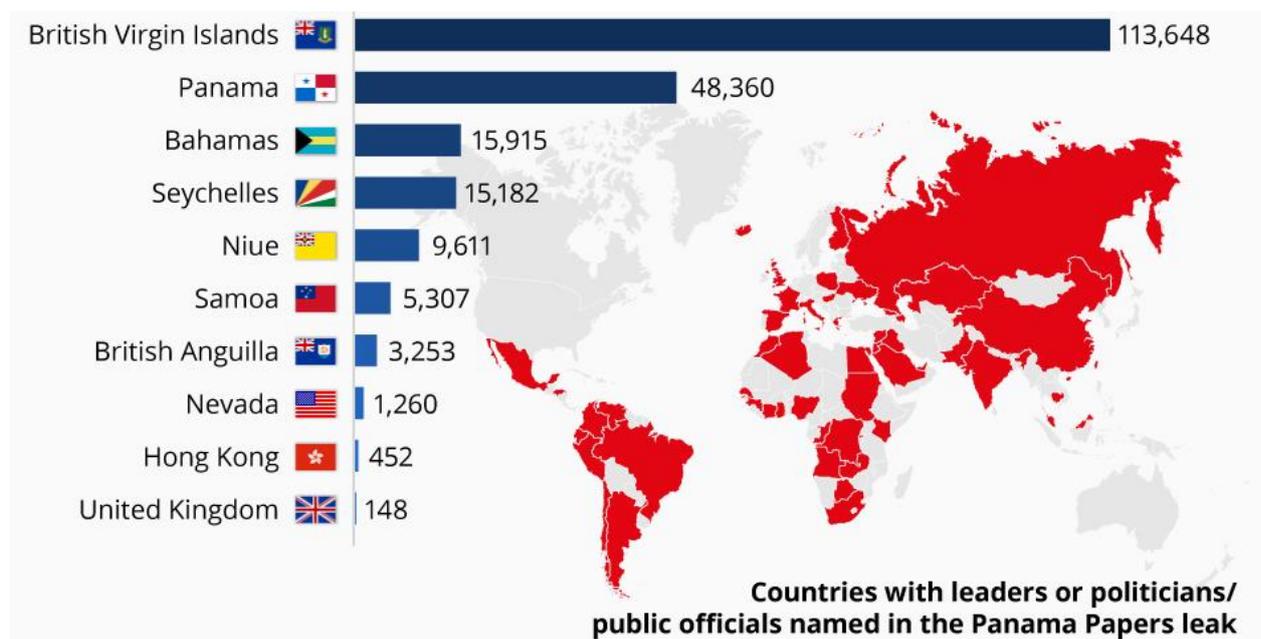
<sup>17</sup> Global Witness 2016.



minister wished to buy a Manhattan home, a yacht, and a jet plane anonymously and asked if the firms could help. Two declined the opportunity to earn the hefty fee dangled before them, one on the spot and one after thinking things through. The other 11 were willing to consider or immediately accept as a client an obviously corrupt politician wanting to hide assets.

The most well-known asset hiding enabler is the now defunct Panamanian law firm Mossack Fonseca. Its activities were exposed when a firm employee provided internal records to the International Consortium of Investigative Journalists. Dubbed the “Panama Papers,” the documents revealed the firm had created more than 200,000 anonymous corporations and similar entities on behalf of individuals around the globe.

Figure 2 shows the jurisdictions where these corporations were incorporated. The most common one was the British Virgin Islands (BVI) followed by Panama, the Bahamas, and the Seychelles. Small, less developed states were, however, not the only ones the firms chose. As the figure shows, the firm also created corporations in the U.S. state of Nevada, Hong Kong SAR, and the United Kingdom. At the time Mossack Fonseca created these corporations, the laws of all these jurisdictions made it difficult if not impossible for investigators to discover who the real, beneficial owner of the corporation was and therefore to connect an individual to the assets the corporation held.



Source: Armstrong 2016.

There are legitimate reasons why some persons or corporations in some circumstances wish to keep their holdings secret, but a retrospective on the Panama Papers suggests many Mossack Fonseca clients asked its lawyers to create an anonymous corporation for reasons that were anything but legitimate. The most common motive appears to have been to evade taxes. Another was to hide stolen assets. The former Finance Minister of Mongolia was charged with bribery after the Panama Papers revealed that a corporation he owned held \$10 million in a



Swiss bank.<sup>18</sup> This is likely not the only case of the firm’s complicity in concealing stolen assets. Mossack Fonseca’s records show six percent of the companies the firm established were owned by persons holding public office, several of whom were then current or former heads of state.<sup>19</sup>

Disclosures in the Panama Papers is one of the reasons that has prompted many UN Member States to write into their domestic law the Financial Action Task Force (FATF) recommendations making it easy to determine the beneficial owner of a corporation.<sup>20</sup> The British Virgin Islands now requires those creating a corporation to provide the names of the beneficial owner.<sup>21</sup> Thanks to new U.K. legislation, starting 2021 the BVI and other U.K. Overseas Territories will have to publicly disclose the identity of the beneficial owners of corporations organized under their respective laws.<sup>22</sup> However, because as explained above enablers can still hide the beneficial owner through the use of nominee owners, states will need to adopt further measures to defeat this ploy. They are discussed in section V below.

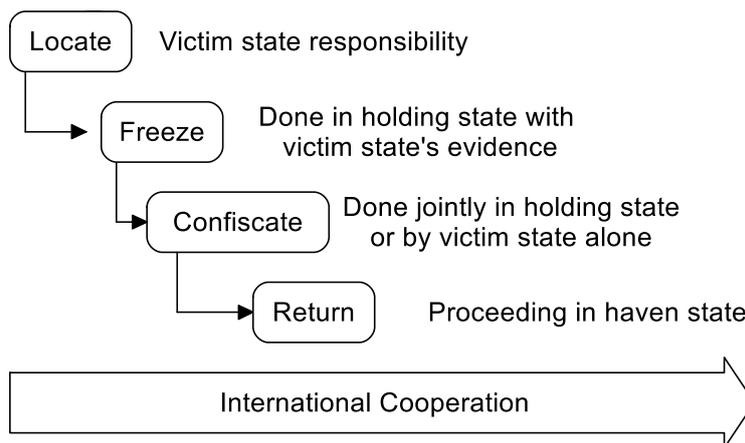
Moreover, not all nations have accepted the FATF beneficial owner recommendations. The United States has yet to ensure that the beneficial owner of American corporations organized in Delaware, Nevada, and Wyoming can be determined.<sup>23</sup> And while Singapore now requires disclosure of beneficial ownership, the disclosures are not public and the penalty for lying about who is the beneficial owner is modest, SGD 5,000 or \$3,500.<sup>24</sup>

## 4 Confiscation and return of stolen assets

### 4.1 Asset recovery process

Figure 3 breaks the process of recovering stolen assets into four steps. In the first, the state whose public official stole money, property, or other tangible or intangible assets, the victim state, locates where the assets have been hidden. The victim state bears the primary responsibility for finding the assets; but as explained below, all states must have measure in place to make it difficult to hide assets. Even with such measures, though, locating stolen assets

**Figure 3. Asset Recovery Process**



requires a victim state to have the technical capacity and resources to undertake complex financial investigations and the political wherewithal to initiate them where the thief or his or her associates still retains significant power.

Assuming a victim state locates stolen assets, it requests the state where the assets are held to “freeze” them, to prevent them from being moved until the legal requirements for

18 Reuters 2018.

19 Dalby and Wilson-Chapman 2019.

20 FATF 2019, Recommendation 24.

21 Virgin Islands Beneficial Ownership Secure Search System Act 2017.

22 Sanctions and Anti-Money Laundering Act 2018.

23 FATF 2016.

24 Corporate Services 2020.



return have been completed. This requires the victim state to produce sufficient evidence to persuade authorities in the holding state the assets are likely stolen. Presuming this requirement is met, step three involves the commencement of full-blown judicial proceedings to confiscate the assets. “Confiscation” is the legal term meaning any claim the official or former official or anyone to whom the assets have been given are extinguished under the holding state’s law. Step four follows the successful conclusion of the proceedings extinguishing the claims, the return of the assets to the victim state.

The arrow at the bottom of the diagram emphasizes the critical importance at every step of the process of international cooperation. Some will be informal, telephone calls and emails between police or prosecutors in different jurisdictions alerting one another to suspicious activity or providing a counterpart with publicly available information from a land or motor vehicle registry. But when investigators in one state need bank records, or homes or offices searches or other non-public information, they must, as explained above, make a formal request for Mutual Legal Assistance (MLA). While states will be bound by treaty or domestic law to comply with the request, in practice the requested state has enormous discretion whether and when to comply, and as recounted below, some asset recovery actions have had to be abandoned thanks to delays or refusals to provide MLA.

## 4.2 Recovery prior to UNCAC

The recovery of criminal assets located in another State traditionally involved a complex, multi-step process. The State from which the assets were stolen had to serve a letter rogatory, a lengthy and drawn out process, to secure information from another state on where the assets were hidden. If assets were found, judicial proceedings had to be commenced in the state where they were found. If the victim state won the case, the court issued an order depriving the criminal of any right to the assets. Once that final order of confiscation was entered, the State requesting return of the assets often had to then secure a second order, many times through a separate judicial proceeding in the requested State’s courts, directing the assets be returned. In the case of former Philippine President Ferdinand Marcos, it took 18 years for the Philippines to secure the return the return first, small portion of the money he had hidden in Swiss banks.<sup>25</sup>

The 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 2000 Palermo Convention Against Transnational Organized Crime were the international community’s first efforts to streamline the process. Both require States Parties to assist one another in locating the proceeds of the offences established in accordance with the Conventions and ease the confiscation process. Neither Convention, however, addressed the last step in the process, the actual return of confiscated assets to the State party from which they were stolen.

## 4.3 Recovery under UNCAC

The United Nations Convention Against Corruption does. Article 51 makes recovery of stolen assets a “fundamental principle” of the Convention and provides victim states a variety of ways to recover them. Acknowledging that return depends upon help from other states, the article requires Convention parties to “afford one another the widest measure of cooperation and assistance” throughout the return process.

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<sup>25</sup> UNODC/World Bank 2007, p. 21.



### **4.3.1 Holding state recovery proceedings under Article 53**

Article 53(a) of the Convention requires State parties to open their courts to all other State parties to the Convention, granting them “standing,” or the right to file a civil action to have property acquired through any of the nine offences defined in the Convention confiscated and returned. Article 53(b) provides a second method of return. It directs each State party to establish procedures permitting its courts “to order those who have committed offences [established in accordance with the Convention] to pay compensation or damage” to a State party injured by the offence. Article 53(c) contains an important proviso. It mandates that in any confiscation proceeding in the state where assets are found, any ownership claim asserted by another State Party must be considered. The significance of this proviso is explained below.

### **4.3.2 Mandatory recovery under Article 57(3)**

Article 57(3) provides for mandatory return where certain conditions hold; article 57(5) provides for a cooperative return based on mutually acceptable agreement.

Return under article 57 (3) is obligatory when:

a final order confiscating the assets has been issued in the requesting State’s courts;  
that order has been accorded legal effect by the holding State’s courts; and  
the requesting State’s claim to the assets is clear.

These provisions obtain where:

the confiscated assets are the result of the embezzlement of public funds or the laundering of such funds (article 57(3)(a)); or

the requesting State “reasonably establishes its prior ownership” of the confiscated assets (article 57(3)(b)); or

the law of the State party where the assets are located “recognizes damage” to the requesting State “as a basis for returning the confiscated property” (article 57(3)(b)). This provision, the Convention Legislative Guide explains, covers cases such as bribery of the requesting State party’s employee, where the requesting State has been damaged but under its law may not have legal title to the bribe proceeds.

In all three cases, the Convention establishes that the requested State “shall [...] return the confiscated property” to the requesting State. States are permitted some flexibility in applying these provisions. A requested State may waive the requirement that a final judgment of confiscation has been issued in the requesting State.

The Convention Legislative Guide explains that article 57(3)(c) applies in cases where these conditions are not present.<sup>26</sup> Examples include where i) the requesting State “may not be able to establish prior ownership” of the assets, ii) others have also been “damaged by” the corruption offences, iii) the holding State did not or could not waive the final judgment requirement, or iv) the assets were confiscated pursuant to an order initiated by the requested State or by a settlement. In all such cases, this provision directs the requested State to “give priority consideration” to returning confiscated property to the requesting State, prior legitimate owners, and to compensating corruption victims.

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<sup>26</sup> UNODC 2012, p. 227.



### **4.3.3 Cooperative returns under Article 57(5)**

Article 57(5) provides for cooperative returns. It permits the holding state and victim states to conclude “agreements or mutually acceptable arrangements on a case-by-case basis for the final disposal” of confiscated assets at any time. It is, as noted below, the provision most commonly invoked to return assets.

### **4.3.4 International cooperation: Articles 46, 48, 52, 56 and 58**

While the primary responsibility for recovery rests with victim states, the Convention requires all states to adopt measures to make it easier for them to find stolen assets. The two most important provisions are found in articles 46 and 52. Article 46 requires States Parties to “afford one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings” aimed at recovering assets. Article 52 mandates they require banks and other financial institutions to know the natural person, the beneficial owner, of any account holder with a large amount on deposit. Importantly for asset recovery, where the customer is or has been a public official or a relative or an associate of the official, the institution must take extra care to ensure the account is for legitimate purposes. It must conduct “enhanced scrutiny” of the account’s activities.

In addition to its broad direction to provide victim states the “widest measure” of help in locating assets, article 46 urges States Parties to provide spontaneously any information they have that would help a victim state recover assets rather than wait for it to be requested. Article 48 encourages States Parties to establish networks of law enforcement agencies to facilitate the unprompted provision of information and article 56 extends this encouragement to materials a state uncovers in its own investigations or judicial proceedings. Article 58 directs States Parties to consider establishing a financial intelligence unit to collect and analyze suspicious financial transactions and to share any analysis that would help another States Party recover stolen assets.

### **4.3.5 Oversight of Asset Recovery Process Under Article 63**

The Convention’s governing body is the Conference of States Parties (COSP) to which all States Parties, now 187, are members. The COSP is responsible for overseeing the Convention’s implementation and improving “the capacity of and cooperation between States Parties” to achieve its objectives. At its first meeting, in December 2006, it established the Open-ended Intergovernmental Working Group on Asset Recovery to assist the Conference in implementing UNCAC’s asset return provisions by “facilitating the exchange of information, good practices and ideas among States.”<sup>27</sup> The Working Group has met regularly since; its recommendations for improving the asset recovery process form the nucleus of those discussed in section V below.

## **4.4 Assets recovered under UNCAC**

The only comprehensive source of information on assets returned to victim countries is StAR’s Asset Recovery Watch database. It catalogues information on international asset recovery cases initiated in 1980 or later. StAR relies on submissions by States Parties supplemented by information from court decisions, media reports, information gathered by UNODC and World Bank staff. For each case, information is sought about the date it was initiated; the identity of the victim and holding state or states; the amount recovered or sought to be recovered; whether the assets were or have been frozen, confiscated, or returned; the provisions of the Convention governing the recovery proceedings; and for completed cases the text of any agreement on return. StAR largely depends upon UNCAC States Parties to provide asset recovery data, and

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<sup>27</sup> COSP Resolution 1/4, 2006.



thus the data is only as accurate and complete as the information they provide. On its website StAR asks those visiting the site to alert it to missing or inaccurate data, and it is now in the process of updating and revising the database. StAR staff expect have that effort completed sometime in the fall of 2020.

A few major recoveries occurred before UNCAC took effect in December 2005. Switzerland returned \$680 million of Marcos' money to the Philippines in 2003 and the Cayman Islands, Switzerland, and the United States together returned roughly \$120 million to Peru in the early 2000s.

Table 4 shows the more notable returns since UNCAC came into force. The largest return to date is the \$700 million of Abacha money Switzerland returned to Nigeria in 2005. Other large returns are the \$365 million Switzerland returned to Brazil in several tranches over the period 2015 to 2019 and the \$546 million stolen from Malaysia through the 1MDB scheme the United States returned in 2019 and early 2020. Two of the returns arose from civil suits States Parties brought in the holding state in accordance with article 53(a), the \$46 million Zambia secured in 2007 and the \$56 million Macao SAR won in a civil action in Hong Kong SAR in 2007. From the information in the StAR database it appears the remainder of the returns were through "agreements or mutually acceptable arrangements" under article 57(5).

## 4.5 Human rights and asset recovery

The Convention assigns national courts a central role in in the recovery process: ruling on MLA requests, asset freezes, and confiscations. Human rights treaties demand that in all these proceedings the rights of those with claims to the assets, no matter how unfounded, be observed<sup>28</sup>.

The broadest provision appears in Article 14 of International Covenant on Civil and Political Rights. It obliges states to ensure that in any proceedings, criminal or civil, all parties enjoy "a fair and public hearing."<sup>29</sup> Article 1 to Protocol 1 of the European Convention on Human Rights speaks directly to the fairness of freezing and confiscation proceedings. As construed by the European Court of Human Rights, it requires that any judicial action to seize property "must be compatible with the rule of law and must provide guarantees against arbitrariness."<sup>30</sup> Read together, the fair trial and right to property articles in the African Charter on Human and Peoples' Rights<sup>31</sup> and in the American Convention on Human Rights<sup>32</sup> likewise require that judicial procedures confiscating property observe the property holder's rights.

States' failure to observe these provisions will frustrate asset recovery efforts. A failure can even bar a state from learning where stolen assets are hidden. A Russian request to Switzerland for MLA for information on assets held in Swiss banks was denied because the property holder's human rights had been violated while in Russian custody, and an order freezing those Swiss assets that had been found was also dissolved.<sup>33</sup> In *Saccoccia v. Austria*, the European Court of Human Rights Court held Austrian courts could not execute a U.S. asset confiscation order until they independently determined whether the asset holder had suffered a "flagrant denial of justice" in the U.S. proceeding.<sup>34</sup>

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28 Ivory 2014.

29 International Covenant on Civil and Political Rights.

30 European Court 2020.

31 African Charter on Human and Peoples' Rights, article 7 and article 14.

32 American Convention on Human Rights, article 8 and article 21.

33 Mikahail Khodorkovski contre Ministère. Swiss law barring MLA where human rights have been violated is discussed in Lugentz, Rayroud, and Turk 2014, pp. 549 - 557

34 2013.



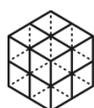
Table 4. Notable Asset Returns Since UNCAC Came into Force

Returned to	Returned by	Amount (millions USD)	Date
Angola	Switzerland	24.0	2005
Angola	Switzerland	43.0	2012
Brazil	Switzerland	365.0	2015- '19
Equatorial Guinea	United States*	20.0	2014
Kazakhstan	Switzerland, United States	115.0	2007
Kazakhstan	Switzerland	48.8	2012
Kyrgyz Republic	United States	4.5	2019
Libya	United Kingdom	12.5	2012
Malaysia	United States	196.0	2019
Libya	The Netherlands	143.5	
<b>Macao SAR</b>	<b>Hong Kong SAR</b>	<b>56.0</b>	<b>2009</b>
Macau	United Kingdom	44.0	2015
Malaysia	United States	196.0	2019
Malaysia	United States	300.0	2020
Malaysia	United States	49.0	2020
Nigeria	Jersey, United States	308.0	2020
Nigeria	Liechtenstein	233.8	2013-2014
Nigeria	Switzerland	700.0	2005
Nigeria	Switzerland	321.0	2017
Nigeria	United Kingdom	17.7	2006 – '10
Pakistan	United Kingdom	248.0	2019
Taiwan	Switzerland	20.5	2010
Tunisia	Switzerland	3.9	2017
Uzbekistan	France	10.0	2020
<b>Zambia</b>	<b>United Kingdom</b>	<b>46.0</b>	<b>2007</b>

\$3.5 billion

\* Final return mechanism under negotiation; returns by civil suit in gray.

Source: StAR database; authors calculations



States' human rights obligations do not end when the assets are returned. As in the allocation of all state resources,<sup>35</sup> human rights treaties require returned assets be distributed in an accountable, transparent, and participatory manner. Where assets are returned pursuant to an agreement between the victim and the holding state, the holding state is bound by this requirement as well.<sup>36</sup>

## 5 Accelerating and streamlining the asset recovery process

What follows are recommendations to accelerate and streamline the recovery of stolen assets. All aim to eliminate the sometimes hyper-technical legal defenses corrupt officials raise to avoid returning the money they stole, to reduce the costs and time victim and holding states can incur in the return process, and to otherwise ensure States Parties are able to meet article 51's command that they "afford one another the widest measure of cooperation and assistance" in the return of assets. All have been previously vetted and proposed by one or more international agencies or groups expert on asset recovery: the COSP's Open-ended Intergovernmental Working Group on Asset Recovery, the UNODC, StAR, the Addis Ababa International Expert Meetings on the Return of Stolen Assets, the International Centre for Asset Recovery, the COSP Expert Group on Corruption Involving Vast Quantities of Assets, the Global Forum on Asset Recovery, and the Lausanne Seminars.

### 5.1 Strengthen information sharing procedures

Information is the essential element in any asset recovery. Assets cannot be returned to a victim state unless the victim state finds where they are hidden. Locating them can, as explained above, often require a lengthy, painstaking investigation involving multiple jurisdictions. Part of the investigation can be conducted quickly and inexpensively: through telephone calls and emails to police, prosecutors, or investigating magistrates in other states; information exchanges among financial intelligence units; and the spontaneous provision of information by holding states. There are, however, some facts that cannot be ascertained through such informal means. Determining these requires the victim state to present a holding state with a formal request for MLA.

UNCAC States Parties have made significant progress reducing the cost and time required to find stolen assets since the Convention took effect in 2005. Nevertheless, as the COSP Working Group on Asset Recover, the UNODC, and StAR have all observed, there remain ways the time and effort required to obtain information from both informal requests and MLA can be reduced. They are identified in the sections below.

#### 5.1.1 Enhance opportunities for informal exchanges

Interviews with investigators and prosecutors in both victim and holding states show that a lack of trust is the number one barrier to the informal exchange of information.<sup>37</sup> The existence of an investigation, a suspect's identity, and where the assets may be hidden are highly sensitive matters. Were the facts surrounding any of them to leak, the suspect and the assets would likely disappear. Law enforcement personnel thus keep a tight hold on such information. Only if they are sure they can trust others not to reveal it will they share it with them.

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<sup>35</sup> OHCHR 2013.

<sup>36</sup> OHCHR 2020.

<sup>37</sup> Stephenson et al. 2011, pp. 19-24.



Trust is built among law enforcement professionals by creating opportunities for them get to know one another, in professional settings and the related social interactions they occasion. The COSP's Asset Recovery Working Group holds numerous meetings each year, and States Parties should encourage personnel responsible for asset recovery to attend. There are many global and regional networks of law enforcement agencies. Listed in table five, States Parties should be sure relevant personnel from their agencies are members and that they are afforded the time and resources to attend meetings.

States Parties should support the creation of more regional and global networks. Donor agencies should support creation of informal networks where developing state personnel from anticorruption agencies and prosecution services and counterparts in possible holding states can discuss common concerns and share information. The Norwegian Aid Agency has been funding the Corruption Hunters Network for over a decade.<sup>38</sup> Brazilian members attribute the recovery of several hundreds of millions of dollars in the Petrobras scandal to relationships fostered in the group's twice-a-year, off-the-record meetings.

Table 5. Selected Global and Regional Networks of Law Enforcement Agencies

Association of Caribbean Commissioners of Police	Global Focal Point Network on Asset Recovery (Interpol-StAR)
Association of Southeast Asian Nations Chiefs of Police	Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States
Camden Assets Recovery Inter-Agency Network	Pacific Transnational Crime Coordination Centre
Eastern Africa Police Chiefs Cooperation Organization	Red Iberoamericana de Cooperación Jurídica Internacional
Eurojust	Rede de Cooperação Jurídica e Judiciária Internacional dos Países de Língua Portuguesa
European Judicial Network	Southeast European Law Enforcement Centre
Europol	Southern African Regional Police Chiefs Cooperation Organization
Global Legal Information Network	Sahel Judicial Platform

Source: UNODC

Training courses or seminars for investigators and prosecutors from different nations are a second, particularly effective way to build relationships. StAR, UNODC, and nongovernmental organizations such as the Basel Institute's International Centre for Asset Recovery and the International Anticorruption Academy in Vienna offer training programs open to personnel from different countries. Funding organizations should finance these and similar efforts; they should ensure the development of trusting relationships among counterparts is included as a measure of their effectiveness in program evaluations.

### 5.1.2 Disclose Information and Statistics on MLA Requests

There are no shortcuts to the MLA process. A request must be drafted and transmitted to the requested state and that state must in turn gather the information and return it. The request must comply with the requirements of the state to which it is submitted. At a minimum that

<sup>38</sup> Davis 2010.



means the request must be translated into an official language of the requested state, a legally sufficient reason for wanting the information provided, and enough detail furnished so the requested state knows where to look for the information sought.

As experience with the MLA process has grown, states have found ways to reduce the time required to respond to an MAL. To ensure a request complies with their law, and time is not lost if a request must be returned for noncompliance, many states post a guide to their MLA law on the internet. Several states have gone a step further and will review and comment on a draft request in advance of formal submission. All States Parties where assets may be hidden should follow these examples.

Even with these efforts, delays in responding to MLA requests remain all too common. UNODC reports it can take on average up to six months to comply with a request and some take more than a year.<sup>39</sup> To reduce response time, States Parties should publish statistics on requests received, the number returned for noncompliance and why they were returned, and the median time to satisfy a request. These data, which states that receive large requests should automate, would alert victim states to areas to pay particular attention to when drafting an MLA and provide an estimate of how long it will take to receive the requested information. The data would also inform legislators, the media, and civil society on whether their government is fully cooperating with others in the fight against corruption, and if not, where the delays are and what additional resources or amendments to the law are required to ensure their country is fully engaged in the asset recovery process.

### **5.1.3 Designate an International Focal Point to Assist with MLA Requests**

Under the best of circumstances, misunderstandings and disagreements can arise between the state submitting an MLA request and the state receiving it. In the past staff of UNODC, StAR, the International Centre for Asset Recovery, and other international and inter-governmental agencies have drawn on personal relationships to resolve differences. Valuable as that has been, with the volume of MLA requests continuing to grow, the international community can no longer afford to depend on the ad hoc resolution of disputes. A focal point for assisting with MLA requests should be identified, either an existing international or inter-governmental agency or a new one and made formerly responsible for assisting states with the MLA process.

The focal point could host a website where guides to all States Parties MLA laws could be found. States preparing an MLA request could consult the web site or focal point staff on how to prepare a request. Where there are questions, the staff could put the requesting state in contact with those in the requested state who could answer them. When a request must be filled urgently, the staff could ensure authorities in the requested state are on notice of the urgency. When the victim state and the requested state are at loggerheads over the validity of a request, focal point staff could mediate the dispute. Staff could also work with countries to modernize their MLA laws to ensure they can respond to requests for information no matter whether it is sought for conduct that is criminal in the requested state and to repeal outmoded provisions requiring them to notify an account holder when records of account activity are sought.<sup>40</sup>

The COSP's asset recovery working group might assume this responsibility. It could be staffed by the UNCAC Secretariat, the UNODC. Other possibilities would include StAR, an office in the UN Secretary General's Office, or even a new agency. The important thing is that there be an entity responsible for helping victim states secure the information and assistance they need from requested states quickly and easily and that the agency be accountable for the results.

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<sup>39</sup> UNODC 2017.

<sup>40</sup> Basel Institute 2020.

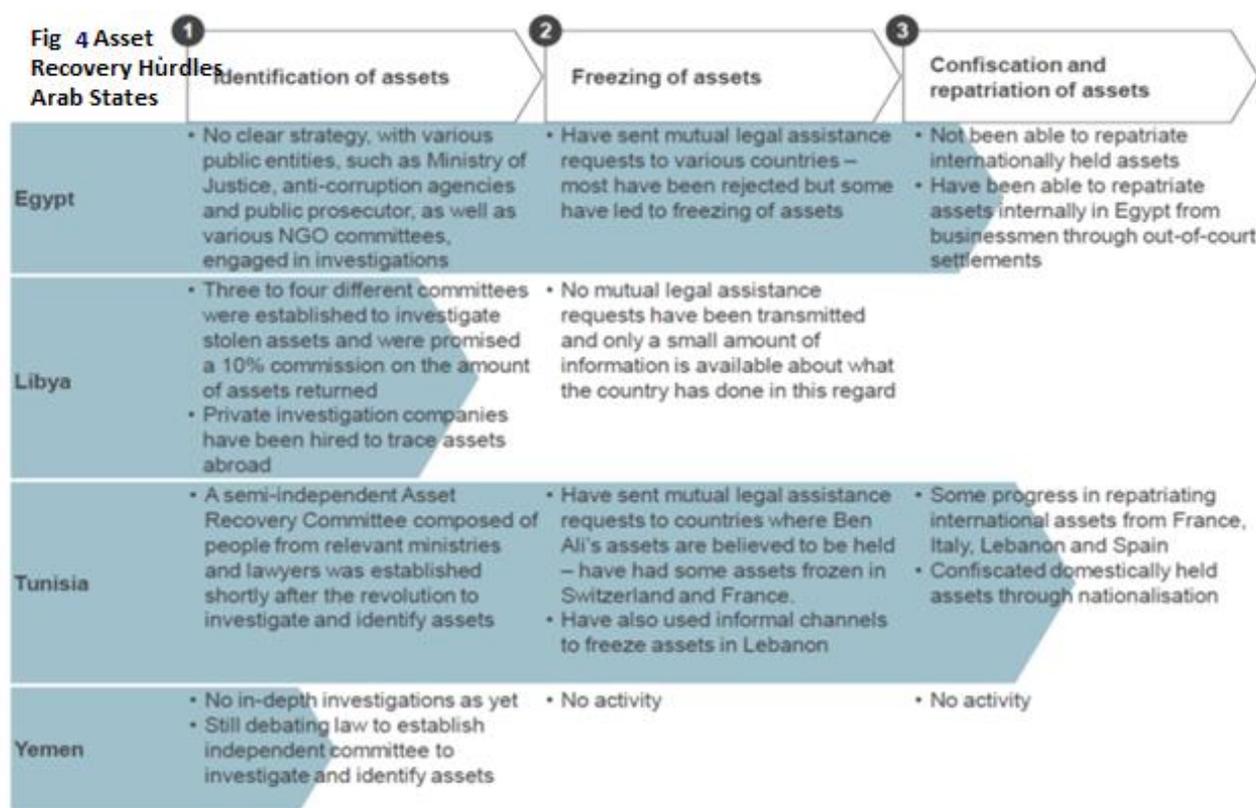


## 5.2 Assist States in transition and with those with limited capacity

UNCAC presupposes that victim states have both the technical ability and the political wherewithal to pursue asset recovery actions against former corrupt officials.<sup>41</sup> International experience unfortunately offers examples where these prerequisites were absent. After the Democratic Republic of the Congo's long-time ruler Mobutu Sese Seko died, Swiss authorities froze Mobutu's Swiss bank accounts to be sure his family not seize them until the new government-initiated recovery proceedings. But despite repeated entreaties by Swiss officials and the provision of expert advice on the procedures required to recover the funds, DRC authorities were unable to follow through, and the money eventually returned to Mobutu's family.<sup>42</sup>

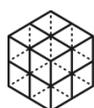
The same challenges defeated the recovery efforts of the governments that came to power in the wake of the Arab Spring. Figure 4 shows the hurdles the new governments of Egypt, Libya, Tunisia, and Yemen faced in developing the factual basis and complying with the legal procedures required to recover assets their deposed leaders and their family and cronies stole. The difficulties ranged from the lack of an agency with the mandate or skills to gather the facts to show the assets had been stolen to problems of inter-agency coordination to an unfamiliarity with how to obtain international assistance to domestic courts unwilling to issue seizure orders.

For states facing similar challenges, stolen assets will only be returned if holding state governments are more proactive. Three measures they should take are described below.



41 Article 51(c): In requesting a holding state to freeze assets, the victim state must provide "a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based."

42 Government of Switzerland n. d.



### 5.2.1 Enact legislation modeled on the Swiss Foreign Illicit Assets Act

Switzerland's Foreign Illicit Assets Act<sup>43</sup> allows its authorities to initiate proceedings to freeze, confiscate, and return stolen assets when a victim state government is unable to do so. Any assets of an official or recent official of another government, their family members, and associates found in Switzerland can be frozen and confiscated without a request from that government when four conditions are met:

- 1) the official's government has lost power, or a loss appears inevitable;
- 2) corruption in that government is notoriously high;
- 3) the assets were likely acquired through corruption, criminal mismanagement or other felonies; and
- 4) Switzerland's interests require a freeze.

When the Swiss government determines these conditions obtain, the Finance Ministry petitions the Federal Administrative Court for an order first freezing and then confiscating the assets. The confiscation is not subject to any limitation in time, and the assets are rebuttably presumed to be of illicit origin. The presumption applies when the court determines the individual's wealth has increased inordinately and the level of corruption in the country was notoriously high during his or her term of office. The presumption of illicit origin can be rebutted if the asset holder establishes the assets were by an "overwhelming probability" acquired legitimately.<sup>44</sup>

The European Union's efforts to assist the Tunisian and Egyptian governments that came to power in the wake of the Arab Spring and the Ukrainian one that assumed power after the collapse of the Yanukovich regime shows why other jurisdictions should enact similar legislation.<sup>45</sup> Exercising its authority under the Common Foreign and Security Policy, the European Council directed member states to freeze the assets of the former leaders of these countries, their family, and cronies. But the power to confiscate and return the assets rests with EU Member States, none of which have a law like the Swiss one. Confiscation and return thus depended on the ability of the successor governments to present sufficient evidence to Member State authorities justifying confiscation. When the new governments could not, European domestic courts were left with no choice but to order the asset freezes lifted and the assets returned to the malefactors.

Legislation pending in the Canadian Senate would expand the Canadian federal government's power beyond that the Swiss executive enjoys under its Foreign Illicit Assets Act.<sup>46</sup> As with the Swiss law, it authorizes the Canadian executive to initiate proceedings to freeze and confiscate stolen assets when the victim state is unable to do so. But whereas the Swiss statute provides only for their return to the victim state, the Canadian legislation would permit them to be used for any "just and appropriate" cause. The bill's sponsor has explained this would permit Canada to direct assets to refugees driven from their country by a corrupt government.<sup>47</sup>

### 5.2.2 Introduce unexplained wealth orders

Legislation the United Kingdom enacted in 2017 is a second measure that holding states should take to help victim states lacking capacity or political will recover stolen assets. The Criminal Finances Act 2017 creates a forfeiture regime for property suspected of being derived from

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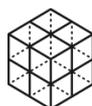
<sup>43</sup> Federal Act on the Freezing and the Restitution of Illicit Assets 2015

<sup>44</sup> Membrez and Hösli 2020.

<sup>45</sup> Portela 2019.

<sup>46</sup> S-259, the Frozen Asset Repurposing Act.

<sup>47</sup> Omidvar 2019.



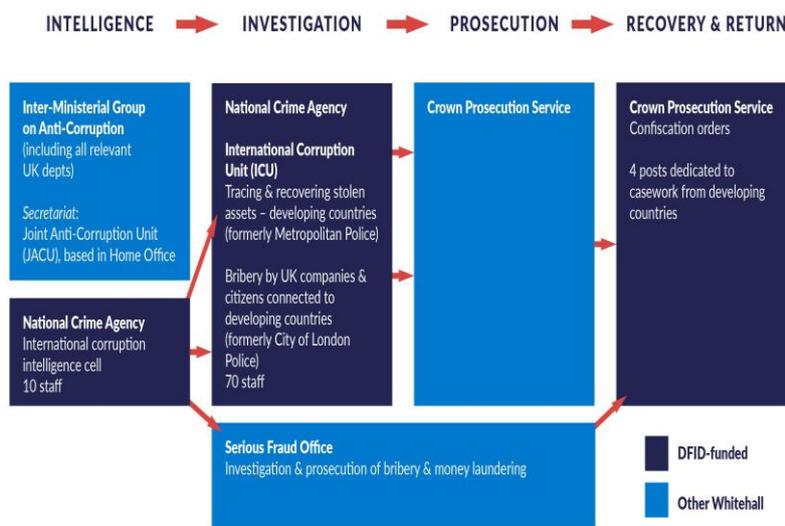
bribery, money laundering, and other serious crimes. Law enforcement agencies can obtain disclosure orders from banks and other third parties to learn an asset’s origins, an order freezing it if the origin appears suspicious, ultimately if it was obtained by criminal means an Unexplained Wealth Order. A court will issue the latter when it is “satisfied that there are reasonable grounds for suspecting” that the target of the order could not afford the property given the person’s “known sources” of “lawfully obtained income.”<sup>48</sup> The target must produce a statement showing his or her interest in the property, how the property was obtained “including, in particular, how any costs incurred in obtaining it were met,” and other property-related information the order requests. If the target fails to fully comply with the order, the agency can bring a civil action under part 5 of the Proceeds of Crime Act to seize the property.

The law was first invoked to require Zamira Hajiyeva to explain the source of funds used to purchase a \$15 million London flat and finance a \$21 million shopping spree.<sup>49</sup> Hajiyeva is an Azeri national living in London. Apparently unemployed, her husband, a former executive of Azerbaijan state-owned bank, was convicted of massively defrauding the bank. U.K. law provides that if her assets are successfully seized, they can be returned to Azerbaijan.

### 5.2.3 Establish dedicated units to assist victim States

A third measure holding states should take to assist victim states is to establish a dedicated group of staff members or a dedicated office or offices within the government to locate and recover stolen assets.

Figure 5. United Kingdom Asset Recovery Assistance



Source: Mason 2020.

roughly £21million annually to support the program with the remainder coming from the budgets of participating agencies. Figures for 2017 show that program froze £114 for every pound spent.<sup>51</sup> While scheduled to end in 2020, given its success, the U.K. government is expected to extend it.

The U.S. Department of Justice has a special unit in the Anti-Money Laundering Section of the Criminal Division dedicated to helping states recover stolen assets. The Kleptocracy Asset

48 Criminal Finances Act 2017 §362B.  
 49 Zamira Hajiyeva v. National Crime Agency 2020.  
 50 Fontana 2011.  
 51 Government of United Kingdom 2018.



Recovery Initiative opens investigations and brings cases in the United States to recover the proceeds of foreign officials' corruption. It has 21 full-time attorneys with additional prosecutors working on the initiative part time. It gets support from the Department of Homeland Security and the FBI, which established an international corruption squad to target foreign bribery and kleptocracy in 2015. From 2011 to 2016, it froze several billion dollars in funds believed to be stolen assets and confiscated and returned hundreds of millions to victim states.<sup>52</sup> Notable returns include \$350 million to Malaysia and \$308 million to Nigeria in 2020, \$115 million jointly with Switzerland to Kazakhstan, and \$28 million to the Republic of Korea. Another \$xx million in monies from the 1MDB scandal is frozen pending proceedings to return it to Malaysia, and it has restrained \$850 million stolen from Uzbekistan.

## 5.3 Crack down on enablers

As explained above, in all but the simplest schemes a public official wanting to hide assets will seek help from someone who knows how to surreptitiously move assets across national borders. A person knowledgeable in establishing corporations in different countries, in acquiring property or other valuable assets, and in opening bank accounts in the corporations' names all the while keeping the official's identity secret. Cracking down on these enablers is critical. This section offers three recommendations for doing so.

### 5.3.1 Make all enablers subject to the anti-money laundering laws

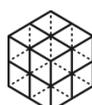
Money laundering is the concealment of the origins of illegally obtained money. UNCAC required States Parties to criminalize it, and all but a few have.<sup>53</sup> Thus anyone who helps a public official hide stolen money is guilty of the crime of money laundering. But enablers do not fear prosecution. If their actions are discovered, they will claim they did not know the assets were stolen. They will say that they were simply asked to establish a corporation, buy real estate or conduct other transactions with a client's assets. They had no idea the assets were stolen. A criminal conviction requires defendants know their actions were wrong, and enablers can take measures to make it almost impossible to show they knew where the assets came from.

For almost two decades, the Financial Action Task Force, the body that advises countries on how to combat money laundering, has urged the enactment of legislation to end this defense. The recommended legislation would require professionals to carefully investigate, in money laundering terms conduct "enhanced due diligence" on, the origins of funds a current or former government official, a family member or close associate asked the professional to handle. Making professionals scrutinize the assets of these "politically exposed persons," as the anti-money laundering laws term them, would prevent enablers from asserting the lack of knowledge defense. The law would require them to know where the funds came from and sanction them from not knowing. To increase further the risk of prosecution for enabling, FATF also recommends that professionals continuously monitor transactions they conduct for a politically exposed person and report any that appears suspicious.

The enhanced due diligence recommendation is contained in FATF Recommendation 22 and the suspicious transaction one in Recommendation 23. The adoption of FATF recommendations depends upon a government's commitment and willingness to curb money laundering. Governments' compliance is subject to periodical review. The publicity generated when a review shows a country is not complying with a recommendation often generates international and domestic pressure on the government to comply.

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<sup>52</sup> Davis 2016.  
<sup>53</sup> UNODC 2017.



**Table 6. States Partly Compliant with FATF Recommendations 22 and 23**

Country	Partly compliant 22	Partly compliant 23	Country	Partly compliant 22	Partly compliant 23
Andorra		✓	Macao, China	✓	✓
Austria	✓		Mali	✓	✓
Bahamas	✓	✓	Mauritania	✓	✓
Bahrain	✓	✓	Mexico	✓	
Burkina Faso	✓		Moldova	✓	✓
Cabo Verde	✓		Morocco		✓
Cambodia	✓		Myanmar	✓	✓
Cayman Islands	✓	✓	Norway	✓	
Colombia	✓	✓	Philippines	✓	✓
Costa Rica	✓	✓	Portugal	✓	
Czech Republic	✓	✓	Samoa	✓	
Denmark	✓		Senegal	✓	✓
Fiji	✓	✓	Serbia	✓	✓
Gibraltar	✓		Singapore	✓	✓
Guatemala	✓	✓	Switzerland	✓	✓
Hong Kong	✓		Chinese Taipei	✓	
Hungary	✓	✓	Tajikistan	✓	
Iceland		✓	Tunisia	✓	✓
Ireland	✓		Turkey	✓	✓
Israel	✓	✓	Turks & Caicos	✓	✓
Jamaica	✓	✓	Uganda	✓	✓
Korea	✓	✓	Vanuatu	✓	✓
Kyrgyzstan	✓	✓	Zambia	✓	
Latvia	✓		Zimbabwe	✓	

Source: FATF, Consolidated assessment ratings, <http://www.fatf-gafi.org/publications/mutualevaluations/documents/assessment-ratings.html>

In the case of Recommendations 22 and 23 that pressure has not been effective. Four G20 members – Australia, Canada, the People’s Republic of China, and the United States – have rejected them in toto.<sup>54</sup> Shown in table 6 are another 48 jurisdictions that have only partially or half-heartedly complied with one, the other, or both Recommendation 22 and 23. Partial compliance can mean that an important profession – lawyers in Denmark, real estate agents in Singapore – is not covered or that no firm or individual has ever reported a suspicious transaction or that the sanctions for failing to report are mild. As the table shows, the list of countries only partly complying include several important financial centers.

Until all states fully adhere to FATF Recommendations 22 and 23,

corrupt officials will almost certainly be able to find someone willing to act as an enabler, to be an accomplice to their theft of government assets. It is thus critical that all states write FATF Recommendations 22 and 23 into their law.

### 5.3.2 Make enabling asset hiding a serious crime

When incorporating Recommendations 22 and 23 into their domestic law, Member States should ensure the penalties for violations reflect the seriousness of the offense. Assets are too often stolen from the world’s poorest nations, depriving their governments of the resources required to achieve the SDGs and thus to meet the needs of their most vulnerable citizens. As accomplices, those who hide these assets are as responsible for the resulting harm as the government officials who betrayed the public trust.

Violations of Recommendations 22 and 23 are not the only enabling-offenses that should carry large fines and long prison sentences. Falsely reporting the beneficial owner of a corporation or other offshore vehicle or failing to disclose that an individual is a director or manager of a vehicles facilitates asset hiding as well. These offenses merit penalties as severe as those for failing to comply with Recommendations 22 and 23.

Those who hide assets reap large rewards for little work. Those can be powerful incentives to become an enabler. The penalties for enabling should be substantial enough to change those incentives.

### 5.3.3 Deny professional privilege protection to investment transactions

All Member States protect a client’s communications with a lawyer, notary, or other legal professional when they relate to a judicial proceeding or the legal aspects of a transaction.

<sup>54</sup> FATF n.d.



Lawyers are barred, in some countries by statute and in others by court decisions, from disclosing what their client tells them and the advice they provide. Lawyer-enablers often abuse this legal professional privilege, asserting that routine, non-legal work – creating a corporation or purchasing real estate – is protected from disclosure on grounds of privilege.

Vaguely drafted statutes or broadly worded decisions allow lawyer-enablers to get away with such abuses. Member States should be sure they cannot, that their law does not permit such work to be shielded from disclosure by the legal professional privilege. FATF Recommendation 22 reflects a widely shared international consensus that there are certain tasks a lawyer may do but which are routine, can be performed by non-lawyers, and do not involve providing legal advice They are:

- forming a corporation or other legal person;
- serving as a director or secretary of a company, a partner of a partnership, or a similar position in relation to any other legal person;
- performing the duties of a trustee of an express trust or the equivalent function for another form of legal arrangement;
- acting a nominee shareholder for another person;
- arranging for another person to act in one of the roles identified above; or
- providing a registered office; business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;

The abuses of Panamanian law firm Mossack Fonseca, the lawyers that replied positively to the money laundering researchers’ inquiries about asset hiding schemes, and the alacrity with which numerous prestigious New York lawyers responded to the Global Witness ruse make enactment of legislation denying professional privilege for these tasks and other purely financial or administrative work a critical element in the crack down on enablers.

## 5.4 Reduce time and costs to victim States to recover assets

As explained above, Member States are bound by international human rights law to ensure proceedings to freeze and confiscate assets are fair. That does not mean the proceedings must be prolonged or that they have to be inordinately expensive. It took Nigeria 16 years to recover one tranche of the billions Sani Abacha stole while in power,<sup>55</sup> and it will reportedly pay private counsel a “fortune” to recover money lost from a recent theft of oil revenues.<sup>56</sup> No victim state should have to wait a decade and one-half or pay a fortune to get back money stolen from its citizens. Three ways to reduce the time and expense are listed below.

### 5.4.1 Limit the use of frozen assets in confiscation proceedings

One reason for lengthy delays in asset recovery cases is that the officials who steal the money use it to pay lawyers to drag out recovery proceedings. Although Nigeria secured a freeze of £50 million its deceased leader Sani Abacha stole and hid in the United Kingdom, the U.K. court allowed his heirs to withdraw more than £30 million to fight recovery efforts in the United Kingdom and elsewhere.<sup>57</sup> They twice sought judicial review of Nigeria’s MLA requests to the United Kingdom and regularly appealed lower court decisions in recovery actions in Switzerland, Luxembourg, Lichtenstein, and the Channel Islands. No matter how meritless the claims, they had nothing to lose. They paid the lawyers with money they would lose if the

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<sup>55</sup> Ferguson 2018, p. 532.

<sup>56</sup> Faull and Olawoyin 2020.

<sup>57</sup> Daniel and Maton 2013.



recovery action succeeded. If they prevailed in a case, whatever funds were left were theirs to keep.

Courts have long recognized criminals have no claim to use stolen funds to pay their legal fees. As the American Supreme Court has said: “A robbery suspect... has no ... right to use funds he has stolen from a bank to retain an attorney to defend him.” Likewise, public officials who steal government assets should not be able to spend the assets to defeat recovery by the victim state.

A 2011 StAR survey of practitioners and legal professionals found widespread support for a policy that would bar the use of frozen funds to pay legal fees unless the putative owner could convincingly show he or she had no other source of funds.<sup>58</sup> In these cases, StAR recommended policymakers set appropriate limits on the funds’ use including restrictions on exorbitant fees and fruitless or meritless challenges to court actions. The policy should balance the rights of the alleged owner’s access to funds for a defense against the rights of the victim state to recover stolen assets. All Member States should have such a policy in place.

#### **5.4.2 Curb exorbitant fee agreements with private counsel**

The recovery of stolen assets demands skills in short supply in some victim countries: analysts able to track international money flows, investigators who know how to use public records to find assets, and prosecutors familiar with mutual legal assistance laws. A government lacking personnel with these skills can turn to StAR, the International Centre for Asset Recovery, or other donors or donor-funded entities. Or it can seek assistance from holding states -- in some cases, like the United Kingdom and the United States from units specifically established to help on asset recovery.

None of these sources charge governments for the help they provide. Despite their availability, however, there have been cases where a government hired a private firm to recover assets. Private firms do charge, and they can be expensive. There have been cases where unable to afford a private firm, the government has agreed to pay it a percentage of whatever is recovered. A return of tens if not hundreds of millions of dollars means the firm will realize an enormous amount, far exceeding a reasonable fee for its work even accounting for the risk it takes that it will receive little or nothing if no assets are recovered. A very large fee not only means the victim state receives less, but the size of the fee can discredit the asset recovery process and fuel citizen suspicions that the process itself has been corrupted. For these reasons, the governments and civil society organizations that participated in the 2017 Global Forum on Asset Recovery recommended that victim states avoid “the use of unspecified or contingent fee arrangements.”<sup>59</sup>

To ensure any fee paid for asset recovery services is reasonable, victim states should not agree to pay a percentage what is recovered. To eliminate any suggestion of a “sweetheart” deal with the firm retained, they should in addition follow standard, competitive procurement procedures applicable for hiring any consultant or professional service firm: drafting a request for proposals, circulating it widely, and appointing an expert technical committee to evaluate the proposals submitted in accordance with publicly disclosed selection metrics. The resulting contract should also be disclosed.

#### **5.4.3 Prosecute corrupt officials in holding States for money laundering**

Article 23 of UNCAC requires States Parties to make hiding the proceeds of a crime a crime itself, the crime of laundering money. In addition to fines and a possible prison sentence, the

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<sup>58</sup> Stephenson et al. 2011, pp. 94 -97.

<sup>59</sup> GFAR 2017.



sanction for money laundering is the confiscation of the monies laundered. Accordingly, whenever a corrupt official and his or her enabler purchases property or makes a deposit in a bank in a State Party using stolen assets, authorities in that state can initiate proceedings to confiscate the assets.

Article 53(c) gives the victim state the right interpose its claim to the assets as their “legitimate owner before they are confiscated.”<sup>60</sup> In states whose laws follow the civil law tradition, crime victims can generally join a criminal prosecution as a “civil party.” Civil party procedures provide that upon a conviction the defendant will be ordered to compensate the victim for damages caused by the offense. France and Switzerland have both accorded victim country governments civil party status in money laundering cases arising from the hiding of stolen assets in their countries. In accordance with their civil party laws, both were awarded the assets stolen.<sup>61</sup>

Victim compensation statutes in some common law countries produce the same result through a different procedure. Crime victim statutes in these countries allow the victim to petition the court upon a defendant’s conviction to recover either damages or the property stolen. In United States crime victim laws have been employed in foreign bribery cases. In several, the government that employed the bribe taker has received the amount of the bribe the official was paid as compensation.<sup>62</sup>

Holding states should ensure their laws either have civil party or victim compensation provisions in their laws. They should then employ them to find stolen assets and see they are returned to victim states.

## 5.5 Eliminate technical obstacles to recovery

Article 54 makes UNCAC’s asset recovery procedures applicable only to “property acquired ... through the commission of an offense established in accordance with this Convention.” It also requires holding states to confiscate it only when the confiscation procedure the victim state followed accords with the holding state law on confiscation. Where both conditions obtain, recovery can proceed without objection. Where they do not, holding state laws can prevent recovery. Two measures to eliminate these technical legal obstacles to recovery are below.

### 5.5.1 Ensure illicit enrichment statutes cover all corruptly acquired assets

A straightforward way to ensure any asset stolen by corrupt means comes within the Convention’s mandatory return provision is to rely on article 20, the illicit enrichment provision. It urges States Parties to make any “significant increase in the assets of a public official” that cannot be “reasonably explain[ed]” an UNCAC offense. Where such a law is in force, any asset an official obtained by corrupt means becomes under article 54 be an asset “involved in the commission of an offense established in accordance with” UNCAC. It is therefore subject to mandatory confiscation by holding states.

Illicit enrichment charges can be subject to long, drawn-out defenses. They can be obviated in Member States which require public officials to file a financial disclosure statement. The law can be amended to make any asset an official willfully fails to disclose subject to immediate confiscation. In two successful civil recovery cases the Federal Republic of Nigeria brought in the United Kingdom, courts relied on the failure to disclose assets as evidence they were

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<sup>60</sup> Brun 2019, p. 545, emphasis in original.

<sup>61</sup> Oduor et al. 2014, pp. 88-89.

<sup>62</sup> Messick 2019.



obtained unlawfully. In Trinidad and Tobago, the courts ruled that assets not disclosed are subject to confiscation.<sup>63</sup>

### **5.5.2 Enact non-conviction based forfeiture legislation**

Traditionally assets have been subject to confiscation only upon the thief's conviction for stealing them. An important trend in recent years has been to expand forfeiture laws to permit assets to be confiscated absent a conviction, in cases where the thief has died, cannot be found, or the statute of limitation has expired.<sup>64</sup> Not all governments, however, have enacted non-conviction base forfeiture laws (NCB). In a note for the COSP,<sup>65</sup> UNODC has explained that on a number of occasions a state's failure to have an NCB law has prevented return.

An NCB law is an important addition to any Member State's anticorruption legislation. Moreover, UNCAC calls on States Parties to provide each other the "widest measure of assistance" in the return of stolen assets. There is no reason all States Parties should not enact NCB legislation and every reason they should.

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<sup>63</sup> Messick 2013.

<sup>64</sup> Greenberg et al. 2009.

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[https://www.unodc.org/pdf/crime/convention\\_corruption/cosp/session1/V0659563e.pdf](https://www.unodc.org/pdf/crime/convention_corruption/cosp/session1/V0659563e.pdf)

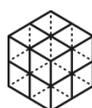
Resolution 3/3, 2009, Asset Recovery, <https://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3-resolutions.html>

Resolution 5/3, 2013, Facilitating International Cooperation in Asset Recovery,  
<https://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1401171e.pdf>

Resolution 7/1, 2017, Strengthening Mutual Legal Assistance for International Cooperation and Asset Recovery,  
<https://www.unodc.org/unodc/en/corruption/COSP/session7-resolutions.html>

### 6.2.3 Statutes, Regulations, and Legislation

#### Canada



S-259, Frozen Assets Repurposing Act,  
<https://www.parl.ca/legisinfo/BillDetails.aspx?billId=10382249&Language=E>

England

First Statute of Westminster, ch. 30, 3 Edw 1, 1275,  
<http://www.legislation.gov.uk/aep/Edw1/3/5/section/wrapper1>

European Union

Council Decision 2011/72/CFSP of 31 January 2011 Concerning Restrictive Measures Directed Against Certain Persons and Entities in View of the Situation in Tunisia, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011D0072>

Switzerland

Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act), Law Nr.196.1, <https://www.admin.ch/opc/en/classified-compilation/20131214/index.html>

United Kingdom

Sanctions and AntiMoney Laundering Act 2018, [http://www.legislation.gov.uk/ukpga/2018/13/pdfs/ukpga\\_20180013\\_en.pdf](http://www.legislation.gov.uk/ukpga/2018/13/pdfs/ukpga_20180013_en.pdf)  
Criminal Finances Act 2017, <http://www.legislation.gov.uk/ukpga/2017/22/contents/enacted>

Virgin Islands

Virgin Islands Beneficial Ownership Secure Search System Act, Law No. 15 of 2017,  
[https://tridenttrust.com/media/2513/boss\\_act\\_june\\_2017.pdf](https://tridenttrust.com/media/2513/boss_act_june_2017.pdf)

#### **6.2.4 Treaties**

African Charter on Human and Peoples' Rights, [https://au.int/sites/default/files/treaties/36390-treaty-0011\\_-\\_african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf)

American Convention on Human Rights, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm)

International Covenant on Civil and Political Rights,  
[https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf)

