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OHCHR Recommended Principles on Human Rights and Asset Recovery

Foreword

In the 2030 Agenda for Sustainable Development, Member States committed to significantly reduce illicit financial flows and to strengthen the recovery and return of stolen assets by 2030 (target 16.4 of the Sustainable Development Goals). Despite this commitment, the assets estimated to have been stolen from developing countries outnumber by far the assets returned. Urgent action is needed to meet the goal to reduce illicit financial flows and to meet the 2030 Sustainable Development Goals in their entirety.

Stolen assets and corruption more broadly are human rights issues because acts of corruption have a negative impact on the realization of human rights. Corruption undermines States' ability to meet their minimum core obligations and to mobilise the maximum available resources for the progressive realization of human rights, including the right to development. Corruption is a human rights issue also because anti-corruption and asset recovery processes can themselves infringe on the enjoyment of human rights. States have obligations to take anti-corruption measures, and to do so in a manner that is consistent with their human rights obligations. Furthermore, upholding human rights is critical for preventing and supressing corruption and money laundering.

Since 2011, the Human Rights Council has been considering the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation in this respect. In 2021, the Council invited the Conference of the States Parties to the United Nations Convention against Corruption to consider ways of adopting a human rights-based approach in the implementation of the Convention, including when dealing with the return of the proceeds of crime.[1]

In contribution to this effort, and further to the mandate of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the request of the General Assembly in resolution 75/182 that the High Commissioner work to strengthen the global partnership for development, OHCHR has developed these Recommended Principles on Human Rights and Asset Recovery. They are the result of extensive research, wide-ranging expert and public consultations and critical review by Member States, relevant organizations in the United Nations system and other international organizations, academics and civil society organizations. This document, while the outcome of a broad consultative process, reflects OHCHR's views.

The Conference of the States Parties to the United Nations Convention against Corruption and its Open-ended Intergovernmental Working Group on Asset Recovery are the United Nations mechanisms established to address the issue of stolen asset recovery. OHCHR has developed the Recommended Principles in order to complement these intergovernmental processes as part of its mandate to mainstream the right to development under General Assembly resolution 75/182. The Recommended Principles do not purport to state or vary legal obligations, but instead draw on established positions in order to further inform ongoing policy discussion in these areas of such importance to the right to development.

The Recommended Principles are designed to support international cooperation in the context of asset recovery by detailing a human rights-based approach to the recovery and return of proceeds of corruption, and by providing best practices. The Recommended Principles highlight the ways in which human rights law and anti-corruption law can act as mutually

[1] Human Rights Council resolution 46/11.

reinforcing bodies of law. The nine Recommended Principles cover all phases of the process of asset recovery, including the prevention and detection of corruption, the tracing of proceeds of corruption, the preservation and confiscation of proceeds of corruption and the return and allocation of proceeds of corruption.

The Recommended Principles are intended as a practical tool available for use and reference by interested States, international organizations and other stakeholders directly concerned with asset recovery processes and as a contribution to intergovernmental debate and processes aimed at adopting a human rights-based approach to the return of stolen assets.

I encourage States, international organizations and other stakeholders to make use of OHCHR's Recommended Principles.

Michelle Bachelet
United Nations High Commissioner for Human Rights

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3. States should put in place effective measures to protect the human rights of persons who report corruption and money laundering.

4. States should ensure the progressive realization of economic, social and cultural rights by providing international assistance and cooperation to combat corruption and money laundering and to recover stolen assets.

5. States should take effective measures to ensure the human rights of persons under investigation for, accused of or convicted of corruption and money laundering offences and subject to asset recovery procedures.

6. States should ensure that persons whose human rights have been violated as a result of corruption have access to an effective remedy.

7. Receiving States should allocate returned assets in an accountable, transparent and participatory manner.

8. Receiving States should use recovered assets in a manner that contributes to the realization of human rights.

9. Requested States should return embezzled public funds to requesting States.

Introduction

1. Corruption exists in all countries, irrespective of their economic or political system and their level of development. The proceeds of corruption are a type of illicit financial flow – a term referring to funds that are illegally acquired or transferred, as well as to behaviours related to tax and commercial practices such as aggressive tax avoidance.[2] Illicit financial flows have potentially profound economic, social and political consequences for developing and developed countries. According to the non-governmental organization Global Financial Integrity, which has been publishing estimates of illicit financial flows into and out of developing countries since 2008, between $598 billion and $807 billion is estimated to have been transferred out of developing countries in 2015.[3] Global Financial Integrity further estimates that, between 2006 and 2015, average illicit financial flows out of developing countries were between 10.8 per cent and 12.4 per cent of the total volume of trade carried out by those countries.[4] Africa alone is losing an estimated $86.6 billion annually through illicit financial flows, according to the United Nations Conference on Trade and Development.[5] Moreover, between 2010 and 2015, capital flight from African countries amounted to an estimated $381.9 billion.[6]

2. Following the Stolen Asset Recovery (StAR) Initiative, a joint initiative by the United Nations Office on Drugs and Crime (UNODC) and the World Bank, it was concluded that a "huge gap" remains between the proceeds of corruption that have been returned and the billions of dollars that are estimated to have been stolen from developing countries.[7] Based on cases of stolen asset recovery reported by States in response to a recent StAR questionnaire, it is estimated that a total of $2.4 billion was returned to countries of origin between 2010 and 2020.[8]

3. Given those estimates and the discrepancy between the amount of assets stolen and the funds that are ultimately returned, the recovery and return of assets is understandably

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[2] United Nations Office on Drugs and Crime (UNODC) and United Nations Conference on Trade and Development (UNCTAD), *Conceptual Framework for the Statistical Measurement of Illicit Financial Flows* (Geneva, October 2020) pp. 7–8.

[3] Global Financial Integrity, *Illicit Financial Flows to and from 148 Developing Countries: 2006–2015* (Washington, D.C., January 2019), p. ix, Table X-1. See also High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel), *Financial Integrity for Sustainable Development: Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda*, (New York, February 2021), p. 9.

[4] Ibid.

[5] UNCTAD, *Tackling Illicit Financial Flows for Sustainable Development in Africa: Economic Development in Africa Report 2020* (Geneva, 2020).

[6] Léonce Ndikumana and James K. Boyce, *Capital Flight from Africa: Updated Methodology and New Estimates* (Amherst, Massachusetts, Political Economy Research Institute, June 2018).

[7] Larissa Gray and others, *Few and Far: The Hard Facts on Stolen Asset Recovery* (Washington, D.C., World Bank, 2014), p. 2.

[8] Conference of the States Parties to the United Nations Convention against Corruption, "Collection of information from States parties on international asset recovery, including reporting challenges and barriers", note prepared by the Secretariat (CAC/COSP/WG.2/2020/4). It was noted that this figure was preliminary, based only on responses received as at 18 September 2020, and it did not account for historical exchange rates. A number of large, well-known asset returns were not included, owing to ongoing data collection efforts and the finalization of responses from States parties.

high on the political agenda of the countries concerned. The recovery and return of assets is a means of financing for development, it forms part of the effort to mobilize domestic financial resources and it is a way of fulfilling the obligation to maximize resources for the realization of economic, social and cultural rights. The 2030 Agenda for Sustainable Development reflects these perspectives, as United Nations Member States have committed to reducing illicit financial flows significantly and to strengthening the recovery and return of stolen assets by 2030 (target 16.4 of the Sustainable Development Goals).[9] The Addis Ababa Action Agenda of the Third International Conference on Financing for Development contains a similar commitment, in furtherance of which UNODC has organized international expert meetings concerning, inter alia, stolen asset recovery and sustainable development.[10]

4. Stolen assets, and corruption more broadly, are human rights issues because acts of corruption have a negative impact on the realization of human rights, and in some cases acts of corruption can even violate human rights.[11] When a government official embezzles public assets, for example, this detracts from the State's capacity to realize economic, social and cultural rights to the maximum of its available resources.[12] The history of the past several decades is unfortunately replete with examples of the large-scale bribery and theft of public resources by heads of State and other high-level government officials, their family members and associates, especially in developing States that are rich in natural resources.[13] Corruption is a human rights issue also because anti-corruption and anti-money-laundering investigations and prosecutions and asset recovery processes can themselves infringe on the enjoyment of other rights such as the rights to life, to liberty, to a fair trial and to property and on the prohibition of torture and ill-treatment.[14] States have obligations not only to undertake anti-corruption measures but to do so in a manner consistent with their human rights obligations.

[9] General Assembly resolution 71/313; UNODC and UNCTAD, *Conceptual Framework for the Statistical Measurement of Illicit Financial Flows*.

[10] Addis Ababa Action Agenda of the Third International Conference on Financing for Development, para. 25; International Expert Meeting on the Management and Disposal of Recovered and Returned Stolen Assets, Including in Support of Sustainable Development, Addis Ababa, 14–16 February 2017 (Addis I); International Expert Meeting on the return of stolen assets, Addis Ababa, 7–9 May 2019 (Addis II).

[11] Community Court of Justice, Economic Community of West African States (ECOWAS), *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)*, ECW/CCJ/JUD/07/10, Judgment, 30 November 2010, para. 19. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has identified circumstances in which the undue advantage in a corrupt transaction amounts to torture or ill-treatment. This may take the form of a sexual act or forced labour, for example. See Human Rights Council, "Torture and other cruel, inhuman or degrading treatment or punishment", report of the Special Rapporteur (A/HRC/40/59), para. 28.

[12] International Covenant on Economic, Social and Cultural Rights, art. 2 (1).

[13] World Bank and UNODC, StAR Asset Recovery Watch database. Available at https://star.worldbank.org/corruption-cases/; see also Michela Wrong, *In the Footsteps of Mr Kurtz: Living on the Brink of Disaster in Mobutu's Congo* (New York, HarperCollins, 2002).

[14] The right to property is not included in the International Covenant on Civil and Political Rights, but is recognized in several regional and global human rights instruments, including the Universal Declaration on Human Rights (art. 17).

5. The term "asset recovery", as used in these Principles, refers to the process by which States recover proceeds of crime[15] and return them to a foreign jurisdiction.[16] The focus of these Principles is on the recovery of assets that have been embezzled, misappropriated or otherwise diverted by a public official, and that in many instances have been the subject of money laundering.[17] The Principles also have relevance for the recovery of proceeds of other acts of corruption, such as bribery, trading in influence, abuse of functions and illicit enrichment.[18] The proceeds of these other forms of corruption may, however, raise distinct legal issues in an asset recovery context, as discussed in the commentary to Principle 9.[19] Other forms of illicit financial flows, such as tax evasion, abusive transfer pricing and transnational criminal activities, including drug trafficking and human trafficking, are not specifically addressed by these Principles, as they involve different legal questions, although the Principles may nevertheless have relevance for these other forms of illicit conduct.[20] Although the Principles focus on international asset recovery, most of them are also relevant in domestic asset recovery proceedings, and the commentary references domestic cases and laws.[21]

6. Since 2011, the Human Rights Council has been considering the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, and the importance of improving international cooperation in this respect. In 2021, in its most recent resolution on the subject, the Council invited the Conference of the States Parties to the United Nations Convention against Corruption to consider ways of adopting a human rights-based approach in the implementation of the Convention, including when dealing with the return of the proceeds of crime.[22]

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[15] According to the United Nations Convention against Corruption, the term "proceeds of crime" refers to "any property derived from or obtained, directly or indirectly, through the commission of an offence" (art. 2); see also the Inter-American Convention against Corruption, art. XV (1); the African Union Convention on Preventing and Combating Corruption, art. 1; and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, art. 1 (a).

[16] Gray and others, *Few and Far*, p. 9.

[17] United Nations Convention against Corruption, arts. 17 and 23; Inter-American Convention against Corruption, art. XI (1) (d); Council of Europe Criminal Law Convention on Corruption, art. 13; African Union Convention on Preventing and Combating Corruption, arts. 4 (1) (d) and 6; Economic Community of West African States Protocol on the Fight against Corruption, arts. 6 (1) (e) and 7; Southern African Development Community (SADC) Protocol against Corruption, art. 3 (d).

[18] For definitions of each of these acts of corruption, see the United Nations Convention against Corruption, arts. 15–16 and 18–20; the Inter-American Convention against Corruption, arts. VI, VIII–IX and XI; the Council of Europe Criminal Law Convention on Corruption, arts. 2–12; the African Union Convention on Preventing and Combating Corruption, arts. 4 and 8; and the Economic Community of West African States Protocol on the Fight against Corruption, art. 6.

[19] See, for example, Principle 9. For a detailed treatment of these issues, see Jacinta Anyango Oduor and others, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington, D.C, World Bank, 2014), and Tina Søreide and Abiola Makinwa, eds., *Negotiated Settlements in Bribery Cases: A Principled Approach* (Cheltenham, United Kingdom, and Northampton, Massachusetts, United States, Edward Elgar Publishing, 2020).

[20] For a discussion of the broader term "illicit financial flows", see Mathis Lohaus, *Asset Recovery and Illicit Financial Flows from a Development Perspective: Concepts, Scope and Potential* (Bergen, U4 Anti-Corruption Resource Centre, Chr. Michelsen Institute, 2019).

[21] Only Principle 4, concerning international assistance and cooperation, applies to international, as opposed to domestic, asset recovery proceedings.

[22] Human Rights Council resolution 46/11, para. 15.

7. Within its mandate, OHCHR developed the Recommended Principles in order to support the efforts of United Nations Member States to strengthen cooperation in the area of stolen asset recovery and, in that context, to foster the right to development. They are the result of extensive research, wide-ranging expert and public consultations and critical review by Member States, relevant organizations in the United Nations system and other international organizations, academics and civil society organizations. This document, while the outcome of a broad consultative process, reflects the views of OHCHR.

8. The present Principles are designed to support international cooperation in the context of asset recovery by detailing a human rights-based approach to the recovery and return of proceeds of corruption, and by providing best practices. The Principles highlight the ways in which human rights law and anti-corruption law can act as mutually reinforcing bodies of law despite having often been treated as fundamentally distinct from each other by States and practitioners. These two bodies of law can, however, be understood as complementary, and as being based on the same fundamental principles of the rule of law, accountability, transparency and participation.

9. The Principles are not legally binding. Rather, they are intended to support States in their implementation of existing international legal obligations, without altering those commitments or creating new obligations. The best practices discussed in the commentary to the Principles have been identified through research and a public consultation process, and have been selected with a view to representing the diversity of legal systems and the considerations both of States requesting asset recovery and of those requested to return assets. States, international organizations and civil society organizations are the primary intended users of this document.

10. The nine Principles cover all phases of the process of asset recovery, including the prevention and detection of corruption, the tracing of proceeds of corruption, the preservation and confiscation of proceeds of corruption, and the return and allocation of proceeds of corruption. Each principle is accompanied by a commentary, which sets out the relevant legal framework and best practices. The Principles reference and discuss both international and regional instruments governing corruption, money laundering and human rights, as well as the judgments of regional and subregional human rights courts.

Principle 1: **States should respect, protect and fulfil human rights by adopting and enforcing laws and policies on the prevention of corruption and money laundering.**

Commentary

11. Principle 1 addresses the prevention of corruption and money laundering, which is integral to the legal framework governing asset recovery.[23] Through domestic laws, policies and institutions designed to prevent corruption and money laundering, States can forestall the need to recover stolen assets in the first place. Relevant domestic institutions include an independent judiciary, anti-corruption bodies and financial intelligence units. Anti-money-laundering measures are a key part of the legal framework governing asset recovery, as they prevent perpetrators of corruption from being able to disguise the illegal origins of their corrupt proceeds. Corrupt public officials typically cannot use stolen assets unless they have successfully integrated them into the global financial system without attracting suspicion. Anti-money-laundering and anti-corruption measures are thus inextricably linked.[24]

12. In addition to comprising part of the legal framework governing asset recovery, measures for the prevention of corruption and money laundering may also be seen as critical means by which States can respect, protect and fulfil human rights. Because of the negative impact of corruption on the enjoyment of human rights, States should put in place measures to prevent such conduct. The prevention of corruption and money laundering can be seen from the perspective of international human rights law, under which States bear obligations to respect, protect and fulfil all human rights, including civil, political, social, economic and cultural rights, as well as the right to development.[25]

13. The duty to protect under international human rights law involves an obligation on States to prevent non-State actors from interfering with the enjoyment of human rights.[26] In the context of corruption, money laundering and asset recovery, key private actors include business enterprises, financial institutions and designated non-financial businesses and professions.[27] Private sector entities can play critical roles in the misallocation or theft of public funds, so their conduct must be regulated as part of any anti-corruption or anti-money-laundering strategy. By preventing private actors from engaging in corrupt

[23] United Nations Convention against Corruption, arts. 5–14 and 52; Inter-American Convention against Corruption, art. III; African Union Convention on Preventing and Combating Corruption, arts. 5 and 7; Economic Community of West African States Protocol on the Fight against Corruption, art. 5; SADC Protocol against Corruption, art. 4.

[24] Financial Action Task Force, *Laundering the Proceeds of Corruption* (Paris, 2011).

[25] See, for example, Human Rights Committee, general comment No. 31 (2004); Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) and general comment No. 24 (2017).

[26] Human Rights Council, report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (A/HRC/17/31), Principle 1; Human Rights Council, final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights (A/HRC/28/73), para. 9.

[27] For a definition of designated non-financial businesses and professions, see Financial Action Task Force (FATF), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Paris, updated October 2021), general glossary, pp. 120–121.

conduct or facilitating money laundering, States prevent those actors from interfering with the optimal use of public funds for the fulfilment of human rights.

14. The duty to fulfil under international human rights law obliges States to take positive action to facilitate the enjoyment of human rights. The fulfilment of economic, social and cultural rights, for example, involves the maximum use of available resources for purposes such as funding public schools and health-care systems.[28] Research by development economists shows that corruption is correlated with the diversion of government resources away from the fulfilment of human rights through, for example, the funding of education and health care.[29] Anti-corruption and anti-money-laundering laws aim to prevent such diversions of public funds, and to help ensure that government resources are devoted to the fulfilment of human rights.

15. Principle 1 is thus premised on the notion that compliance by States with their human rights obligations may be strengthened by compliance with anti-corruption treaties and anti-money-laundering standards.[30] Broadly speaking, such compliance involves adopting and enforcing anti-corruption and anti-money-laundering laws or regulations, developing anti-corruption and anti-money-laundering policies and establishing and funding domestic anti-corruption bodies.[31] A number of preventive anti-corruption measures are particularly relevant for preventing the theft of public funds. The behaviour of public officials may be regulated, in part, through codes or standards of conduct "for the correct, honourable and proper performance of public functions".[32] In addition, States may require public officials to make declarations regarding "their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict

[28] International Covenant on Economic, Social and Cultural Rights, art. 2 (1); see also Convention on the Rights of the Child, art. 4; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, art. 8 (4), providing that the Committee on Economic, Social and Cultural Rights shall use the standard of "reasonableness" in evaluating the "steps taken" by States parties in accordance with the Covenant. On the meaning of "maximal use", see also Committee on Economic, Social and Cultural Rights, general comment No. 12 (1999), para. 17, and general comment No. 14 (2000), para. 47.

[29] See, for example, Sanjeev Gupta, Hamid Davoodi and Erwin Tiongson, "Corruption and the provision of health care and education services" (International Monetary Fund working paper WP/00/116) (2000); Clara Delavallade, "Corruption and distribution of public spending in developing countries", *Journal of Economics and Finance*, vol. 30 (2006), p. 222.

[30] Human Rights Council, "Challenges faced and best practices applied by States in integrating human rights into their national strategies and policies to fight against corruption, including those addressing non-State actors, such as the private sector", report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/44/27), para. 41: "adopting anti-corruption compliance procedures can be seen to be part of human rights due diligence."

[31] United Nations Convention against Corruption, art. 6; Inter-American Convention against Corruption, art. III (9); African Union Convention on Preventing and Combating Corruption, art. 5 (3); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (h); SADC Protocol against Corruption, art. 4 (g). See also Inter-American Commission on Human Rights, *Guidelines for Preparation of Progress Indicators in the Area of Economic Social, and Cultural Rights* (OEA/Ser.L/V/II.132) (2008), p. 24, listing the existence, empowerment and funding of an anti-corruption monitoring agency as a structural indicator for national progress reports on economic, social and cultural rights.

[32] United Nations Convention against Corruption, art. 8 (2); Inter-American Convention against Corruption, art. III (1)–(2); African Union Convention on Preventing and Combating Corruption, art. 7 (2); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (a); SADC Protocol against Corruption, art. 4 (1) (a).

of interest may result with respect to their functions as public officials."[33] The reform of beneficial ownership disclosure rules can play a role in preventing public officials from concealing their ownership and control over illicit assets and in remedying the harm caused by such conduct.[34] Misallocation of public resources can be prevented in part through the development and maintenance of public financial management systems and practices that allow for public scrutiny and that make information on public resources freely available in a timely manner.[35]

16. Preventive anti-money-laundering measures include due-diligence obligations for financial institutions and designated non-financial businesses and professions.[36] Key rules require customer identification, beneficial owner identification, record keeping and the reporting of suspicious transactions to financial intelligence units.[37] States should adopt anti-money-laundering measures that conform to a risk-based approach, according to which the anti-money-laundering regime in place is commensurate with the risks identified.[38] Such anti-money-laundering measures are aimed at preventing, detecting and tracing money laundering, thereby facilitating both asset recovery and prevention.[39] By requiring financial institutions to instigate such procedures, States are working to safeguard the integrity of public funds by preventing public officials from laundering the proceeds of corruption.

17. This commentary provides neither an exhaustive list of preventive anti-corruption and anti-money-laundering measures nor further elaboration on the substantive content of such measures, which are already the subject of extensive and detailed instruments and studies.[40] Rather, this commentary seeks to stress the interrelationship between human rights law and anti-corruption and anti-money-laundering measures. In light of the negative impact of corruption on the enjoyment of human rights, compliance by States with their human rights obligations entails compliance with anti-corruption treaties and anti-money-laundering standards. As is discussed in the commentary to Principle 5, however, anti-corruption measures may themselves have a negative impact on human rights, and States should put measures in place to prevent such violations.

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[33] United Nations Convention against Corruption, art. 8 (5); Inter-American Convention against Corruption, art. III (4); African Union Convention on Preventing and Combating Corruption, art. 7 (1); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (g).

[34] Human Rights Council, "Connecting the business and human rights and the anti-corruption agendas", report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/44/43), paras. 33–34.

[35] Human Rights Council, "Challenges faced and best practices applied by States in integrating human rights into their national strategies and policies to fight against corruption, including those addressing non-State actors, such as the private sector" (A/HRC/44/27), para. 30.

[36] With respect to the human rights due diligence of business enterprises, see Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", Principle 17.

[37] United Nations Convention against Corruption, arts. 14 and 52; FATF, *The FATF Recommendations*, recommendations 10 and 24–25.

[38] FATF, *The FATF Recommendations*, recommendation 1.

[39] See, more generally, FATF, *The FATF Recommendations*, recommendations 9–23. Self-reporting obligations are a useful tool for the detection of money laundering and corruption. By requiring or encouraging self-reporting by businesses, States can facilitate the detection of money laundering and corruption offences.

[40] See, for example, FATF, *The FATF Recommendations.*

Principle 2: States should ensure that their laws and policies for the prevention of corruption reflect the principles of the rule of law, accountability, transparency and participation.

Commentary

18. The rule of law, accountability, transparency and the right to participate in public affairs[41] are fundamental principles in both anti-corruption law and human rights law. Article 5 (1) of the United Nations Convention against Corruption provides that "each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability." Principle 2 focuses specifically on the principles of the rule of law, accountability, transparency and participation because these principles are common to both anti-corruption law and human rights law. In other words, these two bodies of law may be seen as grounded in or sharing some of the same fundamental principles.

19. The rule of law is a governance principle, according to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[42] More specifically, the rule of law requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[43] The realization of human rights and the rule of law are interrelated: the rule of law is essential for the realization of human rights, which in turn reinforces the rule of law.[44] In addition, the rule of law is essential for addressing and preventing corruption, which necessarily entails non-transparent, arbitrary and inequitable decision-making by government officials.[45]

20. Accountability may be defined as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."[46] In the context of

[41] The terms "the right to participate" and "participation" are treated as synonymous with the right to take part in the conduct of public affairs, as stipulated in article 25 of the International Covenant on Civil and Political Rights.

[42] United Nations Security Council, "The rule of law and transitional justice in conflict and post-conflict societies", report of the Secretary-General (S/2004/616), para. 6; General Assembly resolution 67/1; Council of Europe, European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist* (CDL-AD(2016)007rev) (Strasbourg, 2016).

[43] United Nations Security Council, "The rule of law and transitional justice in conflict and post-conflict societies", para. 6.

[44] General Assembly resolution 67/1, para. 7.

[45] Ibid., para. 25.

[46] Mark Bovens, "Analysing and assessing accountability: a conceptual framework", *European Law Journal*, vol. 13, issue 4 (2007), pp. 447 and 450.

asset recovery, the actor would be the Government (or a branch or official of the Government) of the requested or requesting State. The forum could be the society of the requested or requesting State. In the United Nations Convention against Corruption, the term "society" refers to "individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations".[47]

21. This relationship of accountability between the actor and the forum involves three elements. First, the actor (a government department or official) must inform the public about its conduct by providing information, explanations and justifications.[48] Second, the actor must be answerable for its conduct, which means that the forum (the public) must be able to question the actor and the adequacy of the information given about its conduct.[49] Third, the forum may pass judgment on the actor by imposing sanctions of some sort, for example by condemning the behaviour of a government official.[50] Accountability focuses on ex post facto processes, which involve answerability and sanctions after the actor has taken decisions.[51] Both human rights law and anti-corruption law play roles in building a legal framework that ensures accountability. Human rights law, in particular, provides a legal basis for the principles of transparency and participation, which are critical for ensuring answerability.[52]

22. Transparency is a precondition for the prevention of corruption and for the enjoyment of human rights more generally.[53] The principle of transparency is grounded in article 19 of the International Covenant on Civil and Political Rights, which provides that the right to freedom of expression includes the right to seek and receive information, that is, the right to access to information.[54] According to the Human Rights Committee, States parties to the Covenant should give effect to the right of access to information by proactively putting in the public domain government information of public interest.[55] From an anti-corruption perspective, information about public finances, public procurement, public decision-making processes and public sector human resource systems is of particular relevance. States parties should make every effort to ensure easy, prompt, effective and practical

[47] United Nations Convention against Corruption, art. 13; see also Inter-American Convention against Corruption, art. III (11); African Union Convention on Preventing and Combating Corruption, art. 12 ("Civil Society and Media"); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (e); SADC Protocol on Corruption, art. 4 (i).

[48] Bovens, "Analysing and Assessing Accountability", pp. 447 and 451; on the distinction between responsibility and accountability, see James Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013) pp. 83–84.

[49] Bovens, "Analysing and Assessing Accountability", pp. 447 and 451.

[50] Ibid.

[51] Ibid., p. 467.

[52] Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (HR/PUB/13/1/Add.1) (Geneva and Brooklyn, New York, 2013), p. 11.

[53] Andrea Bianchi, "On power and illusion: the concept of transparency in international law", in *Transparency in International Law*, Andrea Bianchi and Anne Peters, eds. (Cambridge, Cambridge University Press, 2013).

[54] See also African Charter on Human and Peoples' Rights, art. 9; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), art. 10; General Assembly resolution 70/1, target 16.10 of the Sustainable Development Goals: "Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements".

[55] Human Rights Committee, general comment No. 34 (2011), para. 19.

access to such information of public interest upon the request of an individual or an association.[56] In the public procurement context, however, transparency must be maintained in a balanced manner, meaning that government authorities should avoid requiring the release of sensitive information that could be used by bidders to distort competition.[57] In light of the right of access to information, government authorities should narrowly construe the grounds for refusing to disclose information, and they should clearly set out their reasons for refusal in particular cases. In the context of extreme poverty, States may have to take special measures to ensure that information is made available in a manner that is accessible and understandable to the poorest or most disadvantaged, who may be illiterate or experience language barriers.[58] Finally, the right to access to information covers information that is held by the State but is not yet in the public domain.[59] States must therefore put procedures in place, such as freedom of information legislation, to allow people to gain access to such information.[60]

23. Transparency enables private persons or entities to carry out a watchdog function with respect to matters of legitimate public concern.[61] The fight against corruption is widely accepted as a matter of legitimate public interest, as it concerns the allocation of public funds and governmental decision-making processes more generally.[62] The provision of information by the Government to an individual allows for the circulation of that information within society, which can then access and assess that information.[63] Access to Government-held information allows persons to "question, investigate and consider whether public functions are being performed adequately."[64] To ensure that meaningful participation is possible, government authorities should incorporate access to information into all stages of decision-making, including initial planning, budgeting, implementation,

[56] Ibid.

[57] Organisation for Economic Co-operation and Development (OECD), "Recommendation of the Council on Public Procurement" (C(2015)2), recommendation II (i); OECD, "Recommendation of the Council on Fighting Bid Rigging in Public Procurement" (C(2012)115), recommendation 4: "When publishing the results of a tender, carefully consider which information is published and avoid disclosing competitively sensitive information as this can facilitate the formation of bid-rigging schemes, going forward."

[58] See Human Rights Council, report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (A/HRC/23/36), which states that information "should be free of charge, relevant, up-to-date, understandable, free of technical language or jargon, and in local languages." Furthermore, dissemination of information in non-written form (e.g. radio announcements) may be necessary to reach the poorest (para. 61).

[59] Nicola Wenzel, "Opinion and expression, freedom of, international protection", in *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, last updated April 2014), para. 19.

[60] Human Rights Council, report of the Special Rapporteur on extreme poverty and human rights, para. 61. See also Commission on Human Rights, "Civil and political rights including the question of: freedom of expression", report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain (E/CN.4/2000/63), annex II: "The public's right to know: principles on freedom of information legislation".

[61] Human Rights Committee, Views, *Toktakunov v. Kyrgyzstan* (CCPR/C/101/D/1470/2006), para. 7.4.

[62] General Assembly, report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/70/361), which states that corruption "should be considered presumptively in the public interest" (para. 10).

[63] Ibid.

[64] Inter-American Court of Human Rights, *Claude-Reyes et al v. Chile*, Series C No. 151, Judgment, 19 September 2006, para. 86.

monitoring and evaluation.[65] Without information about the process by which a Government privatizes an industry or grants concessions, for example, people may not be able to pursue their rights effectively. Access to information, and the related right to participation, thereby enables people to defend their own human rights and to combat corruption.[66]

24. The right to participate in public affairs is important for the prevention of corruption, as well as for the enjoyment of human rights more generally. The right to participate in public affairs is grounded in article 25 of the International Covenant on Civil and Political Rights, which provides that "every citizen shall have the right and the opportunity … to take part in the conduct of public affairs, directly or through freely chosen representatives".[67] Ensuring that citizens have the right and opportunity to take part in public affairs is thus a legal obligation for States parties to the Covenant, and not simply a policy option that Governments can decide not to pursue.[68] The right to participate in public affairs is dependent on transparency and on the right of access to information, as information about government decision-making processes enables or facilitates the public's contribution to and assessment of those decisions.[69]

25. The term "public affairs" is a broad concept that covers the exercise of all facets of political power, whether legislative, executive or administrative.[70] The term "public affairs" refers to public administration at all levels of government: local, regional, national and international.[71] Participation in public affairs can take place directly or indirectly.[72] Direct participation involves the exercise of power through membership in a legislative body, by holding an executive or administrative office and through referendums and other electoral processes.[73] Indirect participation involves citizens exerting influence on public affairs through public debate and dialogue with freely chosen representatives and by organizing themselves.[74] In an anti-corruption context, non-governmental organizations and the media play particularly important roles in fostering participation, through public debate and dialogue about public finances and decision-making processes.

[65] OHCHR, *Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs* (Geneva, 2018), para. 23.

[66] Committee on Economic, Social and Cultural Rights, concluding observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan (E/C.12/1/Add.20), para. 29.

[67] See also target 16.7 of the Sustainable Development Goals: "Ensure responsive, inclusive, participatory and representative decision-making at all levels"; General Assembly resolution 41/128, art. 8.

[68] See also Universal Declaration of Human Rights, art. 21(1); Human Rights Council, report of the Special Rapporteur on extreme poverty and human rights, para. 24.

[69] Human Rights Council, "Draft guidelines for States on the effective implementation of the right to participate in public affairs", report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/39/28), para. 15.

[70] Human Rights Committee, general comment No. 25 (1996), para. 5.

[71] Ibid.

[72] Ibid.

[73] Ibid., para. 6.

[74] Ibid., para. 8.

26. Participation in public affairs should occur at all stages of governmental decision-making processes, and it can take many different forms, depending on the stage and the circumstances. States must realize the right to participation at early stages of decision-making, when agendas are being set and priorities are being established, and when policy options have not yet been foreclosed.[75] As participation is a continuous process, States should ensure that it is maintained at later stages, when the implementation of a law, policy, project or programme can be monitored and ultimately evaluated.[76] With respect to the form of participation, it can take place online (e.g. through written consultation processes or via social media) or in person (e.g. through public hearings, stakeholder committees or advisory bodies).[77] The intensity or level of participation can range from consultation and dialogue to co-drafting and partnership.[78] Participation in public affairs should not be limited to marginal or peripheral aspects of public affairs, but should focus on key issues such as public services, budgets and fiscal policy.[79] Public awareness of and debate about corruption in the context of public procurement or public expenditure, for example, represent important manifestations of the right to participate in public affairs.

27. In anti-corruption law, the principles of the rule of law, accountability, transparency and the right to participation in public affairs play a fundamental role. The United Nations Convention against Corruption identifies the promotion of "integrity, accountability and proper management of public affairs and public property" as one of its main purposes.[80] Chapter II of the Convention, which deals with the prevention of corruption, gives these broad principles some definite contours through provisions on the transparent and accountable management of public finances and public administration, transparent conduct by public officials and the participation of civil society in the prevention of corruption.[81]

28. The United Nations Convention against Corruption requires the transparent and accountable management of public procurement and public finances, and transparent public administration more generally.[82] In order to ensure transparency, the measures that States parties take to manage their public finances must include procedures for the

[75] Human Rights Council, "Draft guidelines for States on the effective implementation of the right to participate in public affairs", paras. 64 and 70.

[76] Human Rights Council, report of the Special Rapporteur on extreme poverty and human rights, para. 26; Human Rights Council, "Draft guidelines for States on the effective implementation of the right to participate in public affairs", para. 84.

[77] Human Rights Council, "Draft guidelines for States on the effective implementation of the right to participate in public affairs", paras. 54, 64 and 74.

[78] Ibid., para. 53.

[79] Ibid., para. 73.

[80] United Nations Convention against Corruption, art. 1 (c).

[81] United Nations Convention against Corruption, arts. 7–10 and 13; Inter-American Convention against Corruption, art. III; African Union Convention on Preventing and Combating Corruption, arts. 5 and 7; Economic Community of West African States Protocol on the Fight against Corruption, art. 5; SADC Protocol against Corruption, art. 4.

[82] United Nations Convention against Corruption, arts. 9–10; Inter-American Convention against Corruption, art. III (1) and (5); African Union Convention on Preventing and Combating Corruption, arts. 5(4) and 7(4); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (b) and (f); SADC Protocol against Corruption, art. 4(b)–(c).

adoption of a national budget and timely reporting on revenue and expenditure.[83] States parties are required to ensure accountability by implementing accounting and auditing standards, systems of risk management and internal control and, where appropriate, corrective action in cases of failure to comply with such requirements.[84] States parties must also take measures, in accordance with the fundamental principles of their domestic laws, to enhance transparency in their public administration by publishing information and by adopting procedures or regulations that allow members of the general public to obtain, where appropriate, information on governmental decision-making processes.[85] The administration of the public sector, and of human resource systems in particular (e.g. for the recruitment, retention, promotion and retirement of public officials), must be based on the principle of transparency.[86] With respect to participation in public affairs, States parties must take appropriate measures, within their means and in accordance with fundamental principles of their domestic laws, to promote the active participation of society, including civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption.[87]

29. Chapter II of the United Nations Convention against Corruption provides relatively little detail on how these broad principles of accountability, transparency and participation can be implemented in practice by States parties. The provisions for the prevention of corruption should therefore be understood in light of human rights law, which is discussed in detail in the principles that follow. As these principles have been extensively elaborated in human rights law, this field of law can assist the development of a better understanding of the requirements for anti-corruption provisions and how they can be implemented in practice.[88]

30. **Best practice**: With respect to accountability, transparency and the right to participate in public affairs,[89] best practices include the UNCAC Coalition's "Transparency Pledge", which represents a set of principles concerning transparency and participation in the context of the United Nations Convention against Corruption review process. By signing this pledge, States parties commit to the publication of information about the review process and the documents produced through it, and to the inclusion of civil society in

[83] United Nations Convention against Corruption, art. 9 (2) (a)–(b); Inter-American Convention against Corruption, art. III (6); African Union Convention on Preventing and Combating Corruption, art. 5 (4).

[84] United Nations Convention against Corruption, art. 9 (2) (c)–(e).

[85] United Nations Convention against Corruption, art. 10; African Union Convention on Preventing and Combating Corruption, arts. 9 and 12; SADC Protocol against Corruption, art. 4 (d).

[86] United Nations Convention against Corruption, art. 7; Inter-American Convention against Corruption, art. III (5); African Union Convention on Preventing and Combating Corruption, art. 5 (4); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (b); SADC Protocol against Corruption, art. 4 (c).

[87] United Nations Convention against Corruption, art. 13; Inter-American Convention against Corruption, art. III (11); African Union Convention on Preventing and Combating Corruption, art. 12; Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (e); SADC Protocol against Corruption, art. 4 (i).

[88] Such an approach to treaty interpretation is in keeping with the principle of systemic treaty integration. Vienna Convention on the Law of Treaties, art. 31 (3) (c)).

[89] On the right to participate in public affairs, see OHCHR, *Guidelines for States on the Effective Implementation of the Right to Participate in Public Affairs*.

aspects of the review process.[90] Transparency can also be fostered through adherence to the principles developed by the Open Government Partnership's Beneficial Ownership Leadership Group. These best-practice disclosure principles require free and open beneficial ownership data for the purpose of preventing abuse by companies to facilitate corruption, other crimes or tax evasion. In resource-rich States, membership of the Extractive Industries Transparency Initiative can be considered best practice for ensuring transparency of revenue and expenditure and participation in public affairs.[91] With respect to the participation of civil society in anti-corruption and asset recovery efforts, the Basel Institute on Governance, in particular its International Centre for Asset Recovery, provides an example of how not-for-profit organizations can play an important role in providing training and supporting legal and policy reform in an asset recovery context. States can promote accountability by implementing domestic legislation that relaxes standing requirements in civil litigation cases concerning corruption. As discussed in the commentary to Principle 6, more flexible standing rules would enable plaintiffs to pursue public interest litigation concerning the negative consequences of corruption.

[90] See https://uncaccoalition.org/uncac-review/transparency-pledge/.

[91] See UNCAC Coalition, "Civil society statement for the global forum on asset recovery", 4 December 2017, recommendation 1.

Principle 3: States should put in place effective measures to protect the human rights of persons who report corruption and money laundering.

Commentary

31. Individuals who report corruption, such as whistle-blowers, can play a critical role in the detection of acts of corruption and money laundering that may give rise to the need for asset recovery. The human rights of reporting persons may be especially vulnerable in situations that involve reporting the corrupt conduct of government officials. Human rights at issue in this context include the right to life, the right to liberty and security of person, the right to be free from torture and cruel, inhuman or degrading treatment and the right to freedom of expression. The protection of reporting persons therefore merits specific consideration in the asset recovery context.

32. Both human rights law and anti-corruption law address the situation of reporting persons, a term that refers to someone who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste or fraud.[92] Reporting persons play an important role in the detection of acts of corruption, as the perpetrators of corruption typically go to great lengths to conceal their conduct. The detection of corruption thus depends, in part, on persons reporting relevant information to government authorities, although insufficient protections for and instances of retaliation against reporting persons can deter people from coming forward to report acts of corruption.

33. The United Nations Convention against Corruption addresses the need to protect reporting persons, although it does so in a semi-mandatory manner, meaning that it requires States parties to consider implementing protections for reporting persons, but without requiring States parties to provide these protections.[93] Each State party has an obligation to consider taking measures to provide protection against any unjustified treatment of any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning the offences set out in the Convention.[94] States parties also have an obligation to consider establishing measures and systems for reporting by public officials, when such acts come to their notice in the performance of their functions.[95] These provisions have generated a substantial body of commentary, which greatly elaborates upon the substantive content of whistle-blower protections in an anti-corruption context.[96]

[92] General Assembly, report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 28.

[93] United Nations Convention against Corruption, arts. 8 (4) and 33; see also Council of Europe Civil Law Convention on Corruption, art. 9; Inter-American Convention against Corruption, art. III (8); Organization of American States, Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses; African Union Convention on Preventing and Combating Corruption, art. 5 (6); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (c); SADC Protocol on Corruption, art. 4 (e).

[94] United Nations Convention against Corruption, art. 33.

[95] United Nations Convention against Corruption, arts. 8 (4) and 38.

[96] See, for example, Transparency International, *Whistleblower Protection and the UN Convention Against Corruption* (Berlin, 2013); UNODC, *The United Nations Convention against Corruption: Resource Guide on Good Practices in the Protection of Reporting Persons* (New York, 2015); UNODC, *State of Implementation of*

34. Under human rights law, the protection of reporting persons is covered by numerous rights, including the right to freedom of expression and the right not to be arbitrarily deprived of liberty. States have a legal obligation to respect, protect and fulfil these rights.[97] Thus, while anti-corruption law does not mandate protections for reporting persons, human rights law imposes legal obligations on States to respect, protect and fulfil the right to freedom of expression of all persons within their territory and under their jurisdiction, including whistle-blowers. Human rights law thereby complements anti-corruption law with respect to protections for reporting persons.[98] The obligation of States to establish protections for reporting persons involves measures to ensure the right to freedom of expression and to ensure protection against threats, violence, retaliation or other actions against reporting persons.[99] The reporting of information concerning corrupt conduct specifically falls within the scope of the right to impart information.[100] Moreover, the disclosure of information by reporting persons is covered by the right to receive information. The right to receive information advances the principle of transparency, and it enables the development of opinions and the right to take part in the conduct of public affairs.[101]

35. **Best practice**: The obligation to ensure the right to freedom of expression means that States should detail, and provide, protections for reporting persons and their family members in their domestic laws, in an explicit and clear manner.[102] Such protections should address the coercion or harassment of reporting persons and their families, discrimination, physical harm to a person or property, threats of retaliation, job loss, suspension or demotion, transfer or other hardship, disciplinary penalty, blacklisting or prosecution on grounds of breach of secrecy laws, libel or defamation.[103] In addition, domestic laws should require reporting persons to hold a reasonable belief of wrongdoing, regardless of whether the information proves to be correct and regardless of the reporting person's motivations at the time of disclosure.[104] Where persons hold a reasonable belief that corruption has taken place, States should avoid discouraging them

the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation, 2nd ed. (Vienna, 2017), pp. 152–157.

[97] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders); General Assembly, report of the Special Rapporteur on the situation of human rights defenders (A/70/217), paras. 69–70 and 91; Inter-American Commission on Human Rights, *Aristeu Guida Da Silva and Family v. Brazil*, Report No. 7/16, Case 12.213, 13 April 2016.

[98] See, for example, the Declaration on Human Rights Defenders.

[99] Article 19 of the International Covenant on Civil and Political Rights provides that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice." See also European Convention on Human Rights, art. 10; American Convention on Human Rights, art. 13; African Charter on Human and Peoples' Rights, art. 9.

[100] General Assembly, report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 5.

[101] Ibid.

[102] Ibid., para. 41.

[103] Ibid.

[104] Ibid., paras. 30–31.

from reporting suspicions of corruption and must not initiate criminal proceedings against them.[105] Reporting persons should have access to external disclosure mechanisms if they reasonably perceive that internal processes lack effective protection and redress.[106] An external but confidential avenue for disclosure may be provided by an independent ombudsperson or other independent oversight body.[107] When reporting persons resort to public disclosure, they must do so in keeping with any restrictions imposed under domestic law, in accordance with article 19 (3) of the International Covenant on Civil and Political Rights.[108] External public disclosure would involve the reporting of information to external entities such as the media or civil society organizations, or self-publishing.[109]

36. **Best practice**: In addition to protecting persons who report corruption, States can incentivize individuals to report such allegations in the first place. Some States have put in place laws to reward persons who voluntarily provide government authorities with information that leads to a successful enforcement action resulting in monetary sanctions above a certain threshold.[110] While such laws are not specific to corruption or money laundering, they can play an important role in encouraging persons to report such conduct, especially given the extent to which anti-corruption whistle-blowers tend to experience professional and financial hardships. The benefits of encouraging such reporting may outweigh the costs, which can take the form of an increase in false reporting, the processing of which requires government resources.

[105] See, for example, Inter-American Court of Human Rights, *Álvarez Ramos v. Venezuela*, Judgment, 30 August 2019, paras. 76–132; African Court on Human and Peoples' Rights, *Lohé Issa Konaté v. Burkina Faso*, Application No. 004/2013, Judgment, 5 December 2014.

[106] General Assembly, report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, para. 35.

[107] Ibid.

[108] Ibid., para. 8.

[109] Ibid. The case law of the European Court of Human Rights, which is of persuasive value for States not party to the European Convention on Human Rights, further establishes that certain conditions must be met in order for such public disclosures to benefit from the protections provided by article 10 of the European Convention on Human Rights. See Council of Europe, thematic factsheet, "Whistleblowers and their freedom to impart information" (May 2017).

[110] See, for example, United States of America, Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 of 21 July 2010, sect. 922; Ontario Securities Commission, OSC Policy 15-601, "Whistleblower Program", sect. 22.

Principle 4: States should ensure the progressive realization of economic, social and cultural rights by providing international assistance and cooperation for combating corruption and money laundering and for recovering stolen assets.

Commentary

37. International cooperation is critical for the prevention, investigation and prosecution of acts of corruption and money laundering, and for the recovery and return of proceeds of corruption. While both human rights instruments and anti-corruption instruments oblige States to cooperate with each other, the most relevant and specific obligations of cooperation can be found in anti-corruption instruments, which provide for mutual legal assistance, among other forms of cooperation. Human rights instruments highlight the role that international cooperation can play in the fulfilment of human rights.

38. Under the International Covenant on Economic, Social and Cultural Rights, States parties have duties to provide international assistance and cooperation for the purpose of ensuring the progressive realization of economic, social and cultural rights. Article 2 (1) states that each State party to the Covenant

> undertakes to take steps, individually and through *international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures (emphasis added).[111]

This provision has relevance in an anti-corruption context, as corruption detracts from the public resources that are available for progressively achieving the full realization of human rights. Hence, not only must States take steps to combat corruption (e.g. through laws and policies); they must do so through international assistance and cooperation.

39. Similar obligations of international assistance and cooperation in an economic, social and cultural context can be found in the Charter of the United Nations and in a significant number of other treaties and non-binding instruments.[112] The exact means by which States may fulfil these obligations of conduct may be worked out by States on an ad hoc or permanent basis, and in bilateral or multilateral settings, through treaties, recommendations or technical assistance.[113]

[111] Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990).

[112] Charter of the United Nations, arts. 55–56; Universal Declaration of Human Rights, arts. 22 and 28; Declaration on the Right to Development, arts. 3 (3) and 4 (2); Vienna Declaration and Programme of Action (A/CONF.157/23), arts. 1, 4 and 10; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (the Friendly Relations Declaration); Charter of Economic Rights and Duties of States, arts. 9 and 17; Convention on the Rights of the Child, arts. 4 and 28 (3); African Charter on Human and Peoples' Rights, art. 22 (2); American Convention on Human Rights, art. 36; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Principles 29–34. See also General Assembly resolutions 73/222 and 73/190.

[113] International Covenant on Economic, Social and Cultural Rights, art. 23; Tahmina Karimova, *Human Rights and Development in International Law* (London and New York, Routledge, 2016) p. 158.

40. The provisions in the United Nations Convention against Corruption on international cooperation and technical assistance[114] represent the means by which States can achieve the anti-corruption objectives that are explicitly set out in the Convention[115] and the realization of human rights more broadly. One of the main purposes of the Convention is to promote, facilitate and support international cooperation and assistance in the prevention of and fight against corruption, including in asset recovery.[116] The return of assets is a fundamental principle of the Convention, according to which "States Parties shall afford one another the widest measure of cooperation and assistance".[117] The Convention's provisions on mutual legal assistance in the context of asset recovery thereby form an integral part of its anti-corruption goals.[118] Mutual legal assistance in the context of asset recovery can also be understood as serving a broader goal of human rights promotion. By providing a legal basis for the return of assets, the Convention's mutual legal assistance provisions work towards maximizing the resources that are available to States for the realization of economic, social and cultural rights.[119] The Convention's provisions on mutual legal assistance in the context of asset recovery complement article 2 (1) of the International Covenant on Economic, Social and Cultural Rights by detailing substantive cooperation obligations for the purpose of maximizing available resources.

41. The United Nations Convention against Corruption imposes a number of obligations concerning asset restraint and confiscation on requested States – that is, States that receive requests for international cooperation from States where the proceeds of corruption originated.[120] Requested States are typically States with financial institutions and real estate markets that are attractive for public officials seeking to launder public funds. In order to provide mutual legal assistance upon a request made pursuant to article 55 (2), requested States parties must first be able to restrain (i.e. freeze or seize[121])

[114] United Nations Convention against Corruption, chapters IV–VI; see also Inter-American Convention against Corruption, arts. XIV–XVI and XVIII; Council of Europe Criminal Law Convention on Corruption, chapter IV; African Union Convention on Preventing and Combating Corruption, arts. 16–20; Economic Community of West African States Protocol on the Fight against Corruption, arts. 13 and 15–16; SADC Protocol against Corruption, arts. 8 and 10.

[115] United Nations Convention against Corruption, art. 1; Inter-American Convention against Corruption, art. II (2); African Union Convention on Preventing and Combating Corruption, art. 2 (2); Economic Community of West African States Protocol on the Fight against Corruption, art. 2 (ii); SADC Protocol against Corruption, art. 2 (b).

[116] United Nations Convention against Corruption, art. 1 (b).

[117] United Nations Convention against Corruption, art. 51.

[118] United Nations Convention against Corruption, chapter V.

[119] Human Rights Council resolution 40/4, preambular para. 16.

[120] United Nations Convention against Corruption, art. 54; see also Inter-American Convention against Corruption, art. XV; Council of Europe Criminal Law Convention on Corruption, art. 23; African Union Convention on Preventing and Combating Corruption, art. 16; Economic Community of West African States Protocol on the Fight against Corruption, art. 13; SADC Protocol against Corruption, art. 8.

[121] The United Nations Convention against Corruption defines "freezing" or "seizure" as "temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority" (art. 2 (f)). There is no clear distinction between the terms "freezing" and "seizure". See Cornelia Spörl, "Article 2: Use of Terms", in *The United Nations Convention against Corruption: A Commentary*, Cecily Rose, Michael Kubiciel and Oliver Landwehr, eds. (Oxford, Oxford University Press, 2019) pp. 30–31.

property when requested to do so.[122] In addition, the competent authorities of requested States must have the capacity to restrain property on the basis of a freezing or seizure order issued by a court of the requesting State party, or simply on the basis of a request by authorities in the requesting State – that is, a State that requests international cooperation from other States, such as those States where the assets are located. Both orders and requests must provide a reasonable basis for the requested State party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation.[123] In order to provide mutual legal assistance pursuant to article 55 with respect to property acquired through or involved in the commission of an offence established in accordance with the Convention, requested States must be able to give effect to orders for confiscation[124] that have been issued by a court in another State, such as the requesting State.[125] In addition, States parties must be able to order the confiscation of property of foreign origin on the basis of domestic money laundering (or other) proceedings, without being requested to do so by another State.[126] Finally, the Convention requires States parties to consider allowing non-conviction-based confiscation, which refers to confiscation in cases where the offender cannot be prosecuted due to death, flight or absence or in other appropriate cases.[127]

42. **Best practice**: For requested States, best practices may involve more informal, flexible approaches to international cooperation that go beyond the mandatory requirements of the United Nations Convention against Corruption. These practices allow, for example, for more rapid and proactive approaches to the freezing or seizing of assets, which do not necessarily depend on orders made by courts in requesting States or on mutual legal assistance requests by States of origin.[128] These measures for restraining assets aim to prevent the proceeds of corruption from being transferred to other jurisdictions before mutual legal assistance processes have been able to run their course.[129] The Convention already provides for, but does not require, the preservation of property on the basis of such grounds as a foreign arrest or criminal charge. The freezing or seizure of assets in the absence of a court order in the requesting States and requests for mutual legal assistance are thus contemplated under the Convention.[130] The Convention further

[122] United Nations Convention against Corruption, art. 54 (2).

[123] Ibid.

[124] The United Nations Convention against Corruption defines "confiscation" as "the permanent deprivation of property by order of a court or other competent authority" (art. 2 (g)); see also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, art. 1; the African Union Convention on Preventing and Combating Corruption, art. 1; and the SADC Protocol against Corruption, art. 1.

[125] United Nations Convention against Corruption, art. 54 (1) (a).

[126] United Nations Convention against Corruption, art. 54 (1) (b).

[127] United Nations Convention against Corruption, art. 54 (1) (c).

[128] Gray and others, *Few and Far*, p. 2. See also the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, art. 21 (1).

[129] Gray and others, *Few and Far*, p. 41; Radha Ivory, "Article 54: mechanisms for recovery of property through international cooperation in confiscation", in *The United Nations Convention against Corruption: A Commentary*, p. 550.

[130] United Nations Convention against Corruption, art. 54 (2) (c). See also Directive 2014/42/EU of the European Parliament and of the Council on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, according to which "measures to enable the freezing of property with a view to

provides for, but does not require, confiscation in the absence of a criminal conviction in certain circumstances: in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.[131]

43. **Best practice**: Swiss and Canadian laws, for example, allow the Governments of those States to freeze assets in a timely and proactive manner where political upheaval or the failure of State structures is taking place in the State of origin.[132] The Swiss Federal Act of 18 December 2015 on the Freezing and the Restitution of Illicit Assets held by Politically Exposed Persons (the Foreign Illicit Assets Act or FIAA) allows the State to freeze the assets of foreign politically exposed persons or their close associates under certain conditions.[133] The first condition requires that "the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable". The second condition requires that "the level of corruption in the country of origin is notoriously high". The third condition requires that "it appears likely that the assets were acquired through corruption, criminal mismanagement or other felonies". Finally, under the fourth condition, "the safeguarding of Switzerland's interests requires the freezing of the assets." The Swiss FIAA also allows for the freezing of foreign assets in the event that mutual legal assistance proceedings fail (i.e. where the requesting State is unable to meet mutual legal assistance requirements due to "the total or substantial collapse, or the impairment, of its judicial system".[134] This basis for freezing assets is conditioned on the existence of a provisional seizure order made by the requesting State; a further condition is that "the safeguarding of Switzerland's interests requires the freezing of the assets."[135]

44. **Best practice**: Requested States should provide technical assistance to States of origin and share information with them to enable asset tracing.[136] Technical assistance and information sharing are especially important in situations where the requesting State (or would-be requesting State) lacks the expertise and evidence needed to meet mutual legal assistance requirements. The ability to restrain assets in the absence of a court order or other request does not, however, replace the need for compliance with mutual legal

possible subsequent confiscation … shall include urgent action to be taken when necessary in order to preserve property." (art. 7 (1)).

[131] United Nations Convention against Corruption, art. 54 (1); FATF, *The FATF Recommendations*, recommendation 4; Directive 2014/42/EU, art. 4 (2).

[132] Switzerland, Federal Act of 18 December 2015 on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (FIAA), SR 196.1; Canada, Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 (March 2011). See also United States, Preserving Foreign Criminal Assets for Forfeiture Act of 2010, Public Law 111-342 of 22 December 2010; Australia, Mutual Assistance in Criminal Matters Act 1987, art. 34J; Gray and others, *Few and Far*, p. 37. On further asset freezing measures in the context of the Arab Spring, see: Security Council resolution 1970 (2011); Security Council resolution 1973 (2011); European Union, Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against persons and entities in view of the situation in Tunisia; United States, Executive Order 13566 of February 25, 2011 Blocking Property and Prohibiting Certain Transactions Related to Libya; Switzerland, Ordinance 946.231.175.8 on measures against certain persons from Tunisia (19 January 2011); Switzerland, Ordinance 946.231.132.1 on measures against certain persons from the Arab Republic of Egypt (2 February 2011).

[133] Switzerland, FIAA, art. 3 (2).

[134] Ibid., art. 4 (2) (b).

[135] Ibid., art. 4 (2) (c).

[136] See, for example, G20 Anti-Corruption Working Group, "2020 Accountability Report", pp. 24–27.

assistance requirements at later stages of the asset recovery process.[137] Networks such as the Camden Asset Recovery Inter-Agency Network, the newly established Global Operational Network of Anti-Corruption Law Enforcement Authorities and the regional asset recovery networks[138] provide important forums for training and capacity-building initiatives. National initiatives can also play an important role. For example, Italy has provided technical assistance to countries in Central America through its *Programa de Apoyo de Italia a la ESCA* (Italian Support Programme for the Central American Security Strategy), which focuses on asset recovery and the disposal of confiscated assets.

45. **Best practice**: The need for international assistance has been acknowledged in Switzerland by providing a legal basis in the FIAA for the Swiss Confederation to provide countries of origin with assistance in efforts to obtain the restitution of frozen assets.[139] Switzerland may provide training or legal advice, organize conferences or meetings, and second experts to the country of origin. The FIAA also provides for the transmission of information, including bank information, to the country of origin so that it can prepare a mutual legal assistance request or complete an insufficient one.[140] The FIAA notably provides that the transmission of information to the country of origin may be subject to conditions, and such transmission may be refused if "the country of origin is experiencing a failure of state structures, or if the life or physical well-being of the persons concerned would be threatened as a result" of the transmission.[141]

46. Requesting States bear obligations of international cooperation. Successful cooperation in the context of asset recovery ultimately depends, in part, on requesting States actively seeking the return of assets and providing the information necessary to facilitate this process. When seeking the identification and restraint of assets, a requesting State must provide a statement of facts, a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.[142]

47. The provision of information by the requesting State is likewise obligatory in the context of a request for effect to be given by the requested State to a confiscation order. The type and extent of information required depends on the legal basis for the confiscation, that is, whether authorities in the requested or requesting State ordered it. When a requesting State seeks to have the requested State give effect to a confiscation order made by authorities in the requested State (a "local" confiscation order), the requesting State must provide a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of

[137] Gray and others, *Few and Far*, p. 41, explaining that mutual legal assistance will be required eventually for evidentiary purposes and for enforcing judgments.

[138] Asset Recovery Interagency Network – Asia Pacific (ARIN-AP); Asset Recovery Inter-Agency Network for Southern Africa (ARINSA); Asset Recovery Inter-Agency Network in West and Central Asia (ARIN-WCA), Asset Recovery Inter-Agency Network for the Caribbean (ARIN-CARIB).

[139] Switzerland, FIAA, art. 11.

[140] Ibid., arts. 12 (2) and 13 (1).

[141] Ibid., art. 13 (3). For a detailed discussion of the FIAA from the perspective of victims, see Sandrine Giroud, "Le droit des victimes de potentats à obtenir réparation: progrès et lacunes de la LVP", in *Droit suisse des sanctions et de la confiscation internationales*, Sandrine Giroud and Héloïse Rordorf-Braun, eds. (Basel, Helbing Lichtenhahn Verlag, 2020).

[142] United Nations Convention against Corruption, art. 55 (3) (c).

the facts that have been relied upon by the requesting State.[143] When the requesting State seeks to have the requested State give effect to a confiscation order made by its own authorities (a "foreign" confiscation order), it must provide a legally admissible copy of an order of confiscation, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State party to provide adequate notification to bona fide third parties and to ensure due process, and a statement that the confiscation order is final.[144]

Principle 5: States should take effective measures to ensure the human rights of persons under investigation for, accused of or convicted of corruption and money laundering offences and subject to asset recovery procedures.

Commentary

48. The implementation and enforcement by States of domestic criminal laws and asset recovery procedures, including those pertaining to corruption and money laundering, must conform with their human rights obligations. States must ensure that all stages of their anti-corruption and anti-money-laundering investigations and prosecutions and asset recovery procedures comply with human rights law, including the right to a fair trial, the right to property, the right to privacy, the right to be free from torture and ill-treatment, the right to life and the right not to be convicted on the basis of a retroactive criminal law. In addition, requested States should seek assurances that requests to restrain and confiscate assets arise out of proceedings in the requesting State that comply with human rights law. The obligation held by States to ensure human rights in the asset recovery context extends not only to persons under investigation or accused of criminal conduct, but also to witnesses and bona fide third parties who may have acquired illicit property.

49. International anti-corruption treaties acknowledge the human rights implications of anti-corruption measures.[145] Anti-corruption treaties should therefore be applied by States together with international and regional human rights treaties, creating a legal framework that complements and circumscribes the application of domestic anti-corruption and anti-money-laundering laws as well as criminal and civil asset forfeiture proceedings. Anti-corruption treaties cannot be understood and applied in isolation, but should instead be harmonized with human rights law. Domestic legislation on mutual legal assistance can give effect to international human rights law by providing for certain limitations on cooperation where there are reasons to believe that the procedural requirements of the International Covenant on Civil and Political Rights or the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) have not been met.[146] The focus here is on the rights to a fair trial and to the

[143] United Nations Convention against Corruption, art. 55 (3) (a).

[144] United Nations Convention against Corruption, art. 55 (3) (b).

[145] United Nations Convention against Corruption, preambular para. 9; see also the references throughout the Convention to the "fundamental principles" of States parties' legal systems and domestic laws; Council of Europe Criminal Law Convention on Corruption, art. 20; Inter-American Convention against Corruption, arts. VIII–IX; African Union Convention on Preventing and Combating Corruption, art. 14; Economic Community of West African States Protocol on the Fight against Corruption, art. 7.

[146] Switzerland, Federal Act on International Mutual Assistance in Criminal Matters, SR 351.1, 20 March 1981, art. 2; see also Martin Böse, "International law and treaty obligations, mutual legal assistance, and EU

protection of property, which have frequently been at issue both in court cases and in commentary. States have an obligation to respect the rights of accused persons to a fair trial. They are entitled, in particular, to be presumed innocent until proved guilty according to law.[147] In an anti-corruption context, questions have arisen about whether the establishment of an offence of illicit enrichment is compatible with the presumption of innocence.[148] The United Nations Convention against Corruption requires States parties to consider criminalizing illicit enrichment, meaning "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income."[149] That approach may contravene human rights law, however, as such an offence could conflict with the presumption of innocence by requiring the defendant to bear the burden of proving his or her innocence.[150]

50. While these concerns have led some States to forgo criminalizing illicit enrichment, the case law of the European Court of Human Rights suggests that illicit enrichment laws can be drafted and enforced in a manner that is consistent with the right to a fair trial and, in particular, with the presumption of innocence. In cases involving drug trafficking and the proceeds therefrom, the European Court of Human Rights has found that shifting the burden of proof on to the defendant does not violate the right to the presumption of innocence, so long as such burden shifting is confined "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[151]

51. In the same vein, shifting of the burden of proof to individuals accused of illicit enrichment can be considered reasonable where the prosecution has first demonstrated a link between the assets and the public official and the existence of a significant discrepancy between those assets and the public official's legal income. The Swiss FIAA, for example, which sets out administrative procedures for freezing and forfeiture, provides for a reversal of the presumption of illicit origins where the defendant

instruments", in *The Oxford Handbook of Criminal Process*, Darryl K. Brown, Jenia Inotcheva Turner and Bettina Weisser, eds. (Oxford, Oxford University Press 2019); Robert J. Currie, "Human rights and international mutual legal assistance: resolving the tension", *Criminal Law Forum* vol. 11, No. 2 (2000) pp. 143–181.

[147] International Covenant on Civil and Political Rights, art. 14 (2); see also European Convention on Human Rights art. 6 (2); American Convention on Human Rights, art. 8 (2); African Charter on Human and Peoples' Rights, art. 7 (1) (2); Universal Declaration of Human Rights, art. 11 (1).

[148] See Lindy Muzila and others, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (Washington, D.C., World Bank, 2012).

[149] United Nations Convention against Corruption, art. 20; Inter-American Convention against Corruption, art IX; African Union Convention on Preventing and Combating Corruption, art. 8; Economic Community of West African States Protocol on the Fight against Corruption, art. 6 (3).

[150] The Human Rights Committee's general comment No. 32 (2007) states: "The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of the doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle" (para. 30).

[151] European Court of Human Rights, *Salabiaku v. France*, Application No. 10519/83, Judgment, 7 October 1988, para. 28; European Court of Human Rights, *Phillips v. United Kingdom*, Application No. 41087/98, Judgment, 5 July 2001, para. 43; Community Court of Justice, ECOWAS, *Baldé et al v. the Republic of Senegal*, ECW/CCJ/JUG/04/13, Judgment, 22 February 2013.

demonstrates "with overwhelming probability that the assets in question were acquired legitimately."[152]

52. Persons whose assets are the subject of criminal or civil confiscation proceedings enjoy rights to protection of property.[153] These rights are also enjoyed by bona fide third parties who have a legitimate interest in the property in question.[154] Given those protections, confiscation of assets obtained through acts of corruption and the process of confiscation can raise human rights concerns. The European Court of Human Rights found that the confiscation of proceeds of crime can constitute an interference with a person's right to "the peaceful enjoyment of his possessions."[155] Such confiscations are allowable only if they are lawful, serve a legitimate, public interest and are proportionate.[156] In applying those standards, the Court has found that the confiscation of assets obtained through acts of corruption serves the legitimate, public interests of combating corruption, repairing damage caused by corruption and deterring such conduct in the future.[157] States parties to the European Convention on Human Rights and its Protocol No. 11 have broad discretion in determining how these criteria are interpreted and applied when implementing political, economic or social policies, such as anti-corruption measures.[158]

53. The United Nations Convention against Corruption and other anti-corruption treaties specifically address, and implicitly or explicitly endorse, the confiscation of property linked to corruption offences and money laundering.[159]

[152] Switzerland, FIAA, art. 15 (3). See also Australia, Proceeds of Crime Act 2002, sect. 179E (3); United Kingdom, Criminal Finances Act 2017, sect. 1 (on unexplained wealth orders).

[153] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, art. 1; American Convention on Human Rights, art. 21; African Charter on Human and Peoples' Rights, art. 14; Universal Declaration of Human Rights, art. 17. See in general Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge, Cambridge University Press, 2014).

[154] United Nations Convention against Corruption, art. 31 (9); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, sect. 6.

[155] Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law*, pp. 174–184.

[156] European Court of Human Rights, *Dimitrovi v. Bulgaria*, Application no. 12655/09, Judgment, 3 March 2015, paras. 44–45. See also Inter-American Court of Human Rights, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment, 21 November 2007, para. 188; Community Court of Justice, ECOWAS, *Nancy Bohn-Doe v. Republic of Liberia*, ECW/CCJ/JUD/12/19, Judgment, 28 February 2019; African Commission on Human and Peoples' Rights, *Dino Noca v. Democratic Republic of the Congo*, 286/2004, Communication, 12 October 2013, paras. 143–147.

[157] European Court of Human Rights, *Gogitidze and others v. Georgia*, Application No. 36862/05, Judgment, 12 May 2015, paras. 101–103; Community Court of Justice, ECOWAS, *Dexter Oil Limited v. Republic of Liberia*, ECW/CCJ/JUD/03/19, Judgment, 6 February 2019, para. 87.

[158] European Court of Human Rights, *Dimitrovi v. Bulgaria*, para. 51.

[159] European Court of Human Rights, *Gogitidze and others v. Georgia*, para. 106.

Principle 6: States should ensure that persons whose human rights have been violated as a result of corruption have access to an effective remedy.

Commentary

54. Corruption is not a victimless crime.[160] The term "victim", in this context, refers to persons who have suffered harm, individually or collectively, as a result of the commission of a corruption offence.[161] Depending on the circumstances, such harm may or may not involve a violation of a human right. Acts of corruption may violate rights based on human rights law, or rights based on other bodies of law, such as administrative law, international refugee law or international environmental law.[162] In some instances, harm occasioned by acts of corruption may result in harm that does not necessarily violate any particular rights, but instead causes "social damage", such as damage to the credibility of institutions.[163] In many instances, acts of corruption harm society at large or "the public", which is comprised of the many individuals who form the collective.

55. The International Covenant on Civil and Political Rights requires States parties to ensure that effective remedies exist for violations of civil and political rights.[164] States must therefore ensure that victims of civil and political rights violations, such as those that occur in the context of anti-corruption investigations or prosecutions, can pursue effective remedies under domestic law. Such remedies must be available without discrimination, especially for members of marginalized and vulnerable groups, and should be free from corruption, bias and political influence.[165] Many corruption-related human rights violations concern economic, social and cultural rights. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights creates

[160] Conference of the States Parties to the United Nations Convention against Corruption, Open-ended Intergovernmental Working Group on Asset Recovery, "Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V", note by the Secretariat (CAC/COSP/WG.2/2019/5). For a debate about victims of corruption from a human rights perspective, see Anne Peters, "Corruption as a violation of international human rights", *European Journal of International Law*, vol. 29, issue 4 (November 2018), pp. 1251 and 1255–1256; Franco Peirone, "Corruption as a violation of international human rights: a reply to Anne Peters", *European Journal of International Law*, vol. 29, No. 4 (November 2018), pp. 1297 and 1299–1301.

[161] General Assembly resolution 40/34; See also International Criminal Court, *Rules of Procedure and Evidence* (The Hague, 2019), rule 85 (a); General Assembly resolution 60/147, para. 8.

[162] See, for example, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), and the Convention relating to the Status of Refugees.

[163] Open-ended Intergovernmental Working Group on Asset Recovery, "Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V", para. 9.

[164] International Covenant on Civil and Political Rights, art. 2 (3); see also European Convention on Human Rights, art. 13; American Convention on Human Rights, art. 25.

[165] International Covenant on Civil and Political Rights, art. 2 (1); European Convention on Human Rights, art. 14; American Convention on Human Rights, art. 24; Human Rights Council, "Connecting the business and human rights and the anti-corruption agendas", report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/44/43), paras. 57 and 67; Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", Principle 26; see also the work undertaken under the OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses.

a remedy at an international level by allowing individuals to submit communications to the Committee on Economic, Social and Cultural Rights.[166]

56. International anti-corruption instruments require States to ensure that victims of corruption have a right to pursue a remedy.[167] Article 35 of the United Nations Convention against Corruption requires States parties "to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." The phrase "entities or persons" encompasses States and natural and legal persons.[168] This provision leaves the exact extent and form of such private rights of action to the discretion of States parties.[169] Compliance with this provision has taken three general forms.[170] First, a general law can enable individuals to seek compensation for wrongful acts. Second, a law or mechanism can allow individuals to institute a civil claim for compensation as a private participant in criminal proceedings.[171] Finally, once a person has been convicted, courts can order compensation for damages, either on their own initiative or based on an application by the victim.[172]

57. These domestic laws and mechanisms by which individuals may pursue remedies for corruption complement the existing human rights framework. The application of such domestic laws in an anti-corruption context can be difficult in practice, on account of the challenges involved in identifying victims who have been directly harmed by the corrupt conduct at issue.[173] Legal proceedings concerning corruption require the plaintiff to demonstrate a causal link between the act of corruption and the damage that they have suffered. Article 35 of the United Nations Convention against Corruption concerns "entities or persons who have suffered damage *as a result of* an act of corruption" (emphasis added). Tracing the damage caused by the theft of public assets to a particular victim or group of victims or to a specific entity represents an obstacle in some

[166] Economic, social and cultural rights have also been addressed in part by other human rights courts or quasi-judicial bodies, such as the Human Rights Committee, the European Court of Human Rights and the African Court on Human and Peoples' Rights.

[167] United Nations Convention against Corruption, art. 35; Council of Europe Civil Law Convention on Corruption, arts. 3–4; Economic Community of West African States Protocol on the Fight against Corruption, art. 9 (2). See also Civil Forum for Asset Recovery, "Civil society principles for accountable asset return", principle 8.

[168] UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (New York, 2010) p. 299.

[169] Abiola Makinwa, "Article 35: compensation for damage", in *The United Nations Convention against Corruption: A Commentary*, p. 358.

[170] UNODC, *State of Implementation of the United Nations Convention against Corruption*, p. 161.

[171] Makinwa, "Article 35: compensation for damage", pp. 360–361.

[172] Ibid. pp. 363–364.

[173] Open-ended Intergovernmental Working Group on Asset Recovery, "Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V"; See also the best practices identified in Conference of the States Parties to the United Nations Convention against Corruption, "Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption", thematic report prepared by the Secretariat (CAC/COSP/2019/10), para. 50 (on the identification of taxpayers as victims of corruption offences).

instances.[174] Plaintiffs must be able to show, for example, that embezzled funds were allocated by the Government concerned for a particular use and that, because of the theft of those funds, certain individuals did not receive the benefits to which they were entitled. Tracing the harm occasioned by corrupt acts may be difficult where there is a lack of budget transparency, for instance. The challenges involved in tracing the harm resulting from acts of foreign bribery are considerable, too, as the distorting effects of foreign bribery sometimes cannot be measured in a manner that allows for the ready identification of victims and damages.[175]

58. **Best practice**: In light of the challenges involved in establishing causal links between acts of corruption and damage suffered by victims, domestic civil procedure laws that broadly define victims of corruption and that allow for public interest litigation represent best practices in the context of asset recovery.[176] Combating corruption is widely regarded as being in the public interest; corruption results in widespread harm to domestic and global economies, it has a negative impact on the enjoyment of human rights, and it may further correlate with serious human rights violations. When public assets are stolen by government officials, the entire population of the State may be considered the victim of this theft. Defining victims of corruption in this broad manner acknowledges both the diffuse impact of corruption and the inherent difficulties involved in demonstrating causality between corruption and harm suffered by victims. Not only can public interest litigation be directed towards obtaining damages caused by corrupt acts; it can also trigger asset recovery processes or the adoption of preventive measures. Domestic rules on standing in civil litigation cases should permit public interest litigation concerning the negative effects of corruption on economies and societies. Relaxed rules on standing would permit plaintiffs to pursue remedies without having been personally injured by the conduct at issue.[177] Relaxed standing rules are justified in the context of corruption because combating corruption is in the public interest. An example of this best practice can be found in the French Law No. 2013-1117, which allows civil society organizations to have civil party status in corruption cases.[178]

[174] See, for example, Kevin E. Davis, "Corruption as a violation of international human rights: a reply to Anne Peters", *European Journal of International Law*, vol. 29, No. 4 (November 2018), p. 1289; Cecily Rose, "The limitations of a human rights approach to corruption", *International & Comparative Law Quarterly*, vol. 65, issue 2 (April 2016), p. 405.

[175] United Kingdom of Great Britain and Northern Ireland, "General principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases", principles 2–3.

[176] Open-ended Intergovernmental Working Group on Asset Recovery, "Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V", paras. 7, 12 and 16; UNCAC Coalition, "Civil society statement for the global forum on asset recovery".

[177] See, for example, Community Court of Justice, ECOWAS, *Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission (UBEC)*, ECW/CCJ/APP/08/08, Ruling, 27 October 2009, paras. 33–34.

[178] France, Law No. 2013-1117 of 6 December 2013 concerning the fight against tax fraud and serious economic and financial crime, art. 1. See also the proceedings instituted by Sherpa and Transparency International France against Teodoro Nguema Obiang Mangue (son of the President of Equatorial Guinea) and Rifaat al-Assad (uncle of the President of the Syrian Arab Republic). Both cases concerned corruption and money laundering.

Principle 7: Receiving States should allocate returned assets in an accountable, transparent and participatory manner.

Commentary

59. Under human rights law, States should allocate returned assets in an accountable, transparent and participatory manner that accords with the rule of law.[179] This commentary builds on the commentary to Principle 2, which discusses the legal bases – in both human rights law and anti-corruption law – for the principles of the rule of law, accountability, transparency and participation. The importance of these principles with respect to the allocation of returned assets has been confirmed by the Human Rights Council, which has called on States requesting the repatriation of funds of illicit origin to apply these principles in the decision-making process regarding the allocation of repatriated funds for the purpose of realizing economic, social and cultural rights.[180] The principles and best practices discussed in this commentary and in the commentary to Principle 8 also have potential relevance for purely domestic asset recovery proceedings, and for the transfer of settlement proceeds in domestic enforcement actions taken against persons accused of foreign bribery.

60. The accountable management of returned assets involves ensuring that the returned funds can be traced and monitored, in accordance with the sound management of public finances.[181] In practice, this should involve receiving States treating returned funds separately for accounting purposes.[182] The direct return of assets to the central budget of a receiving State may be undesirable, from an accountability perspective, in circumstances where the mechanisms in place for the administration of public finances do not allow for the assets to be tracked. More desirable alternatives, from an accountability perspective, could involve either directing funds to a dedicated government fund subject to special financial management procedures or receipt by a third party, such as a non-governmental organization that works on behalf of victims and is subject to measures to ensure the accountable management of funds.[183] The exact mode of return should be the subject of an agreement, such as a memorandum of understanding,

[179] See OHCHR, *Realizing Human Rights through Government Budgets* (New York and Geneva, 2017).

[180] Human Rights Council resolution 40/4, para. 21.

[181] Transparency International France, "Le sort des biens mal acquis et autres avoirs illicites issus de la grande corruption", 2017, pp. 14–15 (on Transparency International France's proposed five key principles that should govern the allocation of assets derived from major corruption); African Union, "Draft common African position on asset recovery" (EX.CL/1213(XXXVI) Add.1 Rev.1) (9 February 2020), pillar three: management of recovered assets.

[182] Gretta Fenner Zinkernagel and Kodjo Attisso, *Returning Stolen Assets – Learning from Past Practice: Selected Case Studies* (Basel, Basel Institute on Governance, 2013), p. 4; Gretta Fenner Zinkernagel, Pedro Gomes Pereira and Francesco De Simone, "The role of donors in the recovery of stolen assets", *U4 Issue*, No. 8 (December 2014), p. 23.

[183] See, for example, the Fondo Especial de Administración del Dinero Obtenido Ilícitamente en Perjuicio del Estado (FEDADOI, the Special Fund for the Administration of Money Illicitly Obtained in Prejudice to the State), a special national fund established in Peru for the return of assets in the case concerning Vladimiro Montesinos.

between the returning and receiving States, a possibility which is specifically contemplated by the United Nations Convention against Corruption.[184]

61. **Best practice:** The trilateral agreement reached in 2020 between the United States of America, Jersey and Nigeria can be seen as an example of good practice with respect to accountability.[185] The agreement provides that the Nigeria Sovereign Investment Authority will administer the funds and related projects, and that this will be accompanied by financial review by an independent auditor and monitoring by an independent civil society organization.[186] Such measures are appropriate where funds are returned either to a State or to a third party, such as a non-governmental organization. Where funds are returned through bilateral aid programmes, returning and receiving States should ensure that the principles of the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action – namely the principles of ownership, alignment and mutual accountability – are upheld.[187]

62. The transparent allocation of returned assets involves States making information about the transfer and administration of returned assets available to society.[188] Such information can be made available by both returning and receiving States, and should be accessible to society in both the returning and receiving States. The information provided by States should be reliable, exhaustive and, ideally, available on a public website and in the local language or languages.[189] All stages of the decision-making process concerning the allocation of returned assets, including initial consultations, the selection of recipients, the choice of projects or programmes, the method for transferring the funds and the recipient's administration of the funds, should be transparent.[190] Transparency in the management of returned assets should also involve the publication of the agreements – such as memoranda of understanding – that form the basis, whether legal or non-legal, for the return of assets. At the time of writing, only a small number of such agreements had been made publicly available by States, which instead rely mainly on the issuance of press releases.

63. Receiving States should include society in the asset recovery process in order to ensure that funds are allocated and used in a manner that works towards the realization of human

[184] United Nations Convention against Corruption, art. 57 (5): "Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property."

[185] United States Department of Justice, "U.S. enters into trilateral agreement with Nigeria and Jersey to repatriate over $300 million to Nigeria in assets stolen by former Nigerian dictator General Sani Abacha", press release, 3 February 2020.

[186] Ibid.

[187] Fenner Zinkernagel and Attisso, *Returning Stolen Assets*, pp. 6–7; see also "Draft common African position on asset recovery", pillar five: managing recovered assets, paras. 27–28.

[188] Global Forum on Asset Recovery, "GFAR principles for disposition and transfer of confiscated stolen assets in corruption cases", principle 4. See also United Kingdom, "General principles to compensate overseas victims", principle 3: "Ensure the process for the payment of compensation is transparent, accountable and fair"; "Draft common African position on asset recovery", para. 29: pillar five: managing recovered assets.

[189] Transparency International France, "Le sort des biens mal acquis", pp. 14–15.

[190] Ibid. For discussion of a counter-example, see Global Witness, "Return of blocked oil money to Angola involves opaque deal with Swiss arms company", press release, 10 June 2008.

rights and, where possible, meets the needs of victims in particular.[191] The term "society" refers to individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, including victims' organizations and anti-corruption non-governmental organizations.[192] At the stage when States are returning and allocating assets, members of society may play a role in identifying victims and harm that can be remedied by the returned assets, in contributing to decision-making on asset return and use, and in "fostering transparency and accountability in the transfer, disposition and administration of recovered assets."[193] Members of society can foster accountability by participating in monitoring returned assets, for example, and they can foster transparency by helping to keep the public informed about the asset recovery process.[194]

64. **Best practice**: The Swiss FIAA can be considered an example of best practice with respect to the inclusion of society, insofar as it specifically provides that agreements for the return of assets shall, "to the extent possible … include non-governmental organisations in the restitution process" (art. 18 (5)).[195] The memorandum of understanding concluded between the United States, Switzerland and Kazakhstan exemplifies this practice, although it predates the enactment of the Swiss FIAA.[196] The BOTA Foundation, an independent non-governmental organization that was established in accordance with the memorandum of understanding, was deeply involved in the asset return process, as it served as the beneficiary of the funds that were returned to Kazakhstan.

65. **Best practice**: A distributed ledger programming project that is under development in the United States at the time of writing may become an example of best practice in the future. The project is aimed at increasing transparency and accountability with respect to the disposal of assets returned by the United States to a recipient country.[197] This open-source system would provide information about how funds are disbursed to the recipient country.

[191] Transparency International France, "Le sort des biens mal acquis", pp. 14–15. See also Declaration on the Right to Development, art. 2 (3): States have a duty to formulate development policies on the basis of the active, free and meaningful participation of the entire population and all individuals.

[192] United Nations Convention against Corruption, art. 13; see also Inter-American Convention against Corruption, art. III (11); African Union Convention on Preventing and Combating Corruption, art. 12 ("Civil Society and Media"); Economic Community of West African States Protocol on the Fight against Corruption, art. 5 (e); SADC Protocol against Corruption, art. 4 (1) (i).

[193] Global Forum on Asset Recovery, "GFAR principles for disposition and transfer of confiscated stolen assets in corruption cases", principle 10; Civil Forum for Asset Recovery, "Civil society principles for accountable asset return", principle 10.

[194] UNCAC Coalition, "Civil society statement for the global forum on asset recovery".

[195] Under the Swiss FIAA, the Swiss Government may conclude agreements with foreign Governments that provide for the restitution of assets (art. 18 (2)). In the absence of such an agreement, the Swiss Government determines the process of restitution, and may return the forfeited assets through international or national organizations (art. 18 (4)).

[196] Amended "Memorandum of understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan", April 2008.

[197] G20 Anti-Corruption Working Group, "2020 Accountability Report", p. 31.

Principle 8: Receiving States should use recovered assets in a manner that contributes to the realization of human rights.

Commentary

66. States should use recovered assets for the purpose of realizing human rights. Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights requires States to take steps, to the maximum of their available resources, for the purpose of realizing economic, social and cultural rights. Funds recovered by States through asset recovery processes may therefore contribute to the available financial resources from which States can draw for the purposes of realizing economic, social and cultural rights, as well as civil and political rights. In allocating recovered funds, receiving States should further take into account the right to development and the corresponding duties held by States. The Declaration on the Right to Development provides, in particular, that States have a "duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."[198] Receiving States should therefore ensure that returned funds are used for the benefit of society (i.e. the general population of the State) in cases where no particular victims of corruption can be identified.[199]

67. In formulating development policies for the purpose of improving the well-being of the population, receiving States should aim to address the conditions that gave rise to corruption, such as weak implementation and enforcement of anti-corruption laws and policies. In allocating recovered assets, receiving States should therefore consider giving priority to anti-corruption as well as sustainable development initiatives.[200] Transparency International France has proposed, for example, that such funds should be allocated towards improving the living standards of populations and/or strengthening the rule of law and tackling corruption in the receiving State.[201] The use of assets in such a manner would allow States to work towards achieving Sustainable Development Goal 16, which includes promotion of the rule of law (target 16.3) and substantially reducing corruption and bribery in all their forms (target 16.5).[202]

68. According to international anti-money-laundering standards, the use of confiscated funds for the well-being of the population is considered to be good practice. The Financial Action Task Force recommends that States use confiscated funds for "the public good",[203] in particular "for law enforcement, health, education, or other appropriate

[198] Declaration on the Right to Development, art. 2(3).

[199] Global Forum on Asset Recovery, "GFAR principles for disposition and transfer of confiscated stolen assets in corruption cases", principle 5.

[200] Ibid., principle 6. See also "Draft common African position on asset recovery", pillar three: management of recovered assets, para. 21; Open-ended Intergovernmental Working Group on Asset Recovery, *Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets* (CAC/COSP/WG.2/2017/CRP.1), p. 10.

[201] Transparency International France, "Le sort des biens mal acquis", p. 14.

[202] See also UNCAC Coalition, "Civil society statement for the global forum on asset recovery".

[203] FATF, "Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery", October 2012, para. 21.

purposes."[204] In this regard, anti-money-laundering standards and human rights law are mutually reinforcing. Both bodies of law contemplate the use of recovered funds for the purpose of advancing human rights, even though the task force does not use the language of human rights law in making this recommendation.

69. **Best practice**: Receiving States can look to a number of best practices with respect to the use of returned funds for human rights and development initiatives. National legislation in both returning and receiving States can specify that returned funds should be devoted to furthering human rights, development or anti-corruption initiatives. A law in the Philippines, for example, directs recovered assets towards reparations for victims of human rights violations.[205] The Swiss FIAA specifies that the restitution of assets is to be made through the financing of programmes of public interest and in pursuit of the objectives of improving the living conditions of the inhabitants of the State of origin and strengthening the rule of law, thereby contributing to the fight against impunity.[206] The United States, Jersey and Nigeria agreed in 2020 that funds stolen by Sani Abacha would be returned to Nigeria to help finance three specific infrastructure projects (concerning bridges, highways and roads).[207] Funds returned from Switzerland to Angola in 2012 were allocated to "hospital infrastructure, water supply, and local capacity building for the reintegration of displaced persons."[208] Funds returned from the United States and Switzerland to Kazakhstan in accordance with those States' memorandum of understanding, updated in 2008, were allocated to the promotion of children's rights through a number of initiatives run by the BOTA Foundation.[209]

70. The use of returned funds to further anti-corruption initiatives does not, however, appear to be common practice based on the available information, despite being widely identified as one of the most appropriate uses of such funds. In the memorandum of understanding between the United States, Switzerland and Kazakhstan, the three States agreed that Kazakhstan would improve its public financial management system and become a participant in the Extractive Industries Transparency Initiative (EITI).[210] The recovered assets were not, however, used to fund these anti-corruption initiatives. Instead, the memorandum of understanding specifically states that the World Bank would support the public financial management initiative[211] and that the Government of Kazakhstan would ensure "adequate and sustainable financing for EITI implementation".[212]

[204] FATF, *The FATF Recommendations*, "Interpretive note to Recommendation 38 (mutual legal assistance: freezing and confiscation)".

[205] Philippines, Human Rights Victims Reparation and Recognition Act of 2013, Republic Act No. 10368, rule V, sect. 24.

[206] Switzerland, FIAA, arts. 17–18.

[207] United States Department of Justice, "U.S. enters into trilateral agreement with Nigeria and Jersey".

[208] Gray and others, *Few and Far*, p. 5.

[209] Amended "Memorandum of understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan", para. 3.1.

[210] Ibid., paras. 4.1 and 5.1.

[211] Ibid., para. 4.1.

[212] Ibid., para. 5.1.

71. The principle of accountability requires both returning and receiving States to ensure that returned funds do not benefit the persons who were involved in the commission of the offence (e.g. the public official or officials who embezzled and laundered the public funds).[213] Returning and receiving States can work towards ensuring accountability by explicitly agreeing, in a written memorandum of understanding or other agreement, that recovered funds must not be used for corrupt or other illicit purposes. The memoranda of understanding concluded in the case of Kazakhstan and in the case of Nigeria (referred to as Abacha II) exemplify this best practice.[214] Ensuring the integrity of returned funds requires returning and receiving States to agree to accountability mechanisms and to ensure and verify that the funds are administered in accordance with the agreement. Examples of accountability mechanisms include monitoring, auditing and investigations in the event of suspicion of wrongdoing.

[213] Global Forum on Asset Recovery, "GFAR principles for disposition and transfer of confiscated stolen assets in corruption cases", principle 9; Transparency International France, "Le sort des biens mal acquis", pp. 14–15; Civil Forum for Asset Recovery, "Civil society principles for accountable asset return", principle 5; United Kingdom, "General principles to compensate overseas victims", principle 3.

[214] Amended "Memorandum of understanding among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan", para. 2.6. See also "Memorandum of understanding among the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association on the return, monitoring and management of illegally-acquired assets confiscated by Switzerland and to be restituted to the Federal Republic of Nigeria", art. 13.

Principle 9: Requested States should return embezzled public funds to requesting States.

Commentary

72. Under certain circumstances, requested States have an obligation under the United Nations Convention against Corruption to return embezzled public funds, including embezzled public funds that have been laundered, to requesting States with an ownership claim over such funds.[215] Article 57 of the Convention stipulates that the requested State party shall return the confiscated property to the requesting State party where the confiscated property represents embezzled public funds or embezzled public funds that have been laundered.[216] Such an obligation to return embezzled public funds, or embezzled public funds that have been laundered, arises when two conditions are met, namely "when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party".[217] The application of article 57's obligation to return is thus determined in part by article 55, which sets out the procedures governing international cooperation for purposes of confiscation.

73. There may also be an obligation to return with respect to the proceeds of other offences established in accordance with the United Nations Convention against Corruption, beyond the embezzlement of public funds and the laundering of embezzled public funds, but only where the requesting State reasonably establishes its prior ownership of the confiscated property.[218] This obligation to return the proceeds of other corrupt acts is subject to the same conditions as those governing the return of embezzled public funds and embezzled public funds that have been laundered: "when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party".[219] The proceeds of corrupt acts such as bribery typically cannot be characterized as having been "owned" by the receiving State, as the funds represent undue advantages received by public officials.[220] In such circumstances, the receiving State can claim compensation for damage caused by the corrupt act, but not prior ownership.[221] A requested State's obligation to return confiscated property to the requested State therefore extends to embezzled funds and embezzled funds that have been laundered, but does not extend to other proceeds of corruption with respect to which the requesting State cannot establish prior ownership.

74. In certain limited circumstances, article 57 of the United Nations Convention against Corruption imposes an obligation of result (as opposed to an obligation of conduct) on

[215] United Nations Convention against Corruption, art. 57 (3), which must be read in conjunction with arts. 46, 55 and 57 (1) and (2).

[216] United Nations Convention against Corruption, art. 57 (3) (a).

[217] United Nations Convention against Corruption, art. 57 (3) (b).

[218] Ibid.

[219] Ibid.

[220] UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed., (New York, 2012) para. 781.

[221] Ibid., para. 768.

requested States, which must ensure that embezzled funds, or embezzled funds that have been laundered, are actually returned to the requesting State. A good faith attempt by a requested State to return such funds to a requesting State does not, in itself, fulfil this obligation of result. Provided that the conditions set out in article 57 have been met (i.e. an ownership claim, confiscation in accordance with article 55 and a final judgment in the requesting State), the language "shall … return" in article 57 does not permit States to decline to return such funds to the requesting State on the ground that certain terms have not been met by the requesting State.[222] Domestic legislation that provides for return only at the discretion of competent authorities in such circumstances does not comply with article 57.[223] The Convention does not itself govern the resolution of concerns about compliance by the requesting State with its human rights obligations, as they pertain to the asset recovery process. Instead, the Convention leaves the resolution of human rights concerns to case-by-case agreements or mutually acceptable arrangements for the disposal of assets.[224]

75. The requested State's obligation under the United Nations Convention against Corruption to return embezzled public funds or embezzled public funds that have been laundered exists in parallel to the human rights obligations of the requesting State. As discussed above, human rights obligations govern the manner in which requesting States must conduct anti-corruption and anti-money-laundering investigations and prosecutions and asset recovery proceedings (Principle 5), as well as the manner in which they allocate and use returned assets (Principles 7 and 8). In keeping with human rights law, requesting States should allocate returned assets in an accountable, transparent and participatory manner (Principle 7) and use recovered assets in a manner that contributes to the realization of human rights (Principle 8). Moreover, requested and requesting States should engage in international cooperation in the context of asset recovery processes to ensure the progressive realization of economic, social and cultural rights (Principle 4).

76. Taken together, these principles provide that requested and requesting States should cooperate with each other, through formal or informal means, to ensure that embezzled funds are not only returned to requesting States but returned in a manner that is consistent with human rights law. Requested and requesting States should reconcile these diverse obligations through negotiations that culminate in a memorandum of understanding or other written agreement governing the return of embezzled public funds.[225] Cooperation in this context entails requested and requesting States pursuing such negotiations in good faith, with a willingness to compromise. If necessary, requested and requesting States may engage a third party, such as an international organization or an independent expert, to assist as a mediator in the process of reaching an agreement that ensures that the States'

[222] United Nations Convention against Corruption, art. 57 (3) (a), according to which the requested State party shall return the confiscated property to the requesting State Party.

[223] The review process for the United Nations Convention against Corruption has revealed that "the mandatory and unconditional return in cases of embezzlement of public funds or the laundering of those embezzled funds (art. 57, para. 3 (a)) was not foreseen under domestic legislation in any State. Instead, return was usually at the discretion of the competent authorities". Conference of the States Parties to the United Nations Convention against Corruption, "Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption", thematic report prepared by the Secretariat (CAC/COSP/IRG/2020/6), para. 56.

[224] United Nations Convention against Corruption, art. 57 (5).

[225] Ibid.

obligations under both international anti-corruption law and human rights law are fulfilled.

77. The requirements set out in the United Nations Convention against Corruption with respect to the return of assets are further complemented and bolstered by human rights law on the right to self-determination, which encompasses the right of people to choose by whom they are governed (political self-determination) and the right to freely dispose of their resources (economic self-determination).[226] This aspect of the right to self-determination may provide a further legal basis for the return of embezzled public funds in the specific context of natural resource exploitation.

78. Common article 1 (2) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights accordingly provides that "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."[227] The people of every State thus have a right to demand that the Government exploit the State's natural resources in a manner that benefits the people.[228] This specifically entails "continuing procedural obligations on state authorities to ensure transparency in disposing of public resources."[229] The right to economic self-determination may be violated where a Government exploits natural resources in a corrupt manner, in the interests of a small political elite and in disregard of the needs of the vast majority of the people.[230] The right of people to the free disposal of their natural wealth and resources may be implicated when requested States fail to return stolen assets, or when States fail to allocate returned funds in a manner that benefits the people.

79. The scope of application of the right to economic self-determination in the asset recovery field is limited, however, in that it applies to States' natural wealth and resources, not to their wealth in general, such as wealth derived from tax revenues. The term "natural wealth" refers to "those components of nature from which natural resources can be extracted or which can serve as the basis for economic activities".[231] The term "natural resources" refers to "supplies drawn from natural wealth which may be either renewable or non-renewable and which can be used to satisfy the needs of human beings and other living species."[232] The right of the people to the free disposal of their natural wealth and resources is therefore only relevant in an asset recovery context where a public official

[226] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995) pp. 55–56.

[227] See also International Covenant on Civil and Political Rights, art. 47; International Covenant on Economic, Social and Cultural Rights, art. 25; African Charter on Human and Peoples' Rights, art. 21; Declaration on the Right to Development, art. 1 (2).

[228] Cassese, *Self-Determination of Peoples*, pp. 55–56.

[229] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford, Oxford University Press, 2014), p. 67.

[230] Cassese, *Self-Determination of Peoples*, pp. 55–56.

[231] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge, Cambridge University Press, 1997), p. 18.

[232] Ibid.

has embezzled public funds derived from natural wealth and resources, such as revenues from the exploitation of oil, gas or minerals. The proceeds of corrupt acts such as bribery cannot be characterized as the "natural wealth and resources" of the State of origin, and they may therefore fall outside of the scope of the right to economic self-determination, even though the given act of bribery may have taken place in the context of oil or gas exploitation. To the extent that corruption has the effect of subverting the will of the people, however, it may nevertheless interfere with the right to internal self-determination.

80. The requested State's obligation under article 57 of the United Nations Convention against Corruption to return embezzled public funds, or embezzled public funds that have been laundered, exists alongside the principle of accountability (see Principles 2 and 7), according to which States should ensure that returned funds are administered in an accountable manner. Accountability, in this context, means that the return of embezzled public funds should be accompanied by the establishment of mechanisms for monitoring the administration of returned funds and for handling complaints about irregularities.[233] Returning and receiving States should reach mutually acceptable agreements concerning monitoring and complaints mechanisms before the return of the assets takes place. When requesting States are not compliant with the Convention's provisions concerning transparency and accountability in public financial management, public reporting and the participation of society, the monitoring mechanisms should be particularly stringent.[234]

81. **Best practice:** The monitoring of funds returned by the United States and Switzerland to the people of Kazakhstan through the BOTA Foundation involved trilateral monitoring by the requested States, representatives from Kazakhstan (rather than representatives of the State of Kazakhstan) and a third party, the World Bank.[235]

82. Requested States should refrain from deducting their own costs incurred in the asset recovery process from the returned funds, or they should reduce such deductions to the barest minimum, in particular where the requested State is a developing country.[236] The United Nations Convention against Corruption provides that, "where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property" (art. 57 (4)). An interpretive note to this provision further explains that the term "reasonable expenses" refers to "costs and expenses incurred and not as finders' fees or other unspecified charges."[237]

[233] FATF, "Best practices on confiscation"; Civil Forum for Asset Recovery, "Civil society principles for accountable asset return", principles 6–7; UNCAC Coalition, "Civil society statement for the global forum on asset recovery"; Fenner Zinkernagel and Attiso, *Returning Stolen Assets*, p. 3.

[234] United Nations Convention against Corruption, arts. 9–10 and 13; Inter-American Convention against Corruption, art. III; African Union Convention on Preventing and Combating Corruption, arts. 3, 5, 7, 9–10 and 12; Economic Community of West African States Protocol on the Fight against Corruption, art. 5; SADC Protocol on Corruption, art. 4; Civil Forum for Asset Recovery, "Civil society principles for accountable asset return", principle 6; UNCAC Coalition, "Civil society statement for the global forum on asset recovery".

[235] Fenner Zinkernagel and Attiso, *Returning Stolen Assets*, p. 5.

[236] Conference of the States Parties to the United Nations Convention against Corruption resolution 8/9, para. 21.

[237] UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, p. 516.

83. **Best practice**: A recent example of the best practice of waiving such fees can be found in the memorandum of understanding between the United States, Jersey and Nigeria, according to which the United States and Jersey agreed to transfer 100 per cent of the assets to Nigeria.[238] Another approach is to establish, through legislation, a small, fixed percentage of the confiscated assets that may be deducted by the requested State.[239] This approach would be appropriate in circumstances where the requesting State does not have an ownership claim over the confiscated assets (i.e. where the assets represent proceeds of bribery, rather than embezzled public funds).

[238] United States Department of Justice, "U.S. enters into trilateral agreement with Nigeria and Jersey".

[239] Switzerland, FIAA, art. 19 (1), allowing for the deduction of "2.5% of the value of the confiscated assets … to cover costs incurred in proceedings for the freezing, confiscating and restitution of the assets, and in implementation of support measures"; Human Rights Council resolution 40/4, para. 12.