



VICTIMS AND ASSET RECOVERY: PRINCIPLES AND STANDARDS

CIFAR RESEARCH PAPER

Cover picture: provided by Pixabay.

CONTENTS

INTRODUCTION - 1

TREATY OBLIGATIONS AND LEGISLATION - 1

INTERNATIONAL PRINCIPLES - 3

CIVIL SOCIETY INITIATIVES - 5

EXAMPLES - 6

Paper prepared by Brianna Rock, and reviewed by Jackson Oldfield. The author has made reasonable steps to ensure that the content is accurate. The views, opinions and evidence presented in this paper are the sole responsibility of the author.

Published: 2022, CiFAR – Civil Forum for Asset Recovery e.V.
CiFAR – Civil Forum for Asset Recovery e.V., Köpenicker Str. 147,
Berlin, Germany,
www.cifar.eu



INTRODUCTION

The loss of public assets to corruption has a significant impact on countries and their populations. Infrastructure development, social welfare, and other public programmes are deprived of their intended impact due to loss of funding, which harms the people relying on these resources for their well-being. Grand corruption cases often involve money stolen from countries with limited democratic structures, where those from particularly vulnerable sectors of the population are both more likely to face the effects of reduced public spending and are less likely to be able to contest the allocation of limited resources.

These victims of grand corruption rarely have recourse to secure their rights. While obligations to return the proceeds of corruption to prior legitimate owners and to compensate victims exist in international law, these rights are limited and there is still much to be developed in terms of addressing the needs of the victims of corruption. Nevertheless, there is a growing effort to prioritise victims within asset recovery processes. This has been strengthened by the work of civil society organizations (CSOs), legislatures and international organizations.

TREATY OBLIGATIONS AND LEGISLATION ON VICTIMS AND ASSET RECOVERY

The first global anti-corruption treaty was also the first to dedicate an entire chapter to asset recovery. Chapter V of the 2003 United Nations Convention against Corruption (UNCAC) outlines a process for international cooperation on asset recovery and for how states should approach the return and disposal of assets.¹ In this it includes a provision to address the victims of corruption. Article 57(3)(c) states that, "in all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime".² Under this provision the UNCAC established that apart from circumstances in which a final judgment from the requesting State Party provides otherwise, States should prioritise the return of assets to those who can be identified as legitimate owners or victims of the crime.³ This right is not as expansive as it may look.

It does not include a provision for determining who is a victim and, in its formulation, leaves discretion for States to consider victims and nevertheless decide not to provide them with compensation.

The EU has also issued directives that establish minimum rules for the freezing of assets, and support victims of cross-border corruption. Directive 2014/42/EU addresses the freezing, management, and confiscation of criminal assets, and includes an obligation to ensure that victims can claim compensation (art. 8(10)).⁴ Directive 2012/29/EU also provides rights for victims, through establishing minimum standards on the rights, support, and protection of victims of crime. Specifically, paragraphs 48 and 62 of the preamble call for the swift return of property to the victims of crime and encourage member states (MSs) to work closely with CSOs that work with the victims of crime.⁵ This directive includes the right for victims to be heard during criminal proceedings (Art. 10), the right of return of property seized

during proceedings (Art. 15) and the right to compensation from the offender (Art. 16). It is important to note that the focus of this Directive is aimed primarily at victims within EU Member States and where the crime took place in another MS or where the victim is resident in another MS – thereby excluding victims from outside the EU from its scope. Further, it limits the definition of victims to natural persons suffering harm and their family members (Art. 2(1)(a)). This excludes significant types of victims who are likely to be identifiable in grand corruption cases such as victims who are more often identified as large classes, for example members of a particular ethnic group or sector of society particularly affected by grand corruption.

Introduced in 2010, Switzerland's Restitution of Illicit Assets Act (RIAA) is an early piece of asset return legislation in Switzerland. Section 4 of the RIAA deals with restitution and establishes the principles and procedure for this process. It is written that the objectives for the restitution of forfeited assets should be to improve the living conditions for the people in the country of origin, to reinforce the rule of law in the country of origin, and to prevent serious crimes from being committed with impunity (Art. 8).⁶ Furthermore, in this procedure, the RIAA mandates that seized assets are to be returned in the form of funding for programs of public interest (Art. 9).⁷ While not specifically providing for the restitution of recovered assets to victims or for their participation in the process, this piece of legislation nevertheless provides, at a minimum, for the consideration of the people in the country of origin as part of the return. In 2016 Switzerland introduced the Foreign Illicit Assets Act (FIAA). The FIAA further enables Switzerland to freeze assets if there is reason to suspect they are of illicit origin. Building off previous objectives of restitution outlined in the RIAA, the FIAA states that "to the extent possible, [the Federal Council] shall include non-governmental organizations in the

restitution process".⁸ This may then allow for the participation of victims' rights organisations, albeit without a guarantee of their inclusion in the process.

The UK committed to introducing principles to govern compensation for victims of Illicit financial flows overseas in the UK Anti-Corruption Strategy 2017-2022. Following through on this commitment in June 2018, the UK published the General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases.⁹ The General Principles outline legal mechanisms necessary to secure compensation, as well as which other departments should be collaborated with to determine who should be regarded as victims overseas, assess cases, obtain evidence in support of compensation claims, and ensure a transparent, accountable, suitable, and fair process for the asset return.¹⁰

In January of 2022, the UK became the first country to publish its principles and policy on international asset returns. This document was written to increase consistency in how proceeds of corruption are returned and sets a legal requirement for transparency in the use of the returned funds.¹¹ Building off the agreements outlined in the UNCAC agreement, this framework expands on Article 57(3)(c), to allow for cases in which the UK may initiate a return otherwise not mandated by UNCAC, and to ensure that when the UK exercises discretionary "priority consideration" of the victims of the crimes, it initiates the returns with a standardized, procedural method.

INTERNATIONAL PRINCIPLES ON VICTIMS AND ASSET RECOVERY

Over the last five years there has been significant developments in how international organizations consider and identify victims, as well as how they seek to address their needs in the asset recovery process. The importance of accounting for and addressing the human rights repercussions of corruption was set as primary aim in the global expert group meetings on corruption, set in Lima¹² in 2018, and in Oslo¹³ and Addis Ababa¹⁴ in 2019. As the conversations surrounding asset recovery continues to grow, there has been growing momentum behind articulating the role of victims in this process.

In 2017, the Global Forum on Asset Recovery, with support from the Stolen Asset Recovery Initiative (StAR) – a joint initiative of the world bank and the UN office of Drugs and crime – published *Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases*, a set of principles that address, “approaches and mechanisms for enhancing coordination and cooperation, and for strengthening transparency and accountability of the processes involved.”¹⁵ These principles have been relied on in many asset return cases, and have served as a reference point for asset recovery process dialogues. Regarding victims, principle (5) states, “where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.”¹⁶ Here then implying that concern should first be given to identifiable victims before wider purposes for recovery are considered.

On 23rd March 2021, the UN Human Rights Council published resolution 46/11: *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.*¹⁷ In addition to reiterating the importance of compliance with international human rights law in the returning of proceeds of crime and corruption, this resolution underlines the “need for greater access to effective remedies by victims in order to realize effective prevention of, and remedy for, business related human rights harm.”¹⁸ Further, it also expresses concern for the fact that funds of illicit origin “which are urgently needed for development and the realization of all human rights,” can remain in banks of requested states for extended periods of time, which not only is to the detriment of the victims in need of the relief these funds ought to provide, but that these banks accrue financial gain from holding the funds over time.¹⁹

Prior to the first ever United Nations General Assembly Special Session against Corruption (UNGASS) resolution on June 2nd, 2021, the UNODC solicited, reviewed, and published submissions from state governments, UN bodies, international organizations, and CSOs. These submissions offered new ideas for multilateral agreements, recommended specific actions to be taken, and outlined key topics for the UNGASS to cover in their official resolution addressing measures to address asset recovery, human rights issues, and to strengthen international collaboration regarding anti-corruption work. The final UNGASS political declaration²⁰ highlights how corruption may disproportionately affect the most disadvantaged individuals in society, the

loss of citizens' trust due to corruption scandals, and the impact corruption has on human rights – especially highlighting the victims of corruption as those who ought to be prioritized in the asset return process. This political declaration was designed to provide a path to a stronger international framework for cooperation in asset recovery cases.

The United Nations Human Rights Office of the High Commissioner (OHCHR) released a draft set of guidelines on a human rights framework for asset recovery in 2019. Alongside this release, the OHCHR invited all member states, intergovernmental organizations, non-governmental organizations, and academia to review the guidelines, share comments, feedback, and insight on good practices, national laws, multilateral agreements, as well as any jurisprudence that may be relevant in the development of legislation regarding the human rights aspects of asset recovery.²¹ The final version of these were published February 17, 2022 as the Recommended Principles on Human Rights and Asset Recovery.²² Principle 6 is particularly relevant for victims. It highlights that corruption is not a victimless crime, and defines the term 'victim' as "the persons who have suffered harm, individually or collectively as a result of the commission of a corruption offence."²³ It further clarifies that for the purpose of the Principles, while victims may include those whose human rights have been violated, they also include victims who have suffered rights violations provided under other bodies of law, such as administrative law, international refugee law, and international environmental law. Further, 'harm' is identified as not just violations of rights but also as causing 'social damage', such as weakening the credibility of institutions. In this 'the public' is clarified as the many individuals who form the collective, society at large – which can also be the victim of acts of corruption.²⁴

It substantively recalls in para. 55 that Art. 2(3) of the International Covenant on Civil and Political Rights requires that victims should be able to pursue effective remedies under domestic law for violations of their civil and political rights, including in the context of anti-corruption investigations and prosecution, and that these remedies should be available without discrimination. It further recalls the possibility to seek a remedy at the international level for States that have ratified the Optional Protocol for corruption-related violations of the International Covenant on Economic, Social and Cultural Rights. In paras. 56 and 57, it highlights that a right of remedy also exists under Article 35 of the UNCAC for victims of corruption, but that this is limited by an obligation to identify a causal link between the harm and the corruption, which may be difficult in practice.

As a result of this, it highlights that 'domestic civil procedure laws that broadly define victims of corruption and that allow for public interest' (para. 58) represent examples of best practice when it comes to the right to an effective remedy for the victims of corruption.

CIVIL SOCIETY INITIATIVES ON VICTIMS AND ASSET RECOVERY

Many CSOs emphasize the importance of focusing on victims in the asset recovery process. Through a yearlong process of collaboration with CSOs across the globe, the *Civil Society Principles for Accountable Asset Return* (CSPAAR) were released in 2020 as minimum framework standards for asset recovery.²⁵ These principles were designed to serve as a baseline that can be supplemented by countries dealing with the asset return process on a case-by-case basis. More than establishing the importance of prioritizing victims in the restitution, Principle 3 includes the aim that victims, victim groups and representatives of victimsshould be “able and enabled to participate in the asset recovery process,” itself.²⁶ Principles 8, 9 and 10 of the CSPAAR are dedicated to victim restitution and recovery to other beneficiaries. They state that victims and their representatives ought to be able to engage with the legal proceedings and bring cases against state officials; they emphasize that the restituted assets ought to benefit the victims of corruption; and that where victims’ groups do not exist CSOs should help identify and represent victims and their interest.

Amongst the large response to the call for submissions to UNGASS, the Centre for Civil and Political Rights partnered with the International State Crime Initiative to submit a paper emphasizing the link between corruption and human rights. In their submission they advocate for a human rights-based approach to corruption, focusing on the victims of corruption to create effective frameworks that prevent further victimization of populations subject to corruption. It is put forward that the asset seizure, recovery and redistribution procedure is, “just as important as the

conceptual framework within which the funds themselves are disbursed,” and that they should be going towards, “positively contributing to the lives of victim population and remediating the harm caused to them.”²⁷ This submission argues for the priority in returning assets to be that the recovered assets are dedicated to repairing the harm experienced by populations victim to grand corruption.

EXAMPLES OF THE INCLUSION OF VICTIMS IN ASSET RECOVERY

A tripartite memorandum of understanding (MoU) was reached by Nigeria, Switzerland, and the World Bank on December 4, 2017, to coordinate the return of the \$321 million stolen by the late General Sani Abacha back to Nigeria. The MoU establishes and regulates the following: the transfer of funds from Switzerland to Nigeria; the mechanism for this return for the benefit of the population through the National Social Safety Nets Project cash transfers; the method of mandated monitoring which will be conducted by the World Bank; and the inclusion of CSOs as third party monitors.²⁸ Principle 1 of the General Principles introduced in Article 1 of the MoU states that the intention of the MoU is to ensure restituted funds are returned “for the benefit of the people of Nigeria,” who are the victims of Abacha’s corruption.²⁹ Fitting into the framework of international standards already established, this agreement relied on precedents established in the Addis Ababa Action Agenda, the 2030 Agenda for sustainable Development, chapter V of UNCAC and the GFAR principles. In 2019, one of the major NGOs charged with monitoring the implementation of the restitution, the Africa Network for Environmental and Economic Justice, reported the disbursement of monthly payments to beneficiaries across Nigeria had begun.³⁰

Most recently, after signing a Framework Agreement that outlines principles to be observed in the restitution process in September 2020,³¹ Switzerland and Uzbekistan have been negotiating a restitution agreement that engages victims both as recipients of the restitution, and as participants in the restitution process. On February 11, 2022, these countries

agreed to set up a new United Nations Multi-Partner Trust Fund (the Fund), which will be used as the mechanism for the return of USD 131 million to Uzbekistan.³² The Fund will have representatives from the Uzbek population to ensure that the victims of public asset theft are involved in the restitution process, as well as representatives from the United Nations and Switzerland. The Fund will observe principles agreed upon in 2020, including to use the assets ‘to improve the living conditions of the people of Uzbekistan’.³³ The Fund will begin its activities and more details of its functioning will be made available once the formal restitution agreement is signed. It should be noted that Uzbek civil society has been critical of the process and exclusion of independent civil society in discussions around the return.³⁴

- 1 UNCAC Coalition (2020) Full Text of the UN Convention Against Corruption – UNCAC. Retrieved from: <https://uncaccoalition.org/the-uncac/united-nations-convention-against-corruption/>
- 2 *ibid.*
- 3 *ibid.*
- 4 European Parliament (2014) Directive EU 2014/42 of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042>
- 5 European Parliament (2012) Directive EU 2012/29 of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029>
- 6 Federal Assembly of the Swiss Confederation (2011) Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons. Restitution of Illicit Assets Act (RIAA) Retrieved from: <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/2011/38/20110201/en/pdf-a/fedlex-data-admin-ch-eli-cc-2011-38-20110201-en-pdf-a.pdf>
- 7 *ibid.*
- 8 Federal Assembly of the Swiss Confederation (2016) Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons. Foreign Illicit Assets Act (FIAA) Retrieved from: <https://www.fedlex.admin.ch/eli/cc/2016/322/en>
- 9 Serious Fraud Office (2022) Compensation Principles to Victims Outside the UK. Retrieved from: <https://www.sfo.gov.uk/publications/information-victims-witnesses-whistleblowers/compensation-principles-to-victims-outside-the-uk/>
- 10 Serious Fraud Office (2018) General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases. Retrieved from: <https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/>
- 11 Home Office (2022) Framework for transparent and accountable asset return. Retrieved from: <https://www.gov.uk/government/publications/framework-for-transparent-and-accountable-asset-return>
- 12 United Nations Office on Drugs and Crime (2018) Global Expert Group Meeting on Corruption involving Vast Quantities of Assets. Lima, Peru, 3-5 December 2018. Retrieved from: <https://www.unodc.org/unodc/en/corruption/meetings/Lima-egm-2018.html>
- 13 United Nations Office on Drugs and Crime (2019) Global Expert Group Meeting on Corruption involving Vast Quantities of Assets. Oslo, Norway, 12-14 June 2019. Retrieved from: <https://www.unodc.org/unodc/en/corruption/meetings/oslo-egm-2019.html>
- 14 United Nations Office on Drugs and Crime (2019) International Expert Meeting on the return of stolen assets. Addis Ababa, Ethiopia, 7-9 May 2019. Retrieved from: <https://www.unodc.org/unodc/en/corruption/meetings/addis-egm-2019.html>
- 15 The World Bank (2017) The Global Forum for Asset Recovery: GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases. Retrieved from: <https://starworldbank.org/sites/star/files/the-gfar-principles.pdf>
- 16 *ibid.*
- 17 The United Nations Human Rights Council (2021) 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: resolution / adopted by the Human Rights Council on 23 March 2021. Retrieved from: <https://digitallibrary.un.org/record/3921852?ln=en>
- 18 United Nations General Assembly (2021) Resolution 46/11, 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. A/HRC/RES/46/11 Available at: <https://undocs.org/A/HRC/RES/46/11>
- 19 United Nations General Assembly (2021) Resolution 46/11, 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. A/HRC/RES/46/11. Retrieved from: <https://undocs.org/A/HRC/RES/46/11>
- 20 United Nations General Assembly (2021) Resolution S-32/1, Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation. A/RES/S-32/1. Retrieved from: <https://undocs.org/A/RES/S-32/1>
- 21 United Nations Human Rights Office of the High Commissioner (2019) Call for input: Guidelines on a Human Rights Framework for Asset Recovery. Retrieved from: <https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/FrameworkForAssetRecovery.aspx>
- 22 United Nations Human Rights Office of the High Commissioner (2019) OHCHR Recommended Principles on Human Rights and Asset Recovery. Retrieved from: <https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/OHCHR-RecommendedPrinciplesHumanRightsAssetRecovery.pdf>
- 23 *ibid.*
- 24 *ibid.*
- 25 CiFAR (2020) Civil Society Principles for Accountable Asset Return. Retrieved from: <https://cifareu/what-is-asset-recovery/civil-society-principles-for-accountable-asset-return/>
- 26 *ibid.*
- 27 Centre for Civil and Political Rights (2020) A Human Rights Based Approach to Corruption. Retrieved from: https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/UNGASS_submission_-_CCPR_and_IS-CI_30april2020.pdf
- 28 Federal Department of Foreign Affairs Directorate of International Law (2019) The Abacha II Case: a successful tripartite cooperation of asset return – the Swiss Perspective. Retrieved from: https://www.unodc.org/documents/corruption/AddisEGM2019/Presentations/3_2019-05-07_Presentation_KURSI_Addis_Abacha.pdf
- 29 World Bank (2017) Memorandum of Understanding Among the Government of the Federal Republic of Nigeria, The Swiss Federal Council and the International Development Association on the Return, Monitoring and Management of Illegally-Acquired Assets Confiscated by Switzerland to be Restituted to the Federal Republic of Nigeria. Retrieved from: <https://www.newsdata.admin.ch/newsdata/message/attachments/50734.pdf>
- 30 Oladeinde Olawoyin (2019) Group commends disbursement of Abacha loot, Premium Times, 17 February 2022. Retrieved from: <https://www.premiumtimesng.com/news/top-news/309642-group-commends-disbursement-of-abacha-loot.html>
- 31 Federal Department of Foreign Affairs (2020) Switzerland and Uzbekistan sign an agreement with a view to the restitution of confiscated assets. Retrieved from: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80393.html>
- 32 Federal Department of Foreign Affairs (2022) Restitution of illicitly acquired assets: Progress of negotiations between Switzerland and Uzbekistan. Retrieved from: <https://www.eda.admin.ch/eda/en/fdfa/fdfa/aktuell/newsuebersicht/2022/02/negotiations-switzerland-uzbekistan.html>
- 33 Federal Department of Foreign Affairs (2020) Switzerland and Uzbekistan sign an agreement with a view to the restitution of confiscated assets. Retrieved from: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80393.html>
- 34 Uzbek Forum for Human Rights, Call for Transparency and Inclusion in the Return of Gulnara Karimova's Ill-Gotten Assets to Uzbekistan by the Swiss Government, 8 June 2021, <https://www.uzbekforum.org/call-for-transparency-and-inclusion-in-the-return-of-gulnara-karimovas-ill-gotten-assets-to-uzbekistan-by-the-swiss-government/>

