The Repatriation of Illicit Assets – A UK Perspective

Executive Summary

The World Bank estimates that between US$20 and $40 billion is stolen from developing countries every year through high-level corruption and hidden overseas. Only a small fraction of these assets is recovered and returned to those directly harmed by the corruption. In the United Kingdom, the Proceeds of Crime Act 2002 ("POCA 2002") provides authorities with powers to investigate, freeze and seize assets obtained through illegal activity.

Despite demonstrating political will to address the problem of asset return, the UK has no specific legislation enabling the repatriation of confiscated assets. This is ostensibly justified on the basis that the UK is already bound by international obligations under the United Nations Convention Against Corruption (UNCAC).

The return of assets is proclaimed as a 'fundamental principle' of the UNCAC, however the circumstances in which states are obligated to repatriate confiscated proceeds of corruption under the Convention are very narrow. A further challenge is that an increasing number of corruption cases, particularly in the UK, are being resolved through settlements, rather than through a full criminal investigation and trial. This leads to a lack of transparency and opportunity for Affected States to participate in the recovery process, or to pursue their own domestic criminal investigations or enforcement.

Given the extensive resources dedicated to the original recovery efforts, the UK has a vested interest in ensuring that if returned, assets are not misappropriated again. This paper explores international experiences in repatriating stolen assets and explore various approaches that have been adopted in order to prescribe and monitor the way that assets have been used when repatriated to Affected States.

Having considered the perceived obstacles to illicit asset repatriation, it proposes a legislative framework that would mandate and govern the return of stolen assets by the UK. It calls for POCA 2002 to be amended to insert a provision setting out a process for the repatriation of assets following the making of a recovery order.

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The White Collar Crime Centre is a pro bono initiative which provides high level research and commentary on white collar crime law reform issues and makes pragmatic recommendations for future action. It was established by Bright Line Law and operates separately to its legal practice.

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I. Introduction

Corruption is endemic throughout the world, and undoubtedly its most destructive impact is on developing and transition states. Corruption diverts vital resources away from development projects, undermines confidence in public institutions and governance structures, and weakens the rule of law in Affected States. The United Kingdom recognises the importance of using asset recovery as a means of combatting corruption. The Proceeds of Crime Act 2002 (POCA) provides authorities with powers to investigate, freeze and seize assets obtained through illegal activity. However, the UK's commitment to returning recovered assets to those who are most harmed by corruption is less apparent.

The UK has no specific legislation enabling the repatriation of confiscated assets. Ostensibly, the rationale behind this is that its international obligations already bind the UK under the United Nations Convention Against Corruption (UNCAC). The Government has argued that specifically providing for asset return in domestic legislation would impede the UK's ability to make tailor-made agreements in individual cases.[1] However, the UK's international obligations are arguably neither explicit nor prescriptive. Although the return of assets is proclaimed as a "fundamental principle" of the UNCAC, the circumstances in which states are obligated to repatriate confiscated illicit assets under art 57 of the Convention are surprisingly narrow. Essentially, the UNCAC adopts what has been described as a "dessert focussed" approach whereby the Affected State is only entitled to demand the return of assets in circumstances where it was the driving force behind the confiscation.[2]

This paper will begin by considering the global issues presented by the recovery and return of illicit assets. It will consider the implications of the increased use of settlement mechanisms as a means of resolving cases, and the obstacles this presents to the participation of the Affected State in the recovery process and the return of assets. What will follow is an examination of the UK's international obligations area, focusing primarily on

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the UNCAC. At a domestic level, this paper will consider the POCA and other legal and policy developments that have demonstrated that there is a political will to address this contentious area. Having considered the UK's domestic and international obligations, this paper will explore previous experiences of asset recovery and return, both in the UK and internationally. The UK's piecemeal approach to the issue of repatriation of stolen assets has resulted in limited instances of asset return, and ad hoc settlements in which the Affected State has had little (if any) involvement.

The second half of this paper will move on to consider possible avenues for legal reform. A fundamental issue that arises when considering legal reform in this area relates to whether or not the Affected State should remain unconstrained in how it uses the recovered assets. Given the extensive resources dedicated to the initial recovery efforts, it is unsurprising that states have a vested interest in ensuring that if returned, the assets are not misappropriated again. Moreover, the practical ability to freeze, confiscate and return assets has generally been dependent on the willingness and capacity of third countries to cooperate, and fragile judicial systems or corrupt regimes hamper these efforts. This paper will explore alternative approaches and mechanisms that have been used in order to prescribe and monitor the way that assets have been disbursed and used when repatriated to Affected States.

Given that the UK presently has no domestic legislation explicitly enabling the repatriation of confiscated assets, there is considerable room for reform in this area. This paper will consider the possibility of legislative reform that will better reconcile the UK's strong rhetoric of commitment and responsibility in this area with its legal obligations. Given the varying circumstances and contexts in which repatriation of assets takes place, it is acknowledged that some flexibility will be required in applying the law to individual cases. However, this does not preclude the UK from incorporating the principles and obligations already endorsed into domestic law.

Ultimately there is a need to develop institutional capacity, and establish a comprehensive and robust legal framework for both asset recovery *and* return. The process of asset confiscation certainly serves as a valuable sanction and deterrent for improper, dishonest and corrupt behaviours. However, the process of asset repatriation, where financial resources are confiscated from the offenders and directed back towards economic development and growth in the Affected State, is equally significant for its potential to repair the damage caused to victim populations.

II. The global dilemma of stolen asset recovery and return

The World Bank estimates that between US$20 and $40 billion is stolen every year through high-level corruption from developing countries and hidden overseas – the equivalent to between 20 and 40 percent of official development assistance.[3] Over the past 15 years, only approximately 5 billion has been recovered (between 0.8 and 1.6 percent of the stolen assets).[4] It is widely acknowledged that the UK's role as a financial centre, coupled with its close links to offshore centres, exposes it to significant risks of corruption and foreign bribery-related money laundering. The National Crime Agency estimates up to £90 billion of illicit funds are laundered through the UK each year.[5]

The troubling extent of global corruption belies a further significant dilemma – when the corruption is uncovered, and the stolen assets recovered, what happens to them and where do they go? In 2014 the Stolen Asset Recovery Initiative (StAR), a partnership between the World Bank Group and the United Nations Office on Drugs and Crime published a study titled "Left Out of the Bargain" in order to gain a broader understanding of global settlement and asset recovery.[6] The report looked at 395 cases involving settlements that took place between 1999 and mid-2012, which resulted in a total of US$6.9 billion in monetary sanctions.[7] Nearly US$6 billion of this amount was the result of monetary sanctions that had been imposed by a different country from the one that employed the bribed official.[8] Of the nearly US$6 billion imposed, only about 3.3 percent (approximately US$197 million) had been returned or ordered to be returned.

Broadly, there are four key stages in international asset recovery - tracing the assets; gathering the evidence; freezing and confiscation; and disposal of the assets. All four of these stages are highly complex, necessitating international cooperation significant time and financial resources. However, this paper will be focused on the latter two stages: the process of the freezing of assets through obtaining and executing restraint or freezing orders and the return (or sharing) of recovered assets between the Holding State (that is, the jurisdiction that has confiscated the assets) and the Affected State.

Significant international progress in battling foreign bribery has led to increased enforcement of foreign bribery laws. However, a growing number of cases are being

resolved through settlements, rather than criminal proceedings. StAR has noted that "*very few cases of foreign bribery (whether against natural or legal persons) have ever gone to trial anywhere*."[9] In common law jurisdictions, the mechanisms most commonly used involve negotiated processes such as guilty pleas, civil settlements, deferred prosecution agreements, and non-prosecution agreements. Increasingly, particularly in the UK context, settlements have been perceived as presenting a more efficient and effective way of concluding what are invariably highly complex cases. These mechanisms can result in a relatively quick punishment of offenders, the imposition of significant monetary penalties and the recovery of proceeds of corruption.[10] A 2019 report of the OECD on "Resolving Foreign Bribery Cases with Non-Trial Resolutions" stated that the UK had used non-trial resolutions to resolve over 79% of its cases.[11]

The increased use of these "ad hoc" arrangements to recover illicit assets inevitably presents several significant challenges, particularly when it comes to the return of the assets to Affected States. Firstly, the opaque nature of these arrangements and the limited scope for Affected States to participate in the recovery process creates barriers to stolen assets being returned to those most directly harmed by corrupt practices. Secondly, the use of non-trial resolutions can lead to significant inconsistency in the level of sanctions imposed by different states – reflecting both the wide variation in monetary penalties imposed and the reductions that may be applied as part of negotiated processes.[12] Thirdly, Affected States (who are generally excluded from the settlement process) often struggle to bring their prosecutions against those officials responsible for the corruption, and settlements may further impede their domestic criminal investigations or enforcement due to the use of Mutual Legal Assistance (MLA) treaties.[13]

Where stolen assets are returned, this takes place through a range of different mechanisms: including direct recovery through the order of a court,[14] restitution or compensation as part of a criminal or private civil action, or through voluntary payments, memorandums of understanding and other international agreements. There are a number of international legal instruments in place that govern the recovery and return of illicit assets, however, as will be examined further below, the mechanisms provided by these for the return of assets are surprisingly limited in their scope and applicability.

When assessing the international experience of illicit asset repatriation, it has to be acknowledged that there are significant factors that make the recovery and return of assets

an extremely onerous task for states. States will be reluctant to engage in the expensive, resource-intensive and time-consuming process of asset recovery in circumstances where there is a high possibility that the recovered funds will be misspent again or fail to reach the intended beneficiaries.[15] There is a concern that the culture of impunity surrounding international corruption will not be addressed until the pursuit of justice becomes a more attractive proposition for those states with the resources to pursue it.

III. The international legal framework

A. The United Nations Convention Against Corruption

The UNCAC is the primary international legal instrument that enables states to prevent the transfer of proceeds of corruption and to detect, freeze, forfeit, and return funds that have been obtained through corrupt activities and moved across jurisdictions. One hundred and sixty-eight countries, including the UK, have now ratified the Convention which establishes asset recovery as a "fundamental principle' of the Convention."[16] The UNCAC requires that State Parties ensure that the views of victims are considered in criminal proceedings,[17] and to enable those who have suffered damage from corruption to take legal action to get compensation.[18] The UNCAC requires States Parties to establish a regime and procedures for the receipt, processing, recognition and enforcement of a request received by another State Party for confiscation, either through the freezing, seizure or confiscation of assets by its competent national authorities or through direct enforcement of foreign orders (arts 55 and 54).

Despite elevating asset recovery to the status of a "fundamental principle," art 57 of the UNCAC (which establishes some mandatory requirements that States Parties must adhere to when establishing their procedures for the return and disposal of confiscated assets) is narrow in scope. Repatriation of assets from the jurisdiction that confiscated the assets, to the Affected State under art 57 of the UNCAC is only obligatory where three pre-requisites are met:

i. a final order confiscating the assets has been issued in the Affected State's courts;
ii. that order has been accorded legal effect by the Holding State's courts; and

iii. the requesting state's claim to the assets is clear – that is, the confiscated assets are the result of the embezzlement of public funds or the laundering of such funds;[19] the Affected State "*reasonably established its prior ownership*" of the confiscated assets;[20] or the law of the Holding State "*recognises damage*" to the Affected State "*as a basis for returning the confiscated property*".[21]

Where these conditions are not met, the return or sharing of confiscated assets depends on other international agreements, MLA treaties (discussed in further detail below)[22], or special arrangements reached with other jurisdictions.

Article 53 of the Convention recognises that asset recovery through criminal proceedings is hampered by numerous obstacles – including the immunity of some public officials, the high standard of proof required in criminal cases, and difficulties in locating and apprehending defendants. Given these constraints, art 53 of the UNCAC facilitates the recovery of assets through direct (private) civil litigation. Under this provision, State Parties are allowed to initiate a civil action in the court of another State Party in order to establish ownership over assets. Concerns have been raised regarding the poor implementation of this provision. – In some circumstances, Holding States fail to recognise the legal standing of Affected States. Similarly, in other states a lack of transparency means that often Affected States are not aware of the existence of legal proceedings and settlements abroad and, as a consequence, they are not in a position to claim ownership of property or compensation.[23]

B. OECD Anti-Bribery Convention

Another significant international instrument in the area of global corruption is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly referred to as the OECD Anti-Bribery Convention). The Convention reinforces the importance of mutual legal assistance, requiring State Parties to provide prompt and effective assistance to other parties. However, this is concerned with both criminal and non-criminal investigations, and legal proceedings generally, and provides no guidance concerning the repatriation of assets. However, member states self-report cases to the OECD Working Group on Bribery under their convention obligations, and this provides some useful data on the recovery and return of corrupt assets.

C. Stolen Asset Recovery Initiative

The Stolen Asset Recovery Initiative (StAR) is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime that was established to support international efforts to end safe havens for corrupt funds. In December 2017 the United States and the United Kingdom hosted the first Global Asset Recovery Forum (GFAR), with support from StAR which resulted in the *GFAR Principles for the Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases* (hereinafter referred to as the GFAR Principles).[24] These ten principles were described as '"considerations" that would promote successful asset return and included transparency and accountability (Principle 4). They also emphasised the use of returned assets to benefit the people of nations harmed by corrupt conduct and achieve development goals (Principles 5 and 6), and the inclusion of non-governmental organisations and civil society groups in the asset return process (Principle 10).

IV. UK's legal framework for asset recovery and return

A. Proceeds of Crime Act 2002

The UK's asset recovery regime is primarily based on the Proceeds of Crime Act 2002. POCA provides UK law enforcement agencies with the power to investigate, freeze and seize assets that have been obtained through illegal activity (in both circumstances where there has and has not been a conviction). Part 2 of POCA allows for the recovery of assets through the imposition of a confiscation order, following a successful conviction of an individual or entity.[25] These are designed to prevent offenders from benefiting from criminal offending, by confiscating an amount that is equivalent to the '"benefit" that the offender obtained from the crime. Part 5 of POCA deals with civil recovery orders in the absence of any criminal conviction (including where a criminal conviction has been unsuccessful, where the alleged offender has died, or where there is insufficient evidence to bring criminal charges). This involves an order imposed by the High Court to forfeit assets in circumstances where there is sufficient evidence to demonstrate that, on the balance of probabilities, the assets in question are the proceeds of crime.[26] Judges may also rely on circumstantial evidence in order to draw an "irresistible inference" that assets are the proceeds of crime.[27] Property in the UK that can be shown to be derived from unlawful conduct *outside* the UK may also be

the subject of a recovery order POCA was amended by the Criminal Finances Act 2017, which included introducing Unexplained Wealth Orders as a further means of enforcement to act quickly to freeze stolen assets and reduce law enforcement agencies' reliance on foreign convictions in grand corruption asset recovery cases. In practice, relatively few civil recovery cases have gone through the courts, and they account for only a small proportion of total recovered assets in the UK.[28]

Significantly, there is no UK domestic legislation that deals with the return of recovered assets back to the state from which they were originally stolen. Part 11 of POCA (together with its related statutory instruments)[29] provide for cooperation in the investigation and enforcement of orders between the UK and overseas jurisdictions.[30] However, the legislative definition of an 'external request', and an "external order"does not extend to any request or order for assets to be repatriated to the requesting state.[31] In the absence of any domestic legislative guidance on this issue, UK authorities rely on their obligations under the UNCAC. However, as noted above, the obligations imposed on states by the UNCAC to repatriate illicit assets back to Affected States are limited in their scope. Where art 57 of the UNCAC does not apply, the return or sharing of confiscated assets by the UK will instead depend on the existence of other international agreements, MLA treaties, or special arrangements reached between jurisdictions. Within the European Union, two important framework decisions have been adopted by the Council of the European Union which improve cooperation among member states in the area of asset recovery, and ensure that "*the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union*."[32]

B. Mutual Legal Assistance system

The process for recognising and enforcing non-EU orders is generally founded in the MLA system. Foreign jurisdictions may request for MLA to restrain proceeds of crime located in the UK. Any requests for the restraint or confiscation of assets requires dual criminality. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 provides the framework for restraint and confiscation orders. The UK provided a guidance document to the World Bank's Stolen Asset Recovery Initiative on this issue. The guidance states:

> *Once the assets have been realised, they will be disposed of under one of three processes. Cases that fall under the provisions of the United Nations Convention Against Corruption (UNCAC) will be returned to the requesting*

> *state less reasonable expenses. Cases that do not fall under the provisions of UNCAC can be shared with the requesting state if it enters into an asset sharing agreement with the UK (or where there is an existing multilateral international convention or other agreement that has such provisions).*[33]

The guide asserts that "*the UK seeks to establish asset sharing agreements wherever possible*."[34] Based on the treaties published online by the Foreign and Commonwealth Office, the UK is a party to only 13 bilateral Mutual Legal Assistance treaties that cover the issue of asset return and,or sharing.[35] Broadly, these MLA treaties cover three main areas: the return of assets generally, the return of embezzled public funds, and the sharing of assets that have been confiscated. Where an offence has been committed, and a conviction has been obtained in the state of the "Requesting Party"(i.e. the Affected State), the "Requested Party" (i.e. the Holding State) *may* return the assets that it has seized. Most of the existing MLA treaties that the UK is a party to carry over the art 57 UNCAC requirement that the return of assets must be based on a final judgment in the Affected State.[36] More prescriptive obligations are imposed in the context of the return of embezzled public funds: where the Holding State seizes or confiscates assets that constitute public funds which have been embezzled from the Affected State, the Holding State "*shall return the seized or confiscated assets, less any costs of realisation, to the [Affected State]*".[37] Again, this obligation generally only arises where there has been a final judgment in the Affected State. The majority of the 13 MLA treaties signed between the UK and other states also prescribe arrangements for the sharing of confiscated assets or their equivalent funds. The party in possession of the confiscated assets (the Holding State) may, at its discretion and in accordance with its domestic laws, share those assets with another party where their cooperation has led to the confiscation. The decision as to whether or not to share the assets is entirely for the Holding Party, as is the proportion of assets to be shared.[38] Unless otherwise mutually agreed, the Holding Party may not impose any conditions on the Affected State as to how the returned or shared assets should be used. The default position of these MLA treaties primarily reflects the UNCAC – the illicit assets remain in the state that enforces the confiscation, and not the state that initiated the request. As with the UNCAC, the MLA treaties explicitly rule out any conditions being unilaterally imposed by the Holding State on how the returned funds should be used, or how they should be divested. As noted above, the only area in which the United Kingdom's obligations are strengthened in the MLA agreements is in relation to the return of publicly embezzled funds.

When examining the use of these arrangements, it is important to recognise that the system that is primarily relied on by the UK for illicit asset recovery (and return) is highly reliant on a conviction being secured in the Affected State. In reality, this scenario is very rare. Generally, the detection and investigation of grand corruption by public officials and heads of state only occurs in circumstances where there has been a change in government, where specific individuals fell out of favour with the government, or where a public outcry led to the wrongdoing being publicly exposed.[39] Often, this means that a significant period will pass between the act of the corruption and the investigation, leading to further impediments to restraining, recovering and returning assets. These challenges pose significant, and often insurmountable, obstacles to initiating the MLA process.

C. Policy developments

Alongside the legislation and legal arrangements discussed above, policy developments in the UK have demonstrated that there is political will (or at least, rhetoric) to improve the UK's record of illicit asset return. In 2017 the Government released its Anti-Corruption Strategy for 2017-2022. The strategy is guided by four key approaches, one of which is reducing the impact of corruption where it takes place, "*including redress from injustice caused by corruption.*"Among its priorities, the report includes strengthening the ability of UK authorities to investigate and prosecute grand corruption and return assets, working with international partners.[40]

A further demonstration of the UK's commitment to this issue came in June 2018 when the Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) agreed upon six joint principles to be applied to compensate overseas victims in bribery, corruption and economic crime cases. When announcing its principles, the SFO noted that UK authorities had secured compensation for victims in five cases since 2014.[41] The principles were to be used in order to "*identify overseas victims and aim to seek compensation where appropriate*," and "*identify a suitable means by which compensation can be paid to avoid the risk of further corruption*."[42] On 1 June 2017 the SFO, CPS and NCA published their joint compensation principles, that committed the agencies to:[43]

- considering compensation in all relevant cases;
- using whatever legal means to achieve it;

- working cross-government to identify victims, assess the case and obtain evidence for compensation, and identifying a means by which compensation can be repaid in a transparent, accountable and just way that avoids the risk of further corruption;
- proactively engage where possible with law enforcement in affected states; and
- publish information on concluded cases.

Compensation to victims is also provided for in the context of both conviction-based, and non-conviction-based proceedings. Under s63 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, courts must consider making a compensation order where they can. Also, under s130 of the Powers of Criminal Courts (Sentencing) Act 2000, the court must give priority to the "*payment of compensation overpayment of any other financial penalty*" and give reasons where a compensation order is not made. The Sentencing Council has issued Definitive Guidelines for Fraud, Bribery and Money Laundering Offences which reiterates this approach.[44]

The Deferred Prosecution Agreement (DPA) regime, introduced in the UK in 2014, also provides some guidance on the return of illicit assets to those most directly harmed by corruption. Compensation forms an integral part of the regime, with compensation for victims identified as one of the requirements that can be imposed through an agreement. The DPA Code of Practice (issued jointly by the SFO and CPS) states that it is "*particularly desirable that measures should be included [in the terms of the DPA] that achieve redress for victims, such as payment of compensation*".[45]

Most recently, in July 2019 the UK Home Office released an 'Asset Recovery Action Plan' in which it emphasised that "*the UK is strongly committed to ensuring the return of corruptly recovered assets to victim states, in line with our obligations under the UN Convention Against Corruption', and noting that UK 'has returned the proceeds of corruption to Macau, Chad, and will shortly do so to Nigeria*."[46] The Plan also notes that the Home Office will continue to negotiate asset recovery and share terms across mutual legal assistance treaties and will continue to share assets on a case-by-case basis to improve asset recovery cooperation.[47]

V. Conditionality on asset return

As already discussed, both the UNCAC and the UK's existing MLA arrangements generally rule out the possibility of conditions being placed on how Affected States should use

returned assets. Indeed, given the UNCAC itself does not provide for attaching conditions to the return of confiscated assets, some commentators have argued that the UNCAC *requires* the unconditional surrender of stolen assets to the Affected State.[48] However, past experiences of asset return, have demonstrated the difficulties involved in recovering and repatriating the proceeds of corruption where the Affected State is either unwilling or unable to participate in the proceedings or where there are doubts concerning the disposition of assets upon their return. The issue of whether or not an Affected State should remain unconstrained in how it uses recovered assets is contentious, given the extensive resources that are dedicated to recovery efforts. States have a vested interest in ensuring that if returned, recovered assets are not misappropriated again. Moreover, the practical ability to freeze, confiscate and return assets has generally been dependent on the willingness and capacity of third countries to investigate and cooperate, and fragile judicial systems, or corrupt regimes can hamper efforts.

Even in the "straightforward" scenario of criminal proceedings, where the defendant company has been found guilty and sentenced, Courts have demonstrated reluctance to rule on the return and disbursement of proceeds of corruption. In *Smith & Ouzman,* a UK SFO investigation found that between 2006 and 2010 officers at a printing company paid almost £400,000 in bribes to public officials in Kenya and Mauritania. The company and two directors were found guilty of charges under the pre-Bribery Act legislation. The Court imposed financial penalties of £2.2 million (£1.3 million as a fine, and £881,000 in confiscation). Although the SFO applied for a compensation order for Kenya, this was refused by the Court on a number of grounds.[49] The Judge noted that neither Kenya nor Mauritania made a formal request for compensation, and the recovery of sums from their officials. The Judge also expressed concern that it was uncertain which institution the compensation should be given to, and whether the compensation would reach the right entity.

Despite acknowledging that the people of both countries were the victims of the fraud, the Judge stressed the importance of evidence being provided to the Court that would demonstrate the Affected State itself had taken proactive measures to obtain compensation, and which would allow the Court to be confident that the assets would be returned into the right hands.

The Court in *Smith & Ouzman* has set a high threshold for a compensation order (and subsequent asset return). Governments of Affected States are often unwilling to pursue compensation because it implies an acceptance of guilt on behalf of the officials involved who might still be sitting politicians, or who have so far evaded conviction in their jurisdiction. In highly corrupt impoverished environments, particularly where there is a lack of capacity in terms of expertise or legal resource, the requirement that the government will make a formal request for compensation or will have taken action against the officials will rarely be met.

Furthermore, as UK courts only appear to recognise the actual amount of bribe paid as the compensation level, rather than the full social harm that corruption has caused, the amounts that an Affected State could seek are likely to be relatively small. As a result, the legal costs of pursuing a formal claim for compensation, particularly if contested, may render the exercise for Affected States futile. As no compensation order was made in *Smith & Ouzman*, the issue of how the financial penalties imposed on the company would be used and disbursed was entirely within the discretion of the UK government.

In this case, the SFO announced that the Government had paid £349,000 (of the £2.2 million financial penalties imposed) to the Government of Kenya which paid for a number of new ambulances for the country.[50] Discretion on the part of the SFO and UK Treasury was similarly relied on in 2018 in a civil recovery case involving a company, Griffiths Energy, bribing Chadian diplomats in the United States and Canada. The SFO announced that £4.4 million in recovered funds was to be transferred to the Department for International Development (DfID) so that investments could be made in key projects in Chad.[51] This case marked the first time in the UK that money had been returned overseas via civil recovery .[52]

The Court's decision in *Smith & Ouzman* also exposed an anomaly with regards to the different ways that the issue of compensation is dealt with in criminal cases, compared to those involving alternative settlement processes.

In the 2010 case of *R v. BAE Systems PLC* a reparation payment was made to an Affected State in the absence of a conviction. BAE Systems reached a multi-jurisdictional settlement agreement with the SFO (and the Department of Justice in the US) regarding bribery allegations involving a US$40 million contract to supply radar control systems to Tanzania.

As part of the settlement agreement, the company made a £29.5 million voluntary reparation payment "*for the benefit of the people of Tanzania in a manner to be agreed upon between the SFO and BAE*."[53] In approving the settlement agreement the Court acknowledged that "*the victims of this way of obtaining business…are not the people of the UK, but the people of Tanzania*."[54] There is no record as to whether Tanzania played any role in the settlement of the case or the determination of the restitution payment.

Companies that enter into Deferred Prosecution Agreements will also be required to pay compensation regardless of whether or not the Affected State has requested it. As discussed above, the DPA Code of Practice for Prosecutors notes that it is "*particularly desirable that measures should be included that achieve redress for victims, such as the payment of compensation*."[55] In November 2015 the SFO entered into its first DPA with Standard Bank. Standard Bank agreed to pay US$7 million in compensation to the Tanzanian government.[56] That amount was calculated on the basis that it represented the sum that the Government of Tanzania lost as a result of the bribery payment made (including interest).[57] The compensation was paid to Tanzania with support and advice received from DfID. A key condition of the bilateral agreement reached between the UK Government and Tanzania was that the funds must be used for activities within the Ministry of Health and Education.[58]

The payment of compensation may also be a required term of a plea agreement. For example, in 2009 the construction firm Mabey and Johnson reached a plea agreement with the SFO in which the company was ordered to pay compensation to the Development Fund for Iraq, to Jamaica and Iraq (to a total of £1,415,000).[59] This case demonstrates that even where a company is required to pay compensation, the cooperation and involvement of an Affected State is essential to its efficacy. In late 2011, the International Development Committee noted that although reparations were paid to the Development Fund for Iraq, and to the "customer" in Jamaica, no payment was made to Ghana due to the "*reluctance of the Ghanaian authorities to accept that any corruption was involved*."[60]

The UK's previous experience with repatriating recovered illicit assets demonstrates that considerable thought needs to be put into how to establish an effective and fair mechanism to return and disburse funds, and how to ensure greater consistency across the different legal processes in how compensation is paid. The UK has demonstrated a keen interest in

ensuring that returned assets are used and distributed responsibly. However, its experience to date has largely involved the use of ad hoc arrangements which has led to inconsistencies and poorly administered and monitored outcomes.

VI. Solutions to disbursing recovered illicit assets

As illustrated by the examples above, a major systemic problem with asset return is that the Affected States often lack the expertise and,or political will to follow established asset recovery and MLA processes used by the Holding State.

The GFAR principles (discussed above) demonstrate the international community's focus on the need for good governance standards to be upheld during asset repatriation. [61] In particular, Principle Four highlights the importance of transparency and accountability in the return and disposition of recovered assets (including that information on the transfer and administration of returned assets should be made public and be available to the people in both the Holding and Affected States). Principle Five reinforces that, wherever possible, returned stolen assets should benefit the people of Affected States that have been harmed by the corrupt conduct. Principle Five is extended by Principle Nine, which states that "*all steps should be taken to ensure that the disposition of confiscated proceeds of crime do not benefit persons involved in the commission of the offence*."[62] These GFAR principles are reflected in the position of various non-governmental organisations and civil society groups, and the UNCAC Coalition's Civil Society Working Group on Accountable Asset Return has also issued guiding principles on this topic.[63] Starting from the default position that recovered stolen assets *should be* returned to the country of origin, the principles go on to emphasise the importance of transparency and accountability. Furthermore, it is imperative that returned stolen assets should be used to remedy the harm caused by their theft. Where there is a concern about ongoing corruption in an Affected State and a lack of effective oversight of returned funds, states should ensure consultation with a broad spectrum of relevant experts and non-state actors in order to find alternative means of managing the stolen assets.[64]

A. Assistance for Affected States

Following the *BAE Systems* case discussed above, BAE advised in December 2011 that it intended to set up a commission to disburse its £29.5 million voluntary reparation payment to Tanzania. An inquiry set up by the UK Parliament into the settlement agreement was

concerned that the payment remained outstanding more than eight months later.[65] The DfID had worked with the Government of Tanzania to develop a proposal for how to spend the payment. The proposal involved using the money to buy essential teaching materials and to improve classroom facilities and teachers' accommodation and included details of how the payment would be monitored and would be subject to independent evaluation and audit to international standards.[66] The Secretary of State for International Development contacted BAE and advised the company that it should adopt the proposal in full, and advised that DfID would be able to assist in verifying that the money was being used for its intended purposes.[67] BAE advised that, after consultation with NGOs, Tanzanian citizens and others, they were reluctant to provide the payment directly to the Tanzanian government. Given the company did not have any development expertise, BAE was criticised for having not engaged with DfID earlier in relation to how the ex gratia payment could be used most effectively, and for the delay in making the payment. The International Development Committee urged BAE in "*the strongest possible terms*" to make the payment immediately to the Government of Tanzania based on the proposal that had been endorsed by DfID. The Committee recommended that future settlements made by the SFO in this area should be drawn more tightly – including being explicit about what those involved are required to do, and by when.[68]

In its submission to the UK Parliament's 2012 International Development Committee Inquiry into Financial Crime and Development, Transparency International recommended that convicted companies and individuals should not have any role in the modalities for the implementation of reparation payments.[69] It was asserted that they should be required to pay the assets into a fund maintained by the UK government (specifically, the DfID).[70] Transparency International stated that if corruption risks are low, DfID could make the reparation payment directly to the government of the affected country. In circumstances where the risk of corruption is perceived to be higher, the DfID could allocate the funds to the DfID aid programme for the contract (although this assumes that the country is a recipient of UK aid). The funds would be "*disbursed through standard DfID mechanisms and be subject to DfID's standard aid monitoring/auditing procedures*."[71] Transparency International noted that this approach would allow payments to still go to citizens of affected countries, where the state is reluctant to receive a reparation payment directly for whatever reason. Undoubtedly, the UK DfID has a significant role to play in this area insofar as it can assist in identifying potential victims overseas, provide evidence in support of

compensation claims, ensure the process for the payment is "*transparent, accountable and fair*," and advise how compensation may be paid in a way that minimises the risk of further corruption.[72]

B. Asset distribution by an appropriate third-party

Another option would be for returned assets to be disbursed via the World Bank or an appropriate regional development bank. The World Bank had a significant role in the repatriation of the Abacha Funds back to Nigeria. Over £500 million of assets from the former president of Nigeria, Sani Abacha, was seized by Switzerland between 2004 and 2006. The Swiss and Nigerian Governments worked together with the World Bank in order to reach an agreement as to how the money would be spent once it was returned to Nigeria. However, several issues arose with the monitoring of the assets upon their return. In particular, the monitoring mechanisms were largely not implemented until *after* the money had already been spent and allocated. A World Bank review of the disbursement of assets determined that the "*quality and impact of projects varied greatly across sectors and significant weaknesses in budget accounting and reporting were identified*."[73] A report from Nigerian civil society organisations described several factors involved in the use of the assets that bordered on 'lack of good faith', lack of political will and ghost projects.[74] Switzerland's experience with the return of these funds in 2006 led to a different approach being adopted when a further US$322 million of recovered Abacha assets were returned to Nigeria in 2018. The 2006 experience had demonstrated that good governance guarantees were needed before such substantial funds could be returned. Conditions were attached to the return, which included third party oversight by the World Bank and for civil society groups to monitor the use of the returned funds.[75] The funds were to be used to finance Nigeria's National Safety Social Net Project, which involved transfers of cash to Nigerians living below the poverty line.

C. Employing national mechanisms

A further possible route for repatriating and monitoring the return of stolen assets is through the use of national mechanisms established within the Affected State. The solution was used in the case of approximately US$77 million in assets belonging to the former head of Peru's intelligence service, Vladimiro Montesinos, which had been frozen in Swiss bank accounts. Peru sought Switzerland's assistance to recover the assets following Montesinos being convicted and sentenced for corruption-related offences. In 2002 the recovered assets were paid into a special-purpose fund which the Peruvian government established

explicitly for the administration of forfeited corruption proceeds.[76] The special fund was mandated with ensuring the appropriate and transparent management of the recovered proceeds of corruption. In this context, there was no agreement between Switzerland and Peru,whereby Switzerland was involved in how the assets would be disbursed upon their return – responsibility was left solely to the national mechanism. Although the use of a national mechanism appears to be a promising solution to the repatriation and disbursement of stolen assets, there has been some concerns raised regarding how the repatriated funds were spent and the lack of checks and balances involved.[77]

D. Utilise or implement civil society organisations

An alternative approach to disbursement through government channels would be to utilise strong and effective civil society organisations in the affected country. A possible solution is for the Holding State to create some kind of monitoring mechanism that allows it to control how the Affected States use the recovered funds when they are returned. This approach was adopted by the US, Switzerland and Kazakhstan when returning US$115 million in stolen funds to Kazakhstan between 2007 and 2008.[78] US law enforcement sought for US$84 million held in Swiss bank accounts to be forfeited on the basis that they were the proceeds of bribery by American businessman James Giffen to Kazakh officials. Following Giffen's conviction for bribery, a settlement was reached in 2007 regarding the forfeited funds (which had increased to over US$115.2 million due to interest). The BOTA Foundation was created and jointly administered by the Governments of Switzerland, Kazakhstan and the United States, alongside the World Bank and international NGOs. NGOs oversaw projects with a focus onassisting families and youth. A Memorandum of Understanding signed between the three governments explicitly prescribed that BOTA:

> *The BOTA Foundation shall be independent of the Government of the Republic of Kazakhstan, its officials, and their personal or business associates. The BOTA Program shall be subject to the monitoring of the Governments of the United States of America and the Swiss Confederation. The administration, management, and expenditures of the BOTA Foundation shall be conducted by a reputable international non-governmental organization serving as the BOTA Program Manager. The World Bank shall supervise and monitor the BOTA Program and the administration and expenditures of the Funds.*[79]

With all of its mechanisms and structures reflecting this key stipulation, this case has been hailed as an example of responsible and successful restitution of corruption funds and an important precedent for future schemes.

The success of this example can be viewed in stark contrast to the process followed for the return of a further US$48.8 million to Kazakhstan in 2010 by Switzerland via the World Bank.[80] The Corruption of Human Rights Initiative released a report in which it described the funds as being "*returned through a series of transactions that serves to conceal their origins in a Swiss criminal investigation*," before being "*distributed through a series of lax governance arrangements*" that have seen the assets benefit the corrupt regime in place.[81] The report concluded that the funds were used in ways that violated the law, and the GFAR principles, with inadequate oversight measures in place to prevent such abuse.[82] These contrasting experiences of asset return have served as a cautionary tale for some national civil society groups with concerns that assets will not be used appropriately by their governments. Upon hearing news that the Swiss Government was preparing to return several hundred million dollars of stolen funds that had been requested by Uzbekistan, Uzbek civil society groups wrote an open letter calling for the cautious and responsible return of the assets and urging the Swiss government to not act hastily in returning the funds.[83]

,Legislative reform in the UK

The UK presently has no domestic legislation explicitly enabling the repatriation of confiscated assets. Therefore there is considerable room for reform in this area. In light of the varying circumstances and contexts in which repatriation of assets takes place, it is acknowledged that some flexibility will be required when applying the law to individual cases. However, this should not preclude the UK from incorporating the principles and obligations, which it has demonstrated a strong rhetorical commitment to, into its domestic law.

E. The Swiss example

Switzerland has significant experience in asset repatriation - over time, it has adopted proactive and innovative practices, leading to the return of nearly USD$2 billion of assets to Affected States since 1986.[84] Significantly, Switzerland has chosen to legislate to address the challenges involved in repatriating stolen funds to Affected States where institutions of

accountability are not working well. The Swiss asset recovery policy is acknowledged as a success: since 2014, Switzerland has been able to return approximately 1.7 billion CHF.[85] Furthermore, it has been a positive foreign policy tool for Switzerland and has provided the country with the opportunity to be part of global efforts to fight corruption (which is also in its interests).[86]Switzerland's legislative efforts towards establishing a robust asset recovery system provides the UK with a beneficial model. The Foreign Illicit Assets Act (FIAA) came into force on 1 July 2016 and orders were immediately issued under it concerning Tunisia and Ukraine[87]. The FIAA provides for alternative confiscation and restitution procedures where neither independent criminal proceedings (leading to the seizure or confiscation of assets) nor proceedings under the Swiss Federal Act on International Mutual Assistance in Criminal Matters has been successful.[88] The law applies to assets in Switzerland's jurisdiction which belong to a foreign politically exposed person (PEP) – that is, individuals who are or have been entrusted with prominent public functions by a foreign country, and to their close associates.[89]

The first step under the FIAA is that the assets of a PEP must be frozen so that the assets cannot be transferred to uncooperative jurisdictions. The FIAA applies to a broad range of assets – including assets belonging to the formal official, their close associates, those for which they are beneficial owners, and assets belonging to legal entities under their control.[90]

A criminal proceeding must then be opened, either independently by Switzerland, or more commonly based on an MLA request. This remains the most significant hurdle to the successful confiscation and return of assets. However, the FIAA does introduce some tools to attempt to assist Affected States struggling with this step. Article 12 of the FIAA provides that the Swiss Authorities can provide the Affected State with technical assistance and expertise, including through the training of competent authorities, the provision of legal advice, and through the organisation of bilateral and multilateral meetings. Furthermore, art 13 allows for the possibility of Switzerland spontaneously transferring confidential information to the Affected State or completing a request that is insufficiently substantiated.

The final step is that the confiscation and return of the assets must be ordered, which can occur by way of three different avenues: independent criminal procedure in Switzerland; a mutual assistance procedure; or through administrative confiscation.

1. Independent criminal procedure

Under art 70 of the Swiss Criminal Code confiscation is possible even if no criminal procedure is successfully opened or closed in Switzerland.[91] Article 70 allows for the confiscation of all assets that are acquired through the commission of an offence or intended to be used in the commission of an offence, or as a reward for it. The prosecutor must be able to prove that a criminal offence took place and that there is a causal link between the offence and procurement of the involved assets, and confiscation is subject to a time limit for seven years. Once confiscated, the assets are transferred entirely to the Swiss Federal State, and the Affected State has no legal right to any of them in the absence of a sharing agreement. Switzerland's Federal Act on the Sharing of Confiscated Assets (2004) provides the possibility of reaching a sharing agreement between Switzerland and the Affected State. Although the objective is that at least 50 percent of the assets should remain with Switzerland, there may be a departure from this in cases where foreign officials have misappropriated the assets.[92] This approach is consistent with Switzerland's commitments under art 57 of the UNCAC.

2. Mutual legal assistance request

The second possible avenue is by way of a mutual legal assistance request pursuant to art 75(a) of the Federal Act on International Mutual Assistance in Criminal Matters. Switzerland will only grant mutual legal assistance in circumstances where the main criminal procedures in the Affected State observes specific minimum standards. The criminal procedure must comply with the procedural requirements set out in the European Convention on Human Rights, it must not be aimed at prosecuting a person on unlawfully discriminatory grounds, and it must not suffer from any serious defects regarding the rule of law.[93]

Where assets are confiscated under mutual assistance arrangements, the assets should be returned to the Affected State in their entirety. Switzerland is only entitled to retain them, or part of them, in limited circumstances: where the victim is resident in Switzerland, and so the assets have to be returned to him/her; where an authority asserts rights over them; where a person not involved in the offence and whose claims are not guaranteed by the Affected States shows probable cause that he or she has acquired rights in rem over the assets in good faith; where the assets are necessary for pending criminal proceedings in Switzerland, or where they are subject to forfeiture in Switzerland.[94]

3. Administrative confiscation

The final avenue available for the confiscation and return of assets stems directly from Switzerland's experience with the Duvalier assets, where the Swiss authorities were left with the extremely unattractive option of returning the assets to the suspected kleptocrat. The solution adopted in "Lex Duvalier"has been incorporated into the FIAA under art 4. Under this approach, a freezing order under art 4 requires that:

1) the Affected State introduces a request for assistance that demonstrates that it wants to reclaim the stolen assets; and
2) the Affected State is unable to satisfy the formal requirement of mutual legal assistance due to the collapse or impairment of its judicial system, *or* cooperation with the Affected State is impossible because the country's proceedings do not satisfy the procedural and rights-based standards required under art 2 of the IMAC; and
3) the freezing of assets based on art 4 is limited to a maximum of ten years.

Once an art 4 freezing order has been made, the Swiss Authorities can order the administrative confiscation of the assets. Such a confiscation order is not subject to any limitations in time. If the Swiss authorities can prove that the wealth of the individual concerned increased inordinately and that there was high corruption in the Affected State at the time, the burden of proof for establishing that the assets are of illicit origin is reversed.

The procedure aims to ensure that assets are used to improve the living conditions of the people in the Affected State, or funding programmes that strengthen the rule of law and contribute to the fight against impunity.[95] Wherever possible, this should be done based on an agreement negotiated between the Affected State and Swiss government, which may include provisions on the control and monitoring of how the illicit assets are used and disbursed.[96] If it is not possible to reach an agreement, it is up to the Swiss Government to determine the process of restitution and the assets may be returned by utilising local or international NGOs and other international organisations (i.e. the Word Bank or ICRC).[97]

F. Repatriation orders in UK legislation

Although there is currently no domestic legislation providing for the repatriation of illicit assets, there have been attempts to introduce such a law. During the Sixth Sitting of Parliament, considering the Criminal Finances Act in 2016, Parliament debated the addition of an amendment that would place a duty on the Secretary of State—and the enforcement

agencies vested with the power to do so—to receive recovered property under the Proceeds of Crime Act 2002, and to repatriate recovered property where a court is satisfied that the property or the value of the property was begotten by illicit means.[98]

The proposed amendment provided that, where a court issues a civil recovery order and is satisfied that the assets were obtained through unlawful conduct abroad, the court may instruct a receiving enforcement agency to take steps towards repatriating that wealth upon the property being recovered by the making of a "repatriation order." The draft provision set a time limit on the repatriation process (within a year, but with the option to apply for a five-year extension) and set out the process by which the Secretary of State can seek cooperation and agreement both with the Affected State and other third parties.

The proposed process bears some similarities to Switzerland's FIAA. In particular, s 266A(3) provides a process for reaching a negotiated agreement between the UK and Affected State in order to determine how the assets will be used and monitored upon their return. The agreement must cover how the returned assets will be used in order to "*promote peaceful and inclusive societies, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"* (i.e. Sustainable Development Goal 16), or how the assets will be used for their original purpose before them being diverted through corruption.

Additionally, the agreement must also determine a mechanism in order to account for and monitor the disbursement of the assets properly. The proposed amendment allows consultation with third parties, such as civil society groups and NGOs, or international institutions such as the World Bank. It recognises the possibility of the assets being given to a non-state actor for distribution. .

The proposed amendment contains a number of safeguards to ensure that the UK's recovery efforts will not lead to stolen assets being returned into corrupt hands. The Affected State's cooperation under s 266A(3) must "conclusively demonstrate" that it can implement the necessary steps required for the assets to be returned and used for the purposes agreed between the states. No repatriation order can be issued where the Court is satisfied on the balance of probabilities that the return of the assets would raise issues under the Human Rights Act 1998, that it would be used again for corrupt purposes, or that

it would not be used for the purposes agreed between the states. During the first reading of the proposed amendment, Opposition MP Dr Rupa Luq emphasised a third dimension to the proposed clause – that it provides the UK with the soft power to influence other states in situations of corruption and systematic human rights violations.[99]

The proposed provision received a tepid response from the Government, with the Minister of State for Security Rt Hon Ben Wallace MP reiterating the UK's commitments and obligations under the UNCAC:

> *The UK is party to the UN convention against corruption, article 57 of which clearly requires embezzled funds to be paid back to the victim state, so we are already obliged under international law to do that. We must do that, and it is what we want to do. The £28 million returned to Macau that the Hon. Lady and I both mentioned fell under the auspices of that convention. As we are subject to international law, there is no requirement to put such provisions in our domestic legislation. Nothing in our law prevents us from returning recovered assets.* [100]

In emphasising the UK's "full support for repatriating assets," Mr Wallace pointed to the EU framework decision and asserted that the UK 'enthusiastically pursues' international asset sharing agreements, using the example of the Memorandum of Understanding completed with Nigeria. In light of existing international obligations, the Minister asserted that domestic legislation would impede the UK from making progress in this area.[101]

As discussed in detail above, art 57 is extremely limited in scope (requiring a final judgment to have been reached in the Affected State). It is not a feasible mechanism for asset return in the familiar scenario of an Affected State experiencing a collapse of legal and political institutions. Indeed, even in the Macau example offered by the Minister of State for Security, the basis for international cooperation and the return of US$44 million in assets was not the UNCAC, but rather an MLA treaty between Hong Kong Special Administrative Region, China and the United Kingdom. The UK's experience with asset return clearly illustrates that within the UK corrupt assets are primarily recovered through the use of various settlement mechanisms, rather than through criminal confiscation or private civil litigation by Affected

States. The UK cannot point to its international commitments under the UNCAC as evidence of fair and robust asset recovery and return system.

Specific domestic legislation (by way of an amendment to POCA) would go a long way to creating a comprehensive and practical legal framework for asset recovery and repatriation, and a useful foreign policy tool that would improve the UK's international reputation. Helpfully, the substantive work on this was already drafted and debated in Parliament in 2016, and the Swiss example provides further insight into how the proposed amendment may be made more effective. In particular, the UK should consider including a provision similar to art 18(4) of FIAA which ensures that repatriation of illicit funds can still occur even where an agreement cannot be reached between the UK and the Affected State regarding their disbursement and monitoring. As it is currently drafted, the proposed provision allows the UK to retain the total value of the property if it has endeavoured to reach an agreement with the Affected State, but the Affected State has not "conclusively demonstrated" cooperation within a year. As previous experience has shown, third parties such as civil society groups, NGOs and international organisations can be an effective mechanism for disbursing and monitoring repatriated assets. The UK's legislation should provide for alternative mechanisms for repatriating assets even where agreement with the Affected State cannot be achieved, and paragraph 6 in the proposed amendment above could be rewritten to state:

> "(*6) In the absence of an agreement being reached with the country of origin under section (3) the Secretary of State may determine the process of repatriation. The Secretary of State may, :*
>
> (a) *return confiscated assets through international or national organisations; and*
>
> (b) *provide for the supervision of the returned assets by the Department for International Development."*

A further shortcoming of the previously drafted amendment is that it does not provide any legal framework for the repatriation of assets that have been obtained through criminal confiscation. Currently in both the UK and Switzerland, assets that are confiscated based on a criminal conviction are awarded solely to the state that confiscated them. There is no requirement for any proportion of the assets to be repatriated to the Affected State unless an asset sharing agreement has been negotiated. If the UK wants to genuinely contribute to

the fight against the culture of impunity and return stolen property, it should consider doing the same.[102]

Aside from adopting new legislation, given the prevalence of settlement-based proceedings in the UK, increased cooperation and transparency are essential to improving its record of asset recovery and return. In its "Left Out of the Bargain" report, StAR emphasised the fundamental importance of transparency and information-sharing between countries.[103] In circumstances where a state is negotiating a settlement, it should proactively inform other affected countries of legal avenues (both criminal and civil) available to them to seek redress and recover assets. Moreover, many forms of settlement occur behind closed doors, with little to no involvement of other states affected by the corruption, or independent oversight.[104] In its report, StAR called upon countries to address several challenges that are posed by this ad hoc settlement process. In particular, countries should develop a clear legal framework regulating the conditions and process of settlements and should proactively share information on concluded settlements with other potentially affected countries. Such information could include the exact terms of the settlement, the underlying facts of the case, the content of any self-disclosure, and any evidence gathered by the investigation.

VII. Conclusion

Widespread corruption undermines justice, governance and accountability mechanisms, and is a driver of human rights abuses. More can and should be done by the UK to return stolen assets to those directly harmed by corruption. The UK had demonstrated strong political will and rhetoric to be international leaders in tackling global corruption. Moreover, as a global financial centre, there is a strong moral responsibility on the UK to have comprehensive and robust legal processes and institutions in place in order to detect and recover corrupt assets and repatriate them back to where they rightfully belong. The return and restitution of assets is undoubtedly a challenging process with significant political, legal and administrative obstacles.

Recovered assets need to be returned in an inclusive, accountable, and transparent manner that benefits victim populations, rather than corrupt officials. Internationally, this has led to the development of a range of inventive return methods in order to appropriately deal with

countries that have been systemically impacted and impaired by corruption. Having an effective and comprehensive legal framework for the recovery and restitution or repatriation of assets is essential to ensuring integrity in the process. It will serve to enhance the UK's position in an international community striving to fight global corruption.

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[1] Public Bill Committee *Criminal Finances Bill* (HC 2016, 075). Accessed at https://publications.parliament.uk/pa/cm201617/cmpublic/CriminalFinances/PBC_Criminal%20Finances%201-6%20sits%2022.11.16.pdf .

[2] Anton Moiseienko "The Ownership of the Confiscated Proceeds of Corruption Under the UN Convention Against Corruption" (2018) 67 ICLQ 669, at 683.

[3] See Chapter 5, p 386 Global Corruption text and World Bank & United Nations Office on Drugs and Crime, "Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan" (World Bank, 2007) at 9, online: <http://www.unodc.org/documents/corruption/StAR-Sept07-full.pdf>. 2

[4] Larris Gray, Kjetil Hansen, Pranvera Recica-Kirkbride and Linnea Mills *Few and Far: The Hard Facts on Stolen Asset Recovery* (The Stolen Asset Recovery Initiative of the World Bank and OECD, Washington DC, 2014).

[5] UK Government *Anti-Corruption Strategy 2017-2022* (London, 2017) at p 16. Available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

[6] Jacinta Oduor, Francisca Fernando, Agustin Flah, Dorothee Gottwald, Jeanne Hauch, Marianne Mathias, Ji Won Park, and Oliver Stolpe *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (World Bank, Washington, 2014). Available online at https://star.worldbank.org/sites/star/files/9781464800863.pdf. Significantly, this study was accompanied by a companion databased – the Stolen Assets Recovery Watch Databased that compiles 534 settled cases that took place between 1999 and July 2012. This is accessible at https://star.worldbank.org/corruption-cases/?db=All.

[7] Ibid, at 2. It is worth noting that the study did not cover private civil lawsuits, when a state acting in its private capacity filed a civil claim in the courts of another state – lawsuits contemplated by Article 53 of the UNCAC.

[8] Ibid.

[9] Ibid, at 17.

[10] Ibid, at 8.

[11] OECD *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreement by Parties to the Anti-Bribery Convention* (2019), at p 14. Available online at https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

[12] Ibid. The OECD paper highlights the drastic range: In the December 2016 *Odebrecht* and *Braskem* coordinated resolutions the companies agreed to pay a total of at least USD 3.23 billion to Brazil, Switzerland and the United States as part of a coordinated resolution Contrast this to a fine of CHF 1 imposed in the March 2017 *Banknotes case* which was resolved through Switzerland's Simplified Procedure.

[13] *Left Out of the Bargain,* above n 6, at p 8.

[14] As provided for in art 53 of the UNCAC.

[15] Anton Moiseienko, above n 2, at 669.

[16] United Nations Conventions Against Corruption A/58/422 (opened for signature 9 December 2003, entered into force 14 December 2005), art 51.

[17] Article 32, UNCAC, above n 16.

[18] Article 35, UNCAC, above n 16.

[19] Article 57(3)(a), UNCAC, above n 16.
[20] Article 57(3)(b), UNCAC, above n 16.
[21] Ibid.
[22] See page 8 of this paper for a further discussion of mutual legal assistant agreements.
[23] UNODC *Report of the International Expert Meeting on the return of stolen assets* UN Doc CAC/COSP/2019/CRP/3 (8 October 2019).
[24] Stolen Asset Recovery Initiative *Global Forum on Asset Recovery Communique' Stolen Asset Recovery Initiative* December 2017. Available online at https://star.worldbank.org/sites/star/files/20171206_gfar_communique.pdf
[25] Proceeds of Crime Act 2002 (UK), s 6.
[26] Ibid, ss 240 and 241.
[27] See *R v Anwoir* [2008] EWCA Crim 1354; *National Crime Agency v Khan* [2017] EWHC 28 (QB).
[28] UK Home Office "Asset Recovery Action Plan" (July 2019), at [59]. Available online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815900/20190709_Asset_Recovery_Action_Plan_FINAL_Clean.pdf.
[29] The Proceeds of Crime Act 2002 (External Investigations)(Amendment)(No. 2) Order 2015; The Proceeds of Crime Act 2002 (External Investigations)(Amendment) Order 2015; The Proceeds of Crime Act 2002 (Enforcement in different parts of the United Kingdom)(Amendment) Order 2015 and The Proceeds of Crime Act 2002 (External requests and orders)(Amendment) Order 2015.
[30] In particular, s 444 provides for the freezing of property in the United Kingdom which may be needed to satisfy overseas orders in relation to the recovery of criminal proceeds, and for the enforcement of such orders by the realisation of property in any part of the United Kingdom (Proceeds of Crime Act 2002, Government's Explanatory Note).
[31] Proceeds of Crime Act 2002 (UK), s 447.
[32] The Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; and Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. The UK has implemented its obligations under both the 2003 and 2005 Framework Decisions by adopted The Criminal Justice and Data Protection (Protocol) Regulation 2014.
[33] UK Home Office *Obtaining Assistance from the UK in Asset Recovery: A Guide for International Partners* December 2017, at 4. Available online at https://star.worldbank.org/document/uk-guide-asset-recovery.
[34] Ibid.
[35] Treaties on Mutual Legal Assistance with reference asset return and/or sharing have been signed by the UK with: Brazil (2005); the United Arab Emirates (2006); Algeria (2006); Libya (2008); Vietnam (2009); Philippines (2009); Morocco (2013); Jordan (2013); China (2013); Kazakhstan (2015); Kuwait (2018); Hong Kong; and the United States (2004). An MLA was also signed between the USA and Bermuda (as an overseas territory of the United Kingdom, concluded under a Deed of Entrustment from the UK).
[36] Some of the MLA treaties, including those with Brazil, Libya and Vietnam allow for assets to be returned *prior* to a final judgment, at the Requested Party's discretion.
[37] See for example, the MLA agreements signed with Brazil (art 19), Jordan (art 11(5)) and China (art 20(2)).
[38] With the exception of Kazakhstan and Kuwait – both MLA agreements stipulate that where the Requested State has agreed to share assets, once realised, 50% of the amount obtained (unless otherwise agreed by the Central Authorities) must be transferred to the Requesting State.
[39] Financial Action Task Force *Specific Risk Factors in Laundering the Proceeds of Corruption: Assistance to Reporting Institutions* June 2012, at 26. Available online at http://www.fatf-gafi.org/media/fatf/documents/reports/Specific%20Risk%20Factors%20in%20the%20Laundering%20of%20Proceeds%20of%20Corruption.pdf.
[40] Ibid, at 26.

[41] Serious Fraud Office "New joint principles published to compensate victims of economic crime overseas" (1 June 2018) SFO News Releases. Available at https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/.

[42] Ibid.

[43] These five cases were: the return of £28.7 million of assets to Macao that was recovered by the Crown prosecution Service following the conviction of Ao Man Long; £349,000 paid to Kenya following the SFO's prosecution of the company Smith and Ouzman; £4.9 million in compensation to Tanzania as part of the terms of the SFO's Deferred Prosecution Agreement with Standard Bank; £4.4 million recovered by the SFO from corrupt deals in Chad that were transferred to the Department for International Development to use for development investment in Chad; and £10.9 million in a fourth SFO case that has not been identified for legal reasons. See Serious Fraud Office "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases" (1 June 2018). Available at https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/.

[44] Sentencing Council *Fraud, Bribery and Money Laundering Offences Definitive Guidelines* (May 2016), at p 48. Available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-Bribery-and-Money-Laundering-offences-definitive-guideline-Web.pdf.

[46] UK Home Office "Asset Recovery Action Plan", above n 28, at [57].

[47] Ibid, at [56].

[48] Anton Moiseienko, above n 2, at 669. See also, for example, See, e.g., M Stephenson "What's Left Out of 'Left Out of the Bargain'" Global Anticorruption Blog (18 March 2014). Available at https://globalanticorruptionblog.com/2014/03/18/whats-left-out-of-left- out-of-the-bargain; M Stephenson "UNCAC, Asset Recovery, and the Perils of Careless Legal Analysis" Global Anticorruption Blog (8 May 2014). Available at https://globalanticorruptionblog.com/2014/05/08/uncac-asset-recovery-and-the-perils-of-careless-legal-analysis/; M Perdriel-Vaissiere "Is There an Obligation under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?" UNCAC Coalition (5 September 2014). Available at http://uncaccoalition.org/en_US/is-there- an-obligation-under-the-uncac-to-share-foreign-bribery-settlement-monies-with-host-countries/.

[49] CMS Cameron McKenna Nabarro Olswang LLP "Smith & Ouzman Ltd: First corporate convicted for overseas bribery to pay £2.2 million" Lexology (11 January 2016). Available at https://www.lexology.com/library/detail.aspx?g=f106b433-5fda-4c67-a958-e83815fa0634.

[50] The SFO states on different places on its website that 'the SFO's confiscation order paid for seven new ambulances in Kenya' (see https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/) and that '£349,000 [was] paid to the Government of Kenya …for 11 new ambulances' https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/.

[51] Serious Fraud Office "SFO recovers £4.4 from corrupt diplomats in 'Chad Oil' share deal" (22 March 2018) Serious Fraud Office News Releases. Available at https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/.

[52] Ibid.

[53] *R v. BAE Systems PLC* Case No: S2010565, Crown Court at Southwark, December 21, 2010, at [2.5]. Available at https://www.caat.org.uk/resources/companies/bae-systems/r-v-bae-sentencing-remarks.pdf.

[54] Ibid, at [16.5].

[55] Serious Fraud Office and Crown Prosecution Service *Deferred Prosecution Agreements Code of Practice* (February 2014), at [7.2].

[56] *Serious Fraud Office v Standard Bank PLC* Case No: U20150854 Crown Court at Southwark, 30 November 2015, at [13]. Available at https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf, at 39 to 41.
[57] Ibid, at [15].
[58] *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreement by Parties to the Anti-Bribery Convention*, above n 11, at 215.
[59] *Left Out of the Bargain,* above n 6, at p 27.
[60] Parliament House of Commons (2011) *Financial Crime and Development* (HC 847) London, The Stationary Office, at EV 38.
[61] Stolen Asset Recovery Initiative *Global Forum on Asset Recovery Communique' Stolen Asset Recovery Initiative*, above n 25.
[62] Ibid, at 5.
[63] UNCAC Civil Society Coalition "Civil Society Statement for the UNCAC Working Group on Asset Recovery Session" (6 June 2018) UNCAC Coalition. Available at https://uncaccoalition.org/civil-society-statement-for-the-uncac-working-group-on-asset-recovery-session-june-2018/.
[64] Ibid.
[65] Parliament House of Commons, above n 62, at [28].
[66] Ibid, at [21].
[67] Ibid, at [26]-[27].
[68] Ibid, at [40].
[69] Transparency International UK "House of Commons International Development Committee Inquiry into Financial Crime and Development – Submission by Transparency International UK". Available online at https://www.transparency.org.uk/publications/financial-crime-and-development-2/.
[70] Ibid, at [18].
[71] Transparency International UK, above n 17, at 4.
[72] OECD *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreement by Parties to the Anti-Bribery Convention*, above n 11, at 215.
[73] Gretta Zinkernagel and Kodjo Attisso *Returning Stolen Assets – Learning From Past Experience: Selected case studies* (International Centre for Asset Recovery, Basel Institute on Governance, 2013), at 4.
[74] Ingnasio Jimu *Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan* (International Centre for Asset Recovery, Basel Institute on Governance, Working Paper Series No 6, 2009), at 9.
[75] Article 6 of 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. Available at https://www.newsd.admin.ch/newsd/message/attachments/50734.pdf.
[76] Gretta Zinkernagel and Kodjo Attisso *Returning Stolen Assets,* above n 75, at 3.
[77] Gretta Zinkernagel and Kodjo Attisso *Returning Stolen Assets,* above n 75, at 3.
[78] Ibid, at 5.
[79] Aaron Bornstein "The BOTA Foundation explained: How was BOTA set up?" (15 April 2015) The FCPA Blog. Available at https://fcpablog.com/2015/04/15/the-bota-foundation-explained-part-six-how-was-bota-set-up/.
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[81] Professor Kristian Lasslett and Thomas Mayne, above n 84, at 4.
[82] Ibid, at 8.
[83] Richard Messick "Uzbek Civil Society to Swiss Government: Hasty Return of Stolen Assets to Uzbek Government Not Warranted" (23 May 2018) The Global Anticorruption Blog. Available at

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[85] Francois Membrez and Matthieu Hosli, above n 88, at 23.

[86] Ibid.

[87] Francois Membrez and Matthieu Hosli "How to Return Stolen Assets: The Swiss policy pathway" Centre for Civil and Political Rights Anti-Corruption and Human Rights Initiative (Feb 2010), at 10. Available at http://ccprcentre.org/files/media/SwissReport_Asset_Recovery_25_Feb_20201.pdf.

[88] See Federal Act on International Mutual Assistance in Criminal Matters (IMAC) 1981 (Switzerland).

[89] Federal Act on the Restitution of Assets Illicitly obtained by Politically Exposed Persons (RIAA) 2010 (Switzerland), art 2(a).

[90] Francois Membrez and Matthieu Hosli, above n 88, at 13.

[91] I.e. In circumstances where the suspect has died, or if prosecution of the predicate offence isn't possible because of general statutes of limitations (but the time limit in relation to forfeitures hasn't expired)

[92] Francois Membrez and Matthieu Hosli, above n 88, at 20.

[93] IMAC, above n 91, art 2.

[94] See IMAC, above n 91, art 74a(4) and Francois Membrez and Matthieu Hosli, above n 88, at 21.

[95] FIAA, above n 94, at arts 17 and 18.

[96] Ibid, art 18(3).

[97] Ibid, art 18(4).

[98] (22 November 2016) 617 GBPD HC (Criminal Finances Bill – Sixth Sitting). Available online at https://hansard.parliament.uk/Commons/2016-11-22/debates/58bbbac1-c42f-493c-9ed0-55a23ac752ab/CriminalFinancesBill(SixthSitting)

[99] Criminal Finances Bill – Sixth Sitting, above n 105.

[100] Ibid.

[101] Ibid.

[102] Francois Membrez and Matthieu Hosli, above n 88, at 23.

[103] *Left Out of the Bargain,* above n 6, at p 3.

[104] Ibid.