

Transparency International and UNCAC Coalition Submission
to the UNGASS against Corruption:
Proposal for a Multilateral Agreement on Asset Recovery

Transparency International (TI) and the UNCAC Coalition propose a new multilateral agreement on asset recovery to advance justice, human rights and the achievement of the 2030 Sustainable Development Goals (SDGs). This agreement should cover all illicit financial flows and could be a protocol to the UN Convention against Corruption (UNCAC) or a stand-alone General Assembly-approved instrument.

Despite UNCAC chapter V, the work of the Stolen Assets Recovery Initiative (StAR), and efforts within the Lausanne process to overcome obstacles to asset recovery, only a small percentage of the roughly estimated US\$ 400 billion proceeds of corruption from developing countries has been recovered and returned in the last 10 years¹. The estimated amounts lost to developing countries rise into the trillions if account is taken of other illicit financial flows and harm to victims, including that caused by embezzlement, foreign bribery and related offences². Moreover, the harm caused by illicit financial flows is not limited to developing countries, but extends to all countries around the world.

While overcoming some of the barriers to asset recovery requires long-term reform efforts, a multilateral agreement could address some of the legal and process obstacles that would make a difference in the short term, in time to support the achievement of the SDGs.

This proposal for a multi-lateral agreement takes into account the UNCAC; the 2030 SDGs (in particular SDG 16); UN General Assembly resolutions on asset recovery; the UN General Assembly's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the UN Guiding Principles on Business and Human Rights; successive Human Rights Council resolutions on the subject of the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights; as well as UNCAC resolution 7/2 on Preventing and combating corruption involving vast quantities of assets and the Lima and Oslo Statements on Corruption Involving Vast Quantities of Assets³.

It also takes into account the Common African Position on Asset Recovery (2019); the Global Forum on Asset Recovery Principles for Disposition and Transfer of Confiscated Stolen

¹ StAR's "Handbook on Asset Recovery" (2011) includes an estimate that US\$ 20 – 40 billion is lost to developing countries each year through bribery, misappropriation of funds, and other corrupt practices. The joint StAR/OECD report "Few and Far: The Hard Facts on Stolen Asset Recovery" (2014) showed that in the period 2006 -2012, OECD member states froze only US\$ 2.6 billion and returned US\$ 423.5 million to the respective countries of origin.

<https://www.oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf>

New data is needed since the volume of frozen and returned assets has risen in recent years.

² <https://www.brookings.edu/blog/africa-in-focus/2020/03/02/new-trends-in-illicit-financial-flows-from-africa/>;

According to a 2014 OECD study, in the period 2008-10, Africa alone lost US\$ 63.4 billion through trade mispricing and other illicit outflows https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf.

³ https://www.unodc.org/documents/corruption/LimaEGM2018/Outcome_Statement_Lima_EGM_2018.pdf and https://www.unodc.org/documents/corruption/meetings/OsloEGM2019/Oslo_Outcome_Statement_on_Corruption_involving_Vast_Quantities_of_Assets_-_FINAL_VERSION.pdf.

Assets in Corruption Cases (GFAR Principles, 2017); and the Lausanne process Guidelines for the Efficient Recovery of Stolen Assets (2014).

The proposal: We propose a multilateral agreement covering all illicit financial flows and addressing three main areas:

- (1) Specific measures to address barriers to international cooperation and expedite the asset recovery process. This should include mutual legal assistance arrangements, as well as frameworks in destination countries for proactive freezing and non-conviction-based confiscation
- (2) Standards, legal frameworks and procedures for transparent and accountable asset freezing, confiscation and return processes
- (3) Standards, legal frameworks and procedures for ensuring restitution and compensation of state and non-state victims including in foreign bribery and related money laundering cases, with special measures in cases of grand corruption

In the context of transparent and accountable asset return, the GFAR Principles and the guidance in the Common African Position on Asset Recovery offer a solid basis for agreement. Both set out standards that are specific, enforceable, and suitable for most jurisdictions.

With regard to the second and third areas mentioned above, an international agreement could resolve a set of key issues in order to build trust, collaboration and successful outcomes in asset recovery. The following are the suggested key principles that should be included in such agreement⁴:

- Transparency
 - *In destination countries*: Publishing up-to-date information on asset management and asset return frameworks and policies, including policies for notifying source/origin countries. Publishing data on freezing, seizure and confiscation processes underway and amount of assets involved, broken down by country of origin.
 - *In source/origin countries*: Publishing up-to-date information on asset management frameworks and policies and data on the status and use of transferred funds or property.
- Accountable structures
 - *In destination countries*: Establishing transparent arrangements for immovable assets. Creating funds, trusts or escrow accounts for confiscated assets, where possible.
 - *In source/origin countries*: Creating a returned-asset management agency or designating an existing entity for management of returned assets with clear administrative powers and responsibilities for transparency and accountability. Creating a central returned assets account or public budget account under which returned assets are administered. Creating an asset register, including for physical

⁴ In the text that follows the term “source/origin country” means the country from which the assets have been diverted and the term “destination country” means the country where the proceeds of crime are found.

assets. Creating and strengthening domestic frameworks to promote integrity, transparency and accountability.⁵

- Oversight
 - *In destination and source/origin countries*: Providing for effective mechanisms to manage and monitor the use of frozen, confiscated and returned assets at all stages of the asset recovery process by relevant actors, such as parliamentary committees, supreme audit institutions and interested stakeholders, including civil society organisations.
- Use of funds in source/origin countries
 - Creating domestic and regional policies that recognise that in the countries impacted by illicit financial flows, the whole society is the extended victim of the crime and that once direct victims of corruption or other malfeasance have been adequately compensated or cannot be identified, returned assets should be used for development, meeting the SDGs or other social investment projects.
 - To that end, in policies and practice, providing frameworks for the participation of interested stakeholders, including civil society organisations, in decision-making processes about the use of returned assets.
- Victims' access to justice in foreign bribery and related money laundering cases⁶
 - Notification of states and other victims: Providing for timely notice to enforcement authorities in affected states about enforcement proceedings and opportunities to participate in foreign bribery cases at different stages, from investigation (where feasible) to final disposition. Likewise, notification of other potential affected parties, such as competitors, shareholders, consumers and others who may have been harmed as a result of foreign bribery – this is especially relevant in very large cases.
 - Victims' impact statements: Arranging for such statements by victim states and other victims.
 - Compensations of victims: Establishing principles and guidelines with respect to compensation of victims, including a broad definition of victims and recognition of social and collective damages⁷. Allowing the authorities in victim states and other victims to submit claims for restitution or compensation. In foreign bribery cases, disgorged profits could be taken as one estimate of harm, albeit an imperfect one.
- Victims' access to justice in grand corruption cases (including foreign bribery cases)⁸

⁵ This could address, *inter alia*, domestic legal, financial and justice systems and cover frameworks for the reporting and disclosure of assets of public officials, whistleblower protection, access to information, public registers beneficial ownership, the strengthening of the judiciary and oversight of financial institutions, as well as other policy actions referenced in the African Union's Draft Common African Position on Asset Recovery, EX.CL/1213(XXXVI) Add.1 Rev.1.

⁶ In this connection see e.g. StAR, Left Out of the Bargain (2013) <https://star.worldbank.org/document/left-out-bargain>.

⁷ <https://knowledgehub.transparency.org/helpdesk/country-experience-with-reparation-for-social-damages>: The conference of Ministers of Justice of the Ibero-American countries held in Madrid in 2011 (COMJIB) agreed to Costa Rica's proposal to create a concept of social damage. As a first approximation, they considered the Costa Rican proposal, as follows: "Social damage is defined as the impairment, impact, detriment or loss of social welfare caused by an act of corruption and suffered by a plurality of individuals ...and so giving rise to the obligation to repair."

⁸ TI has proposed the following definition of grand corruption: Grand corruption means the commission of any of the offences in UNCAC Articles 15 - 25⁸ as part of a scheme that (1) involves a high-level public official; and (2) results in or is intended to result in a gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group.

- Standing for non-state actors: Making arrangements for standing for victims and representatives of a broad class of victims in countries other than their own, to present victims' impact statements and to make claims. Making arrangements for a victims' fund, where appropriate. Appropriate for cases where the justice system in the home country is unable or unwilling to address the corruption due to the corruption in question or due to the influence of high-level officials benefitting from grand corruption.
- Possible role for regional or international institutions in coordination of investigations and in oversight of asset recovery processes and dispute mediation.

A multilateral agreement on asset recovery covering the three areas and the specific issues listed above would serve justice and help return much needed resources to be used for the achievement of the SDGs.

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