PhD THESIS DECLARATION

The undersigned

SURNAME	Nessi
FIRST NAME	Giulio
PhD Registration Number	1392133

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SURNAME	Nessi
FIRST NAME	Giulio

'Mi pare che in tali condizioni, prolungate per anni, con tali esperienze psicologiche,
l'uomo dovrebbe aver raggiunto il grado massimo di serenità stoica,
e aver acquistato una tale convinzione profonda
che l'uomo ha in se stesso la sorgente delle proprie forze morali,
che tutto dipende da lui, dalla sua energia, dalla sua volontà,
dalla ferrea coerenza dei fini che si propone e dei mezzi che esplica per attuarli
– da non disperare mai più e non cadere più in quegli stati d'animo volgari e banali
che si chiamano pessimismo e ottimismo.
Il mio stato d'animo sintetizza questi due sentimenti e li supera:
sono pessimista con l'intelligenza ma ottimista per la volontà.'[*]

(Antonio Gramsci, Letter from Prison n. 139 of 19 December 1929)

[*] Translation into English by the Author of the Thesis: 'It seems to me that in such persisting conditions, with such psychological experiences, humanity should have attained the highest degree of stoic serenity, and acquired such a profound conviction that the humankind brings with herself the source of her moral strength, that everything depends from herself, her energy, her will, from the iron consistency of the objectives she aims at and of the means she uses to realize them - not to waste ever again and not to fall anymore in those vulgar and trivial moods that are called pessimism and optimism. My state of mind condenses these two feelings and goes beyond them: I am a pessimist because of intelligence, but an optimist because of will.'

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Giulio Nessi

Como, January 2015

ABSTRACT

The ‘internationalization’ of corruption not only led to a bigger scale of corrupt practices, but also to the increasing number of jurisdictions involved in each single case. Globalization, characterized by the integration of economic and digital spaces, offers many opportunities to escape justice thanks to the increased opportunities to cross borders, conceal investigative trails, and transfer the proceeds of crimes in safe havens. Such historical challenges are not coupled with a corresponding level of effective cooperation among States, which are thus unable to control the international dimension of contemporary transnational corrupt practices: domestic prevention and enforcement provisions are in fact meaningless tools unless an efficient system of assistance among States is established. As a consequence, the analysis of the international obligations fostering cooperation against corruption represents an increasingly crucial area of the contemporary anti-corruption discourse and constitutes the focus of my research.

The present work examines the international legal framework establishing mechanisms of cooperation to tackle transnational corrupt practices, in particular mutual legal assistance, extradition and asset recovery. In this context, my research highlights that the current international legal framework against corruption – in particular the UN Convention against Corruption of 2003 – offers a solid web of legal and policy tools to enhance international cooperation against transnational corrupt practices, especially in relation to the recovery of stolen assets. The latter issue remains the most complex and problematic one, and, considering the likelihood that many other cases of grand corruption will emerge in the coming future, one may expect a growing interest and engagement of the research community on this subject. At this point of history, taking into account the challenges and the lack of results which currently characterize the asset recovery processes, the international community should carefully consider to carry out a cost-benefit analysis of the global asset recovery policy in place. At the same time, any future reform or instrument in this field should entail more stringent overview on States, should be result oriented, and should introduce accountability mechanisms for those States which do not actively engage in asset recovery efforts.

ABBREVIATIONS

AC	Anti-Corruption
ADB	Asian Development Bank
AML	Anti-Money Laundering
ARINSA	Asset Recovery Inter-Agency Network for Southern Africa
ASEAN	Association of South-East Asian Nations
ASEANPOL	Association of South-East Asian Nations Police Office
AU	African Union
CARIN	Europol Camden Asset Recovery Inter-Agency Network
CoE Anti-Corruption Convention	Council of Europe Criminal Law Convention on Corruption
CoE Confiscation Convention	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
CoE Extradition Convention	Council of Europe Convention on Extradition
CoE MLA Convention	Council of Europe Convention on Mutual Assistance in Criminal Matters
CoE	Council of Europe
COSP	United Nations Conference of the State Parties to the United Nations Convention against Corruption
DOJ	United States Department of Justice
EACN	European Contact-Point Network against Corruption

EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
EEW	European Evidence Warrant
EIO	European Investigation Order
EPAC	European Partners against Corruption
EPPO	European Public Prosecutor's Office
ESW	Egmont Secure Web
EU Anti-Corruption Convention	Convention against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union
EU Freezing and Confiscation Directive	European Union Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union
EU MLA Convention	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
EU	European Union
EUROJUST	European Union Agency for Judicial Cooperation in Criminal Matter
EUROPOL	European Police Office
FATF	Financial Action Task Force

FCPA	United States Foreign Corrupt Practices Act
FIU	Financial Intelligence Unit
Framework Decision on Confiscation	European Union Framework Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders
FSRB	FATF-Style Regional Bodies
G-20 Anti-Corruption WG	G-20 Anti-Corruption Working Group
G-20	Group of 20
G-8	Group of 8
GAFISUD	Financial Action Task Force of South America against Money-Laundering
GRECO	Council of Europe Group of States against Corruption
IAACA	International Association of Anti-Corruption Authorities
IBERRED	Ibero-American Legal Assistance Network
ICAR	International Centre for Asset Recovery
ICC	International Criminal Court
ICJ	International Court of Justice
IMF	International Monetary Fund
Interpol	International Criminal Police Organization
IRC	International Rogatory Commissions
I-SECOM	Interpol's Secure Communications for Asset Recovery
JHA	European Union Justice and Home Affairs Sector

Memorandum	Amended Memorandum of Understanding by the Swiss Confederation, United States and the Republic of Kazakhstan of May 2008
MENA	Middle East and North Africa
ML	Money Laundering
MLA	Mutual Legal Assistance
MLAA	Mutual Legal Assistance Agreement
OAS	Organization of American Statees
OCRC	Central Office for Corruption Repression
OECD Anti-Bribery Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
OSCE	Organization for Security and Cooperation in Europe
PC-OC Committee	Council of Europe Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters
PEP	Politically Exposed Person
Rome Statute	Rome Statute of the International Criminal Court
RIAA	Switzerland Federal Act on the Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means
RRAG	GAFISUD Assets Recovery Network
SAFAC	Southern African Forum against Corruption

SEC	United States Security and Exchange Commission
SIS	Schengen Information System
StAR	Stolen Asset Recovery Initiative
Terrorist Financing Convention	United Nations Convention for the Suppression of Financing of International Terrorism
TFEU	Treaty on the Functioning of the European Union
TRACK	United Nations Tools and Resources for Anti-Corruption Knowledge
UFAR	Ukraine Forum on Asset Recovery
UKCA	United Kingdom Central Authority
UN Drug Trafficking Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
U.N.	United Nations
UNCAC	United Nations Convention against Corruption
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNIDROIT	Institut International pour l'Unification du Droit Privé
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
U.S.	United States
WB	World Bank

WG on Asset Recovery	United Nations Working Group on Asset Recovery
WG on Bribery	OECD Working Group on Bribery in International Business Transactions
WG on International Cooperation	United Nations Working Group on International Cooperation
WTO	World Trade Organization

I. GENERAL INTRODUCTION

In spite of the fact that corruption is an enduring characteristic of the humankind, its emergence as an issue dealt with by the international community is a recent one. Up until the 1990s corruption was something belonging to the sovereign domain of each State and was thus addressed at the national level through domestic provisions of criminal and administrative law. However, as society begun to be shaped by historic changes in the field of economy and technology, the phenomenon of corruption evolved progressively across borders and assumed a global dimension. At the same time international institutions started to address the issue by encouraging collaboration among States and creating an international strategy to fight corruption.

The development of corrupt practices has led to the creation of a body of international norms and standards to prevent and tackle corruption, which at the beginning of the new millennium became a subject and priority of international law. While the first international instrument in this field was agreed upon at the regional level in 1996 by the Organization of American States ('OAS'),[1] the United Nations ('U.N.') efforts to combat corruption brought to the adoption of a treaty against transnational organized crime ('UNTOC') in 2000,[2] and, most significantly, to United Nations Convention Against Corruption ('UNCAC'),[3] which remains the only global treaty against corruption.

As for the content, all the international instruments negotiated and adopted so far contain different kinds of provisions which aim at enhancing the domestic institutional and legal frameworks of States in order to better prevent and criminalize corruption. However, a further crucial function of these instruments is to organize inter-State cooperation, that is to set up effective mechanisms enabling States to assist each other in the investigation, prosecution and enforcement of transnational corruption cases. The 'internationalization' of corruption has in fact led, not only to a bigger scale of the corrupt transactions, but also to the increasing

[1] American Convention against Corruption (signed on 29 March 1996; entered into force on 6 March 1997), which was adopted by the OAS to improve America's domestic mechanisms to prevent, detect and eradicate corruption.
[2] U.N. Convention against Transnational Crime (signed on 12 December 2000; entered into force 29 September 2003).
[3] United Nations Convention against Corruption (singed on 31 October 2003, entered into force 9 December 200) ('UNCAC').

number of jurisdictions involved at the same time in each single case. Globalization, characterized by the integration of economic and digital spaces, offers many opportunities to escape justice thanks to the increased opportunities to cross borders, conceal investigative trails, and transfer the proceeds of crimes in safe havens. Such historical challenges are not coupled with a corresponding level of effective cooperation among States, which are thus unable to control the international dimension of contemporary transnational corrupt practices: domestic prevention and enforcement provisions are in fact meaningless tools unless an effective system of assistance among States is established. As a consequence, the analysis of the international obligations fostering cooperation against corruption represents an increasingly crucial area of the contemporary anti-corruption discourse and constitutes the focus of my research.

For a full understanding of this field of international law it is necessary to examine two sets of issues: on the one hand, the status of and the interaction between the general international rules on criminal law cooperation and those specifically addressing corruption; on the other hand, the way States have adopted such legal framework may be improved and made more swift and effective. Accordingly, it is crucial to analyse the relevant international obligations and the legal challenges that arise – in theory and in practice – in the implementation at the domestic level. Drawing from the investigation of the relevant legal framework, cases of international corruption, as well as of the most recent initiatives of the international organizations, my research aims to answer three set of questions: Why are States reluctant to afford each other international assistance in corruption cases? Which are the main legal and practical challenges of the current legal framework? Which kind of good practices and improvements could help create a more effective and adequate system of international cooperation to tackle cases of transnational corruption?

In order to attempt answering these questions the present work intends to provide an exhaustive and in-depth analysis of the fundamental issues and trends with respect to the most significant area of concern of international cooperation, that is mutual legal assistance, extradition and asset recovery.

More to the point, Chapter II will firstly illustrate the international legal framework which currently governs mutual legal and extradition by introducing general issues and categories of criminal law cooperation and then dealing with the examination of the current multilateral legal framework which regulates those issues of cooperation which are relevant to corruption. In this sense I will focus my attention on the most significant international instruments which commit States to provide mutual legal assistance or extradition in relation to the offence of corruption, laying special emphasis on the former issue (MLA) because of the distinctive features it assumes for the purpose of corruption prosecution. I will thus consider the relevant initiatives whose scope is either the whole criminal law domain or specifically corruption. Given the significance and scope of the global initiatives in this field, the examination of the U.N. conventions will include an in-depth analysis of the challenges and limits identified by the experts and the relevant monitoring mechanisms. On top of the assessment of the current binding provisions, the first Chapter will also consider two further relevant initiatives which, although not having a legal nature, may well contribute to favour States cooperation against corrupt practices, namely the G-20 policies and the Financial Action Task Force ('FATF')'s Recommendations.

After having examined the instruments and mechanisms of traditional criminal law cooperation, Chapter III will move on to discuss the issue of asset recovery, which can be generally intended as the legal process through which States obtain or regain property of corruption-related assets which have been transferred abroad. In spite of the fact that mutual legal assistance and extradition are fundamental aspects of international criminal assistance, the latter represents a significantly challenging process which eventually requires an higher degree of inter-State cooperation. The intention of the third part of the work is thus to deal with both the relevant international framework which has been developed so far to boost international cooperation for the purpose of asset recovery, as well as with the most critical issues which emerge in the latter context from a legal and a practical perspective. In view of the latter aim, I will first frame the theoretical justifications underlying the process of repatriating corruption-related assets from foreign countries, and then illustrate the origin and the structure of the asset recovery institution, which consists of two macro-phases ('asset confiscation' and 'asset recovery'). The final part of the Chapter will address the provisions of the most advanced international instrument in the field of asset recovery, that is the UNCAC, laying particular emphasis on the analysis of the issues which deal with international

cooperation, as well as on the most complex and controversial matters which States have to take into account when implementing the relevant parts of the Convention.

The discussion of asset recovery issues will then continue in Chapter IV, taking a more dynamic and analytical perspective. I this Chapter I will in fact examine the work which is being carried out by the Conference of State Parties ('COSP') to the UNCAC in order to inquire into the political priorities set by States as well as the outcomes of the experts' work in this field. At the same time, a crucial part of the Chapter will be devoted to address the barriers which States experience in cooperating to recover assets, as well as the good practices and recommendations to overcome them and eventually establish a swift and effective system of asset recovery.

Lastly, the attention of my work will shift to a number of cases of transnational corruption in order to discuss the norms and standards discussed in the previous Chapters from a practical perspective. Chapter V will then scrutinize and understand the concrete dynamics of corrupt practices, as well as the problems and obstacles created and/or encountered by States to hold responsible those abusing the public office for private gains. In particular, I will take into consideration some significant cases which illustrate the importance of the international cooperation dimension in corruption cases, particularly the problems and the strengths of the strategies set up by States to tackle such offence and to recover its proceeds from foreign countries. For this purpose I will provide the analysis of four sets of corruption cases with transnational elements (two foreign bribery cases and two 'grand corruption cases) where cooperation among States played (or should have played) a crucial role. Considering the fact that such cases are rather complex and (some of them) still on-going, my intention is to provide the available factual background and to inquiry into the judicial outcomes reached in different jurisdictions. More significantly, I aim at observing the impact (if any) of the current international legal framework as well as at addressing what are perceived as the most impairing obstacles and useful tools to overcome them.

To conclude, by taking into consideration the analysis of the previous Chapters, final part of my work will test their theoretical findings on real cases laying special emphasis on the barriers as well as on the most effective practices to enhance cooperation in mutual legal assistance, extradition, and asset recovery matter. In doing so, the Chapter V will also help to

formulate some conclusions as to the effectiveness of the current international provisions as well as to the outstanding issues which are still be addressed.

II. INTERNATIONAL LEGAL ASSISTANCE IN CORRUPTION MATTERS

2.1. Introduction

The increasingly transnational character of crimes,[4] which is claimed to be 'among the defining security threats of this century',[5] has led States to increase their cooperating efforts and to attempt bridging the gaps between their respective criminal systems. This is also true in relation to corruption, which can be regarded as one of the most significant transnational crimes 'because of the harm it does in its own right, and because the 'greasing of palms' is so important to transnational illicit markets'.[6] In this context, fundamental activities for complex corruption investigations such as hearing witnesses or the service of legal documents cannot be taken by a State outside its territory; similarly, an alleged criminal cannot be arrested by the authorities of a State if he/she has escaped in another country. As a consequence, States wishing to tackle corrupt practices of transnational nature are likely to need legal assistance

[4] The term 'transnational crime' was first used at the Fifth U.N. Congress on Crime Prevention and the Treatment of Offenders in 1975 by the U.N. Crime Prevention and Criminal Justice Branch 'in order to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country'. The following year the Fourth U.N. Survey of Crime Trends and Operations of Criminal Justice Systems defined transnational crime as 'offences whose inception, perpetration and/or direct and indirect effects involved more than one country'. The crimes listed included, among others, money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit arms trafficking, aircraft hijacking, sea piracy, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public or party officials; see United Nations, 'Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems', U.N. Doc A/CONF. 169/15/Add.1. The latter, broad ,definition provided by the United Nations is reflected in Article 3(2) of the UNTOC according to which an offence is transnational if satisfies one of the following conditions: (i) it is committed in more than one State; (ii) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (iii) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (iv) it is committed in one State but has a substantial effects in another State. On this recent, yet growing, field of international law see Boister, N. and R. J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (2015); Boister, N., *An Introduction to Transnational Criminal Law* (2012); Muller, G. O. W., 'Transnational Crime: Definitions and Concepts ' in Williams, P. and D. Vlassis (eds), *Combating Transnational Crime: Concept, Activities, Responses* (London, Portland 2011), 13; as well as the seminal contribution for the field of transnational criminal law which is Boister, N., ' "Transnational Criminal Law?" ' (2003) 14(5) European Journal of International Law 953.

[5] Spinner, M., *Civil War and Ethical Conflict in Post-Soviet Moldova – The Case of Gaugazia and Transinistria Compared* (Munich 2003), 24.

[6] Boister, N., *An Introduction to Transnational Criminal Law* (2012), 88.

from another State, which may be requested mutual legal assistance ('MLA') or the extradition of a criminal. In the last decades several international instruments have addressed such processes, but historical issues linked to legal traditions and States' sovereignty over criminal law, as well sensitive matters involved in the control and punishment of citizens (e.g. basic freedoms and human rights) have limited the establishment of an effective system of international cooperation against corruption.

In the attempt to assess the current level of assistance among States against the increasingly harmful threats of transnational corruption, the present Chapter illustrates the international legal framework which currently governs international cooperation to tackle such crime. For this purpose, the first part of the Chapter is dedicated to introduce the source of differences between the criminal laws of States – that is the different legal traditions and systems of each State (paragraph 2) – and to address the principles which generally apply and affect States' requests of assistance in criminal matters (paragraph 3). The following part of the work (paragraph 4) also deals with general criminal law cooperation, and describes the categories of legal basis which may trigger a request of assistance, that is treaty-based (bilateral and multilateral treaties) and non-treaty-based (letters rogatory and domestic law) ones. After that, the Chapter enters its 'core' content, which is the analysis of the current multilateral legal framework which regulates cooperation for the purpose of tackling corruption. In this sense paragraph 5 examines the most significant international instruments which commit States to provide mutual legal assistance or extradition in relation to the offence of corruption: the focus is, in particular, on the relevant initiatives whose scope is either the whole criminal law (e.g. general conventions on mutual legal assistance) or specifically corruption (e.g. the landmark United Nations Convention Against Corruption). As for the kind of international organizations considered, the paragraph scrutinizes the influential work of two regional organizations such as the European Union ('EU') or the Council of Europe ('CoE'), but also the international instruments agreed upon within the Organisation for Economic Co-operation and Development ('OECD') and the United Nations. In the latter paragraph the attention will not only be laid on the analysis of the single provisions, but also on the challenges and limits identified by experts and monitoring mechanisms which influence the possibility for those instruments to effectively favour cooperation among States against corruption. After having assessed the overall significance of the current legal framework, paragraph 6 will consider two further relevant initiatives which, despite not having a legal nature, may well contribute

to favour States cooperation against corrupt practices: firstly, the recent G-20 policies; secondly, the FATF's Recommendations touching upon issues of international cooperation. Finally, some conclusions will comment the outcomes of the Chapter, identifying the most important results obtained so far, but also the limits which States should further concentrate on in order to enhance the cooperation against corruption.

2.2. The Impact of Legal Traditions and Systems

The analysis of the legal framework governing the international assistance for cases of corruption cannot be approached without introducing the basic notions and elements which explain why States have the necessity to cooperate in the first place, and why the different features of each legal system often constitute one of the outstanding obstacles in building an effective system of international cooperation, both against corruption and in criminal law generally.

One perspective to answer to the latter questions is to acknowledge that each country has its own social and legal rules which profoundly affect the way foreign authorities communicate and interact with each other. The laws which a State imposes on its citizens, in particular, represent one of the most fundamental aspects which reflect the identity of a society.[7] As a consequence, establishing enduring bonds among States should first and foremost begin by the mutual understanding and appreciation of the legal system which one is about to enter into contact with.[8] Only through the latter steps officials and authorities could overcome the inflexibility which often hinders international assistance in criminal matters.

Oftentimes practitioners and authorities have been heard calling to 'break down the barriers' and to enhance cooperation and flexibility among authorities.[9] However, the practice and the

[7] 'A legal tradition puts the legal system into a cultural perspective. It refers to deeply rooted and historically conditioned attitudes about things such as the nature of law, the role of law in society, how a legal system should be organized and operated, and the way the law is or should be made, applied or perfected.' Reichel, P., *Comparative Criminal Justice Systems: A Topical Approach* (3rd edn Upper Saddle River, NJ, Prentice Hall 2002), 100, paraphrasing Merryman, J. H., *The Civil Law Tradition: an Introduction to the Legal Systems of Europe and Latin Western America* (2nd edn Stanford University Press, Stanford, California 1985).

[8] According to Reichel, P., *Comparative Criminal Justice Systems* (n. 7), 13, 'both bilateral and multinational cooperation in law enforcement present many problems for the countries involved. However, increasing transnational crime suggests that the potential benefits of cooperative efforts outweigh the problems. A necessary step in achieving that cooperation is an increased understanding of criminal justice systems in the various nations. Thus, more people taking an international perspective towards criminal justice will have definite universal benefits.'

[9] See Prost, K. 'Breaking Down the Barriers: International Cooperation in Combating Transnational Crime', available at www.oas.org/juridico/mla/en/can/en_can_prost.en.html, which sustains that 'effective implementation is not limited to legislation and administration. It runs far deeper than that. A country may have an excellent legislative and treaty scheme for mutual assistance and an established administrative process and it still may be virtually impossible to provide effective assistance; because the best designed system is only as good as the people who operate it on a practical level. In many instances, success in mutual assistance is dependent

experience of those involved in the field of transnational crime and international cooperation have made clear that the latter objective could not be achieved in practice by solely establishing binding commitments on treaties. Before entering into the detailed analysis of the relevant of provisions for the purpose of cooperation in corruption cases – which constitutes the essential parameter of my assessment – at this stage of the work it is important to introduce some purely theoretical concepts which have practical consequences in the field of criminal law cooperation. In sum, the actual issue or execution of an extradition or mutual legal assistance request should always be preceded by a sort of 'due diligence' which comprises the basic understanding of the legal traditions of the counterpart, the ascertainment of which legal tradition that specific country is bounded to, and finally determining the legal systems that each country utilizes. In drawing an overview of those necessary elements of international cooperation it is my intention to pursue a twofold objective: firstly, to frame some of the theoretical issues which contribute to understand why practitioners encounter so many difficulties and complexities when they have to deal with a request of international cooperation; secondly, to illustrate the importance of realizing the different legal traditions and systems in order to establish an effective communication between requesting and requested States. For these purposes, after an introduction of the existing legal traditions and systems, I will emphasize the challenges for the purpose of mutual legal assistance and extradition which are caused by the differences between the civil and common law traditions.

2.2.1. Legal Traditions and Systems

The evolution of a legal tradition is a process which depends on multiple factors, whose analysis goes beyond the purpose of the present work. In this context, it is enough to stress that each legal tradition, which could be defined as 'the rationale and methodology behind how laws are created, interpreted and enforced in a country',[10] is mainly the result of the historical evolution of a country. Moreover, it is hard to classify all the existing legal systems of the world, which reflect the way a country utilizes or interprets a certain legal tradition,

almost entirely on the knowledge and most critically—the flexibility—of the authorities request and, even more importantly, providing the assistance.'

[10] UNODC, *Manual on Mutual Legal Assistance and Extradition* (United Nations, Vienna 2012), 9.

because they often result in unique procedural and legal requirements even within the same country or according to the different areas of law.

In order to simplify the existing picture one could identify three main legal traditions which influence the large majority of States:[11]

(i) *Civil Law Tradition*: it is the most common legal tradition in the world and it is based on the codification of laws, which constitute the primary sources of rights and obligations for citizens;

(ii) *Common Law Tradition*: the main legal parameter in systems of common law tradition is the judgments of the courts, which have precedential authority and create law. Originated in England, the systems of common law tradition can be found in the Commonwealth countries of the former British Empire;

(iii) *Islamic Law Tradition*: despite it is not embraced by all Muslim countries, which often adopt elements of two or more legal systems, in the Islamic law tradition there is no distinction between law and religion, whereby the Islamic religion guides citizens about appropriate behaviour and acceptable conduct.

2.2.2. The Monist and Dualist Approaches

A second general theoretical issue with practical consequences in the field of criminal law cooperation is represented by the way each legal system incorporates international law commitments into domestic law. Generally speaking one can observe two approaches: on the one hand, in dualist systems, international law assumes binding relevance at the domestic

[11] For additional and alternative classifications of legal traditions see Arminjon, Nolde and Wolff, *Traité de Droit Comparé* (Paris 1950-1952); David, *Traité Élémentaire de Droit Civile Comparé: Introduction à l'Étude des Droits Étrangers et à la Méthode Comparative* (Paris 1950); and more recently Zweigert and Kötz, *An Introduction to Comparative Law*,(3rd edn Oxford 1998).

level only when the State enacts a law or regulation which reflects the content of the international instrument. As a consequence, once the State has ratified a treaty there is no immediate effect at the domestic level, and the State is only bound at the international level to ensure that its domestic legislation reflects the requirements of that particular instrument. On the other hand, through the monist approach, which is most commonly embraced by civil law countries, after the State has ratified a treaty or a convention, it becomes automatically part of the law of States and there is no need to enact further legislation in order to become binding at the domestic level. Although in the latter case international and national law generally assume the same relevance, it is important to specify that in some cases domestic law is also necessary in monist States to introduce criminal provisions or to detail measures which are not provided for by the treaty in a clear manner; furthermore, it is often the cases that the rights and obligations arising from international law cannot overcome the provisions of constitutional nature.

2.2.3. Relevant Differences Between the Common Law and Civil Law Traditions

Being civil and common law the most widespread legal traditions, it is worth to focus on the differences which generate the most significant challenges for practitioners seeking to establish criminal law cooperation between those two 'worlds'. One of the greatest obstacles in this context is represented by the criminal law procedure which usually characterizes the two traditions:[12] while the criminal procedure in civil law systems is conceived as an investigation which aims at ascertaining the truth, where the judge is part of the process deciding the relative impact of each evidentiary element, the common law tradition approaches the criminal process under an adversarial perspective, where the judge is bound to admit and consider only those elements which have been submitted and cross-examined by the two opposite parties.

[12] Reichel, P., *Comparative Criminal Justice Systems: A Topical Approach* (5th edn 2008), 162 ff.

2.2.3.1.Evidentiary Matters

The procedural differences between the two traditions are particularly meaningful in relation to the evidence gathered for the purpose of mutual legal assistance or extradition. On the one hand civil law systems do not have in principle any rule of evidence which bar admissibility; on the other hand the common law tradition provides for multiple evidentiary rules which affect all aspects of an investigation. Considering the example of witness statements, which only in some systems need to be subject to some formal requirements for its admissibility, one can realize how the different legal traditions may affect international cooperation on issues which are usually taken for granted by both parties involved.[13] The same kind of problems emerge for extradition, where States based on common law usually envisage a process involving a court and the executive, which may itself be subject to review; on the opposite side, extradition from civil law systems is commonly decided by the judiciary, sometimes without any involvement of the executive branch.[14]

However, it is the issue of evidence which generates the most significant legal traditions-related challenges in relation to mutual legal assistance, since the evidence gathered abroad needs to fulfil the domestic requirements to be valid and admissible. For this reason, it is interesting to recall some evidentiary rules of common law tradition which constitute sources of uncertainty for colleagues of civil law tradition and, thus, potential obstacles toward an effective extradition or mutual legal assistance request.

(i) Firstly one could think about hearsay, a statement reported by a witness regarding something he/she has not observed or experienced, which is

[13] Rabatel, B., 'Legal Challenges in Mutual Legal Assistance' in ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition, and Return of the Proceeds of Corruption* (ADB/OECD, Manila 2006), 42.

[14] This was the case for Austria and Germany until the entry into force of the European Arrest Warrant ('EAW'), which is analyzed in the present Chapter at para 2.5.2.3. Following the latter EU instruments, the two countries modified the relevant legislation and now only the initial decision on extradition pertains to the judiciary. However it is interesting to note that in Austria, when the request for extradition has been found to be inadmissible by the judicial authority the government must reject the request for extradition.

generally not admitted as evidence in front of a court belonging to a system of common law. While some countries have displayed a more flexible approach when assessing hearsay for the purpose of extradition, the latter rule is generally applied stringently in the context of mutual legal assistance;

(ii) A challenging issue for civil law authorities requesting extradition is represented by the prima facie evidentiary standard which is applied by the courts of common law tradition in order to extradite a person. The lack of familiarity with the latter standard from the side of a civil law requesting State may have far-reaching consequence on the extradition process, since the request has to formulated with the awareness of the latter evidentiary criterion;

(iii) In order to do not contaminate evidence of a particular kind (e.g. DNA samples or drug), common law jurisdictions may establish a chain of custody to ensure that the exhibit does not lose its evidentiary weight. Maintaining its continuity may thus constitute a crucial step for a requesting State of common law tradition, which should thus emphasize the important of such phase on the mutual legal assistance request, especially for exhibit of forensic nature;

(iv) The central role of cross examination of evidence within criminal law proceedings of common law systems may be particularly problematic when testimony for witness is requested to a civil law jurisdiction. States belonging to the latter tradition may either be not aware or not allow the opposing party to cross examine a witness and thus to challenge her version of the events. As a consequence, in mutual legal assistance situations civil law and common law authorities should take into account the latter element when cooperating in criminal law matters.

2.2.3.2.Other General Differences

There are many other differences between systems based on the common law and civil law traditions which practically affect a request of mutual legal assistance or extradition and whose description goes beyond the aim of the present paragraph. Consequently, before assessing whether within the two legal traditions there is room to overcome those obstacles and establish a better communication between requesting and requested States, in this context it is sufficient to mention some of the most significant:[15]

(i) *The language and the legal terminology*: being law an instrument rooted in the language of a country, practitioners educated in the common law or civil law tradition usually have difficulties in understanding the meaning of some concept which come into play during international cooperation such as commission rogatory or procès-verbal (for the former) and affidavit or writ of habeas (for the latter). A related source of terminological problems concerns the definition of the criminal offence and its elements for the purpose of fulfilling the double criminality principle (e.g. conspiracy v *association de malfaiteurs*);

(ii) *The role played by relevant authorities*: the role and functions of competent authorities involved during a request of legal assistance may be not fully understood by counterparts, who may be not aware of the role of the *juge d'instruction* (investigating judge) in civil law systems and of the police, lawyers, prosecutors and judges in common law systems;

(iii) *The jurisdiction over nationals*: it is often the case that practitioners from the common law tradition have difficulties realizing that countries of civil law tradition which do not extradite its national usually compensate such restriction by prosecuting them for the offences

[15] UNODC, *Counter-Terrorism Legal Training Curriculum - Module 3 - International Cooperation in Criminal Matters: Counter-Terrorism*, section 6.

committed aboard pursuant to the 'active nationality' principle of jurisdiction.

(iv) *Confidentiality*: from the perspective of common law authorities confidentiality of the content of mutual assistance requests may be hard to maintain, and practitioners with a civil law background should be fully aware of its possible disclosure and the prejudice that this may cause;

(v) *Judgements in absentia*: while in civil law systems persons may be prosecuted even if they are not personally present during the proceedings, common law traditionally does not accept such possibility.

2.2.4. Using Flexibility to Overcome Traditions-Based Challenges

In light of the differences between the common law and civil law systems which emerge in the context of a criminal law requests of cooperation and which I summarily reported in the previous paragraphs, it becomes apparent that, before examining the relevant international instruments in this context, it is crucial to understand the influence played by the legal traditions, which cause the first set of potential risks for the establishment of an effective cooperation in criminal matters.

In order to overcome the latter obstacles, some authors have pointed out the elements of flexibility of the civil law and common law traditions which could play a decisive role in fulfilling the requirements stemming from the counterpart's legal tradition. On the one hand, the possibility for common law judges to 'make law' empowers them to develop solutions to unique cases, the only limit being the need to build it from a base of existing law and practice.[16] On the other hand, the degree of flexibility of civil law judges consists of their

[16] Reichel, P., *Comparative Criminal Justice Systems* (n. 7), 140.

possibility to consider a legal issue either as a question of law or a question of fact, and in evidence or testimony matters such discretion may turn out to be extremely helpful.[17]

However, the most effective way to deal with the differences rooted in each legal tradition is to work on the approach and perspective which should be adopted when requesting international cooperation in criminal matters. Efforts should be made, in particular, to assume that the counterpart of a request may deal differently with the underlying legal issue, and thus one should assume the widest degree of flexibility in imagining what to expect from a different State and which requirements should be stressed when formulating a request. In other words, in order to avoid that a piece of evidence is considered inadmissible in the requesting State and thus loses it evidentiary nature, it becomes crucial to understand the differences between legal system and to avoid those misunderstandings which are often rooted in the lack of flexibility and openness toward the legal tradition of the counterpart.[18]

The obstacles which a State encounters when seeking assistance from another State with a different legal system or tradition is comparable to the ones which a person may have in asking for help in a country or continent with a different language. The difficulties which arise in the latter situations are considerable, but they should be addressed trying to improve as far as possible the level and the nature of the communication. In both legal and language cases, efforts should be undertaken by both parts to focus on three specific issues: firstly, there should be clarity as to what the requesting party is looking for and in which form it needs such information; secondly, attempts should be made to understand and possibly assimilate the basic elements of the counterpart's world, be it its language, or its legal methods and principles; finally, communication should be established with those entities which have most knowledge and experience in assisting request, which in the field of

[17] Reichel, P., *Comparative Criminal Justice Systems* (n. 7), 140.

[18] See, in this sense, Prost, K., 'Practical Solutions to Legal Obstacles in Mutual Legal Assistance' in ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition and Return of the Proceeds of Corruption* (ADB/OECD, Manila 2006), 37, and Rabatel, B., 'Legal Challenges in Mutual Legal Assistance' (n. 13), 39.

international legal assistance are emerging to be the central authorities appointed by each State.[19]

[19] Cf. UNODC, *Manual on Mutual Legal Assistance and Extradition* (n. 10), 17.

2.3. Legal Principles and Requirements Affecting Requests for Assistance in Criminal Matters

A second group of general notion which is essential to present before dealing with the specific provisions which govern the international cooperation in corruption cases is represented by some legal principles which do not belong to any particular legal tradition but, rather, tend to recur in most of the instruments of international criminal assistance. Hence, although they are considered in detail later on when they emerge in the analysis of the legal framework, at this point it is worth to introduce them for their greater significance in the realm of international criminal cooperation.[20]

2.3.1. Severity

Most of the instruments containing extradition and mutual legal assistance arrangements can be triggered by any of the State parties only in case the offence at stake is considered sufficiently serious to justify the efforts needed to carry out the international cooperation. Oftentimes, the latter 'severity' requirement is more stringent for the purpose of extradition, rather than for a request of mutual legal assistance. Three kinds of approaches can be identified in order to put into practice the latter principle: firstly, to list the qualifying offences in the treaty and domestic legislation, which is problematic insofar as conducts are difficult to categorize into types of offences. The second, more recent, approach is to set a minimum-penalty threshold above which a request for assistance may be activated for a given conduct. A third solution is to mix the latter methods and thus create a hybrid approach.[21]

[20] Cf. OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (OECD, Paris 2012), 19 ff, and ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (ADB/OECD, Manila; Paris 2008), 39-59. For an overview of these principles (which can also be considered as grounds of refusal) from the perspective of the U.K. see Ailes, V., 'Mutual Legal Assistance and Other European Council Framework Decisions' in Jones, John R. W. D. (ed), *Extradition and Mutual Legal Assistance Handbook* (2010), 158-160.

[21] Cf. UNODC, *Manual on Mutual Legal Assistance and Extradition* (n. 10), 71.

2.3.2. Dual criminality

Generally speaking the principle of dual criminal implies that in order to request criminal assistance, the underlying criminal offence must be a crime in both the requesting and requested State. While traditionally it was required that the crime had to contain the same names or essential elements in both jurisdictions, more recently the latter principle has be loosened[22] toward a 'conduct-based' approach which only demands that the conduct underlying the offence is criminalized under the law of the two States.[23] A related principle which is applied in some cases is the 'dual punishability' one, requiring the conduct to be punishable (e.g. the statue of limitations should not be expired) in the recipient country or the applicability of similar sanctions or comparable defences (a request for mutual assistance may be denied if, for instance, the requesting State permits the punishment of the offence with the death penalty).

One of the general challenges created by dual criminality concerns the request of assistance in relation to conducts of legal person, which may be refused by those countries which do not provide for their criminal liability.[24] Finally, as for the severity requirement, one should recall that dual criminality is less commonly required for mutual legal assistance than extradition.[25]

2.3.3. Reciprocity

Reciprocity is a long-established principle in relations among States under the perspective of both international law and diplomacy, and it basically rests on a promise of future cooperation. When the latter principle is not incorporated into a treaty or domestic legislation

[22] Cf. Mehra, S. K., 'Law and Cybercrime in the United States Today' (2010) 58 Am J Comp L 659.
[23] As I explain in para 2.5.3.2.2.1., the UNCAC takes a conduct-based approach to dual criminality.
[24] Cf. ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (n. 13), 44.
[25] See also paras 2.5.3.1.2.4. and 2.5.3.2.2.1., which discuss the principle of dual criminality as regulated in the international anti-corruption legal framework.

dealing with criminal law assistance,[26] a request of cooperation is usually responded in case the requesting State ensures that in the future will provide the same level of legal assistance in similar circumstances, that is on a condition of reciprocity. Keeping the promise and thus establishing a solid relationship of trust is crucial whether or not the principle has been laid down in an international instrument.[27] For this reason it is essential to honour the promises made: after all, as argued by the Swiss investigating magistrate Jean-Bernard Schmid, 'there always is a next time. In international cooperation, as in any business, it is in the interest of every party to respect promises that are made.'[28]

2.3.4. Extradition of Nationals

In some cases domestic legislation or treaties provide that a State may or should refuse to extradite their nationals to another country. According to some agreements, the requested State may decide to prosecute its national and this may be either a mandatory or discretionary decision. In the latter case, some additional factors may be considered, such as the State's jurisdiction, its interest in prosecuting the offense, its role in the investigation, the location of the evidence, and the severity of the possible sanctions.[29]

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[26] In some countries' legislation the principle of reciprocity is a precondition for considering extradition. See, for example, the case of Japan which provides mutual legal assistance and extradition only is assurances of reciprocity are given pursuant to Article 3 (ii) of the Act of Extradition, and Article 4 (ii) of the Act on International Assistance in Investigation and Other Related Matters, both available from the website of the Ministry of Justice of Japan at www.moi.go.jp/ENGLISH.

[27] As noted by Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 212, 'the key to increased cooperation is trust in the underlying values of foreign legal system being dealt with. However, the author, citing the case where French authorities refused a request from Djibouti for the file into the investigation of the death of a French judge in Djibouti (*Certain Questions of Mutual Assistance in Criminal Matters [Djibouti v France]*, Judgment, ICJ Reports 2008, 177, para 123) notes that such trust is not always forthcoming at the global level.

[28] Schmid, J. B., 'Legal Problems in Mutual Legal Assistance from a Swiss Perspective' in ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Denying Safe Haven to the Corrupt and the Proceeds of Corruption: Enhancing Asia-Pacific Cooperation on Mutual Legal Assistance, Extradition and Return of the Proceeds of Corruption* (ADB/OECD, Manila; Paris 2006), 47.

[29] See also paras 2.5.2.7.1. and 2.5.3.2.5., which discuss the regulation of nationals' extradition in some instruments of the international anti-corruption legal framework. On the closely-related principle *aut dedere aut iudicare* see also paras 2.5.2.5., 2.5.2.7.3., 2.5.3.1., and 2.5.3.2.2.1.

2.3.5. Evidentiary Standards

In order to receive assistance in criminal matters, requesting States are usually required to show some evidence regarding the alleged crime. The source and the intensity of the latter requirement depend on the jurisdiction and upon the nature of cooperation which is requested. However, two kind of tests could be identified in this context: on the one hand some countries may impose a prima facie evidence test which imposes the requesting State to provide the same evidence needed to stand a trial in the requested State; on the other hand, a less intense test is imposed by those countries which require sufficient elements to suspect there is a link between the request of assistance and the crime committed.

Despite the fact that the purpose of the evidentiary standard is to protect the rights and interests of individuals, the evidentiary requirement is often the cause of delays in international cooperation. This is particularly true in case of different legal traditions, whereas requests from civil law jurisdictions have usually difficulties in fulfilling the prima facie evidence test of common law States. Moreover, an evidentiary test may be the source of delays in case additional judicial hearings take place, or when the accused challenges his/her criminal responsibility and the international assistance request generates a trial in the requested State. A related set of problems of evidentiary standards concerns the use of the evidence obtained through a request of mutual legal assistance: in order for the latter to be used within the trail, the requested State should take into account all the additional requirements which are needed in the requesting State for an exhibit to be admissible in front of the Court.[30]

2.3.6. Specialty and the Limitations on Use

According to the principle of specialty, a person which is extradited may only be prosecuted and eventually punished in the requesting State only for the conduct for which international assistance was requested or for the conducts committed subsequently. The latter limitation

[30] Cf. OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (OECD, Paris 2012) 22-3.

applies in the realm of mutual legal assistance through the principle of 'use limitation', which confines the use of the information provided by the requested State only for the purpose for which it was obtained, that is in the proceedings or investigation where the request for assistance stemmed from.[31]

2.3.7. Procedural Requirements

The procedural requirements requested by a recipient country vary differently from country to country, and depends on several variables such the nature of assistance requested and the legal tradition of origin. While a detailed description of the facts is always required, other information such as the criminal nature of the proceedings or the date of expiration of the statute of limitations may not be always required.

A sensible issue concerns the language of the request, since some countries only accepts requests of assistance in their official language, the latter being a facilitating element in the process of international cooperation. As a consequence, translation assumes a critical importance, and the resulting text is should be fully understandable by the authorities of the requested State.[32]

2.3.8. Other Grounds for Refusal

Besides the latter principles and requirements, one should also take note of additional grounds to deny cooperation which recur in many mutual legal assistance and extradition agreements. Since they will be further illustrated in the following part of the work with specific reference to corruption-related instruments, in this general context it is sufficient to provide a brief overview of them.

[31] Cf. UNODC, *Manual on Mutual Legal Assistance and Extradition* (n. 10), 48-9.
[32] Cf. OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 23.

2.3.8.1.Essential and Public Interests

Denial of cooperation could be justified by a requested State on the rather undefined concept of 'essential interest', which may include wide ranging concepts such as sovereignty, security and foreign affairs, as well as the safety of some persons and the excessive resources needed to satisfy the request. The same holds true for 'public interest', whose precise definition is usually missing from both treaties and domestic legislations. Not surprisingly, the vagueness of both concepts is likely to adversely affect the effectiveness of international cooperation.[33]

2.3.8.2.Political Offences

Together with the latter grounds, the political character of the offence may also justify the refusal to cooperate based on an imprecise definition which is usually applied on casa-by-case basis. In some circumstances, the political offence exception provided for in bilateral treaties may be excluded for offences which are regulated by multilateral agreements to which both States are parties.[34]

2.3.8.3.Offence Committed in the Requested State

A ground to refuse extradition which may have consequences on corruption cases is the one based on the fact that the conduct is an offence committed in whole or in part in the territory of the requested State. Without entering into the discussion of jurisdictional issues which are outside the realm of the present work, it is enough to recall that many multilateral instruments bind the State which refuses to extradite a person using such principle to prosecute him/her.

[33] These issues are also discussed in paras 2.5.2.7.3. and 2.5.3.2.2.1.

[34] Cf. UNODC, *Manual on Mutual Legal Assistance and Extradition* (n. 10), 53-4.

2.3.8.4.Double Jeopardy

In many mutual legal assistance and extradition arrangements, the fact that the conduct underlying the request for assistance has been acquitted or punished in the requested State may lead the latter to deny assistance pursuant to the so-called principle of 'double jeopardy'. Some agreements allow the application of the principle in case of an on-going proceedings or investigation. In rare cases, extradition may be refused if the requested State has already decided not to prosecute the person, without the need of a sentence of acquittal by the Court. As for the previous ground for refusal, the issue of double jeopardy may well arise in corruption cases.[35]

2.3.8.5.Severity of Punishment

The severity of the punishment, be it death, torture or cruel treatment may also be raised by countries which are asked to cooperate. A way to overcome the refusal of assistance in death penalty cases is, for the requesting State, to provide enough assurances that such penalty will not be imposed or carried out in case of conviction.

2.3.8.6.Bank Secrecy

Considering that domestic legislations usually provide for some degree of secrecy against the disclosure of banking records, the investigations of cases of corruption and of other economic crimes may be seriously hindered by a country's refusal to cooperate based on bank secrecy. As it will be pointed out in the course of the Chapter, in order not to frustrate mutual legal assistance requests which are essentials for investigation cases of corruption, many of the

[35] Cf. UNODC, *Manual on Mutual Legal Assistance and Extradition* (n. 10), 73.

relevant multilateral instruments explicitly prohibit that State parties may deny a request of assistance on grounds of bank secrecy.[36]

[36] This issue is also discussed in paras 2.5.2.7.3., 2.5.3.1., and 2.5.3.2.2.1.

2.4. Legal Bases for Rendering Criminal Law Cooperation

The last set of general concepts which is important to illustrate at this stage of the Chapter regards the available legal bases to seek or provide criminal cooperation, which may depend on the kind of assistance sought and/or on the country whose assistance is requested. This paragraph, as the previous ones, will serve a backdrop to the discussion of the following parts of the work, which are mainly focused on the multilateral legal instruments addressing cooperation against corruption.

2.4.1. Non-Treaty-Based Arrangements

2.4.1.1.The Letters Rogatory

One of the oldest ways for States to request international cooperation in criminal matters is to do it through a letters rogatory, which still constitutes a fundamental means of assistance when no other instrument is available between two countries.[37] Traditionally, it consists of a request issued by a judge in the requesting state (sometimes on behalf of the police for the earlier stages of the proceedings) to another judge in the requested state.

The weak side of the letters rogatory is that the scope of assistance which it can provide is limited insofar as it generally encompasses request for documents or to obtain testimony and service of documents from a witness.[38] Further drawbacks of such instrument are due to the fact that it involves a rather cumbersome[39] and time-consuming process,[40] since it usually

[37] Although letters rogatory have traditionally used in the field of extradition, over time they have also developed in relation to mutual legal assistance.

[38] This holds particularly true in case the requested state is of common law tradition, where judges are usually not involved in an investigation.

[39] Strict formal and substantial requirements apply to a letter rogatory. Generally it must be authenticated through an attestation or apostille in order to be legalized; furthermore it needs to be translated into the foreign language. On top of that one should consider that countries also have specific requirements about the content of the request.

consists of applications to a court and/or transmission through diplomatic channels.[41] Finally, contrary to a treaty-based request for assistance, a letters rogatory does not imply any obligation to assist the requesting State.

2.4.1.2.Domestic Law

In order to establish criminal law cooperation with those country which are not counterparts in any relevant bilateral or multilateral treaty, or in cases the latter – when they exist – do not provide for a particular kind of request which is sought, States usually have legislation which regulates mutual legal assistance and extradition and which defines the procedure to be followed in processing both incoming and outgoing requests, as well as the categories of requests which can accepted and how they should be communicated.[42] Furthermore, domestic law may be needed even in presence of a relevant international instrument in case either the requesting or the requested country embraces a so-called dualist approach toward international law,[43] which implies the enactment of some domestic legislation before a treaty or convention becomes effective at the national level.

A new set of approaches can be observed in this field of domestic legislation. In some cases, national law deals with incoming requests for either extradition or mutual legal assistance. Other jurisdictions go beyond the latter procedural scheme and authorize the acceptance of such requests. A third approach is a combination of the latter ones. Finally, some countries specifically provide that extradition should be allowed pursuant to their national law and not to a treaty.

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[40] A letters rogatory can take up to one year to be answered

[41] Despite the fact that the process may differ from country to country, and a judge from a requesting State may need to send the letter to the following institutions: who drafted it to (i) the Ministry of Justice or Ministry of Foreign Affairs (or other appointed Central Authority) of the requesting State (ii) the national Embassy in the requested country; (iii) the Ministry of Justice or Ministry of Foreign Affairs (or other appointed Central Authority) of the requested State; (iv) a judge (or any other competent National authority) in the recipient country.

[42] The procedure is often similar to the schemes provided for by treaties, sometimes with some additional conditions.

[43] On the difference between monist and dualist systems in international law and on the consequence in the field of international criminal cooperation see the brief overview provided at para 2.2.2.

Basing cooperation on domestic legislation has advantages and drawbacks. On the one hand the schemes set at the domestic level are usually cheaper and quicker to implement than treaties; on the other hand, as for the letters rogatory, there is no obligation to assist a country requesting cooperation. Similarly, the foreign State is not bound by the domestic legislation of a requesting State.

From a practical perspective, reviewing the legislation of a country even before contacting the relevant authorities of the State from which assistance is sought (e.g. central authorities) is a phase which may have several beneficial effects, as it is pointed out in a relevant UNODC manual.[44] Looking into the relevant law of a country in the field of criminal cooperation prior to a request provides knowledge, confidence and clarity when the State enters into contacts with the competent authorities in the requested country to request for assistance. In particular, the latter review may provide guidance in three respects: firstly, it clarifies the way a treaty is implemented at the domestic level; secondly, it may be itself the legal basis to request international cooperation; thirdly, it may lead the practitioner to understand whether a request is needed for the kind of assistance sought.

2.4.2. Treaties

Treaties constitute the second group of basis to establish international cooperation, and they represent the most formal way to rely on when requesting mutual legal assistance and extradition. For the purpose of the present work one should stress that treaties, whose terms bind States under international law,[45] are limited in their scope insofar as they often have limited geographical application (e.g. two States in a bilateral treaty) and they are focused on certain types of offences (e.g. corruption). However, they afford greater certainty and clarity than the previous category of arrangements because they usually provide more detailed provisions on the procedures and limits of the cooperation.

[44] UNODC, *Manual on Mutual Legal Assistance and Extradition* (n. 10), 22.
[45] UNODC, *Manual on International Cooperation in Criminal Matters related to Terrorism* (New York 2009), 9-10.

Since the substantial analysis of the scope of the international cooperation agreements in the field of corruption is the content of the following part of the Chapter, the next two paragraphs aims at introducing some general features characterizing mutual legal assistance and extradition's treaties in general.

2.4.2.1.Bilateral Instruments

Bilateral treaties are the instrument which allows the two signatory States to meet at best their reciprocal needs. Generally speaking, they provide a significant degree of flexibility since they can be amended to fit the mutated needs of the Parties; furthermore, they ensure the highest degree of certainty between Parties regarding the respective obligations and expectations. This is particularly so in case the two countries belong to the same legal tradition, as clarity and certainty will also concern the domestic part of the process. The latter advantages hold true also in relation to bilateral agreements for mutual legal assistance in criminal matters, which have been adopted since the first 'breakthrough instrument' between the U.S. and Switzerland came into force in January 1977:[46] one should notice, in particular, that the negotiation process itself is a form of training and capacity building for the countries involved; plus, the negotiation history and the contacts established between the two States may constitute elements which favour the effective practice of mutual legal assistance under the treaty itself.[47] On the other hand, some problems may arise in case two parties to a bilateral treaty have a different legal system; plus, bilateral instruments raise some challenges in terms of time, efforts and resources needed to negotiate and conclude them. However, in order to avoid the latter problems in bilateral MLA agreements one should take note of the

[46] In the 1970s countries like the United States which were eager of gaining access to evidence abroad begun to negotiate bilateral agreements to regulate the mutual assistance process and overcome specific challenges. On the U.S.-Switzerland treaty of 1997 see Frei, L. and S. Freschal, 'Origins and Application of the United States – Switzerland Treaty on Mutual Assistance in Criminal Matters' (1990) 31 Harvard International Law Journal 77, 77.

[47] Prost, K., 'A Multilateral Cooperative Framework for Mutual Legal Assistance' in van den Herik, L. and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges* (2013) 93, 98, where it is also stressed the importance of considering such advantages when assessing the need for and the role of multilateral instruments in the field of mutual legal assistance. Later on, at 113, the author goes even further and states that 'excluding national law, bilateral instruments remain the most effective instruments in terms of implementation and use in practice'.

Model Treaty on Mutual Legal Assistance in Criminal Matters, which intends to assist States in drafting a bilateral (o regional) mutual assistance treaty. The significance of the latter instrument in the mutual assistance process lays also in the fact that it was elaborated and agreed by the members of the United Nations.[48]

As for the content of bilateral instruments in the context of criminal cooperation, despite it may vary in every agreement, they usually contain the following elements: the channel of communication (e.g. central authorities); the type of offences for which assistance is available, either through a list of them or a severity threshold (or a mix of the two approaches);[49] the means of cooperation available (eg, in the field of mutual legal assistance: service of process on individuals in the requested country, locating and producing records or documents, locating witnesses, taking testimony, freezing assets, executing searches and seizures and transferring persons in custody for testimonial purposes) and the limitations on the use of the resulting evidence by the requesting State; finally, the potential obstacles that the parties may encounter in cooperation such as the dual criminality requirement.[50]

2.4.2.2.Multilateral Legal Instruments

Next to bilateral conventions, international rules concerning criminal cooperation are also agreed upon in multilateral instruments, which constitute an efficient and effective way to address issues of assistance, and which should be accepted by the highest number of countries, especially when dealing with contemporary crimes of transnational or global nature. On top of this, multilateral instruments are the realistic answer to the fact that each country can hardly conclude a bilateral treaty with every other country of the world.

These instruments may apply to a specific group of offences such the ones related to terrorism, or they may be focused on certain specific actions, as it is the case for the U.N.

[48] U.N. General Assembly, 'Model Treaty on Mutual Assistance in Criminal Matters' (14 December 1990) A/RES/45/117, subsequently amended by U.N. General Assembly, 'Mutual Assistance and International Cooperation in Criminal Matters' (9 December 1998) A/RES/53/112.

[49] On the severity principle in general see para 2.3.1.

[50] On the dual criminality requirment in general see para 2.3.2.

Convention against Transnational Organized Crime ('UNTOC').[51] In some other cases multilateral treaties may be convened to facilitate international cooperation.[52] Leaving the analysis of the relevant multilateral instruments to the following paragraphs, one should finally notice that many of them coexist with bilateral treaty between two States[53] and in some case they even encourage States parties to enter into regional or bilateral agreements with a view to enhancing cooperation.[54]

In light of the considerations made about the legal bases which make international cooperation in criminal matters possible, it is hard to identify a single approach which may address all the complexities at best. On the one hand treaty-based solutions constitute an undeniable improvement in the relationships among States, since they provide legal certainty and they overcome a system of assistance based on pacts, courtesy or goodwill between heads of State.[55] On this other hand, at the practical level, much of the promptness and willingness in cooperation will depend on other elements such as the legal tradition, the domestic law, the political will and the mutual trust between the States. As a consequence one could finally agree with those who contend that, although international instruments bind States and generate obligations at the international level, 'in practice, however, the absence of treaty-based obligations does not necessarily result in less cooperation.'[56]

[51] Signed on 12 December 2000; entered into force on 29 September 2003. The Convention, also known as 'Palermo Convention', was adopted in U.N. General Assembly, 'United Nations Convention against Transnational Organized Crime' (15 November 2000) A/RES/55/25.

[52] See, e.g., the European Convention on Mutual Assistance in Criminal Matters, CETS No 30 (singed on 20 April 1959; entered into force on 12 June 1962).

[53] See Article 18(6) and (7) of the UNTOC.

[54] While Article 18(30) of the UNTOC declares that 'States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article', its Article 16(17) establishes that 'States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.'

[55] See UNODC, 'Report of the Informal Expert Working Group on Effective Extradition Casework Practice' (2004), para 8.

[56] ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific* (n. 20), 32.

2.5. The Anti-corruption Legal Framework and Initiatives in Relation to MLA and Extradition

2.5.1. Introduction

After having introduced some of the essential issues which characterize the criminal law assistance at the international level, it is now time to scrutinize in greater detail those multilateral instruments which actually enable States to request each other cooperation for the purpose of prosecuting cases of national and transnational corruption. In particular, emphasis is laid on the those initiatives of two regional organizations (EU and CoE) and two international organizations (OECD and U.N.) which have either constituted or represent today the fundamental parameters in relation international judicial assistance and corruption

In this context, one should keep in mind from an historical perspective that, although the field of mutual assistance in criminal matters has developed relatively slowly compared to the corresponding relations in civil and commercial matters, as of the 1990s the activity has significantly increased and it continues today steadily, especially in relation to the transnational nature of some crimes such as terrorism and corruption. Interestingly, as pointed out by McClean, the impetus which has been observed in the recent years seems to be essentially of a political nature rather than stemming from the expert community of law enforcement authorities.[57]

As for the content of the present part of the Chapter, its aim is threefold: firstly, to illustrate the most relevant instruments in the context of criminal assistance and to highlight the differences in their scope as well as their practical problems and weaknesses; secondly, to identify – especially in relation to the most innovative instruments – which kind of challenges State are confronted to, and how they may addressed; thirdly, I will analyze the available findings on States' shortcoming in international cooperation against corruption made by those international bodies in charge of monitoring the implementation of the international anticorruption treaties.

[57] Cf. McClean, D., *International Co-operation in Civil and Criminal Matters* (3rd edn 2012), 154.

A few considerations on the limits and the content of the following paragraphs should be clarified before entering into the examination of the latter issues. The present part of the work does not have the ambition to cover in detail all the international instruments in the field of criminal law cooperation, but rather to touch those which have and will have the most significant impact for the purpose of tackling corruption. For this purpose, emphasis is laid on those treaties which are particularly meaningful in terms of geographical scope and advanced content. Moreover, one should note that two typologies of treaties are considered in the following analysis: on the one hand those which concern international cooperation in criminal matters; on the other hand those which specifically deal with a specific thematic issue (e.g. transnational crime or corruption) and at the same time contain a number of dedicated provision to international cooperation. Finally, one should not overlook the relevance of bilateral treaties in this context: in spite of the fact that they are not dealt with in the following paragraphs for their specificity and limited geographical application, one should always keep in mind their practical significance in the field of criminal assistance.[58]

2.5.2. Regional Instruments

2.5.2.1. The Evolving Criminal Cooperation within the European Union

2.5.2.1.1. The Origins

The degree of cooperation in criminal matters within the EU has evolved rapidly in the last two decades as it reflects the evolution of Europe's more general structure and governance. Considering that up until the entry into force of the Treaty of Maastricht of 1993[59] judicial cooperation was taking place outside the then Community framework, it was only after the abolition of controls at the borders with the first Schengen Agreement in 1985 that the

[58] On the significance of bilateral treaties for the purpose of criminal law cooperation see para 2.4.2.1.

[59] Treaty on European Union – Treaty of Maastricht (Consolidated version), OJ C 191 of 29.7.1992 (signed on 7 February 1992; entered into force on 1 November 1993).

necessity and desirability of further cooperation among law enforcement agencies became apparent. The first as well the second Schengen Agreements were formally implemented through a Convention concluded in 1990.[60] The main features of the latter instruments were the 'hot pursuit' by domestic police forces across countries, some provisions on mutual assistance,[61] and the Schengen Information System ('SIS'), a computerized database which was finally established in 2006. Although further instruments on cooperation have been agreed ever since, the Schengen aquis has been integrated in the new structure of the Union through Protocol No 19 to the Treaty on the Functioning of the European Union.[62]

2.5.2.1.2. The Treaty of Maastricht and the 'Third Pillar'

With specific regard to criminal matters, the first real step toward closer forms of cooperation came into being with the Maastricht Treaty of 1992, whose Title VI created the so-called 'third pillar' dealing with issues in the fields of Justice and Home Affairs ('JHA'). The main competence acquired in the field of cooperation was the possibility to negotiate agreements for mutual assistance in customs matters with third countries.[63] On top of that, few other initiatives were available to the Council such as the adoption of 'joint actions' and the drawing up of Conventions to recommend to Member States. In this context one should recall the EU Anti-Corruption Convention,[64] whose provisions on mutual legal assistance and extradition will be analyzed in a following paragraph,[65] a Joint Action against drug addiction and trafficking,[66] an Action Plan to Combat Organized Crime,[67] and a Joint Action on good

[60] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (signed on 19 June 1990; entered into force on 1 September 1993).
[61] See Chapter 2, Articles 48-53.
[62] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.
[63] See the Agreement signed with the United States in The Hague in May 1997, OJ L 222, 12.8.1997.
[64] Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195, 25.6.1997 ('EU Anti-Corruption Convention').
[65] See para 2.5.2.5.
[66] Joint Action 96/750/JHA, OJ L 342, 31.12.1996.
[67] OJ C 251, 15.8.97.

practices in mutual legal assistance in criminal matters.[68] In the same period Europol and the European Judicial Network were established to set up some form of operational cooperation among Member States.

2.5.2.1.3. The Treaty of Amsterdam and the 'Area of Freedom, Security, and Justice'

The following step of integration of the EU was represented by the 1997 Treaty of Amsterdam[69], which maintained the so-called 'third pillar' with an enhanced instrument to approximate domestic legislations which was called 'framework decision'. The political agenda of this new season of judicial cooperation was set during the special European Council held in Tampere (Finland) in October 1999, which proposed to create an 'area of freedom, security and justice' and made reference to future instruments and initiatives in the following fields: extradition, mutual recognition of criminal judgments and orders, joint investigative teams, money laundering, Europol's competences, and the establishment of Eurojust. As for the content, the actions undertaken in this period concerned money laundering, the victims of crime, terrorism, freezing orders, human trafficking and, from an operational perspective, the joint investigation teams and liaison officers. However, the most significant instruments for the purpose of present Chapter were the Convention on Mutual Assistance in Criminal Matters of 2000 and the framework decision on the European Arrest Warrant ('EAW') of 2002, both of which will be examined in detail in following paragraphs.

2.5.2.1.4. The Hague Programme

The political agenda of the EU in the field of judicial cooperation for the period 2004-2009 was set in the so-called 'Hague Programme', which identified as priorities the fight against

[68] Join Action 98/427/JHA, OJ L 191, 7.7.98.

[69] Treaty on European Union (Consolidated Version), OJ C 340 of 10.11.1997 (signed on 2 October 1997; entered into force on 1 May 1999).

terrorism, the development of a strategy against organized crime, and the promotion of effective access to civil and criminal justice.[70] The framework decisions enacted by the Council in this period aimed to apply the principle of mutual recognition to various typologies of sanctions, and to take into account the convictions received in other Member States. On a substantial level they dealt with terrorism and organized crime, but also with issues of proceeds of crime, the victims of crime, and human trafficking. From our perspective one should recall the establishment of a contact-point network against corruption in 2008,[71] and the framework decision which created the European Evidence Warrant ('EEW')[72] in line with the spirit of the EAW.

2.5.2.1.5. The Treaty of Lisbon and the Stockholm Program

The adoption of the Treaty of Lisbon[73] has represented the last important step undertaken by the EU in the field of judicial cooperation. A whole Chapter of the newly adopted Treaty on the Functioning of the European Union ('TFEU')[74] is dedicated to the judicial cooperation in criminal matters, which 'shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States'[75] in a number of important areas.

Although some countries such as the United Kingdom, Ireland and Denmark signed the TFEU deciding not to be automatically bound by the decisions taken in this field but only to 'opt-in'

[70] Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice; COM(2005) 184; OJ C 236 of 24.9.2005.
[71] Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption, OJ L 301 of 12.11.2008.
[72] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ 2008 L 350 of 29.12.2008, later amended by Council Framework Decision 2009/299/JHA of 26.2.2009.
[73] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.
[74] Chapter 4(V)(3) of Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, entered into force on 1 December 2009.
[75] Article 82 TFEU.

on a case-by-case basis,[76] the latter development constitutes an important basis for an enhanced level of criminal cooperation in light of three elements. Firstly, because Member States decided to extend the ordinary legislative procedure also in this field, which implies an increased level of legitimacy through the involvement of the European Parliament, and the enactment of binding instruments such as directives and regulations. The second remark on the recent EU organization in criminal matters as depicted by Article 83 TFEU concerns the possibility to adopt directives in view of approximating 'the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis' such as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.[77] Thirdly, the TFUE outlines the establishment of an unprecedented level of criminal cooperation through the European Public Prosecutor's Office ('EPPO'), which should be 'responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests' exercising 'the functions of prosecutor in the competent courts of the Member States in relation to such offences.'[78]

As for the political strategy of the EU criminal law activity of the EU from 2010 to 2014 one should refer to the so-called 'Stockholm Program', which provided a roadmap for the area of justice, freedom and security encompassing the following priorities: providing the victims of crime an integrated and co-ordinated protection; strengthening the procedural rights of suspected and accused persons in criminal proceedings; assessing the results of the evaluation of the EAW; focusing on the fight against cross-border crime, such as trafficking in human beings, sexual abuse, sexual exploitation of children and child pornography; cyber crime; economic crime, corruption, counterfeiting and piracy; drugs. After that, at the beginning of

[76] See Protocol No 21 and 22 of the TFEU.

[77] Article 83 TFEU, which specifies that the list is not exhaustive and that 'on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.'

[78] Article 86 TFEU. In light of the latter Article, in July 2013 the European Commission proposed a Regulation on the establishment of a European Public Prosecutor's Office. Although the discussion is still on-going, the original proposal sketched an EPPO characterized by the following features: independent, decentralized, relying on national law, affording strong procedural rights, cost-effective.

2014, the Commission has released a new document on the 'the EU Justice Agenda for 2020'[79] which consists of an overview of the progress made and the key challenges which will be addressed in order to create a European area of justice oriented towards 'trust, mobility and growth' by 2020. In the area of criminal cooperation the Commission has took note of significant developments made in building mutual trust between Member States through the establishment of a set of fair trial rights and minimum standards to protect persons suspected or accused of a crime. The standing of victims throughout the criminal process has also been improved by guaranteeing minimum rights, support, advice and protection for the victims. As for the future of action of the EU, the Commission intends to strengthen the existing mechanisms and networks in criminal matters such as Eurojust and the future EPPO, as well as to use to the maximum the potential of joint investigation teams. In order to improve the smooth cooperation in criminal matters, focus will be further laid on the mutual recognition of instruments in areas such as the recognition of financial penalties, confiscation orders and disqualifications. Finally, the establishment and practice of the EPPO will probably induce the need to adopt further complementary measures.

After having provided an overview of the evolution which the EU has experienced in the field of criminal law cooperation, emphasis should be now laid on the major instruments which enable extradition and mutual legal assistance in criminal matters. The analysis will concern, in particular, two Conventions (on criminal cooperation and corruption) agreed within the EU pursuant to the former 'third pillar', and a few other instruments which have built greater possibilities for Member States to request and afford cooperation in criminal latter based on the principle of mutual recognition.

2.5.2.2.The EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

[79] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2014, 'The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union', COM(2014) 144.

Although in 2014 the EU adopted the 'European Investigation Order' ('EIO') Directive in the field of mutual legal assistance and once it is implemented in all Member States it will replace the corresponding provisions of the previous instruments,[80] the leading EU instrument which currently applies is a Convention adopted in 2000 ('EU MLA Convention', to read together with its Protocol of 2001)[81] which is built on the 'solid foundations'[82] of other parent treaties such as the CoE MLA Convention of 1959[83] and its Additional Protocol, the provisions on criminal cooperation of the Schengen Implementation Convention of 1990,[84] and Chapter 2 of the Benelux Treaty of 1962 as amended by a Protocol in 1974.[85] Accordingly, the EU MLA Convention, which cannot serve as an independent legal basis to make a request for mutual assistance, makes often reference to the latter instruments in order to develop their provisions and to take into account the changes which meanwhile have occurred, especially from a technology point of view.

Building on the previous instruments, Article 3 of the EU MLA Convention extends the scope of proceedings in connection with which mutual assistance is to be afforded and includes those brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Member State, or both, by virtue of being

[80] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ 2014 L130 of 1.5.2014 ('EIO Directive'). The replacement will not concern the Member States' relationship with Ireland and Denmark which did not take part in the instrument pursuant to Protocol 19 of the TFEU. On the relations to other legal instruments, agreements and arrangements see its Article 34. As for the time-limit for its implementation, Member states will have 3 years after the entry into force of the directive to adopt the necessary national provisions. For an overview of the scope of the latter instrument see para 2.5.2.4.

[81] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.7.2000.

[82] McClean, D., *International Co-operation in Civil and Criminal Matters* (n. 57), 191.

[83] The CoE MLA Convention is examined in detail at para 2.5.2.7.2.

[84] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22.9.2000.

[85] Accordingly, Article 1(1) of the Convention established that its purpose is to 'supplement the provisions and facilitate the application between the Member States of the European Union, of: (a) the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959'; (b) the Additional Protocol of 17 March 1978 to the European Mutual Assistance Convention; (c) the provisions on mutual assistance in criminal matters of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders which are not repealed pursuant to Article 2(2); (d) Chapter 2 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, as amended by the Protocol of 11 May 1974, in the context of relations between the Member States of the Benelux Economic Union.

infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters. Interestingly for the purpose of tackling corruption carried out by legal persons, it also encompasses the latter proceedings when they relate to offences or infringements for which a legal person may be held liable in the requesting Member State, even if the same kind of liability for legal persons is not provided for in the legal system of the requested State.[86]

The EU MLA Convention improves the mutual legal assistance procedure set by the CoE MLA Convention on two aspects: while, under the latter, most of the requests have to be transmitted from the Ministries of Justice of both countries and have to be carried out according to the procedures of the requested State,[87] the former EU instrument permits the direct contact between judicial authorities and it sets that, in principle, is the requested State which has to comply with the formalities and procedures of the requesting State, unless otherwise established in the Convention, and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested State.[88] Should the requirement of the requesting State not be met, its authorities should be promptly informed with the indication of conditions under which it might be possible to execute the request.[89] Furthermore, in case the requested State comes across with further elements of the investigation which were not part of the request and which may be appropriate to acquire, its competent authority has the obligation to 'immediately inform the requesting authority accordingly in order to enable it to take further action.'

The EU MLA Convention also provides a more secure legal framework for the operation of joint investigation teams which, pursuant to its Article 13, may be established in case a State requires difficult and demanding investigations having links with other Member States or when more States are conducting investigations into criminal offences which necessitate coordinated, concerted action in the Member States involved. Covert investigations by 'officers acting under covert or false identity' are also allowed on two conditions: firstly, that such investigations take place with due regard to the national law and procedures of the States on the territory of which the covert investigation takes place; secondly, that the States

[86] Article 3(2) EU MLA Convention.
[87] See, respectively, Articles 3 and 11 CoE MLA Convention.
[88] See, respectively, Articles 6 and 4 EU MLA Convention.
[89] Article 4(3) EU MLA Convention.

involved cooperate to ensure that the covert investigation is prepared and supervised, and that the security of the officers acting under covert or false identity is guaranteed.[90] A matter which was source of some concern during the negotiation of the EU MLA Convention was the need to clarify the liability of the officials working in joint investigation team or engaged in covert operations. Two provisions address the latter issue: with regards to criminal liability, Article 15 establishes that those officials 'shall be regarded as officials of the Member State of operation with respect of offences committed against them or by them'; as for civil liability, it rest primarily upon the State whose officials are concerned, but is regulated by the law of the State in whose territory those officials were operating.[91]

2.5.2.3.The European Arrest Warrant and the Principle of Mutual Recognition

The second instrument which should be emphasized in the EU context for its significance in the development of international cooperation among its Member States to tackle corruption is the European Arrest Warrant of 2002,[92] which entered into force on 1 January 2004 and replaced the existing texts in field of extradition within the EU[93] whose nature (classical intergovernmental instruments) did not correspond to 'the objective set for the Union to

[90] Article 14 EU MLA Convention.

[91] Article 16 EU MLA Convention.

[92] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. For a thoughtful account of the latter instrument and its developments see Blekxtoon, R. and W. van Ballegooij, *Handbook on the European Arrest Warrant* (T M C Asser Press, 2005); Jimeno-Bulnes, M., 'The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK' (2007) 15 Eur J Crim Crim L & Crim J 263; Plachta, M., 'European Arrest Warrant: Revolution in Extradition?' (2003) 11 Eur J Crime Crim L & Crim J 178.

[93] See, in particular, Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union, OJ C 78, 30.3.1995; Convention of 27 September 1996 relating to extradition between the Member States of the European Union, OJ C 313, 13.10.1996. While the former instrument instituted a system of simplified extradition between the Member State, where the consent of both the person and of the requested State were needed, the latter dealt with the following specific issues of extradition without reaching any radical solution: lowering the threshold, addressing double criminality, abolishing the political offences exception, matters related to fiscal offences and extradition of national. On the previous EU instruments in the realm of extradition see Nilsson, H. G., 'Developments in Mutual Legal Assistance and Extradition at the International Level' 65 Resource Material Series / United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders 15; and Mackarel, M. and S. Nash, 'Extradition and the European Union' (1997) 46 ICLQ 954.

become an area of freedom, security and justice', which meant abolishing 'extradition between Member States and replacing it by a system of surrender between judicial authorities.'[94] One should also recall the political origin of the EAW, which should be identified in the European Council of Tampere of 1999, where the principle of mutual recognition[95] became the cornerstone of cooperation and the mutual enforcement of arrest warrants was set as one of the objectives.[96]

The principle of mutual recognition is indeed one of the fundamental elements of the EAW, which constitutes 'a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.'[97] Since the latter principle constitutes an essential element of the EAW as well as of the current and future EU policy on criminal cooperation, a few words should be spent on the duty of mutual recognition of judicial decisions, which the Commission has once described in the following terms:

> 'Once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications - would automatically be accepted in all other Member States, and have the same or at least similar effects there.'[98]

Two kinds of (opposite) practical consequences derive from mutual recognition: on the one hand, Member State shall accept national decisions of other Member States which aim at prosecuting or punishing the defendant; on the other hand, mutual recognition may exculpate the defendant in one Member State when a judicial authority of another Member State has already established her innocence pursuant to the principle of *ne bis in idem*. Although the

[94] Recital 5, EAW Framework Decision.

[95] According to the Presidency Conclusions, Tampere European Council of 15 and 16 October 1999, para 33, 'enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.' On the principle of mutual recognition see para 2.5.2.3.

[96] See Presidency Conclusions, Tampere European Council of 15 and 16 October 1999, para 35.

[97] Article 1 EAW Framework decision.

[98] Communication from the Commission to the Council and the European Parliament, 'Mutual Recognition of Final Decisions in Criminal Matters', COM(2000) 495, 2.

latter distinction may give the perception of mutual recognition as a neutral principle, one could easily understand that it is mostly about 'enhancing the Member States' capacity to punish',[99] which becomes extra-territorial in nature.[100] The fact that, as a consequence, national standards are also recognized extra-territorially leads to the need of affording them legitimacy, and thus to enter a 'journey into the unknown'[101] where a Member State recognizes the standards produced by other national authorities on the sole basis of trust. Hence significant safeguards should surround the application of mutual recognition in criminal matters where the deprivation of liberty is at stake,[102] for instance by harmonizing them pursuant to Article 82(1) TFEU.

Another critical issue which should be taken into account is the use of a principle designed for the single market in the delicate realm of criminal law. As pointed out by Mitsilegas, while in the former field the effect of the principle is to facilitate the free movements of products and persons, in the latter context mutual recognition has to do with judicial decisions and makes enforcement rulings easier to circulate. It is true that one could see the coherency of applying the same logic to both the internal market and criminal law whereas criminals could take advantage of the lack of national borders; however, one should also stress the different rationale between facilitating the free movement of individuals and favouring the reach of decisions which ultimately seek to limit the latter freedom as well as other rights of EU citizens.[103]

Back to the EAW, one should primarily highlight the crucial features which makes it the forerunner and main reference for the following (and current) criminal law cooperation instruments within the EU. Firstly, the EAW differs from a request of extradition because the

[99] Chalmers, D., G. Davies and G. Monti, *European Union Law* (2nd edn 2010), 595.

[100] On the creation of extra-territoriality by the principle of mutual recognition see Nicolaidis, K. and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 Law and Contemporary Problems 263, 267.

[101] Chalmers, D., G. Davies and G. Monti, *European Union Law* (n. 99), 596.

[102] For some critical remarks on this issue see Alegre, S. and M. Leaf, 'Mutual Recognition and Judicial Co-operation: A Step Too Far Too Soon? Case Study, the European Arrest Warrant (2004) 10 ELJ 200' (2004) 10 ELJ 200; Peers, S., 'Mutual Recognition and Criminal Law in the European Union; Has the Council Got it Wrong?' (2004) 41 CMLRev 5; Mitsilegas, V., 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 CMLRev 1277.

[103] Mitsilegas, V., *EU Criminal Law* (2009), 118-9.

diplomatic channels are not involved and the whole procedure takes place between judicial authorities which are competent to issue an EAW according to its law.[104] However, a central authority may be appointed to assist its judicial authorities.[105] The second outstanding feature of the EAW is the speed of the procedure, which 'shall be dealt with and executed as a matter of urgency': more precisely, the surrender should take place within either 10 or 60 days from the arrest in the requested State, depending on his/her consent to be surrendered to the requesting State.[106] In any case the decision to surrender a person has to be taken after a hearing in front of a judicial authority.[107] Thirdly, and most notably, the EAW does not need the fulfilment of the double criminality requirement for a number of offences listed in Article 2(2) of the EAW Framework Decision. Notably, corruption belongs to the latter list and this means that for corruption-related offences a Member State must surrender a requested person even though the alleged acts do not constitute an offence within the executing State.[108] On top of this, the principle of double criminality can be discretionally waived by the judicial authority of the requested State in case the alleged facts are punished with a detention of at least 12 months or a detention order of at least four months has been already issued.[109] Finally, one should take note of the exceptions to the State's duty to surrender, that is the mandatory grounds to refuse the execution of an EAW. These are considered integrated, in particular, if:[110]

(i) The corresponding offence is covered by amnesty;

(ii) The requested person has been judged and sentenced in respect of the same acts provided;

(iii) The age of the person sought is below the one set by the State for criminal responsibility.

[104] Article 6 EAW Framework Decision.

[105] Article 7 EAW Framework Decision.

[106] Article 17 EAW Framework Decision. In case the deadlines cannot be respected the time limits may be extended by thirty days: in this case the executing judicial authority has to immediately inform the issuing judicial authority giving the reasons for the delay.

[107] Article 19 EAW.

[108] On the general features of the principle of double criminality see para 2.3.2.

[109] Article 2(4) EAW Framework Decision.

[110] Article 3 EAW Framework Decision.

Furthermore, pursuant to Article 4 EAW Framework Decision, there are also a number of optional grounds for non-execution of the EAW which are nevertheless limited in their scope and significance (e.g. when criminal prosecution or punishment is statute-barred according to the law of the requested State or when a final judgment has been passed by a third State in relation to the same facts). The EAW Framework Decision considers also the case of a person subject to an EAW for the purposes of prosecution who is citizen or resident of the requested State:[111] in this situation 'surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'[112] The 'specialty rule' which is common in extradition cases[113] is also contained in Article 27 EAW Framework Decision: however, it may be subject to waivers in case both the requesting and request State have notified Council the will to waive such rule, or when the requested person decides so, with the exception of some specific cases.[114]

After more than ten years from the release of the EAW Framework Decision one could agree with those who regard its implementation 'not uneventful'.[115] The latter was challenged (without success) in front of the European Court of Justice ('ECJ') for an alleged conflict with the Treaty provisions in relation to the abolition of double criminality,[116] and on other two issues[117] it was held unconstitutional or in conflict with national provisions in a number of countries where national law was amended as a consequence.[118] With specific regards to corruption, Mitsilegas has critically noticed that, despite the fact that dual criminality is

[111] On the extradition of nationals in general cf. para 2.3.4.

[112] Article 5(3) EAW Framework Decision.

[113] According to the principle of specialty a surrendered person may not be prosecuted for offences different from the ones which were contained in the extradition request. On the latter principle cf. para 2.3.6.

[114] Article 27(3) EAW Framework Decision.

[115] McClean, D., *International Co-operation in Civil and Criminal Matters* (n. 57), 164; see also Mitsilegas, V., *EU Criminal Law* (n. 103), 133-8 and the literature referred to therein.

[116] Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, [2007] ECR I-3633. For some remarks on this decision see O'Reilly, P., 'The Exit of the Elephant from the European Arrest Warrant Parlour ' (2007) 2 J Eur Crim Law 23; Sarmiento, D., 'The European Arrest Warrant and the Quest for Constitutional Coherence' (2008) 6 Int J of Const L 171; Bay Larsen, L., 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' in Cardonnel, P., A. Rosas and N. Wahl (eds), *Constitutionalising the EU Judicial System : Essays In Honour of Pernilla Lindh* (Oxford 2012)

[117] About the notion of trust in the prosecutorial and judicial process of the issuing State and the extradition of nationals.

[118] See the Implementation Report of the European Commission of 2007, COM/2007/407, para 2.1.2. and Deen-Racsmàny, Z., 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges' (2006) 14 Eur J Crime Crim L & Crim J 271.

abolished for corruption, the text of the Framework Decision only contains a general reference to the latter concept and thus generates doubts on whether its definition should be entirely left to the domestic law of Member States.[119] If this is the case the author raises doubts on the EAW's legality in relation to those specific conducts which may not be an offence in the executing State; furthermore, the author observes that the EAW for corruption may become in practice a political tool 'in view of the potential link between corruption allegations and the political process in Member States.'[120] Recently, a self-critic assessment came out from the Commission itself, which admitted the lack of standards similar to the ones overseen by the European Court of Human Rights ('ECtHR') across the EU, and stressed the need to strengthen the procedural rights of suspected or accused persons in criminal proceedings.[121]

The overall assessment of the EAW is influenced by the latter problematic issues, which certainly need to be dealt with by the EU[122] and which lead to question whether the latter instrument should had been introduced after the harmonization of solid procedural rights.[123] On the other hand, one cannot deny the innovating features which have been pointed out and

[119] The same reasoning applies for the recent 'European Investigation Order', which also refers generally to the offence of corruption as one of those for which dual criminality is abolished. Cf. para 2.5.2.4.

[120] Mitsilegas, V., 'The Aims and Limits of EU Anti-Corruption Law' in Horder, J. and P. Alldridge (eds), *Modern Bribery Law. Comparative Perspectives* (2013) 160, 174-75 where the author adds that similar considerations with regard to the abolition of dual criminality may be made in relation to the offence of money laundering , especially because corruption is not considered as a predicate offence for money laundering in the Third Money Laundering Directive.

[121] Report of the Commission of 2011, COM(2011) 175, para 4, where criticism are reported in relation to the following problems: no entitlement to legal representation in the issuing state during the surrender proceedings in the executing state; detention conditions in some Member States combined with sometimes lengthy pre-trial detention for surrendered persons and the non-uniform application of a proportionality check by issuing states, resulting in requests for surrender for relatively minor offences that, in the absence of a proportionality check in the executing state, must be executed.

[122] One instrument and one proposal address the issue of procedural rights in relation to the EAW Framework Decision: firstly the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 L 81 of 26.03.2009; secondly the Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 of 27.11.2013.

[123] McClean, D., *International Co-operation in Civil and Criminal Matters* (n. 57), 165. On the more general relationship between the principle of mutual recognition and the protection of fundamental rights see the reflections of a Judge of the EU Court of Justice in Bay Larsen, L., 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice' (n. 116).

which make the EAW 'an undoubted success at least in securing prompt surrender.'[124] This holds also true for the purpose of prosecuting corruption, which is one the crimes for which the principle of dual criminality does not apply.

2.5.2.4. Other EU Instruments Based on the Principle of Mutual Recognition

The application of the principle of mutual recognition among EU countries has not only led to the obligation, for States, to arrest and surrender a person on ground of a decision of another Member State. After having adopted the EAW, the EU elaborated several other instrument based on the latter principle in relation to:

(i) Freezing orders;[125]
(ii) Confiscation orders;[126]
(iii) Investigation orders;[127]
(iv) Financial penalties;[128]
(v) Enforcement orders;[129]
(vi) Supervision order in pre-trial procedures;[130]

[124] McClean, D., *International Co-operation in Civil and Criminal Matters* (n. 57), 164.
[125] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ 2003 L 196 of 1.11.2003.
[126] Council Framework Decision 2006/783/JHA of 6 October 2006 on the Application of the Principle of Mutual Recognition to Confiscation Orders, OJ 2006 L 328 of 23.11.2006, later amended by Council Framework Decision 2009/299/JHA of 26.2.2009.
[127] EIO Directive, which will replace the so-called European Evidence Warrant regulated by Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ 2008 L 350 of 29.12.2008, later amended by Council Framework Decision 2009/299/JHA of 26.2.2009.
[128] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005 L 76 of 21.3.2005, later amended by Council Framework Decision 2009/299/JHA of 26.2.2009.
[129] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ 2008 L 327 of 4.12.2008, later amended by Council Framework Decision 2009/299/JHA of 26.2.2009.

(vii) Protection orders.[131]

In light of the fact that the backbone of these instruments resembles the one of the EAW, including the fact that they can be used without the dual criminality requirement for cases of corruption,[132] the present paragraph aims to touch on some elements concerning their general scope and outstanding features, concentrating on the instrument which will have a more profound impact on the European criminal cooperation, i.e. the European Investigation Order.

The first issue which was addressed by the EU concerned the recovery of assets in criminal matters. Accordingly, a Framework Decision was adopted in 2003 to establish the automatic recognition and immediate execution of a freezing order issued within a criminal proceeding by a judicial authority of another Member State.[133] A punishment threshold in the requesting State is set since the underlying criminal offence must be punishable by a maximum term of imprisonment of at least three year. The 'twin' issue of confiscation was the subject-matter of a following EU instrument, whereas the principle of mutual recognition is applied to any 'final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property.'[134] In this context one should also take note of an initiative taken by the EU in light of the 'increasing need for effective international cooperation on asset recovery and mutual legal assistance':[135] a Directive of 2014 has in fact harmonized the Member States' regimes concerning the freezing and confiscation of assets, and one of the aims of the corresponding rules is exactly 'facilitating mutual trust and effective cross-border cooperation'.[136] In spite of the fact that issues of mutual legal assistance for the purpose of recovery assets will be dealt with in the

[130] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ 2009 L 294 of 11.11.2009.

[131] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, OJ 2011 L 338 of 21.11.2011.

[132] The list of thirty-two offences for which the dual criminality principle does not apply is the same one provided for in the EAW Framework Decision.

[133] Article 1 of the Framework Decision 2003/577/JHA.

[134] Article 2(c) of the Framework Decision 2006/783/JHA.

[135] Recital 2 of the EU Freezing and Confiscation Directive.

[136] Recital 5 of the EU Freezing and Confiscation Directive.

following Chapters,[137] at this stage one should already take note of its Article 4 introducing some aspects of non-conviction based forfeiture.

The recently-adopted European Investigation Order Directive is also going to affect the Framework Decision on freezing orders insofar as – once implemented throughout the Union – it will replace the latter 'as regards freezing of evidence.'[138] Moreover, the Directive will also repeal the so-called European Evidence Warrant ('EEW'), which was adopted in 2008 to apply the principle of mutual recognition in view of obtaining objects, documents and data for use in proceedings in criminal matters. In particular, the EIO will substitute the 'flawed measures' regulating the EEW, whose usefulness was limited because of the confusion it created in practitioners seeking mutual legal assistance and for the fact that it was only applicable to evidence which already existed.[139] Accordingly, the EIO Directive is aimed at setting up 'a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition' and at replacing 'all the existing instruments in this area, including Framework Decision 2008/978/JHA, covering as far as possible all types of evidence, containing time-limits for enforcement and limiting as far as possible the grounds for refusal.'[140] As for the content of the Directive one should stress a number of issues which can be already assessed: the scope of the EIO encompasses any investigative measure (with the exception of the setting up of a joint investigation team and the gathering of evidence)[141] to obtain evidence, including those elements which are already in the possession of the executing State.[142] Such measures may relate to all criminal proceedings 'brought by, or that may be brought before, a judicial authority in respect of a criminal offence under the national law of the issuing State', but it may also extend to a category of administrative proceedings when there is a criminal dimension. Significantly for the purpose of tackling corruption carried out by companies, the Directive includes 'offences or infringements for which a legal person may be held liable or punished in the issuing

[137] See Chapters III and IV of the present work.

[138] Article 34(2), EIO Directive.

[139] Atkinson, D. (ed), *EU Law in Criminal Practice* (2013), 62 where an analysis of the EEW Framework Decision is provided. See also the Commission's 'Green Paper on obtaining evidence from one Member State to another and securing its admissibility', COM(2009) 624, 4 which declares that the existing rules are 'burdensome and may cause confusion among practitioners'.

[140] Recital 6, EIO Directive, which refers to the Stockholm Programme adopted by the European Council of 10-11 December 2009.

[141] Article 3 EIO Directive.

[142] Article 1(1) EIO Directive.

State'.[143] Two are the conditions to issue and transmit an EIO, and they are the necessity and proportionality test as well as the fact that 'the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case'.[144] The latter two requirements, introduced to avoid the overuse of the EIO and to prevent forum-shopping among different procedural system,[145] have to be assessed by the issuing authority, which should also be consulted by the executing authority in case the latter considers the conditions not fulfilled.[146] Article 12 of the Directive sets the deadlines for the execution of the EIO, which 'shall be carried out with the same celerity and priority as for a similar domestic case': in particular, a State receiving an EIO must acknowledge its receipt within 30 days and carry out the investigation measure within the following 90 days. There is a list of grounds not to recognize or execute an EIO and which may be triggered when it touches on a number of issue such as, for instance: essential national security interests; immunity or privileges related to freedom of press and freedom of expression; double jeopardy; and the principle of territoriality (in case of coercive measures).[147] Furthermore, each Member State has to ensure that legal remedies are put in place and cognizable for the people affected by an EIO, and they should be equivalent to those available in similar domestic case. In order to challenge a substantive reason for issuing an EIO remedies a person should be able to do it in the issuing State, 'without prejudice to the guarantees of fundamental rights in the executing State.'[148] Finally, with regards to the controversial issue of costs, the final text of the Directive establishes that they should be borne by the executing State, 'unless otherwise provided'.[149]

While the instruments described so far (with the exception of the EAW) concern mutual legal assistance in the phase of acquisition of evidence, two Framework Decisions address issues of

[143] See Article 4 EIO Directive.
[144] Article 6 EIO Directive.
[145] Cf. Atkinson, D. (ed), *EU Law in Criminal Practice* (n. 139), 68.
[146] Article 6(3) EIO Directive.
[147] Article 11 EIO Directive.
[148] Article 14 EIO Directive.
[149] Article 21 EIO Directive. As assistant to the Italian Counsellor responsible for criminal law cooperation within the Representation of Italy to the European Union during the summer of 2011, the author recalls the tight discussions on the fairness of this Article (former Article Y) in the EU Council meetings, especially for the cases in which the costs of the requested investigation turned out to be 'exceptionally high'. For an overview of the challenges identified in the negotiating phase of the Directive from the U.K. perspective see Atkinson, D. (ed), *EU Law in Criminal Practice* (n. 139), 70 ff.

enforcement in relation to financial penalties[150] and the criminal judgments imposing custodial sentences or measures involving deprivation of liberty.[151] Since both of them are based on the principle of mutual recognition as enshrined in the EAW and they are less relevant for the purpose of prosecuting corrupt practices, in this context only a brief overview is provided. With regards to financial penalties, the corresponding instrument encompasses any final decision by a court or corresponding authority requiring the payment of a financial penalty by a natural or legal person, whereas the latter is intended to comprise a sum of money on conviction of an offence imposed, a compensation imposed in the same decision for the benefit of victims, a sum of money in respect of the costs of court or administrative proceedings leading to the decision or a sum of money to a public fund or a victim support organisation, imposed in the same decision.[152] As for the second instrument it is important to recall that its purpose is to establish the rules for a Member State to recognise a judgment and enforce the sentence 'with a view to facilitating the social rehabilitation of the sentenced person',[153] and that it imposes the principle of mutual recognition to any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings.[154]

2.5.2.5.The EU Convention against Corruption Involving Officials

The examination of those EU measure which deal with criminal law cooperation among its Member States is now to be complemented with the analysis of those provisions which address the same matter in the most prominent EU instrument which has been specifically

[150] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ 2005 L 76 of 21.3.2005, later amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[151] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ 2008 L 327 of 4.12.2008, later amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[152] Article 1, Framework Decision 2005/214/JHA.

[153] Article 3, Framework Decision 2008/909/JHA.

[154] Article 1, Framework Decision 2008/909/JHA.

adopted to tackle corruption, that is the EU Anti-corruption Convention.[155] After that, the current paragraph will also lay some emphasis on a different kind of arrangement reached by Member States to improve cooperation in the fight against corruption within the EU, that is the 'contact point network against corruption'.[156]

The EU Anti-Corruption Convention was agreed upon by the Council of the European Union in 1997, and provided for the obligation to ensure that conducts constituting an act of passive corruption or active corruption by officials is a punished as a criminal offence.[157] The latter instrument is built on the premise that 'the improvement of judicial cooperation in the fight against corruption to be a matter of common interest'.[158] However, the stress on criminal cooperation in the text of the treaty is limited, as it is its practical relevance. To begin with, one should look at Articles 5 and 8 of the Convention which touch on issues of extradition: the former to establish that Member States should punish corruption with effective, proportionate and dissuasive criminal penalties which, at least for the serious cases, should give rise to extradition; the latter to set the principle *aut dedere aut prosequi* which imposes a State to prosecute its nationals which have allegedly committed corruption in another Member State in case its laws do not allow the extradition on grounds of nationality. Furthermore, with regards to a more general level of cooperation, the EU Anti-corruption Convention contains the principle of *ne bis in idem*[159] and, taking a rather mild approach on the matter, calls States to 'cooperate effectively in the investigation, the prosecution and in carrying out the punishment imposed by means, for example, of mutual legal assistance, extradition, transfer of proceedings or enforcement of sentences passed in another Member State.' From today's perspective the tools of cooperation set up by the latter Convention can certainly be considered inadequate to prosecute corruption; however, one should bear in mind that at the time of the agreement, that is 1997, the level of mutual assistance was fairly limited and only

[155] The other EU instrument which deals with corruption so far is Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector which, however, does not provide for any measure on legal assistance.
[156] Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption, OJ L 301.
[157] See Articles 2 and 3, EU Anti-corruption Convention.
[158] Preamble, EU Anti-corruption Convention.
[159] Article 10, EU Anti-corruption Convention.

three years later the first comprehensive EU instrument of mutual legal assistance was adopted.[160]

2.5.2.5.1. The Contact-Point Network against Corruption

The second specific measure which the Member States have adopted to enhance the cooperation in fighting corruption in the European Union is the network of contact points against corruption set in 2008. The Preamble of the corresponding Decision[161] rightly stresses that 'the enhancement of international cooperation is generally recognised as a key issue in the fight against corruption', and that to improve the capacity to tackle all forms of corruption an effective cooperation is one of the crucial elements, together with the identification of opportunities, the sharing of good practices and the development of high professional standards. In this context the EU initiative – a network of contact points consisting of representatives of authorities and agencies of the Member States charged with preventing corruption – is in charge of two sets of tasks: exchanging information throughout the EU on the most effective measures and experience in the prevention and combating of corruption, and facilitating the establishment and the active maintenance of contacts between its members. In practical terms, the European contact-point network against corruption ('EACN') is based on the existing structures of the network bringing together the anti-corruption authorities from Council of Europe Member Countries ('EPAC') in Laxenburg, Austria. The two networks convene annually in a conference and have generated several working groups operating throughout the years. Furthermore, members of the EACN may also meet separately on specific EU issues and projects, particularly within the framework of the General Assembly.[162]

2.5.2.6.Assessing the EU Criminal Cooperation to Tackle Corruption

[160] On the EU MLA Convention see para 2.5.2.2.

[161] Decision 2008/852/JHA.

[162] More information on the networks and on their work can be found at http://www.epac.at/.

The entry into force of the Lisbon Treaty in the EU has represented an unprecedented evolution of the criminal law integration among its Member States. In this novel context, the acknowledgment of the principle of mutual recognition as the cornerstone of cooperation opens the way to the gradual establishment of an area where the prosecution of crimes becomes simpler, more effective and – in prospect – borderless. Two instruments seem in particular to have embraced the latter approach and may be of particular significance for prosecuting corruption across borders, that is the European Arrest Warrant and the European Investigation Order: firstly, because they deal comprehensively with issues of criminal cooperation with the aim to clarify the legislative scenario and become the only reference in their respective field, that is extradition and mutual legal assistance respectively; secondly because they provide for a swift and effective system of cooperation, with tight deadlines and limited grounds to refuse a request.

With specific reference to the prosecution of corruption, the important steps undertaken in the field of criminal cooperation need to be complemented by simultaneous efforts in the process of harmonization of the substantial provisions and sanctions pursuant to Article 83 TFEU, which lists corruption among those crimes 'with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. In this sense it is regrettable that the former Commissioner for Home Affairs Malmström recently declared that 'for the time being, the Commission does not [...] intend to propose new legislation on the definition of corruption or approximation of statutes of limitations of corruption offences or protections of whistleblowers'.[163] As Mitsilegas put it, the latter reluctance in consolidating and clarifying the existing outdated and fragmented EU anti-corruption law 'betrays a lack of political will to intervene via hard, binding law in the field', and wastes the precious chance to give the European Commission significant monitoring and enforcement powers in relation Member States' efforts against corruption.[164] On the other hand, one should welcome the adoption of a Directive in 2014 on the freezing and confiscation of proceeds of crime:[165] the latter represents in fact an important contribution to

[163] Cfr http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1382446871858 and http://www.transparencyinternational.eu/2013/10/malmstrom-no-new-eu-anti-corruption-legislation/.
[164] Mitsilegas, V., 'The Aims and Limits of EU Anti-Corruption Law' (n. 120), 194-5.
[165] EU Freezing and Confiscation Directive.

harmonize a set of potentially effective measures which, if properly implemented, would enable the confiscation and recover of profits generated from corruption and thus constitute a powerful deterrent to commit such crime.[166]

Notwithstanding the latter improvements, much has still to be achieved by the EU, which in order to carry out its action in the field of criminal cooperation shall also guarantee the highest protection to the fundamental rights of the surrender and of the accused persons. Such steps should not only be taken to comply with the basic principles of the rule of law which are shared by the Member States, but also to gain the degree of legitimacy which is needed to undertake further improvements in this field, such the establishment of the European Public Prosecutor Office.

To sum up, then, one can say that the developments in criminal law cooperation set by the TFEU may represent a fundamental basis to build up an effective system of assistance to prosecute corruption throughout the EU. In doing so the European legislator should lay particular emphasis on the respect of fundamental rights and on the harmonization of the crimes and sanctions which are related to corruption. Although many aspects of the criminal cooperation among Member States could be already taken as a reference at the international level, only the implementation of the latter elements could open the way to establish a model which could be eventually transplanted in other regional and global contexts.

2.5.2.7.International Criminal Cooperation within the Council of Europe

The level of integration of the EU's judicial space in the field of criminal law is not only due to the significant developments which have occurred in the last years, but also to the historical roots of criminal cooperation in the European continent which one could trace back in the

[166] In spite of the fact that issues of mutual legal assistance for the purpose of recovery assets will be dealt with in the Chapter III of the present work, one should take note – in particular – of its Article 5 which touches upon some of aspects of non-conviction based forfeiture.

work of the Council of Europe.[167] In this context the two essential instruments agreed upon in the 1950s within the latter organization will be considered, the first one on extradition, the other one on mutual legal assistance. Furthermore, in light of the fact that the CoE also displayed significant efforts in the fight against corruption through the adoption of two conventions, emphasis will be laid on those provisions which touch on issues of criminal cooperation.

2.5.2.7.1. The European Convention on Extradition

Although the names of the European Convention on Extradition ('CoE Extradition Convention')[168] as well of the European Convention on Mutual Assistance in Criminal Matters ('CoE MLA Convention')[169] may induce to consider them EU instruments, both of them were agreed upon within the Council of Europe, long before any other multilateral agreement in the field of criminal cooperation, leads to consider them 'pioneering works', whose influence has been profound on several other conventions.[170]

Extradition was the first element of mutual assistance which was addressed by the Council of Europe as early as 1951 when its Consultative Assembly adopted Recommendation (51) 16, 'on the preparatory measures to be taken to achieve the conclusion of a European Convention

[167] The Council of Europe is a pan-European international organization working in the field of human rights, democracy and rule of law. It includes 47 member states, 28 of which are members of the European Union. In some cases the CoE's instruments are ratified by States which are not part of the organization such as Israel, Korea, and South Africa. All of Council of Europe member states have signed up to the most well-know of its instruments, that it the European Convention on Human Rights. The European Court of Human Rights oversees the implementation of the Convention in the member states. Individuals can bring complaints of human rights violations to the Strasbourg Court once all possibilities of appeal have been exhausted in the member state concerned. The European Union is preparing to sign the European Convention on Human Rights, creating a common European legal space for over 820 million citizens. More information on the CoE's aims and work could be found on http://hub.coe.int/.

[168] European Convention on Extradition, CETS No 24 (signed on 13 December 1957; entered into force on 18 April 1960).

[169] European Convention on Mutual Assistance in Criminal Matters, CETS No 30 (singed on 20 April 1959; entered into force on 12 June 1962).

[170] McClean, D., *International Co-operation in Civil and Criminal Matters* (n. 57), 170.

on Extradition.' The CoE Extradition Convention was adopted six years later, and it is integrated by four Additional Protocols, the last of which was adopted in 2012.[171]

To begin with, the latter convention sets a general obligation to surrender people who have ongoing proceedings for a criminal offence or who are wanted by the authorities to serve a sentence or a detention order.[172] The following Articles lay down the conditions of the obligation to extradite and which can be summarized as follows:

(i) The extraditable offences are generally speaking those which are punished in both the requested and requesting State for a maximum period of at least one year (i.e. double criminality requirement). If the sentence has occurred or a detention order has been released by the requesting Party, the threshold lowers to least four months;[173]

(ii) Extradition cannot be granted in relation to offences which are considered political by the requested State,[174] even though Article 1 of the First Additional Protocol has limited the latter exception, which cannot be valid for the most serious crimes such as the ones against humanity;

(iii) Similarly, extradition should be denied for military law offences which are not punished under criminal law;[175]

(iv) The possibility to extradite for fiscal offences was allowed only in cases States had agreed so[176] until the Second Additional Protocol replaced the latter rule and introduced extradition 'if the offence, under the law of the requested Party, corresponds to an offence of the same

[171] Additional Protocol to the European Convention on Extradition, CETS No 86, (signed on 15 October 1975; entered into force 20 August 1979); Second additional Protocol to the European Convention on Extradition, CETS No 98, (signed on 17 March 1978; entered into force 5 June 1983); Third additional Protocol to the European Convention on Extradition, CETS No 209, (signed on 10 November 2010; entered into force 1 May 2012); Fourth additional Protocol to the European Convention on Extradition, CETS No 212, (signed on 20 September 2012; entered into force 1 June 2014).

[172] Article 1, CoE Extradition Convention.

[173] Article 2, CoE Extradition Convention.

[174] Article 3, CoE Extradition Convention.

[175] Article 4, CoE Extradition Convention.

[176] Article 5, CoE Extradition Convention.

nature.' In any case extradition cannot be refused only on the ground that the requested State does not impose the same kind of tax or duty or does not contain a tax, duty, custom or exchange regulation of the same kind as the law of the requesting State;[177]

(v) Extradition of nationals is not compulsory for States parties; however, at the request of the requesting State, the requested State shall submit the case to its competent authorities in order to consider the action to be taken.[178]

(vi) If the requesting State lays down the death penalty, the person sought for the corresponding offences may not be extradite by the requested State unless assurance is given that such punishment will not be carried out.[179] Similarly, in case a person is requested to enforce a decision rendered against him in absentia, the requested State may refuse to extradite if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence. Also in this case the State should proceed with extradition if due assurance are provided by the requesting State.

(vii) From a criminal procedure perspective, extradition may not be granted if in the requested State there is pending proceedings on the same offences;[180] on the other hand, it should not be granted if a final judgment has been pronounced (principle of *ne bis in idem*)[181] and, according to the latest Additional Protocol, if the 'prosecution or punishment of the person claimed has become statute-barred according to the law of the requesting Party.'[182] In relation to the latter recent provision one should stress its potential incidence to extradite people accused of corruption in those countries such as Italy where the statute

[177] Article 2, Second Additional Protocol CoE Extradition Convention
[178] Article 6, CoE Extradition Convention.
[179] Article 11, CoE Extradition Convention.
[180] Article 8, CoE Extradition Convention.
[181] Article 9, CoE Extradition Convention.
[182] Article 1, Fourth Additional Protocol CoE Extradition Convention, replacing Article 10 of the CoE Extradition Convention.

> of limitations constitutes a critical issue within the criminal legal system.[183]

Once the latter conditions and requirements are met, the CoE Extradition Convention also establishes some rules on the procedure to be followed. Leaving aside the so-called 'simplified procedure', which is regulated in the Third Additional Protocol and which should be carried out if the surrender consents and the requested Party agrees,[184] a few key-principles are laid down in the main Convention. Firstly, the request for extradition, which first had to be carried out through diplomatic channels, is now to be communicated in a faster manner, that is between the Ministries of Justice of the two involved States.[185] Secondly, the rule of specialty applies and thus the extradited person cannot be punished or prosecuted for offences different to the ones for which the extradition was accorded.[186] Thirdly, the requesting Party may extradite a person to a third State in presence of the requested State's consent[187] or if the extradited person has not left the territory of the requesting Party within a certain period despite having had an opportunity to do so.[188]

In spite of the fact that among the EU countries the CoE Extradition Convention was replaced by the European Arrest Warrant,[189] the latter instruments still represent a fundamental tool for the extradition of people accused or sentenced for corruption offence across and beyond the European continent. Furthermore, the fact that its content has been recently updated and integrated through the third and the fourth Additional Protocols[190] signifies the State Parties' will to consider the CoE has an important venue to enhance cooperation in the field of extradition and to face together the evolving challenges related to it.

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[183] On the issue of statute of limitations in Italy see OECD, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention' , available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Italyphase3reportEN.pdf, paras 99-107.

[184] Article 1, Third Protocol CoE Extradition Convention.

[185] Article 2, Fourth Additional Protocol CoE Extradition Convention, replacing Article 12 of the CoE Extradition Convention.

[186] Article 3, Fourth Additional Protocol CoE Extradition Convention, replacing Article 14 of the CoE Extradition Convention.

[187] According to Article 4, Fourth Additional Protocol CoE Extradition Convention, adding Article 15(2) to the CoE Extradition Convention. the requested State shall take its decision as soon as possible and no later than 90 days after receipt of the request for consent.

[188] Article 15(1) to the CoE Extradition Convention.

[189] See para 2.5.2.3.

[190] They entered into force, respectively, on 1 May 2010 and on 1 June 2014.

2.5.2.7.2. The European Convention on Mutual Assistance in Criminal Matters

During the negotiation of the CoE MLA Convention the objective was to create an instrument which could adapt to the different legal systems involved, but at the same time which would provide the general obligation to afford criminal assistance. The resulting text of 'one of the Council of Europe's most successful agreements to date'[191] has been coherent insofar as it constitutes a simple and flexible instrument which can be applied without the need for States to implement detailed legislation. Furthermore its content has been updated by two additional protocols in 1978[192] and 2001:[193] while the former addresses fiscal issues, the enforcement of penalties and information on criminal records, the latter has borrowed some of the most innovative elements of the EU MLA Convention[194] such as, for example, video and telephone conferences, temporary transfer of detained persons, and joint investigative teams. Taking into consideration the historical significance of the CoE MLA Convention and its adoption beyond the European boundaries,[195] it follows an overview of its most crucial features.

The two fundamental provisions of the CoE MLA Convention are contained in its first Chapter and deal with its scope and limits: on the one hand the 'foundational' Article 1 establishes that parties to the Convention have to afford 'the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.' According to the Explanatory Report to the CoE MLA Convention, the latter Article has to be intended and interpreted in a broad sense, comprising 'every kind of mutual legal assistance' and not only the forms mentioned in the text of the Convention. Furthermore, Article 1 of the Second Additional Protocol has clarified that mutual legal assistance should

[191] McClean, D., *International Co-operation in Civil and Criminal Matters* (n. 57), 171.
[192] Additional Protocol, CETS No 99, (signed on 17 March 1978; entered into force 12 April 1982).
[193] Second additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, CETS No 182, (signed on 8 November 2001; entered into force 1 February 2004).
[194] See para 2.5.2.2.
[195] Other than the Member States of the Council of Europe, as of January 2015 the CoE MLA Convention has been ratified by Chile, Israel and Korea.

also be provided in case of acts committed by legal persons. On the other hand, Article 2 sets the cases in which a State may discretionally refuse to provide assistance, that is in presence of a political or fiscal offence or in case there may be a prejudice to an essential interest of the State, including its economic interests. Although the latter provision does not automatically preclude cooperation in those areas, one should stress that the categorization of a crime is operated from the subjective perspective of the requested State's authorities.

A U.K. case involving bribery and corruption clarified the latter point:[196] confronted with a request concerning a case of illicit payments to politicians, the Divisional Court upheld the decision of the Home Secretary which did not admit the exception ex Article 2(2) of the CoE MLA Convention because the offence was not deemed of a political nature. In deciding so, the Court made clear the subjectivity of the assessment underlying the exception contained therein:

> 'The idea that lies behind the phrase "offence of a political character" is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country [...]. It does indicate, I think, that the requesting state is after him for reasons other than the enforcement of the criminal law in its ordinary, what I may call its common or international, aspect.'

In rebutting the political nature of the offence the Court reasoned on the fact that the Italian judicial authorities' will to denounce and punish corruption in public and political life could transform the criminal nature of the offence and it thus amounted to the enforcement of 'the criminal law in its ordinary [...] aspect'.

[196] R v Secretary of State for the Home Department, ex p Fininvest SpA, [1997] 1 WLR 743 (DC).

The Second Protocol has added some additional provisions for the cases of refusal or postponed assistance, and for the modes to transmit the requests. Firstly, in the event the State intends not to afford cooperation, the requested State should consult with the requesting party and consider whether to grant assistance partially or subject to some conditions.[197] Furthermore, it is specified that postponing an action – which should always be communicated to the requesting State – may be possible in case of 'prejudice to the investigations, prosecutions or related proceedings by its authorities.'[198] As for the way letters rogatory and applications for transfer of persons in custody should be carried out, Article 11 – as amended by the Second Protocol – identifies the channel of communication in the Ministries of Justice of the involved States. The latter means is to be considered swifter and easier than the traditional diplomatic channel; on the other hand governments still exercise some degree of supervision on the requests. However, pursuant to the new text agreed in 2001, direct communication is now possible since requests 'may be forwarded directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party and returned through the same channels.'[199] In this context, the CoE MLA Convention does not preclude the prevalence of any bilateral agreements or arrangements which allows for the direct transmission of requests between two parties.[200] As for the expenses, one could notice a solution similar to the one adopted at the EU level in Article 21 of the EIO Directive: in both instruments expenses borne but the requested country are considered not refundable; however, the CoE MLA Convention provides for two exceptions for the expenses 'incurred by the attendance of experts in the territory of the requested Party or the transfer of a person in custody'.[201] Some final remarks concern the possibility, for competent authorities, to forward spontaneous information obtained within one of their own investigations to the authorities of another party 'when they consider that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings, or might lead to a request by that Party under the Convention or its Protocols.' In these cases, the State

[197] Article 7(2), Second Additional Protocol CoE MLA Convention.
[198] Article 7(1) and (3), Second Additional Protocol CoE MLA Convention.
[199] Article 4, Second Additional Protocol CoE MLA Convention.
[200] Article 4, Second Additional Protocol CoE MLA Convention.
[201] Article 20, CoE MLA Convention .

providing information may set some binding conditions through domestic law regarding the use to be made by the receiving State.[202]

To conclude the assessment of the CoE MLA Convention and to have an idea of its significance, one should finally look at the relationship which the other European Convention in this field, that is the EU MLA Convention. While in the 20th century the former instrument has been fundamental in introducing an advanced system of mutual legal assistance in the European continent, with the new century the latter, which builds on the solid foundations of the CoE's work, has developed and modernized the existing provisions taking into account the advances in technology, and has itself represented a point of reference for the Second Additional Protocol of the CoE MLA Convention. Interestingly then, there seems to be a fruitful interaction between the EU and the CoE level which in the future may lead to extend the idea of the European Investigation Order beyond the border of the EU to include the Member States of the Council of Europe as well as the non-European countries which cooperate with it.

2.5.2.7.3. The Criminal Law Convention against Corruption

Next to the instruments in the field of extradition and mutual assistance which I just described, the Council of Europe has also adopted some specific rules for the criminal investigation and prosecution of corruption offences through the Criminal Law Convention on Corruption ('CoE Anti-Corruption Convention').[203] After having outlined the essential features of the Convention, the analysis will centre on the specific measures which deal with international cooperation.

[202] Article 11, Second Additional Protocol CoE MLA Convention.

[203] Criminal Law Convention on Corruption, CETS No 173 (signed on 27 January 1999; entered into force on 1 July 2002), later integrated by the Additional Protocol to the Criminal Law Convention on Corruption, CETS No 191 (signed on 15 May 2003; entered into force 1 February 2005).

The CoE Anti-Corruption Convention was signed in 1999 and so far has been ratified by 44 Member States of the Council of Europe and by a non-member which is Belarus.[204] The scope of the Convention, which aimed at complementing the existing instruments against corruption, is rather wide-ranging and covers the following offences:[205]

(i) Active and passive bribery of domestic and foreign public officials;
(ii) Active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies;
(iii) Active and passive bribery in the private sector;
(iv) Active and passive bribery of international civil servants;
(v) Active and passive bribery of domestic, foreign and international judges and officials of international courts;
(vi) Active and passive trading in influence;
(vii) Money-laundering of proceeds from corruption offences;
(viii) Accounting offences (invoices, accounting documents, etc.) connected with corruption offences;
(ix) Active and passive bribery of domestic and foreign arbitrators and jurors.[206]

Pursuant to Article 19, sanctions and measures for the latter offences should be 'effective, proportionate and dissuasive', including deprivation of liberty leading to extradition. Besides natural persons, legal entities should also be considered liable for offences committed for their benefit by any natural person having a 'leading position' therein.[207]

[204] As of January 2015, Germany, Lichtenstein and San Marino are the CoE Member States which have not ratified the Convention yet. The updated information on its ratification status can be found at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=16/04/2014&CL=ENG.
[205] See Articles 2-14, CoE Anti-Corruption Convention.
[206] These offences were introduced with the Additional Protocol to the CoE Corruption Convention signed in 2003.
[207] Article 18, CoE Anti-Corruption Convention.

On top of that, among the general features of the CoE Anti-Corruption Convention, one should recall the provisions concerning aiding and abetting,[208] immunity,[209] criteria for determining the jurisdiction of States,[210] the setting up of specialised anti-corruption bodies,[211] co-operation with and between national authorities,[212] protection of persons collaborating with investigating or prosecuting authorities,[213] and the gathering of evidence and confiscation of proceeds.[214]

A whole part of the Convention – its Chapter IV – deals with international cooperation, whose importance in view of an effective fight against corruption was expressed from the very outset of the preparatory work[215] at the 19th Conference of the European Ministers of Justice held in Valletta in 1994. Accordingly, the Ministers recommended to the Committee of Ministers the setting up of a Multidisciplinary Group on Corruption, under the joint responsibility of the Committees on Legal Co-operation and on Crime Problems. Throughout the negotiations, the importance of enhancing cooperation in the prosecution of corruption offences as well as in the criminalization of such offences was often reiterated by the political organs of the Council of Europe. Not surprisingly, then, in 1997, at its 101st Session, the Committee of Ministers of the Council of Europe adopted the 20 Guiding Principles for the Fight against Corruption,[216] whereas Principle 20 was exactly 'to develop to the widest extent possible international co-operation in all areas of the fight against corruption.' According to the Convention's Explanatory Report, the procedural and political obstacles which delay or prevent the prosecution of the offenders constituted fundamental difficulties in the coordinated prosecution of transnational corruption cases, and thus direct and swift communication between the relevant national authorities were needed.[217]

[208] Article 15, CoE Anti-Corruption Convention.
[209] Article 16, CoE Anti-Corruption Convention.
[210] Article 17, CoE Anti-Corruption Convention.
[211] Article 20, CoE Anti-Corruption Convention.
[212] Article 21, CoE Anti-Corruption Convention.
[213] Article 22, CoE Corruption Convention.
[214] Article 23, Anti-CoE Corruption Convention.
[215] A description of the preparatory work of the Convention is provided for in its Explanatory Report which available at http://conventions.coe.int/Treaty/en/Reports/Html/173.htm.
[216] Council of Europe Committee of Ministers, 'Twenty Guiding Principles for the Fight Against Corruption', Resolution (97)24 of 6.11.1997.
[217] Explanatory Report of the CoE Anti-Corruption Convention, para 21.

Coming to the single provisions on international cooperation, Article 25 of the CoE Anti-Corruption Convention deals with the relationship with the other instruments in this field. One should recall, in this context, that the latter issue was subject of intense discussion within the negotiations between those who wanted to regulate it in a detailed section and the ones who would have preferred to just simply make a cross-reference to existing multilateral or bilateral treaties.[218] As the resulting text demonstrates, the former approach was adopted and thus it was agreed a set of specific rules on international cooperation for the Convention. Although the latter apply, in principle, when no other international instruments or agreement is in force between two Parties, it should also be stressed that Article 25(3) provides for a derogation to the subsidiary nature of Chapter IV by establishing that, regardless of the existence of relevant instruments, these provisions apply if their application is 'more favourable' for cooperation, that means if they enable a form of cooperation that it would not have been possible to afford otherwise.

The following Article 26 sets the obligation for State parties to cooperate 'to the widest extent possible' and it specifies that requests should be processed 'promptly', since significant delays may obstacle or jeopardize the good course of an investigation for corruption. Possible exceptions to the latter obligation are accepted if they are linked to a prejudice to the sovereignty of the State, national security, *ordre public* and other 'fundamental interests of the country', whereas the latter concept refers to fundamental principles of the legal system, human rights considerations and, more generally, to cases where there is reasonable grounds to believe that the criminal proceedings instituted in the requesting State have been distorted

[218] According to Explanatory Report of the CoE Anti-Corruption Convention, para 119: 'Some arguments militated in favour of this latter option, such as the risk of confusing practitioners with the multiplication of co-operation rules in conventions dealing with specific offences or a possible reduction in the willingness to accede to general conventions. The usefulness of inserting a Chapter that could serve as the legal basis for co-operating in the area of corruption was justified by the particular difficulties encountered to obtain the co-operation required for the prosecution of corruption offences – a problem widely recognised and eloquently stated, inter alia, by the "Appel de Geneve". Also by the fact that this Convention is an open Convention and some of the Contracting Parties to it would not be – in some cases could not be - Parties to Council of Europe treaties on international co-operation in criminal matters or would not be parties to bilateral treaties in this field with many of the other Contracting Parties. In the absence of treaty provisions, some Parties non-members of the Council of Europe would experience difficulties in co-operating with the other Parties. Thus, non-member countries, which could potentially become Parties to this Convention, underlined that co-operation would be facilitated if the present Convention was self-contained and included provisions on international co-operation that could serve as a legal basis for affording the co-operation demanded by other Contracting Parties.'

or misused for purposes other than combating corruption.[219] Similarly to Article 9 of the OECD Anti-Corruption Convention, bank secrecy may not be ground to refuse criminal assistance even though, if the requested State's domestic law so provides, the authorisation of a criminal judicial authority may be needed.[220]

The corruption offences falling within the scope of the CoE Anti-Corruption Convention are to be deemed as extraditable offences, and this means that there must be the possibility to grant the extradition but not the obligation to grant it on every occasion.[221] In particular, there is an obligation to include corruption offences among those which can give rise to extradition both in existing or in future extradition treaties. As for the exceptions to the general rules, there is the possibility to refuse a request as far as it is made pursuant to the conditions provided for by the law of the requested State or to the grounds for refusal provided for by the applicable extradition treaties. Similarly to the CoE Extradition Convention, [222] Article 27(5) contains the principle of *aut dedere aut iudicare* (extradite or punish), which obliges the State refusing to extradite a person to institute criminal proceedings and to inform the requesting State of the result of such proceedings.

The remaining Articles of the CoE Anti-Corruption Convention in international cooperation matters address a few important issues of communication. Considering the transnational character of many corruption offences and that investigating authorities may come across information showing that a corruption-related offence might have been committed in another State Party, Article 28 allows a State Party to forward such 'spontaneous information' to another State party without the need to a prior request.[223] More generally, each State has to designate one or more[224] central authority[225] responsible for sending and answering requests.[226] The aim of the latter authorities, which are a common feature of modern instruments dealing with international cooperation in criminal matters, is to ensure an effective and swift handling of requests. However, in few circumstances direct

[219] Cf. Explanatory Report of the CoE Anti-Corruption Convention, para 125.
[220] Article 26(3) CoE Anti-Corruption Convention.
[221] Article 27 CoE Anti-Corruption Convention.
[222] Article 6(2) CoE Extradition Convention.
[223] Article 28 CoE Anti-Corruption Convention.
[224] This is the case for federal or confederal States where States, Cantons or entities forming the Federation are often better suited to deal with co-operation requests emanating from other Parties.
[225] They may be already existing or instituted *ad-hoc* for the purpose of the Convention.
[226] Article 29 CoE Anti-Corruption Convention.

communication may be established between judges and prosecutors of the requesting and of the requested State:[227] firstly, in case of urgency, but a copy of the request must be also sent through central authorities; secondly, when the authority of the requested State is able to afford assistance without making use of coercive action. In case an authority is requested international assistance which is not competent to address, the latter has the obligation to transfer the request to the competent authority of the requested State and inform the authorities of the requesting State of the transfer made. More generally, an obligation to inform the requested State (promptly, if there are circumstances that make it impossible to carry out the request made or are likely to delay it significantly) is provided for by Article 31 in all cases actions are undertaken pursuant to a request of international cooperation.

Considering these characteristics, a few positive considerations should be spent on the international cooperation's dimension of the CoE Anti-Corruption Convention. Firstly, it represents the most significant effort to lay down tailor-made provisions on criminal assistance for corruption offence at the European level: if one compares the CoE's measures with the ones contained in the EU Anti-Corruption Convention, the former could be certainly regarded more detailed and incisive of the latter. Secondly, the measures of the CoE's Convention on criminal cooperation do not exclude the application of other multilateral or bilateral treaties since they only come into play when their application affords a more 'favourable' assistance, which means only if they enable a more simple and swift level of assistance. Thirdly, in relation to the exceptions to the obligation to cooperate, the CoE Anti-Corruption Convention significantly excludes the one based on the bank secrecy and thus follows the other important instruments in this field such as the OECD Anti-Bribery Convention.

A final remark should be dedicated to the impossibility to assess the actual implementation of the international cooperation's part of the Convention by State Parties. So far the Group of States against Corruption ('GRECO'), which is the mechanism established in 1999 by the CoE to monitor States Parties' compliance with the organisation's anti-corruption standards, has in fact launched four round of evaluations which have not specifically addressed issues of

[227] Article 30 CoE Anti-Corruption Convention.

international assistance.[228] Although the themes of the Convention assessed so far are extremely important for an effective fight against corruption,[229] it is regrettable that in almost twenty years of activity the fundamental issue of international cooperation has not been identified as a priority by the GRECO, which remains an intergovernmental and thus political authority.

2.5.3. International Instruments

The analysis of the multilateral initiatives which favour criminal cooperation for the purpose of tackling corruption moves to those instruments which have an international nature and not just a regional reach like the ones considered so far. In this context I focus on the relevant work of the OECD and the U.N., which in the last two decades have put the most efforts in both the criminal cooperation and anti-corruption dimensions.

2.5.3.1.The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD was the international organization where the first significant anti-corruption instrument was adopted, that is the OECD Convention on Combating Bribery of Foreign

[228] More information about the history and the activity of the GRECO could be found at http://www.coe.int/t/dghl/monitoring/greco/default_en.asp.

[229] Such themes include: independence, specialisation and means available to national bodies engaged in the prevention and fight against corruption; extent and scope of immunities; identification, seizure and confiscation of corruption proceeds; public administration and corruption (auditing systems; conflicts of interest); efficiency and transparency with regard to corruption; prevention of legal persons being used as shields for corruption; tax and financial legislation to counter corruption; links between corruption, organised crime and money laundering; the incriminations provided for in the Criminal Law Convention on Corruption, its Additional Protocol and Guiding Principle 2; transparency of party funding as understood by reference to the Committee of Ministers' Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Rec(2003)4); ethical principles and rules of conduct conflict of interest; prohibition or restriction of certain activities; declaration of assets, income, liabilities and interests; enforcement of the rules regarding conflicts of interest awareness.

Public Officials in International Business Transactions ('OECD Anti-Bribery Convention').[230] In general terms it deals with the active side of corruption, which means the offence committed by the person who promises or gives the bribe to a foreign public official. Without entering into the detailed examined of the Convention which is not the purpose of the present paragraph,[231] one should take note of the fact that through a relatively short text[232] the OECD has attempted and effectively managed to 'assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system'.[233]

As for international cooperation, the OECD Anti-Bribery Convention dedicates two Articles on the issue in light of the fact that 'achieving progress in this field requires not only efforts on a national level but also multilateral co-operation'.[234] With regards to mutual legal assistance Article 9 establishes that State Parties should provide 'prompt and effective legal assistance' pursuant to its laws and the treaties in force, and that communication should be established without delay in case the requested State needs additional documents and information. In line with most anti-corruption instruments, the Convention mandates that each Party designates one or more authorities responsible to elaborate and receive requests in relation to matters of jurisdiction, mutual legal assistance and extradition.[235] Back to the mutual legal assistance's Article, the latter should be read as facilitating the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. For this purpose States should take measures to be able to transfer temporarily such a person in custody to a requesting State and to credit time to the transferred

[230] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted on 21 November 1997, entered into force 15 February 1999).

[231] On the OECD Anti-Bribery Convention see, among many, the analytical and comprehensive work of Pieth, M., L. A. Low and P. Cullen (eds), *The OECD Convention on Bribery : a Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997* (2007).

[232] The OECD Anti-Bribery Convention consists of only 17 Articles addressing the following issues: the offence of bribery of foreign public officials, responsibility of legal persons, sanctions, jurisdiction, enforcement, statute of limitations, money laundering, accounting, mutual legal assistance, extradition, responsible authorities, monitoring and follow-up.

[233] OECD, 'Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Negotiating Conference', 21 November 1997, para 2.

[234] Preamble, OECD Anti-Bribery Convention.

[235] Article 11, OECD Anti-Bribery Convention.

person's sentence in the requested State.[236] The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings. Finally, Article 9 touches on two further matters: firstly double criminality, which should be considered fulfilled if the underlying offence falls within the scope of the OECD Anti-Bribery Convention;[237] secondly, bank secrecy, which is excluded to be a ground to render mutual legal assistance.[238] Issues of extradition are addressed in Article 10 of the Convention, which should be considered as a legal basis to surrender people accused or sentenced for bribery of foreign officials if a State Party requires an extradition treaty with the requesting State but the latter does not exist. Besides that, the Convention confirms the principle *aut dedere aut iudicare* which is also provided for in other anti-corruption instruments as it is the case of Article 27(5) of the CoE Anti-Corruption Convention.

Next to the binding provisions of the OECD Anti-Bribery Convention one should also recall the recommendation adopted in 2009[239] which, although not constituting a proper international treaty, are also subject the monitoring mechanism of the Convention carried out by the OECD Working Group on Bribery in International Business Transactions ('WG on Bribery').[240] Paragraph XIII, in particular, identifies the following priorities:

(i) Cooperating with national and international authorities, also through means such as spontaneous information, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials;

[236] See Commentaries to the OECD Convention, para 31.

[237] Article 9(2), OECD Anti-Bribery Convention. In this context para 32 of the Commentaries to the OECD Anti-Bribery Convention specifies that 'Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.'

[238] Article 9(3), OECD Anti-Bribery Convention.

[239] Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 26 November 2009.

[240] Made up of representatives from the States Parties to the Convention, the Working Group meets four times per year in Paris and publishes all of its country monitoring reports online. For more information on the composition and activity of the WG on Bribery see http://www.oecd.org/daf/anti-bribery/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm.

(ii) Investigating on allegations of bribery of foreign public officials referred to them by international governmental organisations, such as the international and regional development banks;

(iii) Taking advantage of existing agreements and arrangements for mutual international legal assistance and, in case, entering into new agreements or arrangements;

(iv) Affording an adequate domestic legal basis for this cooperation in accordance with Articles 9 and 10 of the OECD Anti-Bribery Convention;

(v) Facilitating mutual legal assistance with non-Member countries for the offences covered by the Convention with regards, in particular, to evidentiary thresholds.

2.5.3.1.1. Implementing the OECD Anti-Bribery Convention's International Cooperation Provisions

Despite of the fact that the OECD Anti-Bribery Convention contains only a few provisions on international cooperation, the importance of analysing the latter instrument lays in the fact that the WG on Bribery carries out a rigorous peer-review monitoring activity which leads to public monitoring reports and constitutes a precious source of information in relation to the implementation of the Convention, the 2009 Recommendations and related instruments. Similarly to the GRECO for the CoE, the monitoring process takes places in phases; on the other hand, contrary to the GRECO,[241] each phase does not address specific themes but, rather, a different level of implementation of the Convention. As a consequence, three phases characterize the work of the WG on Bribery: Phase 1 evaluates the adequacy of a country's legislation to implement the Convention; Phase 2 assesses whether a country is applying this legislation effectively; Phase 3 focuses on enforcement of the relevant instruments and on the outstanding recommendations from Phase 2.

[241] Cf. para 2.5.2.7.3.

Although the last Phase of evaluations is expected to terminate in 2015,[242] a provisional yet solid assessment on the State Parties' implementation of the provisions concerning international cooperation can be already carried out. By scrutinizing the degree of States' compliance with the OECD instruments to fight corruption and examining the developments and trends in the area of international assistance, the present section has a twofold purpose: firstly, to highlight the progresses made, and to identify the innovations and good practices in cooperating to tackle foreign bribery; secondly, and most prominently, to point out the areas where the most significant challenges recur throughout jurisdictions, and to report the outstanding difficulties and shortcomings observed in individual State Parties. In order to illustrate the latter elements the following part of the work is divided in two parts: the first one will first address the main general challenges to an effective mutual legal assistance emerging from the monitoring work of the OECD, as well as some ideas and best practices which could be used to deal with them; the second one will focus on the shortcomings pointed out in the single evaluations of the States Parties, which give a more realistic perspective on the most crucial issues hampering international cooperation for the purpose of tackling foreign bribery.

2.5.3.1.2. Challenges and Solutions for an Effective Cooperation in Foreign Bribery Cases

2.5.3.1.2.1. Delays in Cooperation

Although the WG on Bribery has taken into account the progressive efforts made by State Parties in responding to mutual legal assistance and extradition requests from other Parties to the OECD Anti-Bribery Convention, a first set of concerns emerges from the evaluation rounds carried out so far and that is the timeframe of judicial cooperation. According to the OECD, an effective scheme for extradition and timely responses to MLA requests are two decisive elements to investigate and prosecute foreign bribery offences: the reality is in fact

[242] The last evaluation concerning Israel is expected to be released in June 2015. The tentative schedule for Phase 3 evaluation is available at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/RevisedPhase3Schedule_ENdoc.pdf.

that in many of the foreign bribery cases in which there has been a conviction, MLA was obtained from another State Party.

The sources of delay may vary from country to country. In a recent study on mutual legal assistance the OECD[243] has found that in some cases it is caused by issues linked to a State's particular MLA system such as lengthy appeals processes, complicated procedures to obtain bank records, and the use of traditional, formalistic methods of transmitting requests like diplomatic channels. In some other situations delays have unspecified reasons, depriving the requesting State to understand the shortcomings of its request and the ways to improve in the future. As for the possibility to appeal the decisions related to an MLA request, although it constitutes a fundamental element to ensure a fair trial, one should stress that it usually takes place without the participation of the requesting authority and thus without the chance for the domestic court to understand to the fullest extent the importance and the implications of a swift decision on the MLA issue. An additional element of difficulty to the delay itself is represented by the lack of information about the status of the pending request, which may also hinder the investigation or prosecution connected to the request. Beside the latter consequence, lengthy responses may cause further detrimental effects such as: triggering problems related to the statute of limitations, inducing requesting authorities to charge less serious offences because of the lack of fundamental elements of proof, and, in extreme cases, discouraging law enforcement authorities to open an investigation because of the 'MLA frustration with the country'.[244]

In order to avoid the latter outcomes, the OECD has identified some practices which could be of help to ensure timely responses to requests of assistance.[245] First of all, establishing clear strategies at the domestic level to submit and receive requests, which include the identification of responsible authorities and clear channels of communication. In this context additional measures and policies such as the setting of a maximum period to respond to

[243] OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20). This study was written because many Parties of the OECD Anti-Bribery Convention pointed out the difficulties in obtaining mutual legal assistance both between the Parties and in relation to non Parties. Since the latter issue was identified as a major obstacle to the effective implementation of the Convention, the report lays particular emphasis on the challenges that arise in providing and obtaining mutual legal assistance in foreign bribery cases and ways of addressing those challenges. Mutual legal assistance is in fact consider 'crucial for the successful investigation, prosecution and sanction of this crime.'

[244] OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 26.

[245] OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 28 ff.

requests, excluding that MLA proceedings examine the merits of the foreign case, and including the principle of *favor rogatoriae* which compels Parties to the Convention to afford each other the greatest effort in cooperation are suggested. Secondly, to provide precise and accessible information regarding the procedural requirements to obtain international criminal cooperation by means of examples or through the Internet. The latter, in particular, has been identified by the OECD as a practice that all State Parties should follow because setting up a website constitutes a low-cost and simple way to help requesting States and avoid delays.[246] Thirdly, since international assistance is based on trust and reciprocity, a way to reduce delays is to create and take advantage of strong relationships and networks between law enforcement authorities of State parties and between officials of their central authorities.[247] An enhanced level of communication and more solid contacts could in fact induce several beneficial effects on the whole requesting process, that is both prior to the request on the procedural and substantive requirement and after its submission to inquire into the status and the problems of the request. Furthermore, in view of elaborating a clear and acceptable request which meets the formal requirements and which could reduce the timing of the response, the OECD calls State parties to enable and facilitate the exchange of preliminary information[248] and draft MLA requests. The degree of cooperation could be also intensified by allowing law enforcement officials of the requesting States to work simultaneously with the central

[246] OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 29, which cites the example of the Hong Kong International Law Division's website which includes a description of the responsibilities of advice that may be offered by its Mutual Legal Assistance Unit (www.doj.gov.hk/eng/about/ild.htm), and contains contact information for the MLA Unit (www.doj.gov.hk/eng/about/ild-chart.htm) which can provide, on request, a 'Booklet on Obtaining Assistance from Hong Kong in Criminal Cases'. Furthermore, the Internet website contains an English version text of all bilateral MLA treaties in effect at www.legislation.gov.hk/table3ti.htm.

[247] Examples of this kind of networks are the meetings of law enforcement officials that take place twice per year in connection with the OECD's WG on Bribery meetings but also the numerous international, regional, and other networks dealing with issues of international criminal cooperation such as ARINSA, CARIN, the Commonwealth Network of Contact Persons, the Community of Portuguese Speaking countries Network, the Council of Europe's Committee of Experts on the Operation of European Conventions on Cooperation in Criminal Matters ('PC-OC Committee'), the European Judicial Network, the IberRed network, the OAS Criminal Network, the Assets Recovery Network ('RRAG') of GAFISUD and the Stolen Asset Recovery ('StAR') Initiative of the World Bank and the UNODC.

[248] The OECD specifies that the preliminary requests should only be used in relation to non-coercive measures and to information such as (i) public records, land registry documents and company registrations; (ii) voluntary witness statements; (iii) information about previous convictions; (iv) contact information for a witness or suspect; (v) information from an ongoing investigation in the recipient country, or whether such an investigation has even been opened in the recipient country; or (vi) questions of a legal nature, such as those regarding issues of dual criminality. Cf. OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 30.

authority and the law enforcement officials of the recipient State in order to fulfil the formal requirements with the former and at the same time alert the latter as to the work which has to be carried out. In case two countries have a high number of pending requests or when an underlying case is particularly complex States may avoid unnecessary delays by conducting periodical bilateral meeting and ensuring the consistency of personnel in both law enforcement and central authorities for the whole duration of the investigation and prosecution. According to an official taking part to an OECD expert typology meeting the latter element of cooperation has greatly contributed to the quick and successful exchange of assistance between his country and a non-Party to the OECD Anti-Bribery Convention during simultaneous foreign bribery investigations. Finally, a practical strategy which avoids to receive an inadequate assistance of limited use for the purpose of the investigation in the requesting State is to formulate a 'all-inclusive' first request covering all of the crimes that may arise from the facts, to the extent that these are known at the time of sending the request and there is a sufficient suspicion as well as facts providing reason to believe that transnational bribery has been committed.

2.5.3.1.2.2.Insufficient or Incomplete Requests and Responses

A second issue which challenges international cooperation in foreign bribery cases is represented by the very content of the requests and responses, which too often do not match because of differences between legal systems and language, problems of communication, or an underestimation of the volume of material which a request might give rise to.

In order to address the latter challenge and thus to avoid duplications of efforts (i.e. time and money) by both requesting and requested States, a few criteria should be taken into account. Firstly, requests should be as drafted as clear as possible in both its form and substance: to ensure the latter features, they should be specific on what is needed and, when possible, exclude what it may be not relevant from the perspective of the requesting State. Secondly, direct communication should be established between law enforcement authorities, which may turn to be a highly effective method also in presence of language barriers. Furthermore, in view of ensuring that the response matches the requesting country's need, the OECD has

pointed out two fruitful practices which were reported by some countries and which are the involvement of officials from the requesting State during the execution of the request (also via videoconference), and the initiation of a national investigation in the recipient country on the same fact contained in the request received.[249] The latter procedure may be particularly helpful with respect to mutual legal assistance requests connected with bank accounts: not only it allows the authorities in the requested State to ask for supporting documentation in a faster and more precise manner, but it also facilitate the imposition of seizure measures on funds kept in bank accounts and which may be eventually transferred or maintained available for the requesting State. A final means to avoid the problems connected with insufficient or incomplete requests and responses is the 'split' of the MLA execution by the recipient country, which could send some initial information to the requesting country and allow the latter to adjust the later steps of the request according to evidence needed without the need for formal additional requests but, rather, through informal channels (e.g. by email).

2.5.3.1.2.3.Lack of Resources

In light of the fact that foreign bribery investigations often require complex financial records at multiple locations and in multiple languages, and that the requested State generally bears the ordinary costs needed to execute a request,[250] some countries experience difficulties to afford assistance because of lack of adequate resources. While in some country, especially in the developing world, the lack of capacity concerns the technical expertise, the institutional framework, or the human and financial resources to effectively respond to requests for assistance, in other countries problems may arise from in case a request necessitates resources not readily available because of the need to produce a large number of documents or to freeze and seize several goods. Regardless of the typology of capacity needed, the lack of adequate resources is likely to contribute to the first two challenges examined so far, that is delays and responses not matching with requests.

[249] Cf. OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 37 ff.
[250] See e.g. Article 21 of the EIO Directive and Article 46(8) of the UNCAC.

According to the OECD,[251] the scarcity of resources is to be coped with communication, which can lead to their efficient use. In case of substantial expenses are expected to fulfil a request, early consultations among involved States may have beneficial effects on the sharing of costs but also on the relationship as a whole.[252] Discussions should also concern the scope of the request, which could be limited to the essential elements in case the recipient country predicts problems with the available resources. Should the scarcity concern human resources to carry out searches and seizures, the requesting State might consider to agree with the requested State (if permitted by domestic laws) to provide personnel to assist with the process. Furthermore, precious resources could be saved by using international networks' meetings to discuss pending requests (assuming that this is permitted by the law), and also by taking advantage of their communication systems which can facilitate the transmission of sensitive information and documents between authorities[253] or assist the coordination between multiple countries involved in an investigation.[254]

2.5.3.1.2.4.The Dual Criminality Requirement

The principle of dual criminality which has been introduced at the beginning of the present Chapter[255] demands that the offence underlying the request for cooperation is crime in both the requesting and requested State. Although the latter should not be an issue between Parties to the OECD Anti-Bribery Convention[256] or the UNCAC[257], the latter requirement is still

[251] OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 41 ff.

[252] See Article 46(28) of the UNCAC which states that 'if expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne'.

[253] See e.g. Ibero-American Legal Assistance Network ('IberRed'), which has been created to facilitate judicial cooperation among Ibero-American countries in relation to mutual legal and extradition assistance in criminal matters, the abduction of minors, the transfer of sentenced persons..

[254] See e.g. the OAS Criminal Network.

[255] See para 2.3.2.

[256] See Article 9(2) of the OECD Anti-Bribery Convention which requires that requires that 'where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention'.

[257] According to Article 43(2) of the UNCAC dual criminality 'shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the

demanded when cooperating with countries which are not parties to any of the mentioned instruments or which do not recognize criminal liability for legal persons. Furthermore, both within the OECD and U.N. Conventions some areas of uncertainty still persist. A way to overcome the obstacle represented by the principle of dual criminality is to take advantage of the flexible approach embraced by some countries: in particular, if the recipient country lays emphasis on the conduct rather than on the offence, the requesting country may have an opportunity to seek for assistance even if the requested country does not have a foreign bribery offences. In this sense some countries have in fact reported the successful practice of meeting the dual requirement principle by arguing that the underlying conduct amounted to domestic bribery. On the other hand, if the problem lies in the lack of criminalization of legal persons, the OECD contends that the focus should be laid by the requesting State on the conduct of the individuals which underlies the foreign bribery offence.[258] In all cases, establishing a dialogue among central authorities and law enforcement officials is a potentially effective means to clarify the facts at stake and reach a mutually beneficial solution.

2.5.3.1.2.5.‘Tipping Off’ a Target

A final challenge which should be taken into consideration when submitting a request for cooperation in (foreign) bribery cases is to ‘tip off’ the target of the investigation following a leak of information about the pending request, but also because some countries are compelled by law to disclose some information concerning the request. The latter is the case in those countries which, for instance, require banks to inform their clients when information is requested about bank accounts. In other cases the duty to disclose arises before the documents concerning the MLA request are sent abroad.

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offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties’.

[258] OECD, *Typology on Mutual Legal Assistance in Foreign Bribery Cases* (n. 20), 43.

A fundamental tool to avoid the leaking of information is to use informal exchanges when permitted by the legal framework and without circumventing the MLA process itself.[259] On the other hand, this kind of communication should be used carefully because it is inherently informal and thus less subject to formal controls. Furthermore, preliminary inquiries should be avoided if the media report the foreign bribery allegation, and in these cases it is more important to submit promptly a formal request before potential evidence is destroyed or altered. More generally, however, developing a relationship of trust with relevant authorities in the requested country could be identified as the most effective countermeasure to prevent the tip off of a suspect since it allows to rely on the rules and confidentiality built upon during the course of past experiences in cooperation. Finally, it is suggested that authorities in the requesting States consider the direct transmittal of judicial assistance requests, which could reduce the number of individuals aware of the ongoing investigation and thus diminish the risk of notifying sensitive information before the terms established by the domestic law.

2.5.3.1.3. Issues Emerging from the Evaluations of the WG on Bribery

After having identified the general issues which constitute the greatest challenges for international cooperation in foreign bribery cases, it is now interesting to examine some specific shortcomings which have been pointed out in the single evaluation reports of the WG on Bribery.[260] The first problematic aspect which emerges from the assessments carried out so far concerns the refusal to afford cooperation because of the risks to touch on a fundamental interest of the State. This is the case of France, which has established that requests for assistance may be refused if they imply a threat to an 'essential interest', although a document of the French Minister of Justice of 2004 (the *circulaire-mémento*) has clarified that such interests may be of an economic or social nature and that they should be raised 'very

[259] Failing to follow the required procedures may lead to the inadmissibility of the evidence obtained directly, thus jeopardising the outcome of the whole MLA process and case.

[260] Emphasis is laid, in particular on the evaluations carried out during Phase 2 and 3 of the OECD monitoring process. The detailed assessment reports of every country are available at http://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm.

rarely'.[261] As a consequence, in the Phase 3 evaluation of France, the WG on Bribery recommended 'that decisions to grant mutual legal assistance in foreign bribery cases are not influenced by considerations of national economic interest under the guise of protecting "the fundamental interests of the nation" '. Similarly to France, the law regulating international MLA in Criminal Matters in Luxembourg states that '[the] Prosecutor General may refuse MLA if the request for assistance is liable to prejudice the sovereignty, security, public policy or other essential interests of the Grand Duchy of Luxembourg [...]';[262] however no request was found to be refused on grounds of the discretionary prosecution principle or proportionality.[263]

Almost all the examined Parties have provisions to afford prompt legal assistance to the other parties to the OECD Anti-Bribery Convention. From the Italian perspective, however, a significant difference has been noticed between requests to EU countries and to non-EU-countries: while in the former case requests are usually executed with little delay, in the latter situations Italian authorities have noticed longer timeframes for response and different procedures among countries. Similarly, Belgium representatives of the Central Office for Corruption Repression ('OCRC') remarked the length of time which certain major financial centres take to execute IRC's. This could be the case of Switzerland, which generally cooperate in criminal matters but in some cases after a lengthy and ineffective procedure which Swiss magistrates have imputed to the appeal process. As a consequence, the WG on Bribery has recommended that Switzerland undertakes further efforts to simplify the latter process in relation to MLA requests. As for the United Kingdom, the Crime (International Co-operation) Act of 2003 has fostered the direct transmission of requests and return of evidence, and established agencies to receive requests pertaining to their activity. The extradition procedures were also streamlined in 2003 through the Extradition Act.

Several countries have been recommended to improve the ability to provide and obtain mutual legal assistance in foreign bribery investigations involving criminal and non-criminal proceedings against legal persons (e.g. Argentina, Australia, Brazil, Chile, Italy, Slovak

[261] The essential interest exception has never been used as a basis for not executing international rogatory commissions ('IRCs') relating to a business-related or financial offence.

[262] Article 3 of the Act of 8 August 2000.

[263] Since the Phase 2 examinations have not systematically looked at whether Parties may refuse to provide assistance because an essential interest may be threatened, it is possible that not only France and Luxemburg provide such grounds for refusal.

Republic and Sweden). In its Phase 3 evaluation, in particular, Australia, was called to 'ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons.' In the French legal system, on the other hand, it was noted that that investigations conducted by the judicial police under the supervision and direction of the Public Prosecutor's Office before the opening of a formal criminal proceeding should not be influenced by the identity of the natural or legal persons involved.[264]

The situation of Finland is particular insofar as it does not consider the OECD Anti-Bribery Convention as a legal basis to provide extradition for the offence of bribing a foreign public official. Consequently, where there is no applicable treaty with another Party requesting extradition the lengthier non-treaty practice applies. A similar problem has been noticed in Mexico, which during the Phase 2 examination was recommended to 'reconsider the current practice providing mutual legal assistance based on reciprocity in the absence of bilateral agreements, in order to ensure that such practice is consistent with article 9 of the Convention.'

Another outstanding issue which was pointed out throughout the evaluations of the WG on Bribery is obtaining effective mutual legal assistance from non-Parties to the Convention, which 'may be the single most important reason for terminating an investigation and this represent a major obstacle for an effective implementation' and thus 'one of the biggest obstacles to the effective implementation of the Convention',[265] especially if one consider that most foreign bribery cases take place in those countries. The latter difficulty was raised by the United States authorities who declared that the major difficulty in investigating and prosecuting foreign bribery cases was exactly the lack of cooperation needed to obtain the evidence which had to be found outside the United States. To overcome the latter obstacles the Department of Justice has sometimes reached so-called 'Lockheed Agreements' or mutual legal assistance agreements ('MLAAs'), which are agreed upon only for a specific case. Similar problems have been raised by Mexican and French authorities, whereas the former

[264] WG on Bribery, Phase 3 Report on France.

[265] WG on Bribery, 'Mid-Term Study of Phase 2 Reports Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and The 1997 Recommendation on Combating Bribery in International Business Transactions', 22 May 2006, 108.

mentioned the lack of evidence from abroad as the main reason for the lack of prosecution of offences with links to Mexico, and the latter identified the uncooperative non-State Parties where the bribery of foreign public officials is not an offence as one of the major obstacles facing French magistrates in effectively prosecuting the offence of bribing foreign public officials. Germany and Norway also reported difficulties in obtaining evidence from abroad, including from State Parties.

Since delays in obtaining evidence from Parties as well as from non-Parties threatens the successful investigation and prosecution of transnational bribery, the WG on Bribery has often recommended Parties to reduce the time taken to process international applications for MLA requests by increasing the human and financial resources available. Another suggested means to reduce delays according to the Working Group is to reduce the formalism which still characterizes the process of transmitting requests and returning documents. A good practice in this context takes place in France, which no longer requires that investigating magistrates have their applications for MLA transmitted, via the public prosecutor, by the *procureur général* of the appeal court whose jurisdiction they come under, and that the latter returns the enforcing documents.[266] The situation of Belgium emerges for its complexity because, pursuant to the Mutual Legal Assistance Act, requests for MLA from foreign authorities (except for requests under treaty for the direct exchange of documents between judicial authorities) must be sent by concerned magistrates through diplomatic channels, via the Royal Prosecutor, the General Prosecutor, the Belgian Ministry of Justice and the Ministry of Justice of the requested state and that state's judicial authorities. As a consequence, the requested information, which often touches matters of financial complexity, may easily take several months. Although some of the latter formalities have disappeared in relation to EU Member States, the problem persists when requests are made by non-EU Member States.[267]

A problem which hampers the assessment of the State Parties' legal system with regards to international cooperation and which is often highlighted in the OECD's reports is the lack of

[266] During the Phase 2 examination the WG on Bribery noticed that the four requests for extradition received by France since 1 July 2001, arising from instances of bribery of foreign public officials, were all being processed at the time of the examination.

[267] According to a study by the Council of the European Union, indeed, Belgium receives approximately 1200 requests for MLA each year and between 1998 and 1999 twenty-five of them concerned bribery cases.

accurate and comprehensive statistical information on mutual legal assistance and extradition requests. The United Kingdom Central Authority ('UKCA'), for instance, deals with approximately 5000 MLA requests but the corresponding database to carry out any significant analysis on such data is not publicly available. Switzerland, on the other hand, disclosed the number of requests for assistance (1218 in 2003) but not the ones transmitted directly to the cantonal enforcement authorities under treaty arrangements.[268] From 2000 to 2005 Greece handled more than 15000 MLA request and 380 extradition requests, but none concerned the offence covered by the OECD Anti-Bribery Convention. Australia indicated that only three MLA requests were refused between 1999 and 2004 while Mexico, in its oral follow-up report given in 2005, indicated that out of 21 requests for MLA involving 12 countries, none has been denied. As a consequence the WG on Bribery has often recommended, as it did in the Phase 3 report of Czech Republic, to 'maintain statistics on the number of formal mutual legal assistance requests sent and received, including on the offence underlying the requests, and the outcome and time required for responding.' [269] Similarly, France was called to collect statistics on incoming and out-coming requests for mutual legal assistance executed directly between prosecutors.[270]

As for bank secrecy, generally speaking it is not considered a significant obstacle for mutual legal assistance: in this sense one could recall Greece, which grants access to bank data subject to bank confidentiality under the direction of a prosecutor, and Belgium where no request may be refused on grounds of bank secrecy. On the other hand, in some countries the timing to provide the corresponding information may constitute an obstacle. This is the case of Bulgaria, where the Phase 2 evaluation has taken note of court delays in rendering decisions concerning the lifting of bank secrecy, and Mexico, where the source of problems identified by the WG on Bribery in Phase 2 was the impossibility to request access to banking information through MLA directly to the bank. Sweden addressed the latter issue by providing an exemption from bank secrecy 'in matters concerning legal assistance relating to examinations in conjunction with preliminary investigations in criminal matters or search of premises and seizure'. Finally in Belgium the OECD reported that to carry out the search and seizure of financial records in response to MLA requests one must obtain an enforcement

[268] A similar kind of problem was noticed in Austria.

[269] Similar recommendations were formulated in Phase 3 in respect to Greece, Hungary, Luxemburg, Switzerland, United Kingdom.

[270] WG on Bribery, Phase 3 Report on France.

order from the advisory chamber of the court of first instance of the place where the search and seizure is to be carried out, and this means that the requesting State is compelled to produce a separate letter rogatory for each district involved.

A good practice which has been identified in some countries and recommended to others[271] is to provide information to foreign authorities through alternative channels (e.g. spontaneous transmissions under bilateral or multilateral assistance treaties or through law enforcement contacts abroad) in case a State has reason to believe that a foreign company has violated that country's foreign bribery laws. One example of such practice has been tracked in United States, whose Department of Justice has provided documentary evidence to Korea where, in turn, three foreign bribery cases were adjudicated.

2.5.3.2.The Global Initiatives of the United Nations

While the OECD Anti-Bribery Convention represented a landmark point in the fight against corruption for it was one the first instruments to deal with corruption at the international level,[272] it also had some inherent limits insofar as it was agreed upon an international economic organization (the OECD) and it had a rather narrow scope (the criminalization of foreign bribery). The international organization which attempted to overcome and expand the latter two limits is the United Nations, which in the first years of the 21st century elaborated two important instruments dealing with corruption-related matters such as the UNTOC in

[271] This was the case for Estonia and Sweden.

[272] The very first international anti-corruption instrument was the Inter-American Convention against Corruption (signed on 29 March 1996; entered into force on 6 March 1997) adopted by the Organization of American States ('OAS') in 1996 to improve America's domestic mechanisms to prevent, detect and eradicate corruption. It also deals with international cooperation in its Article 2. In particular, it contains measures which criminalize acts of national and transnational corruption, mutual assistance, extraterritorial jurisdiction, extradition, seizure and confiscation of property, standards of conduct, and removal of bank secrecy. Most notably, Article 8 provides for the obligation to criminalize supply-side bribery of foreign government officials while Article 9 introduces the offence of 'inexplicable illicit enrichment', which is defined as 'a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.' Next to Inter-American Convention against Corruption, the other international anti-corruption instrument which is not addressed in the present work is the African Union Convention on Preventing and Combating Corruption (signed on 11 July 2003; entered into force on 5 August 2006) which criminalizes active and passive bribery, but also offences such as 'influence peddling', illicit enrichment and the concealment of proceed.

2000 and, most significantly, the UNCAC in 2003. The examination of the relevant legal framework dealing with international cooperation for the purpose of tackling corruption will thus continue by taking into consideration the latter instruments. As for the previous paragraphs, the aim is not only to provide an overview of the most significant provision in the field, but also to identify the progress made toward a more effective cooperation among States, and to highlight the challenges and the shortcomings of the two Conventions, with particular emphasis on the only global instrument adopted so far against corruption that is the UNCAC.

2.5.3.2.1. The Conditions to Seek Cooperation Pursuant to the Convention against Transnational Organized Crime[273]

The relevance of the UNTOC (also known as 'Palermo Convention' after the name of the city where the diplomatic conference held negotiations) for the aims of the present work lays in the fact the its Article 8 obliges State Parties to criminalize active and passive bribery[274] and recommends to establish as criminal offence the conduct of bribery involving a foreign public

[273] For an exhaustive analysis of the UNTOC and the international regulation of Transnational Organized Crime one can refer to the following readings: Albrecht, H. J. and C. Fijnaut (eds), *The Containment of Transnational Organized Crime: Comments on the UN Convention of December 2000* (2002); Bassiouni, M. C. and E. Vetere (eds), *Organized Crime: A Compilation of UN Documents 1975-1998* (1998); Beare, M. (ed), *Critical Reflections on Transnational Organized Crime* (2003); Clark, R. S., 'The United Nations Convention Against Transnational Organized Crime' (2004) 50 Wayne Law Review 161; Levi, M., 'Perspective on Organized Crime: An Overview' (1998) 37 Howard J of Crim J 335; Madsen, F., *Transnational Organized Crime* (2009); Madsen, F., *Transnational Organized Crime* (2009) McClean, D., *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007); Obokata, T., *Transnational Organized Crime and International Law* (2010); Paoli, L. and C. Fijnaut (eds), *Organized Crime in Europe: Concepts, Patterns and Control Policies in the European Union and Beyond* (2006); Scholoenhardt, A., *Palermo in the Pacific: Organized Crime Offences in the Asia and Pacific Region* (2010).

[274] Pursuant to Article 8(1) 'Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

official or international civil servant.[275] Furthermore, it aims at constituting an 'effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption',[276] and provides for several obligations in the realm of mutual legal assistance[277] and extradition.[278]

Since the provisions on international cooperation have been developed and improved in 2003 by the UNCAC, which is analyzed in the following paragraph, in the present context it important to stress the conditions triggering the duty to afford international cooperation. The latter aspect does not only highlight the limits of the UNTOC as a reference for mutual assistance in corruption cases, but, from a theoretical perspective, it also gives evidence of 'how transnational organized crime is conceptualized'.[279] In this sense one should in fact notice that Article 3(1), after affirming that the Convention shall apply to the 'prevention, investigation and prosecution' of two sets of crimes including corruption as defined in Article 8, it also specifies that its scope is limited to the offences which are 'transnational in nature' and which involve an organized crime group. On the one hand the transnational nature of a crime is defined very broadly in Article 3(2), and is met if the offence is committed, prepared, planned, directed, controlled or has effects in more than one State, or in case it involves a criminal group which operates in more States. On the other hand, the definition of 'organized criminal group' of Article 2(a) was one of the most controversial issues during the negotiation of the UNTOC, and thus the resulting text did not really define the latter concept but, rather, the involvement of organized criminal groups in serious crimes.[280]

[275] According to Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 83 the choice to only recommend the criminalization of transnational bribery was due to the fact that at the time the latter offence was still lawful in many countries.

[276] Preamble of the UNTOC. One should also note that the purpose of the UNTOC as stated in Article 1 is 'to promote cooperation to prevent and combat transnational organized crime more effectively.'

[277] Article 18 UNTOC.

[278] Article 16 UNTOC.

[279] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 83.

[280] According to such Article, 'Organized criminal group' shall mean 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.' On the development of the UNTOC and on the failure to define organized crime in the UNTOC see Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 79.

As a consequence of the latter framework, a cumbersome and somehow incoherent picture emerges from the text of the Convention: while the 'transnational' and 'organized crime-related' conditions are not to be included in the criminalization of the offences,[281] their fulfilment is required if State Parties intend to use the UNTOC as a basis for international cooperation in relation to the offence established therein. Hence, for the purpose of the present paragraph, it is important to realize that only in case an offence of bribery ex Article 8 of the Convention features a transnational character and a link with an international organization the State Party is allowed to seek cooperation pursuant to the UNTOC's scheme. Overall, then, the Convention suffers two significant shortcomings as a reference to legal practitioners aiming at cooperating to tackle corruption: firstly, it provides for definitions which illustrate the 'inability to agree on what organized crime is and what may be the best way of suppressing it', and which led to a 'patchy' implementation of the Convention itself;[282] secondly, it added further conditions for law enforcement authorities to make use of its procedural regime (including mutual legal assistance and extradition) for a significant category of crimes (money laundering, corruption, obstruction of justice) which in real-world cases may not fulfil the requirements established in Article 3(1) of the UNTOC but could still be ascribable to the transnational business and activities of organized crime groups.

2.5.3.2.2. International Cooperation through the U.N. Convention against Corruption

Although the UNTOC represented a remarkable effort 'to promote cooperation to prevent and combat transnational organized crime more effectively'[283] and to criminalize bribery, the most significant step to expand the application of anti-corruption provisions at the global level was

[281] The issue is stressed in Article 34(2) of the Convention which states that 'The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party *independently* of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.' (emphasis added) According to Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 84, imposing those elements would have had narrowed the domestic definitions of the those crimes unnecessarily.

[282] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 86.

[283] Article 1 of the UNTOC.

the 2003 Convention against Corruption. The latter Convention follows the model used by previous instruments and lists various forms of corruption[284] without introducing any standard definition of the latter concept; however, the UNCAC constitutes a profound innovation insofar as it encompasses a broader and higher number of corrupt activities than any other previous instrument.

In this sense the attention should firstly concentrate on its Articles 15 and 16, which contain the principle offences against national and international bribery respectively. In addition to the latter cases one should also stress the other criminalizing provisions contained in the UNCAC which attempt to consider corruption beyond the limited contours of bribery and address issues such as 'embezzlement, misappropriation or other diversion of property by a public official',[285] 'trading in influence',[286] 'abuse of functions',[287] and 'illicit enrichment'.[288] A further enlargement of the scope of the UNCAC is represented by the criminalization of private corruption contained in Articles 21 and 22,[289] which, equally to the previous three offences, are only discretionary in nature since they were not universally recognized as wrongful at the time of the negotiation. In addition to that, the UNCAC is complemented by a number of 'ancillary' issues to corruption such as money laundering,[290] concealment,[291] obstruction of justice,[292] liability of legal persons,[293] as well as participation and attempt.[294] As for the punishment of the latter offences, the Convention only obliges States to sanction them taking into account the 'gravity of the offences',[295] and with specific regard to legal

[284] Each form of corruption usually differs according to the party committing the offence and their purpose.
[285] Article 17 of the UNCAC.
[286] Article 18 of the UNCAC.
[287] Article 19 of the UNCAC.
[288] Article 20 of the UNCAC.
[289] They deal, respectively, with 'bribery in the private sector' and 'embezzlement of property in the private sector'.
[290] Article 23 of the UNCAC.
[291] Article 24 of the UNCAC.
[292] Article 25 of the UNCAC.
[293] Article 26 of the UNCAC.
[294] Article 27 of the UNCAC.
[295] Article 30(1) of the UNCAC.

persons, to subject them to 'effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.'[296]

Leaving aside the further aspects of the UNCAC[297] and concentrating on the very aim of the present work, which is to identify the international tools to cooperate in the investigation and prosecution of corruption, the analysis turns to the specific part of the Convention dedicated to international cooperation, that is its whole Chapter IV. The importance of the latter issue emerges in the early parts of the UNCAC, where the enhancement of international cooperation is identified as one of the purpose of the Convention,[298] and corruption is recognized as 'no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential'.[299] After introducing the legal framework provided by the UNCAC in this field, my intent is to reflect on the challenges which most threaten its effectiveness and the corresponding solutions which may be put in place to address them.

2.5.3.2.2.1.Chapter IV of the UNCAC as a 'Mini-Treaty' on International Cooperation

[296] Article 26(4) of the UNCAC. In this context one should take as a reference the U.S. FCPA which may inflict a company up to $2 million per violation, while culpable individuals may be imprisoned for up to five years or fined $250 000 per violation.

[297] For an analysis of the most debated themes of the UNCAC see, among many, Passas, N. and D. Vlassis (eds), *The United Nations Convention against Corruption as a way of life. Selected papers and contributions from the International Conference on 'The United Nations Convention against Corruption as a way of life' (Courmayeur, 15-17 December 2006)* (Milan 2007); Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (Conference of the International Bar Association: The Awakening of Giant of Anticorruption Enforcement London 4-5 May 2006); Schroth, P. W., 'The United Nations Convention against Doing Anything Serious about Corruption,' (2005) 12 Journal of Legal Studies in Business 2; Webb, P., 'The United Nations Convention Against Corruption. Global Achievement or Missed Opportunity?' (2005) 8 J Int Economic Law 191; Perry, A., 'The UN Convention against Corruption. Governmental Perspectives in Developing Countries' (2003) 5 OGEL; Rooke, P., 'The UN Convention against Corruption' in Transparency International (ed), *Global Corruption Report 2003* (Cambridge University Press, Cambridge 2003); Murphy, S., 'Adoption of UN Convention Against Corruption' (2004) 98 AJIL 182.

[298] According to Article 1(b) of the UNCAC, one of the purposes of the Convention is 'to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery'.

[299] Preamble of the UNCAC.

Chapter IV opens up with a provision which generally requires State Parties to cooperate in criminal matters in accordance with all articles dealing with extradition, mutual legal assistance, the transfer of criminal proceedings and law enforcement, including joint investigations and special investigative techniques.[300] The same Article also introduce a significant development insofar as it invites States to consider the extension of the latter means of international assistance to civil[301] and administrative[302] investigations and proceedings relating to corruption, the latter being effective and precious avenues to pursue when criminal prosecution is impossible.[303] Furthermore, the issue of dual criminality is addressed and, codifying the contemporary practice on this matter, the UNCAC embraces a 'conduct-based' approach which compels State to deem the latter requirement fulfilled if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States parties, regardless of the fact that the underlying conduct of the criminal offence is defined in the same terms in both States parties or it is placed within the same category of offence. In this context one should also take not of the fact that throughout the text of the Convention States are invited or required to cooperate in absence of the dual criminality itself: this is the case of Article 44 (2), which allows States to grant the extradition of someone sought for a corruption offence that is not punishable under its own domestic law (if its law permits it), and Article 46(9), which grants State the possibility to use the instruments of mutual legal assistance in absence of dual criminality in order to achieve the goals of the Convention, including asset recovery; finally States are required to render

[300] Article 43 of the UNCAC.

[301] Article 43(1) of the UNCAC should be read together with the following Article 53 which allows the adoption of measures for the direct recovery of property acquired through corruption-related offences by requiring , among other things, to ensure that other States Parties may submit civil claims to establish title to, or ownership of, such property.

[302] The relevance of administrative proceedings arise when both criminal acts and regulatory infringements/violations are combined or where a legal person liable to administrative sanctions is involved in offences covered by the UNCAC (see, for instance, Article 26 of the UNCAC). For comparative purposes, one should be highlight that the Second Additional Protocol to the CoE MLA Convention extends its scope to cover administrative proceedings that may give rise to proceedings before a court having jurisdiction in particular in criminal matters. Cf. also Article 3(1) of the EU MLA Convention.

[303] For instance in cases of death, absence, immunities or generally inability to bring defendants before the criminal court. Also in case a State does not criminalize corruption committed by legal persons.

assistance based on non-coercive measures when dual criminality is absent if this is 'consistent with the basic concepts of its legal system'[304]

With regards to extradition[305] the UNCAC favours the adoption of mechanism to streamline the process,[306] and sets basic principles in relation to the offences covered therein, encouraging State parties to go beyond them in bilateral or regional extradition arrangements.[307] As just recalled, the Convention significantly allows for an exception to the principle of dual criminality whereby a person may be extradited even if the conduct is not criminalized in the requested State.[308] As for the grounds to refuse a request of extradition and other conditions, the UNCAC establishes that they are governed by the domestic law of the requested State or by the applicable extradition treaty;[309] and it provides that, where appropriate, the requested State should consult with the requesting State before refusing extradition.[310] On top of that, it also deals with some of the most common ground of refusal, such as:

(i) *Nationality*: in line with the principle *aut dedere aut prosequi*, if a State Party decides not to extradite a person because he/she one of its nationals, it must promptly submit the case to its competent authorities for the purpose of prosecution which 'shall take their decision and conduct their proceedings in the same manner as in the case of any

[304] Article 46(9)(b) of the UNCAC. A duty to cooperate pursuant to the latter Article may arise, for example, in relation to the exchange of information regarding the offence of bribery of foreign officials or officials of international organizations, when such cooperation is essential to bring corrupt officials to justice. See the interpretative note contained in document A/58/422/Add.1, para 26, relating to Article 16(2) of the UNCAC.
[305] Article 44 of the UNCAC.
[306] See, for instance, Article 44(9) of the UNCAC.
[307] Article 44(18) of the UNCAC.
[308] Article 44(2) of the UNCAC.
[309] Article 44(8) of the UNCAC.
[310] Article 44(17) of the UNCAC. This process is aimed at enabling the requesting State to present additional information or explanations to the requested State. Since there may be some cases in which additional information may not change the outcome of the request, the obligation is not categorical and the requested State retains a degree of discretion to determine when it would be appropriate to do so.

other offence of a grave nature under the domestic law of that State Party';[311]

(ii) *Fiscal Offences*: the UNCAC establishes without exception that State Parties may not refuse extradition on the sole ground that the underlying offence is also considered to involve fiscal matters;[312]

(iii) *Political Offences*: without defining the latter concept, Article 44(4) of the UNCAC prohibits to consider 'political offences' any of the offences established in the Convention.

A further intention of the Convention is to ensure the fair treatment of those whose extradition is sought, and the application of all existing rights and guarantees applicable in the requested State party from whom extradition is requested: firstly they should be guaranteed fair treatment at all stages of the proceedings; [313] secondly, a requested State is not obliged to extradite a person if it has reason to believe that the he/she is sought on grounds of 'that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons'.[314] Finally, one should always keep in mind that the provisions of Article 44 are designed to support and complement, rather than decrease, pre-existing extradition agreements.

A central role within Chapter IV of the UNCAC is played by Article 46, which regulates in detail the way State parties should cooperate to obtain or produce evidence that is needed in the requesting State, that is mutual legal assistance. Generally speaking the Convention aims at facilitating and enhancing the latter aspect of international cooperation, and asks State Parties to conclude agreements to give effect to its MLA provisions.[315] Furthermore, the UNCAC includes a 'mini–MLA treaty' that can be used by States Parties not bound by a

[311] Article 44(11) of the UNCAC.
[312] Article 44(16) of the UNCAC.
[313] Article 44(14) of the UNCAC.
[314] Article 44(15) of the UNCAC.
[315] Article 46(30) of the UNCAC.

treaty, or that can take the place of a treaty if the States Parties agree.[316] In any case, the relevant Articles do not affect the obligations of States under any other MLA Treaty.[317]

For its part, the first paragraph of Article 46 requires State Parties 'to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention', also in cases where a legal person is involved.[318] The purposes for which mutual legal assistance may be requested are listed in Article 46(3):

(i) Taking evidence or statements from persons;[319]
(ii) Effecting service of judicial documents;
(iii) Executing searches and seizures, and freezing;
(iv) Examining objects and sites;
(v) Providing information, evidentiary items and expert evaluations;
(vi) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
(vii) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
(viii) Facilitating the voluntary appearance of persons in the requesting State Party;
(ix) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
(x) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of Chapter V of the UNCAC;
(xi) The recovery of assets, in accordance with the provisions of Chapter V of the UNCAC.

[316] Article 46(7) of the UNCAC.
[317] Article 46(6) of the UNCAC.
[318] Article 46(2) of the UNCAC, which refer to its previous Article 26.
[319] In case it is not possible or desirable for a witness or expert to appear in person and testify in the requesting State, Article 46 (18) proposes the use of videoconference as a means of carrying out the hearing.

Among the latter means of mutual legal assistance, it is important to stress the significance of the last two of them, which extend the application of Article 46 to international cooperation in the identification, tracing and seizure of proceeds of crime, property and instrumentalities for the purpose of confiscation and return of assets to legitimate owners.[320]

Before scrutinizing the mechanisms to afford mutual legal assistance pursuant to paragraphs 9 and 29 of Article 46, it is important to specify that they will only apply in the absence of an MLA treaty between the State Parties concerned, unless they agree to refer to those paragraphs anyhow. More generally, the UNCAC encourages their application 'if they facilitate cooperation.'[321]

As it is always the case in MLA Conventions, also the UNCAC recognizes the possibility for a State to refuse a request of mutual legal assistance in four cases: firstly, if the request does not comply with the provisions of Article 46; secondly, if the execution is likely to prejudice its sovereignty, security, *ordre public* or other essential interests; thirdly, if the authorities of the requested State would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence; finally, in case it would be contrary to the legal system of the requested State Party.[322] On the other hand, bank secrecy[323] and the fact that the offence involves fiscal matters[324] are explicitly excluded as legitimate grounds of refusal. Should States refuse to afford assistance on one of the former legitimate grounds, they should provide reasons of such choice; alternatively, they must execute the request 'as soon as possible' and take into account possible challenges facing the requesting authorities such as, for example, the expiration of a statute of limitation.[325]

The absence of dual criminality may be also a reason to decline affording assistance, even though State Parties are crucially required to render cooperation when it involves non-coercive measures, and, more generally, and – to the extent that it consistent with their legal system – are also encouraged to consider the adoption of measures that would widen the scope of assistance even in the absence of dual criminality. More generally, the UNCAC

[320] See Articles 46(3)(j) and (k); Article 31(1), as well as the whole Chapter V of the UNCAC, especially its Articles 54 and 55.
[321] Article 46(7) of the UNCAC.
[322] Article 46(21) of the UNCAC.
[323] Article 46(8) of the UNCAC.
[324] Article 46(22) of the UNCAC.
[325] Article 46(24) of the UNCAC.

requests States to take into account its purposes 'when responding to a request for assistance pursuant to this article in the absence of dual criminality'.[326]

The transmission and execution of requests is to be carried by a central authority, which is to be designated by each State Party as a reference for the communications of judicial authorities from requesting States in alternative to diplomatic challenges.[327] In light of the fact that many State parties may have already designated a central authority in application of other MLA Conventions, the UNCAC's Technical Guide stresses the importance for State Parties 'to ensure that their central authorities under these instruments are a single entity in order to facilitate greater consistency of mutual legal assistance practice for different types of criminal offence and to eliminate the potential for fragmentation or duplication of work in this area.'[328]

Furthermore, the UNCAC offers a legal basis to provide spontaneous information in case a State Party has information or evidence which may be important to combat offences covered by the Convention at an early stage, even if the other State Party is unaware of the existence of such information or evidence and has not formulated a request for assistance.[329] Although the exchange of information is voluntary, two obligations are imposed on the State Party receiving the information: firstly, it has to keep the latter confidential and to comply with any restrictions on its use, unless the information received is exculpatory to the accused person and so it can be freely disclosed in its domestic proceedings;[330] secondly, in case the receiving State wants to make use of such information, a formal request for assistance has to be submitted.

The overview of the UNCAC's detailed Article on mutual legal assistance leads us to elaborate a few considerations on its significance among the set of international MLA agreements. Firstly one should bear in mind that its scope of application is limited to the request of assistance between State Parties which are not bound by any other relevant treaty:

[326] Article 46(9) of the UNCAC.
[327] Article 46(13) and (14) of the UNCAC.
[328] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (2009), 165.
[329] Article 46(4) and (5) of the UNCAC.
[330] For the other cases of mutual legal assistance confidentiality has to be explicitly required by the requesting State, which shall be informed in case the requested State cannot comply with such requirement. See Article 46(20) of the UNCAC.

however, despite its 'residual' nature, it contains innovative features and the potential to foster cooperation with States which are not Parties to previous instruments such the OECD Anti-Bribery Convention and the UNTOC. Furthermore, it is important that Article 46(7) of the UNCAC excludes the prohibition to afford mutual legal assistance on grounds of bank secrecy[331] among the paragraphs that only apply in the absence of a mutual legal assistance treaty.[332] Thirdly, it is worth to emphasize the relationship between Article 18 of the UNCAC and Article 46 of the UNCAC, which have several points in common. Although States Parties which have ratified the UNTOC would normally be in compliance with the latter provision,[333] at least two fundamental differences should be emphasized: not only mutual legal assistance is extended to the recovery of assets,[334] which is fundamental principle of the Convention itself;[335] the UNCAC also introduces the obligation to render assistance consisting of non-coercive measures in the absence of dual criminality, provided this is consistent with their legal system and it does not involve matters of a '*de minimis* nature'.[336] Moreover, when one compares the UNCAC with the UNTOC, one should always keep in mind that, as previously highlighted,[337] the international cooperation provisions of the latter instrument can only be applied in relation to an corruption offence which is 'transnational in nature' and involves an organized crime group.[338]

Next to the regulation of extradition and mutual legal assistance, Chapter IV of the UNCAC provide for additional mechanisms which aim at further improving international cooperation in the investigation and enforcement of corruption cases. The first provision to be considered enables State parties to conclude bilateral or multilateral arrangements allowing for the transfer to their territory of offenders who have been convicted and sentenced for offences

[331] Article 46(8) of the UNCAC.

[332] As a consequences, as pointed out in UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 164, 'States Parties are obliged to ensure that no such ground for refusal may be invoked under their legal regime, including their Criminal Code, Criminal Procedure Code or the banking laws or regulations'.

[333] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (2012), para 590, which refers to Article 45(3)(j) and (k) of the UNCAC itself.

[334] Article 46(3)(j) and (k) of the UNCAC.

[335] Articles 1 and 51 of the UNCAC.

[336] Article 46(9)(b) of the UNCAC.

[337] Cf. para 2.5.3.2.1.

[338] Article 3(1) of the UNTOC.

covered by the UNCAC in order to serve their sentence there, and in view of improving the chances for their social rehabilitation.[339] Similarly, Article 47 gives the possibility to the transfer of criminal proceedings[340] to another State Party in case the latter may be in a better position to conduct the proceedings, or has a closer connection with the defendant (e.g. nationality or residency). Such procedural tool may be particularly helpful to increase the efficiency and effectiveness of domestic prosecutions initiated and conducted after a refusal of extradition by the requested State, and in cases 'where several jurisdictions are involved, with a view to concentrating the prosecution.'[341] The remaining provisions intend to promote a closer cooperation between law enforcement authorities of the States Parties and to contribute to successful investigations of transnational corruption. In order to reach the latter objective the UNCAC:

(i) Requires the enhancement or establishment of channels of communication 'in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities';[342]

(ii) Encourages State Parties to enter into arrangements which enable the use of joint investigative bodies in case multiple States have jurisdiction over the offences involved, and, if the latter do not exist yet, to undertake joint investigations on a case-by-case basis. In all

[339] Article 45 of the UNCAC. The transfer of sentenced persons is based on the concept of enforcement of foreign sentences which may also be used in cases where the requested person is denied on the ground of nationality. In such cases, the requested State may in fact enforce the sentence that has been imposed under the domestic law of the requesting State pursuant to Article 44 (13). See also a CoE's initiative in this field, which is the European Convention on the Transfer of Sentenced Persons (signed on 1983; entered into force 1985).

[340] The only multilateral convention which addresses this issue is the CoE's European Convention on the Transfer of Proceedings in Criminal Matters (signed on 1972; entered into force 1978). In addition to that, both Article 8 of the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (signed on 20 December 1988; entered into force 11 November 1990) ('U.N. Drug Trafficking Convention') and Article 21 of the UNTOC provide for the possibility to afford each other this form of cooperation in relation to the offences covered therein.

[341] Article 47 of the UNCAC.

[342] Article 48 of the UNCAC.

cases the sovereignty of the State where such investigations take place is to fully respected;[343]

(iii) Mandates that State Parties take measures to allow for the appropriate use of special investigative techniques for the investigation of corruption such as controlled delivery, electronic surveillance and undercover operations.[344] According to the UNCAC's Legislative Guide, the latter may be especially useful in dealing with sophisticated organized criminal groups, whose information may be dangerous and difficult to attain.[345]

2.5.3.2.2.2.Crucial Issues of UNCAC's Chapter IV

Though some key issues have already emerged throughout the illustration of the provisions dealing with international cooperation, the present section aims at discussing some of the most crucial aspects of the UNCAC's Chapter IV: emphasis is laid, in particular, on its most innovative and potentially effective parts, as well as on some of the problematic issues which State Parties are confronted to when implementing the Convention.

2.5.3.2.2.2.1. General International Cooperation

[343] Article 49 of the UNCAC.

[344] Article 50 of the UNCAC. While its first paragraph pertains to investigative methods that are to be applied at the domestic level, the remaining ones (2 to 4) provide for measures to be taken at the international level. Similar mechanisms are provided for by Article 11 of the UN Drug Trafficking Convention and Article 20 of the UNTOC.

[345] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), paras 633-5, which describes the nature and purpose of special investigative techniques as follows: 'Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. [...] Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence. Electronic surveillance in the form of listening devices or the interception of communications performs a similar function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators.'

Although the creation of a centralized procedure to deal with issues of mutual legal assistance and extradition is a good practice which may help streamlining the complex process of cooperation, one should carefully consider the role of central authorities with respect to both domestic and international counter-parts. In this sense, State parties should ensure that their activities and duties are clearly defined in order to ensure consistency in the practice of international cooperation, and to avoid the creation of an additional level of bureaucracy with no added value. In this sense State Parties should not only ensure an appropriate level of resources and expertise within their central authorities, but should also make use of them to facilitate the operational framework and contacts between competent authorities, especially if there are other on-going proceedings or parallel investigations in contiguous field such as money-laundering.

Furthermore, at the general level, States Parties should strengthen the channels of communication among them and take advantage of those networks which enable the build up of solid relationships among them in view of affording each other the widest measure of assistance in investigations, inquiries, prosecutions and judicial proceedings related to corruption.[346]

Even in presence of effective partnership schemes and international cooperation mechanisms, the efforts to create an effective system of mutual assistance may be hampered by the lack of human and financial resources, which 'may even affect the ability of the State Party to draft its own enabling or effective legislation to implement the requirements of Chapter IV of the Convention.'[347] In order to cope with the amount of incoming requests which a State may be subject to, certain criteria and threshold may be set, for instance by making reference to the value of the proceeds of the crime. If the problems concern the costs incurred in executing a request, a viable solution could be to set up 'cost-sharing agreements' whereby the requesting

[346] Examples, in this field are the Southern African Forum against Corruption ('SAFAC'), which allows those involved to interact in a way that offers a great deal of support in its challenges to defeat regional and international corruption, and whose members comprise the anti-corruption agencies of several African countries. Another example is the Asian Development Bank – OECD Anti-Corruption Initiative for Asia-Pacific, which has as one of its priority he overcome of obstacles to effective international cooperation.

[347] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 143.

State bears some of the costs. In case two State Parties have a significant amount of casework which necessitates stable cooperation and their respective legal systems differ widely, an efficient solution to consider is to post liaison officers to the partner country's central authority. More generally, State Parties should afford each other technical assistance and training programs to facilitate cooperation, especially for the benefit of developing countries which are often the target of many request of criminal assistance.

2.5.3.2.2.2.2. Extradition

Extradition, which is a delicate issue involving some of the most fundamental rights of a person, is often challenged by a number of obstacles which include: the mutual lack of awareness concerning extradition practice, the grounds for refusing a request, and the means to improve the extradition process or to avoid impunity; divergent evidentiary requirements leading to misunderstandings and delays; procedural issues linked to the language, deadlines, coordination and costs.

In this context the UNCAC has attempted to relax the strict application of some grounds of refusal, which often frustrates the possibility to carry out an extradition process. Accordingly, a State Party which refuses a request to extradite on grounds of the person's nationality has an obligation to bring that person to a trial,[348] and the possibility to enforce the sentence which has been imposed in the requesting country.[349] As for the political offence exception, the UNCAC follows the trend which limits its scope,[350] and excludes it as a ground to refuse extradition when the Convention is the legal basis for the request.[351] The issue of dual criminality is also eased since a conduct-based approach is embraced: furthermore, with specific reference to extradition, the UNCAC introduces the possibility for State Parties to

[348] Article 44(11) of the UNCAC.
[349] Article 44(13) of the UNCAC.
[350] The increasing concerns linked to international terrorism has led to States to limit the scope of the political offence exception, which is generally no more acceptable for those crimes for which States had assumed an international obligation to take prosecutorial action where they did not extradite.
[351] Article 44(4) of the UNCAC.

grant it for any of the offences covered by the Convention which are not punishable under its own domestic legislation.[352]

Although the latter improvements are noteworthy, the extradition process has wide margins of improvement which could lead to a system of backing or recognition of foreign arrest warrants. Examples for State Parties to the UNCAC can be taken from regional initiatives, which have proved to be very effective in this context. Firstly, the Commonwealth scheme, which mainly applies to common-law tradition States Parties;[353] secondly, the European Arrest Warrant, which is an instrument replacing the traditional extradition process among the Member States of the EU, and which introduces some innovative features which are could be eventually considered at the U.N. level such as: expeditious proceedings,[354] abolition of dual criminality for a number of offences, 'judicialization' of the procedure, obligation to surrender nationals, and abolition of the political offence exception.[355]

2.5.3.2.2.2.3. Mutual Legal Assistance

As pointed out in relation to the OECD Anti-Bribery Convention, one of the most critical issues in the realm of mutual legal assistance is an effective use of informal channels of communication:[356] while the latter constitute a faster and flexible means to seek assistance, State Parties should bear in mind that it could also create some problems in relation to the

[352] Article 44(2) of the UNCAC.

[353] The Commonwealth scheme (so-called 'Harare Scheme') was agreed in 1990 and amended in 2002 and 2005. Although not being a treaty nor convention, it greatly assists States in making requests for assistance. Paragraph 14 of the scheme, for instance, sets out the contents to be contained in such a request. See also Reddi, V., 'The Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth. The Harare Scheme: an Appraisal' (2012) 38(1) Commonwealth Law Bulletin 119.

[354] Within the EU the average time taken to execute a request for extradition has fallen from more than nine months to 43 days (when the person consents to the surrender the average time taken is 13 days). See European Commission, 'Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States' (2005) SEC(2005) 267}, 5.

[355] The European Arrest Warrant is discussed in detail at para 2.5.2.3.

[356] Cf. paras 2.5.3.1.2.2. and 2.5.3.1.2.5.

admissibility of the evidence and the protection of sensitive information. Further challenges in the context of mutual legal assistance for corruption offences involving influential political or economic figures may arise since the requested State may refuse to cooperate on grounds of 'national interests' or immunities. Also, if the request for mutual legal assistance is subject to appeal, State Parties should consider a longer timeframe to obtain it and the risk to 'tip-off' the suspects. In addition to that, judicial authorities of a requesting State should devote particular attention to disclosing extremely sensitive information through a request, since it may cause risks for witnesses and endanger the information gathered in the investigation. In order to address the latter confidentiality matters, a requesting State should issue a request which provides the necessary information to permit its execution but that leaves out the most sensitive information. More generally, although the UNCAC encourages State Parties to execute a request in compliance with the procedure specified by the requesting State, the general rule is that it should be executed in accordance with the domestic law of the requested State Party. [357] As a consequence, the State issuing a request for assistance should make the greatest possible efforts to enable requested State parties to respond (positively) and thus to consider the following steps:

(i) Identifying the substantive and procedural requirements in the requested State Party;
(ii) Taking direct contact with the requested State Party to ensure that the request is sent to the proper authority;
(iii) Establishing informal discussion with the requested State Party in advance so that the requested State Party can draw attention to errors or advise on ameliorations to the request;
(iv) Following up the request to ensure its receipt, correctness and taking into consideration.

Finally, State Parties should consider seeking guidance in other multilateral treaties on MLA or on ad-hoc issues, most of which have already been considered in previous part of the

[357] Article 44(17) of the UNCAC. Similarly, Article 18(17) of the UNTOC and Article 7(12) of the U.N. Drug Trafficking Convention.

present work.[358] In addition to that, reference could also be found in the U.N. Model Treaty on Mutual Assistance in Criminal Matters,[359] which represents a helpful elaboration of the international experience gained with the implementation of the latter treaties, in particular between States Parties representing different legal systems.

2.5.3.2.2.2.4. Further Instruments of International Cooperation

Coming to the residual means provided for by Chapter IV of the UNCAC to promote international cooperation, a few important aspects should be stressed in this context. If States Parties decide to adopt domestic legislation to introduce the obligation to transfer sentenced persons, they should be careful in granting such right only to a State Party and not the sentenced person, whose willingness may be eventually taken into account when a State makes or grants a request. However, if a sentenced person has been ordered to be deported from the sentencing State Party after serving his or her sentence, a transfer may be effected regardless of the person's consent.

With regards to the transfer of criminal proceedings problems arise as to the determination of the most appropriate jurisdiction to institute criminal proceedings. One way to address the latter issue is to consider Article 47 on the transfer of criminal proceedings to another State

[358] See Article 7 of U.N. Drug Trafficking Convention, Article 18 of the UNTOC, Articles 8-10 of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Article 26 of the CoE Convention on Cybercrime, Article 26 of the CoE Anti-Corruption Convention, Article XIV of the Inter-American Convention against Corruption, Article 9 of the OECD Anti-Bribery Convention, the whole CoE MLA Convention and additional protocols, the Commonwealth Scheme for Mutual Assistance in Criminal Matters of 1986 (as amended in 1990 and 1999), the OAS' Inter-American Convention on the Taking of Evidence Abroad of 1975 and its Additional Protocol of 1984, as well as the Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 and its Optional Protocol of 1993, the Economic Community of West African States' Convention on Mutual Assistance in Criminal Matters of 1992, the EU MLA Convention and additional protocol, and the 1983 Arab League Convention on Mutual Assistance in Criminal Matters.

[359] See Annex of U.N. General Assembly, 'Model Treaty on Mutual Assistance in Criminal Matters' (14 December 1990) A/RES/45/117, and Annex I of U.N. General Assembly, 'Mutual Assistance and International Cooperation in Criminal Matters' (9 December 1998).

Party together with the jurisdictional criteria set by Article 42 of the UNCAC. However, some arguments have been raised against the latter method, which would give priority to the State where the offence has been committed: according to the UNCAC's Technical Guide, for instance, emphasis should be also laid on the rehabilitation of the offender, which would require to impose and enforce the sanction 'where the reformative aim can be most successfully pursued, that is normally in the State in which the offender has family or social ties or will take up residence after the enforcement of the sanction.'[360] Since additional counter-arguments related to the difficulties in securing evidence militate against the latter choice and no one-fits-all solutions can be set a priori, the elements which should guide such jurisdictional determination are the very facts of the cases and the terms of agreement which the State Parties reach at the early stage of the investigation.[361]

In an effort to address the limits and the challenges pointed out so far, the UNCAC call State Parties to intensify the cooperation in view of enhancing the effectiveness of law enforcement action against corruption. In this sense, Article 48 established that measure should be taken in the following fields: exchange of strategic and technical information; cooperation in the field of intelligence and technical support as well as in the field of professional training and working groups; use of contact points and networks, creation of joint investigation teams. Although the latter may certainly constitute useful tools to enhance cooperation among State Parties, some concerns should be addressed. Firstly, when overseas intelligence is sought the necessary arrangements should be made through protocols and safeguards. Secondly, when reference is made to the posting of liaison officers[362] States should consider the costs involved in it, and eventually appoint an officer responsible of the host State and of additional States in the same region, or representing several States. Thirdly, cooperation could be also established through the existing international structures such as Interpol, Europol, and the Southern African Regional Police Chiefs' Cooperation Organization, whose effectiveness depends on the accuracy and timeliness of the information provided. At the same time, State Parties should always be aware of the abuses which may take place without appropriate controls and judicial supervision over the information systems linked to those networks (e.g. the Interpol's

[360] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 174.
[361] Cf. UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 174.
[362] Article 48(1)(e) of the UNCAC.

system of notices). As a consequence, the respect of fundamental rights should be always ensured by those mechanisms which enable the gathering, analysis and use of operational data, and domestic data protection legislation should be designed to encompass the operation of such databases at both the national and international level.

Similar concerns arise with respect to the special investigative techniques provided for by the last provision of the UNCAC's Chapter IV, [363] which should be always implemented by taking into consideration human rights concerns and the admissibility of the evidence resulting from such cooperation. With regards to the former issue, safeguards should be put in place to ensure their oversight and the establishment of appropriate checks and balances; as for the latter, the UNCAC's Technical Guide suggests training and using specialist judges in order to make the judicial authorities aware of the process and technology involved.[364] From a practical perspective States should also ensure the professionalism and competence of the law enforcement agencies involved in those investigative techniques, as well as the level of their training. Finally, a few considerations should be dedicated to some of the 'special technique' which State may take into consideration to boost cooperation in investigations of corruption:

(i) *Intrusive electronic surveillance*: since conversation of individuals (some of whom external to the investigation) are concerned, particular attention should be paid to the respect of the safeguards which authorize and condition their use;

(ii) *Physical surveillance and observation*: this technique is likely to be less intrusive than the latter and consists of placing a suspected person under physical surveillance, or following and filming the suspect;

(iii) *Undercover operations*: although being extremely useful to investigate cases of corruption, they may generate resistance for their costs and, in some State Parties, concerns about entrapment, or officers committing a criminal act such as offering a bribe;

[363] Article 50 of the UNCAC. Similar provisions are provided for in Article 11 of UN Drug Trafficking Convention (on controlled delivery) and in Article 20 of the UNTOC.

[364] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 184.

(iv) *Informants*: critical issues about their use relate to their potential role as witness before a court, as well as matter linked to the payment, dissemination of information, safety and informant-handler relations;

(v) *Integrity testing of public civil servants*: despite the fact that such method has proved to be effective and efficient in deterring corruption, it cannot be used indiscriminately but should be based on some information by the intelligence services. As for undercover operations, the risks linked to entrapment – that is creating the opportunity for a suspect to commit an offence – should be addressed and prevented;

(vi) *Financial transactions monitoring*: in this context State Parties should ensure that the potentially effective monitoring of location, movement and dispersal of funds linked to corruption is subject to appropriate controls, authority and supervision.

Another instrument to establish enhanced cooperation to take cross-border crimes and which is envisaged by Article 49 of the UNCAC is to set up joint investigations.[365] The latter kind of operations raises several controversial issues related to sovereignty, the legal standing and powers of officials operating in another State, the admissibility of evidence obtained by an official from another jurisdiction, the giving of evidence in court by officials from another State Party, and the sharing of information between States Parties before and during an investigation. In order to address the latter issues, the UNCAC invites States to conclude agreements or arrangements which plan the joint investigative action and thus prevent problematic situations from happening. Furthermore, clarity and consistency should always be ensured among participating parties in relation to the way investigations are conducted and information is exchanged. Plus, State Parties willing to create joint investigation teams should also consider that the implementation of the corresponding agreements may often subject to the limitations and requirements foreseen in their domestic legal systems.

[365] This possibility is also envisaged in the following instruments: Council Framework Decision 2002/465/JHA on joint investigation teams; Article 13, 15 and 16 of the EU MLA Convention; Articles 20-2 of the Second Additional Protocol to the CoE MLA Convention

2.5.3.2.3. Current Challenges of the UNCAC

The central role of international cooperation within the scheme of the UNCAC not only emerges from the very text of the Convention,[366] but also from the complementary activities carried out in this field by the Conference of the State Parties ('COSP'), which was established by Article 63(1) 'to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.'[367] The COSP plays an essential function insofar as it monitors the progress made by State Parties, and provides policy guidance by identifying the most urgent challenges and setting the priority areas to address in the future. In the context of cooperation the COSP is fundamentally assisted by the experts gathered in the Working Group on International Cooperation ('WG on International Cooperation'), established in 2011 to 'advise and assist it with respect to extradition and mutual legal assistance'.[368] The following paragraphs are dedicated to scrutinize the activities carried out so far by the WG on International Cooperation and the subsequent political resolutions adopted by the COSP in the field of cooperation. Further source of analysis is represented by the outcomes of the UNCAC's Review Mechanism: although the publication of the country reports is still dependent on the will of each State Party,[369] the thematic reports compiled by the Secretariat of the COSP on

[366] See Articles 1(b) and 48 of the UNCAC.

[367] Duties and limits of the COSP are set in the following paragraphs of Article 63. Documents, Reports and Resolutions of its sessions, which are held regularly in different cities can be consulted at http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.

[368] Resolution 4/2 of COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fourth session, held in Marrakech, Morocco, from 24 to 28 October 2011', COSP/2011/14. In that same resolution, the COSP also decided that the expert meetings should perform the following functions: (a) assist the Conference in developing cumulative knowledge in the area of international cooperation; (b) assist it in encouraging cooperation among relevant existing bilateral, regional and multilateral initiatives and contribute to the implementation of the related provisions of the United Nations Convention against Corruption under the guidance of the Conference; (c) facilitate the exchange of experiences among States by identifying challenges and disseminating information on good practices to be followed in order to strengthen capacities at the national level; (d) build confidence and encourage cooperation between requesting and requested States by bringing together relevant competent authorities, anti-corruption bodies and practitioners involved in mutual legal assistance and extradition; and (e) assist the Conference in identifying the capacity-building needs of States. All public documents of the open-ended intergovernmental expert meetings to enhance international cooperation under the UNCAC are available at https://www.unodc.org/unodc/en/treaties/CAC/em-internationalcooperation.html.

[369] Para 38, Annex I (Terms of reference of the review mechanism) of COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its third session, held in Doha from 9 to

international cooperation are available for consultation.[370] Through the examination of the latter elements my aim is twofold: firstly, to assess the overall implementation of the UNCAC in the field of international cooperation, as well as the most significant challenges and shortcomings which have been noticed so far; secondly, to identify the areas where the efforts of COSP will concentrate in the future to enhance international cooperation in corruption cases.

Since the work of both the COSP and on the WG on International is aimed at improving the most problematic issues encountered by State Parties, one should begin by providing an overview of the most recurrent challenges in the implementation of Chapter IV of the UNCAC. The attention will then focus on some of the outstanding issues identified by the COSP's Secretariat in this context.

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13 November 2009', CAC/COSP/2009/15 states that 'the State party under review is encouraged to exercise its sovereign right to publish its country review report or part thereof.' As of January 2015 one can consult the following documents: 13 Self-assessment checklists, 77 Executive Summaries, and only 34 Country Reports. The updated lists of documents which State Parties have decided to make public is available at http://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html.

[370] On this task of the COSP's Secretariat see para 35, Annex I (Terms of reference of the review mechanism) of COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its third session, held in Doha from 9 to 13 November 2009', CAC/COSP/2009/15 (n. 369), which establishes that 'the secretariat shall compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports and include them, organized by theme, in a thematic implementation report and regional supplementary addenda, for submission to the Implementation Review Group,' With specific reference to international cooperation reference is be made to COSP, 'Implementation of Chapter IV (International cooperation) of the United Nations Convention against Corruption (review of articles 44 and 45)', CAC/COSP/2013/9, and COSP, 'Implementation of Chapter IV (International cooperation) of the United Nations Convention against Corruption (review of articles 46-50)', CAC/COSP/2013/10.

Article of the UNCAC	Identified challenges in implementation
Extradition (Article 44)	• Limited capacity • Lack of inter-agency coordination • Specificities of the legal system • Lack of specific legal framework, or need for further development of the domestic legal framework • Need to systematize information on extradition cases and to gather relevant statistical data • Limited capacity in terms of technologies and human resources for extradition hearings
Dual criminality (Article 44[2])	• Difficulties in the application of the dual criminality requirement • Specificities of the legal system and constitutional constraints
Expedite proceedings or simplify evidentiary requirements (Article 44[9])	• Need to simplify the proceedings in line with the Convention • Lack of tools to ensure expedited procedures • Difficulties with the adoption of more efficient extradition procedures • Difficulties in reducing administrative and judicial instances in passive extradition procedures

Extradite or prosecute (Article 44[11])	• Need to reform legislation in order to ensure the application of the principle of *aut dedere aut judicare* (extradite or prosecute)
Enforcement of foreign sentences (Article 44[13])	• Need to develop legislation in relation to the enforcement of sentences imposed by a requesting State
Agreements or arrangements (Article 44[18])	• Need to adopt further bilateral and multilateral agreements and expand existing ones, while ensuring that the instruments are in line with the Convention • Need to apply the Convention directly in order to enhance the effectiveness of extradition
Transfer of sentenced persons (Article 45)	• Lack of agreements and experience
Mutual legal	• Limited capacity and resources • Lack of specific legislation

assistance (Article 46)	• Gaps in the legal framework, or inadequacy of existing normative measures, such as non-recognition of the criminal liability of legal persons in mutual legal assistance proceedings • Need to improve case management systems to respond to requests for mutual legal assistance • Need to engage in bilateral and multilateral arrangements aimed at enhancing the effectiveness of the mutual legal assistance process • Need for interagency coordination among competent authorities in responding to and making requests for mutual legal assistance
Purposes of mutual legal assistance (Article 46[3])	• Lack of specific legislation • Gaps in the legal framework
Transfer of criminal proceedings (Article 47)	• Lack of specific legislation, treaties or jurisprudence
Law enforcement cooperation	• Practical challenges in swift information exchange in time sensitive cases • Challenges in compiling statistics

(Article 48[1] and [2])	• Need to expand existing agreements • Lack of specific legislation on sharing information or lack of specific rules on law enforcement cooperation • Difficulties in establishing effective channels of communication among competent authorities • Need to include in relevant legislation powers of authorities to conclude agreements with counterparts
Joint investigations (Article 49)	• Little experience in conducting joint anti-corruption investigations • Lack of specific legislation, as well as clear guidelines through the adoption of relevant agreements with other law enforcement agencies • Need to develop bilateral or multilateral agreements or expand existing ones
Special investigative techniques (Article 50)	• Need to develop legislation, taking into account the specificities in legal systems • Lack of inter-agency coordination • Limited capacity (limited technological resources) • Limited awareness of state-of-the-art special investigative techniques • Limited human and financial resources • Unclear guidelines on the use of special investigative techniques for the judiciary and investigation agencies

Table 1: Most prevalent challenges in the implementation of Chapter IV of the Convention[371]

[371] The content of table is reported from COSP, 'Implementation of Chapter IV (International cooperation) of the United Nations Convention against Corruption (review of articles 44 and 45)' (n. 370), 2-4.

Generally speaking, the information contained in Table 1, which summaries the outcomes of 44 country review reports, reveals that State Parties to the UNCAC are facing both legal and practical challenges in establishing an effective regime of international cooperation against corruption. At the legislative level one could notice the problematic issues linked to cooperation with a country with a different legal system, the dual criminality requirement, the enforcement of sentences and special investigative techniques. On the other hand, from a more practical perspective, the review of States testified the lack of modern tools, technical equipment and human resources required for successful cooperation, as well several challenges concerning the expeditious exchange of and the efficient cooperation among central authorities.

Although many States have declared that in principle could use the UNCAC as a basis for extradition, in practice this is rarely done. In this context, most States have showed willingness to conclude new treaties to improve cooperation in extradition. An horizontal issue in both extradition and mutual assistance matters which is often pointed out in the country reviews is the difficulty in dealing with States having a different legal system:[372] while in some States the Constitution enables the direct application of ratified conventions, other country necessitate the enactment of legislation at the domestic level. Furthermore, only a few State Parties seem to consider all the offences of the UNCAC as extraditable in the relevant treaties with other State Parties as provided for by Article 44(4). Dual criminality confirms to be the standard condition to grant extradition, although in some cases such requirement is not considered to be absolute. On the other, this is not the case for mutual legal assistance, which the majority of State Parties grant regardless of dual criminality. As for the refusal to extradite, most States have adopted the same kind of grounds, which do not include the involvement of fiscal matters as required by Article 44(16); plus, the majority of them does not grant extradition in relation to a political offence or if the person is sought on grounds sex, race, religion, nationality, ethnic origin or political opinion. Although the majority of States Parties does not extradite its nationals, most of them have implemented the principle of *aut dedere aut judicare* which triggers prosecution at the domestic level. In the

[372] On the consequences of differences in legal traditions and systems see the overview provided at para 2.2.

context of refusal, one should take note that the COSP has noticed a lack of uniformity in meeting the duty to engage in consultations before refusing a request of extradition, and has thus recommended not complying States to include such requirement into guidelines or other regulations. Only a few countries have mechanism to comply with Article 44(12), which would allow nationals to serve a sentence in the requesting State; similarly, most State Parties are not able to enforce a foreign sentence when they refuse to extradite a person for enforcement purpose on grounds o nationality.

Delays in carrying out an extradition have been mostly imputed to the complexity of a case, the possibility to initiate appeal proceedings or wait for parallel asylum proceedings; in any case, submitting properly the supporting documentation is considered to sensibility reduce the average duration of an extradition proceedings, which ranges from a minimum of 1.5-4 months to a maximum of 12-18 months. Simplified proceedings are only available in about of the State Parties scrutinized, and they are either based on the person sought's consent or on a privileged relationship with the requesting State. In the latter cases lower standards of proof apply, whereas no uniform levels of evidentiary threshold can be inferred at the general level (ranging from 'probable cause' to 'prima facie case'). Despite the fact that due process guarantees are often present either in Constitutions or in codes of criminal procedure, some State Parties have been recommended to grant the possibility to appeal the decisions granting extradition. The COSP has often highlighted problems in obtaining statistics,[373] which is a crucial element to assess the efficiency and effectiveness of international cooperation: among the few countries which provided such information, the majority of them has provided data of a general nature and without a thorough account of incoming and outgoing requests for extradition for corruption-related offences.

No statistics were generally available on the number of sentenced persons transferred in relation to Convention-based offences; however, most States Parties have set up an appropriate legal framework to carry out the transfer of sentenced person pursuant to Article 45 of the UNCAC, mostly through bilateral and regional agreements.

[373] See COSP, 'Implementation of Chapter IV (International cooperation) of the United Nations Convention against Corruption (review of articles 44 and 45)' CAC/COSP/2013/9.

With specific regard to mutual legal assistance a few issues have been noticed by the COSP.[374] Although assistance for corruption cases involving legal persons is available in the majority of State Parties (also when criminal liability is not established), only some of them provided examples of actual cases. Furthermore, it was noted that the establishment of criminal liability for legal persons seems to have a positive impact on the scope of cooperation which could be provided: accordingly, the absence of criminal provisions was deemed by the COSP's Secretariat as creating obstacles, to the extent that double criminality is required and assistance is not provided on the basis of reciprocity; plus, the latter challenges were also found linked to the existence of certain grounds of refusal of mutual legal assistance.[375] In spite of the latter challenges, the COSP recalls that the UNCAC enables cooperation even in cases where the liability of legal persons is only of civil and/or administrative nature through the principle of Article 43(1), which obliges States to consider assisting each other in investigations and proceedings in civil and administrative matters relating to corruption.[376] As for the (good) practice of giving spontaneous information to foreign authorities, States have generally missed to regulate it and often rely on international networks such as Interpol or the Egmont Group of Financial Intelligence Units. The majority of States does not consider bank secrecy as a ground to decline assistance. In order to submit requests for assistance, twelve States require doing it through diplomatic channels, while most of them accepted Interpol's ways of communication in urgent cases. From a procedural perspective the language and format of the request remain significant challenges, and in 13 cases the official language of the State is the only acceptable one for incoming requests. Complying with the evidentiary requirements of the requesting State was not pointed out as a problem by reviewed countries as long as it does not entail conflicts with domestic legislation or constitutional principles: in this same context, only 16 States admitted the hearing of

[374] See COSP, 'Implementation of Chapter IV (International cooperation) of the United Nations Convention against Corruption (review of articles 46-50)' CAC/COSP/2013/10, and COSP, 'Progress Report on Implementing the Mandates of the Expert Group on International Cooperation' CAC/COSP/EG.1/2013/2.

[375] E.g. the one contained in Article 46(1)(c) of the UNCAC which allows to refuse MLA assistance 'if the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction.'

[376] On the specific issue of cooperation for cases of corruption committed by legal persons see the document prepared by the Secretariat for the WG on International Cooperation: COSP, 'Progress Report on Implementing the Mandates of the Expert Group on International Cooperation', CAC/COSP/EG.1/2013/2.

witnesses by videoconference. With respect to the grounds for refusal, only a few States move away from the UNCAC and established different ones such as prejudice to an ongoing investigation, the excessive burden imposed on domestic resources, the political nature or the insufficient gravity of the offence, and concerns of discrimination and possible prejudice to fundamental rights and freedoms. To respond to a request States take an average of 1 to 6 months, and, as for extradition, the difference is dependent on factors such as the nature of the request, the type of assistance, the complexity of the underlying case, and on the bilateral agreements used. Costs are usually covered by the requested State, even though in case of extraordinary expenses some States have agreed on case-by-case arrangements to share them; some other States have provided in domestic legislation that the requesting State should cover some of the costs to execute some kind of requests, such as the one linked to expert testimony or for transferring detained witnesses. At the practical level, State have indicated further challenges, but also an improvement of cooperation through modern tools and effective mechanisms to share information and experiences. Many States have also stressed the importance of participating and networking in regional bodies aimed at facilitating inter-State judicial assistance. Furthermore, some States showed preference to advanced regional instrument and mechanisms, and considered crucial the role played by central authorities.

Next to issues arising from Article 46 of the UNCAC, one could notice that the transfer of criminal proceedings is not yet regulated in half of the examined States, even though some of the them allow it on an ad-hoc base. As for law enforcement cooperation the implementation review has showed the importance of regional organizations and networks:[377] in particular, membership of INTERPOL and the use of Financial Intelligence Units were considered effective for law enforcement cooperation at the international level. The exchange of personnel or experts was only carried out by some States, which posted police liaison officers to other countries or international organizations. Also the creation joint investigation bodies is

[377] Examples, in this sense, are European Police Office; the European Anti-fraud Office; the Ibero-American Network for International Legal Cooperation; the Network of Prosecutors against Organized Crime; the ASEAN Police ('ASEANAPOL'); the Camden Assets Recovery Inter-Agency Network; ARINSA; the South East Asia Parties against Corruption mechanism; the Hemispheric Information Exchange Network for Mutual Legal Assistance in Criminal Matters and Extradition of the OAS; the Southern African Regional Police Chiefs Cooperation Organization; the Global Focal Point Initiative established by INTERPOL and the Stolen Asset Recovery Initiative; the Regional Organized Crime Information System; and the Schengen Information System.

not an uniform practice, which is only set by half of the State Parties through arrangements, while 10 other States have the possibility to conduct joint investigations on a case-by-case basis; on the other hand, 14 States parties have neither concluded bilateral or multilateral agreements nor undertaken this kind investigations on an ad hoc basis. Finally, special investigation techniques such as controlled deliveries, interception of telephone communications and undercover operations are regulated in the majority of State Parties and normally they need to be authorized only by court order. In this context international arrangements pursuant to Article 50(2) have been concluded by several countries, usually within the same region or regional organization; however, it should be noted that in many States special investigative techniques could be used at the international level also in the absence of relevant international agreements and on a case-by-case basis.

2.5.3.2.4. The Findings of the UNCAC's Working Group on International Cooperation and the Resolutions of the Conference of State Parties to the UNCAC

Established in 2011 to 'advise and assist it with respect to extradition and mutual legal assistance', the group of experts forming the WG on International Cooperation has so far gathered two times, in 2012 (Vienna)[378] and 2013 (Panama City)[379] respectively. In both cases, conclusions and recommendations were formulated towards State Parties on some outstanding issues concerning the full implementation of Chapter IV of the UNCAC. After illustrating the outcomes of the experts' work, the final part of the present paragraph will consider which of the latter elements have been embraced as political priorities by the COSP itself, which at its fifth session held in Panama City in 2013 dedicated one Resolution to the theme of international cooperation.

[378] COSP, 'Report on the meeting of experts to enhance international cooperation under the United Nations Convention against Corruption held in Vienna on 22 and 23 October 2012', CAC/COSP/EG.1/2012/2.

[379] COSP, 'Report of the open-ended intergovernmental expert meeting to enhance international cooperation under the United Nations Convention against Corruption, held in Panama City on 25 and 26 November 2013', CAC/COSP/EG.1/2013/3.

Noting the effectiveness of informal contacts and regional/international cooperation networks, in both meetings the Working Group recommended State Parties to take advantage and create informal channels of communication to share information at the beginning of the process and, in any case, before submitting a request for cooperation.[380] In order to streamline the latter process, States have also been invited to disclose and make full available the domestic conditions needed to grant international cooperation such as format, language, contacts. In the realm of communication, States were called to designate a central authority and, if already done, to ensure its effectiveness as well as to enhance inter-agency coordination. According to the WG on International Cooperation, competent authorities and agencies should have appropriate resources, and additional support should be afforded to developing countries in order to strengthen their capacity in cooperation. Furthermore, both experts' meetings noticed the importance of developing cooperation within civil and administrative investigations and proceedings relating to corruption in line Article 43(1) of the UNCAC.[381] With regards to extradition, the Working Group has encouraged States to carry out consultations before refusing a request,[382] especially when the decision to deny the requests rested with the judicial authority. More generally, experts complained about the scarcity of information and proposed to establish a common approach on its gathering, with specific reference on statistics. Also, the WG on International Cooperation acknowledged the problems arising from differences in the legal systems which have been pointed as a horizontal problem in international cooperation, and invited the COSP's Secretariat to develop tools enhancing cooperation when two countries have a different legal system such as request templates to reduce procedural barriers to cooperation. Finally, at an organizational level, the Working Group proposed to hold together the expert group meetings on international cooperation under the UNCAC and UNTOC at the same venue in order to use resources more efficiently.

Many of the conclusions and recommendations emerging from the latter work of the WG on International Cooperation have been translated into political priorities by Resolution 5/1

[380] Cf. Articles 46,48 and 56 of the UNCAC.

[381] The Article specifies that this should be done 'where appropriate and consistent with States' domestic legal systems'.

[382] Article 44(17) of the UNCAC.

elaborated by the COSP at its fifth session of November 2013.[383] Firstly the COSP recalled the need for State Parties to afford each other cooperation in civil and administrative proceedings for the detection of corruption and, to favour such process, invited States to afford the Secretariat information on the scope of assistance that could be provided in relation to such proceedings. The latter recommendation is closely linked to the delicate issue of cooperation for cases of corruption committed by legal persons, which the COSP also addresses by recommending States to consider the conclusion of bilateral agreements and arrangements among themselves.[384] Further encouragements were made in the realm of communication. States should in fact increase the sharing of information through competent authorities (including financial intelligence units), also on a spontaneous basis. The exchanges should not only concern information about the offences and methods used to commit them, but also staff and experts, including the appointment of liaison officers;[385] plus, items should be made available for the purposes of investigation. Finally, the COSP accepted the organizational proposal made by the WG on International Cooperation and decided, on a provisional basis, to hold 'back to back' the next expert meetings of the UNCAC and the UNTOC on international cooperation at the sixth session of the COSP.[386]

2.5.3.2.5. The Significance of the UNCAC in the Field of International Cooperation

After more than ten years from the adoption of the UNAC and in light of the analysis of the other international instruments, one could elaborate a few remarks on the influence of the UNCAC on international cooperation. On the one hand, the Convention is still source of uncertainties and poses several challenges to State Parties, which have not reached a uniform

[383] COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fifth session, held in Panama City from 25 to 29 November 2013', CAC/COSP/2013/18.

[384] On the specific challenges in cooperation to investigate the corrupt practices committed by legal persons see para 2.5.3.2.3.

[385] On the potential of liaison magistrates for international criminal cooperation see Rabatel, B., 'The Role of Liaison Magistrates in International Judicial Cooperation and Comparative Law' in ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (ed), *Denying Safe Haven to the Corrupt and Proceeds of Crime* (ADB/OECD, Manila 2006), 100-5.

[386] The sixth session of the COSP to the UNCAC will be held in Russia in 2015.

level of implementation for either lack of political will or practical difficulties posed by exogenous factors such as the differences among legal systems.[387] In this sense, the work of the WG on International Cooperation together with the political inputs from the COSP have wide margins to improve the situation: in this context it will be interesting to assess the developments concerning the cooperation in civil and administrative proceedings and in the related cases of corrupt practice committed by legal persons, which represent two significant challenges of the present times. Furthermore, although the grounds for refusing mutual legal assistance are limited, some of them are potentially very broad, especially in case where the refusing state has discretionary room to define their scope.

On the other hand, one could not deny the positive impact of the UNCAC in the field of international cooperation. Firstly, all the earlier instruments had a regional scope with the exception of the OECD Anti-bribery Convention which, nevertheless, is limited to the offence of bribery of foreign officials. As a consequence, the UNCAC – whose Chapter IV is 'predominantly self-executing'[388] – expands a number of provisions on international cooperation at the global level, and in some cases it introduces new ones or describes them in greater detail than in the past instruments (e.g. the criminalization measures). As a consequence, the Convention should be positively seen as creating 'a broad enabling framework for international cooperation in investigations and enforcement proceedings, and to eliminate obstacles (such as dual criminality requirements and bank secrecy laws) that are

[387] According to Transparency International, 'UN Convention Against Corruption. Progress Report 2013' (Berlin), 21-2, in the 45 published executive summaries 29 States parties received recommendations or observations from the reviewers for better implementation of Article 44 on extradition, and 14 countries were commended on their successes. On the other hand, 33 States received recommendations or observations regarding Article 46 on mutual legal assistance and 13 countries were commended for some successes in conducting their mutual legal assistance processes.

[388] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 4, who interestingly notices that 'whether or not a particular offense is mandatory or permissive in Chapter III, Chapter IV applies once that offense has been implemented at the national level. The character of the cooperation obligation imposed by Chapter IV will turn in some cases on whether the offense is one for which dual criminality (criminalization in both the requesting and requested state) is present. For example, Article 44 (Extradition) applies on a mandatory basis to offenses for which there is dual criminality between the country making the extradition requests and the country where the person whose extradition is requested is present. Without such dual criminality, Article 44's provisions apply only on a permissive (discretionary) basis with the requested country.'

thought to have hindered prosecutions in the past.'[389] Accordingly, the UNCAC aims at representing a clear common basis for co-operation between States, which thus tries to overcome the differences in legal systems or between the underlying principles of operation of their criminal justice systems.[390] In this sense the UNCAC significantly addresses the use certain investigative techniques which – if uniformly adopted – may prove to be very useful to deal with sophisticated organized criminal groups (e.g. controlled delivery, electronic surveillance and undercover operations). Similarly one should notice that requested States are exhorted to comply with the law and procedure of the requesting States. Furthermore one should welcome the possibility to overcome the problems resulting from the initiation of multiple criminal investigations through the establishment of joint investigation teams and formal channels to exchange police information, as well as through the possibility to cooperate for the protection of witnesses and to appoint liaison officers. In addition to this, video conferences are allowed and the spontaneous transmission of information is encouraged. Thirdly, the UNCAC deals at the global level with the extradition of nationals, and allows the possibility of 'temporary surrender' of the fugitive on the condition that the person will be subsequently returned; alternatively the requested States is requested to bring the person to trial.

In conclusion then considering that 'cooperation provisions are potentially the most significant tools of the conventions'[391] the innovations brought by the UNCAC provisions in the latter field could have a profound impact, not only because of their content and scope but most importantly, 'because of their potential for creating a global, possibly even universal, enforcement network.'[392] However, such enthusiasm should not undermine the above-mentioned challenges and limits of the Convention, whose further implementation should be required, and whose problems should be addressed and overcome at both the technical and political level.

[389] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 18.
[390] Cf. Joutsen, M., 'The United Nations Convention Against Corruption' in Graycar, A. and R. G. Smith (eds), *Handbook of Global Research and Practice in Corruption* (2011).
[391] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 19.
[392] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 19.

2.5.4. Further International Initiatives to Strengthen Cooperation against Corruption

After having examined the most significant multilateral instruments constituting a fundamental basis to establish cooperation within corruption cases, the final part of the present Chapter introduces two further initiatives which may support the anti-corruption efforts described illustrated so far, that is the 'Group of 20' ('G-20') and the Financial Action Task Force ('FATF'). Despite the fact that the central focus of both the latter initiatives is not the fight against corruption, they nevertheless represent crucial fora in further bringing States to cooperate against corrupt practices.

2.5.4.1.The Policy Initiatives of the Group of 20

Although the very aim of the G-20, which was first constituted in 1999 as a meeting of Finance Ministers and Central Bank Governors, is to create a forum to foster economic cooperation and decision-making of the world's 20 major economies,[393] in November 2010 the leaders of the G20 gathered in Seoul have decided to engage in the fight against corruption, and have adopted a two-year Action Plan on 'combating corruption, promoting

[393] The members of the G-20 are 19 States plus the European Union. Its leaders meet annually (the host country in 2014 is Australia), but during the year the Finance Ministers and Central Bank Governors meet regularly to discuss ways to strengthen the global economy, reform international financial institutions, improve financial regulation, and discuss the key economic reforms that are needed in each of the member countries. In 2008, the first G20 Leaders Summit was held in response to the global financial crisis. According to the G-20's website (www.g20.org) 'its decisive and coordinated actions boosted consumer and business confidence and supported the first stages of economic recovery.' The G20 continues to focus on measures to support global economic growth, with a strong emphasis on promoting job creation and open trade. Each G20 president invites a number of guest countries each year. The G20 works closely with international organisations, including the Financial Stability Board, the International Labour Organisation, the International Monetary Fund, the Organisation for Economic Co-operation and Development, the United Nations, the World Bank and the World Trade Organization.

market integrity, and supporting a clean business Environment' ('Action Plan').[394] A G-20 Anti-Corruption Working Group ('G-20 Anti-Corruption WG') created a few months earlier was given the task to implement the Action Plan and to report on 'individual and collective progresses made by G20 countries in the implementation of the Action Plan to be submitted on an annual basis to the G20 Leaders.'

Among the key-areas identified by the Action Plan where the G-20 intended to lead 'by example' one is international cooperation. In this context the G-20 leaders have committed to:

(i) Promote the use of the UNCAC for extradition, mutual legal assistance and asset recovery;
(ii) Offer technical assistance where needed;
(iii) Encourage the signing of bilateral and multilateral treaties on extradition, mutual legal assistance and asset recovery;

In 2012 at the Los Cabos summit in Mexico, leaders of the G-20 renewed the mandate of the Working Group which developed a revised another two-year Action Plan for 2013-2014[395] aiming, inter alia, at strengthening corruption through the following initiatives:

(i) Encouraging and sharing information on relevant technical assistance among G20 countries and developing country partners;
(ii) Exchanging experiences about networking opportunities and considering the extent to which there are networks, contact points, including designating central authority contact points as required by UNCAC, and other mechanisms in place to ensure the fullest levels of

[394] The Action Plan is available at http://www.oecd.org/g20/topics/anti-corruption/G20_Anti-Corruption_Action_Plan.pdf.
[395] The Revised Action Plan 2013-2014 is available at http://www.oecd.org/g20/topics/anti-corruption/G20_Anti-Corruption_Action_Plan_%282013-2014%29.pdf.

international cooperation between all appropriate government and law enforcement agencies, including FIUs, as well as judicial authorities;

(iii) Considering possible ways to facilitate the cooperation and sharing of information between domestic authorities and the integrity offices of international organisations;

(iv) Considering the use of civil and administrative channels for international cooperation in corruption and asset recovery cases.

Given that G-20 countries represent approximately 90 percent of the world's gross domestic product, the latter commitments of the G-20 represent a positive development insofar as they signal a growing sensibility of the world leaders and the economic sector toward corruption and its detrimental effects on economies and development. However, the significance of the concrete steps taken so far is limited for the purposes of the present study, since only a few results have been attained to enhance international cooperation against corruption. While in 2011 a forum of civil society organizations parallel to the G-20 sustained that in the areas of extradition and mutual legal assistance the Working Group had undertaken a self-assessment of the capacity of G20 countries to undertake successful extradition and mutual legal assistance with other G20 members in corruption matters,[396] the 2013 Working Group's Progress Report gives no evidence of further developments in this area.[397] Despite the fact the G-20's essential mission is not an anti-corruption one, it should also develop as a forum to encourage and support all members to meet some common standards in international cooperation, as well a networking opportunity to facilitate the exchange of information and best practices in the latter field. In this sense one should welcome the release, in 2012, of a step-by-step guide overview of the requisite procedures of G-20 countries to obtain mutual legal assistance in criminal matters (including corruption) in view of ensuring that requests are received and processed as efficiently as possible.[398]

[396] Civil G20, 'First Monitoring Report of the G20 Anti-Corruption Working Group to G20 Leaders on Individual and Collective Progress Made by G20 Countries in the Implementation of the Seoul Action Plan', available at http://www.g20civil.com/documents/Final_G20_Anti-corruption_Working_Group_progress_Report.pdf, para 17.

[397] The report is available at http://www.mofa.go.jp/files/000014208.pdf.

[398] The Guide is available at http://www.track.unodc.org/Documents/G20%20Guide%20to%20Mutual%20Legal%20Assistance%202012.pdf

2.5.4.2.The Financial Action Task Force's Recommendations

The second international initiative which is having an impact on further committing States to cooperate in corruption cases is the Financial Action Task Force ('FATF'), an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing. In order to tackle the latter issues, in 2003 the FATF has released a set of 40+9 Recommendations,[399] which have been revised in 2012 in order to face the evolving threats to security and the integrity of the financial system, as well as to address new areas of intervention such as corruption and tax crimes.[400] The significance of considering the latter Recommendations – which are not binding but are considered a fundamental global standard in the anti-money laundering ('AML') context – rests on two elements: firstly, because the FATF attaches a great importance to the fight against corruption and consider anti-money laundering and anticorruption efforts as mutually enforcing.[401] Secondly, because they address issues of international cooperation in relation to

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. Special emphasis is laid on the requirements for obtaining common types of legal assistance, including court-ordered documentary evidence, executing search warrants, seizing and confiscating assets, and obtaining witness testimonies or statements. The Guide also lists contact information for the relevant country authorities to facilitate communication between states. In this context the Guide complements existing and more comprehensive tools on mutual legal assistance, such as the similar instrument developed by the Group of 8 ('G-8') (Judicial Cooperation Handbook, available at http://www.coe.int/t/dghl/standardsetting/pc-oc/PCOC_documents/8_MLA%20step-by-step_CN152011_CRP.6_eV1182196.pdf) as well as the UNODC's Mutual Legal Assistance Writer Tool (see http://www.unodc.org/mla/en/index.html).

[399] FATF, 'The Forty Reccomendations' (2003), available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202003.pdf.

[400] FATF, 'The FATF Recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' (2012), available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

[401] According to the FATF, corruption and money laundering are intrinsically linked: corruption offences, such as bribery or theft of public funds, are generally committed for the purpose of obtaining private gain; money laundering is the process of concealing illicit gains that were generated from criminal activity. The FATF Recommendations were designed to combat money laundering and terrorist financing, but when effectively implemented they can also help combat corruption, by: safeguarding the integrity of the public sector; protecting designated private sector institutions from abuse; increasing transparency of the financial system; facilitating the detection, investigation and prosecution of corruption and money laundering, and the recovery of stolen assets. The FATF has published a number of works in this field, which are available at http://www.fatf-gafi.org/topics/corruption/documents/bpp-fatfrecs-corruption.html. In this context one could also refer to Fontanta, A. and P. Gomes Pereira, 'Using Money Laundering Investigations to Fight Corruption in Developing Countries: Domestic Obstacles and Strategies to Overcome Them' (2012) 9 U4 Issue, available at

'predicate offences' of money laundering such as corruption; thirdly, because the implementation of the Recommendations is subject to a monitoring mechanism which publishes the results of its activity in the form of evaluation reports.

After having introduced the relevant Recommendations in the field of international cooperation, a few remarks are dedicated to the results of the empirical assessment of approximately 160 evaluation reports which consider the level of geographical compliance with those standards. Considering that the new round of assessments in relation to the 2012 Recommendations is set to start in 2014, it is important to note that the focus of the following paragraphs is represented by the 2003 Recommendations and by the mutual evaluation reports which have been released up until 2012.

2.5.4.2.1. The Relevant Recommendations

Among the 40+9 Recommendations of 2003, only some of them could be taken into consideration for the scope of the present research, which is the international framework governing mutual legal assistance and extradition for the purpose of tackling corruption.

Before dealing with them, it is worth to make a brief introduction about the general framework of the 2003 FATF Recommendations, which are organized into three 'topic areas' and twelve sub-categories ('themes'). The topic areas are:

(i) The *legal* area, that is the establishment of the relevant criminal offences;

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http://www.u4.no/publications/using-money-laundering-investigations-to-fight-corruption-in-developing-countries-domestic-obstacles-and-strategies-to-overcome-them/. Finally, one should also recall that the G20 called upon the FATF to further address the problem of corruption in the framework of its work on combating money laundering and terrorist financing, lastly on the G20 Finance Ministers and Central Bank Governors Final Communiqué held in Moscow on 19-20 July 2013.

(ii) The *preventive* area, which deals with the capacity of States to prevent money laundering and terrorism financing by regulating financial institutions and non-financial businesses and professions;

(iii) The *institutional* area, which includes aspects of international cooperation.

In this context, 12 themes which are sub-categories of the above areas concern:

(i) The scope of the criminal offence of ML;
(ii) Provisional measures and confiscation;
(iii) Customer due diligence and record-keeping;
(iv) Reporting of suspicious transactions and compliance;
(v) Other measures to deter ML and terrorist financing;
(vi) Measures to be taken with respect to countries that do not or insufficiently comply with the FATF recommendations;
(vii) Regulation and supervision;
(viii) Competent authorities, their powers and resources;
(ix) Transparency of legal persons and arrangements;
(x) International co-operation;
(xi) Mutual legal assistance and extradition;
(xii) Other forms of co-operation;

Coming to the Recommendations which are more significant for our purposes, emphasis should be primarily laid on those belonging to the third topic area, and touching on the last three themes of the latter classification.

Firstly there is Recommendation 35 which calls States to take immediate steps to ‘become party to and implement fully’ a number of Conventions, among which one should recall the

UN Drug Trafficking Convention[402] and the UNTOC; furthermore they are 'encouraged to ratify and implement other relevant international conventions, such as the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime'. No reference was made to the UNCAC which, however, is included in the list of instruments to be implemented in Recommendation 36 of the 2012 FATF Recommendations. The following Recommendation – no. 36 – deals with issues of mutual legal assistance and commits States 'to provide the widest possible range of mutual legal assistance in relation to money laundering and terrorist financing investigations, prosecutions, and related proceedings' whereas the latter wording – 'related proceedings' – induces to consider encompassed also the not infrequent cases where a corruption proceedings is carried out parallel to one of money laundering.[403] In this context countries are requested to:

(i) Not prohibiting or place unreasonable or unduly restrictive conditions on the provision of mutual legal assistance;
(ii) Ensuring that they have clear and efficient processes for the execution of mutual legal assistance requests;
(iii) Not refusing to execute a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters;
(iv) Not refusing to execute a request for mutual legal assistance on the grounds that laws require financial institutions to maintain secrecy or confidentiality.

Furthermore, Recommendation 37, despite not making reference to any specific offence, provides that States consider the abolition of double criminality requirements which, in any case, should be considered satisfied 'provided that both countries criminalise the conduct underlying the offence', embracing the so-called 'conduct-based approach'. Pursuant to Recommendation 38 States should have an authority to actively and swiftly cooperate to identify, freeze, seize and confiscate proceeds of predicate offences to money laundering

[402] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (signed on 20 December 1988; entered into force on 11 November 1990).
[403] The corresponding Recommendation 37 of 2012 FATF Recommendations adds that mutual legal assistance should be provided also in relation to 'associated predicate offences'.

(which includes corruption), as well as the 'instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value.'[404] In relation to the latter seized and confiscated proceedings States should also agree on their coordination, 'which may include the sharing of confiscated assets.' While Recommendation 39 deals with extradition, Recommendation 40 on 'other forms of cooperation' requests States to set up 'clear and effective gateways to facilitate the prompt and constructive exchange directly between counterparts, either spontaneously or upon request, of information relating to both money laundering and the underlying predicate offences' (emphasis added).[405] In particular, assistance should not be refused on fiscal grounds, and on grounds of secrecy or confidentiality (however controls and safeguards should ensure that the information exchanged is used only in an authorised manner); furthermore, competent authorities should be able to conduct inquiries and investigations on behalf of foreign counterparts; finally, countries are also encouraged to permit exchange of information with non-counterparts.

2.5.4.2.2. Assessing the Geographical Compliance with the Recommendations on International Cooperation

After having identified the relevant Recommendations for the purpose of the present Chapter, the attention now turns on the analysis of the degree of geographical compliance with such standards, which was made possible thanks to the fact that the FATF monitors their implementation and publishes the corresponding reports. In this context one should recall that the International Monetary Fund ('IMF') and the World Bank ('WB'), in conjunction with the FATF and FATF-style Regional Bodies ('FSRB') in 2002 launched a program to conduct joint assessments of countries' compliance with the FATF framework. The methodology to

[404] Remarkably, new Recommendation 38 of 2012 Recommendations deals with non-conviction-based confiscation and requests that such authority should be also able 'to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.'

[405] Comparing it with new Recommendation 40 of 2012 FATF Recommendation, the latter interestingly adds that 'should a competent authority need bilateral or multilateral agreements or arrangements, such as a Memorandum of Understanding (MOU), these should be negotiated and signed in a timely way with the widest range of foreign counterparts.'

assess and monitor the implementation of the Recommendations was elaborated in 2004[406] and quickly became a turning point in the fight against money laundering and terrorism financing. Up until 2012 approximately 170 countries were assessed under the program. As a result of this process, the geographical compliance with such standards can be examined by scrutinizing the public evaluations.

2.5.4.2.2.1.Methodology

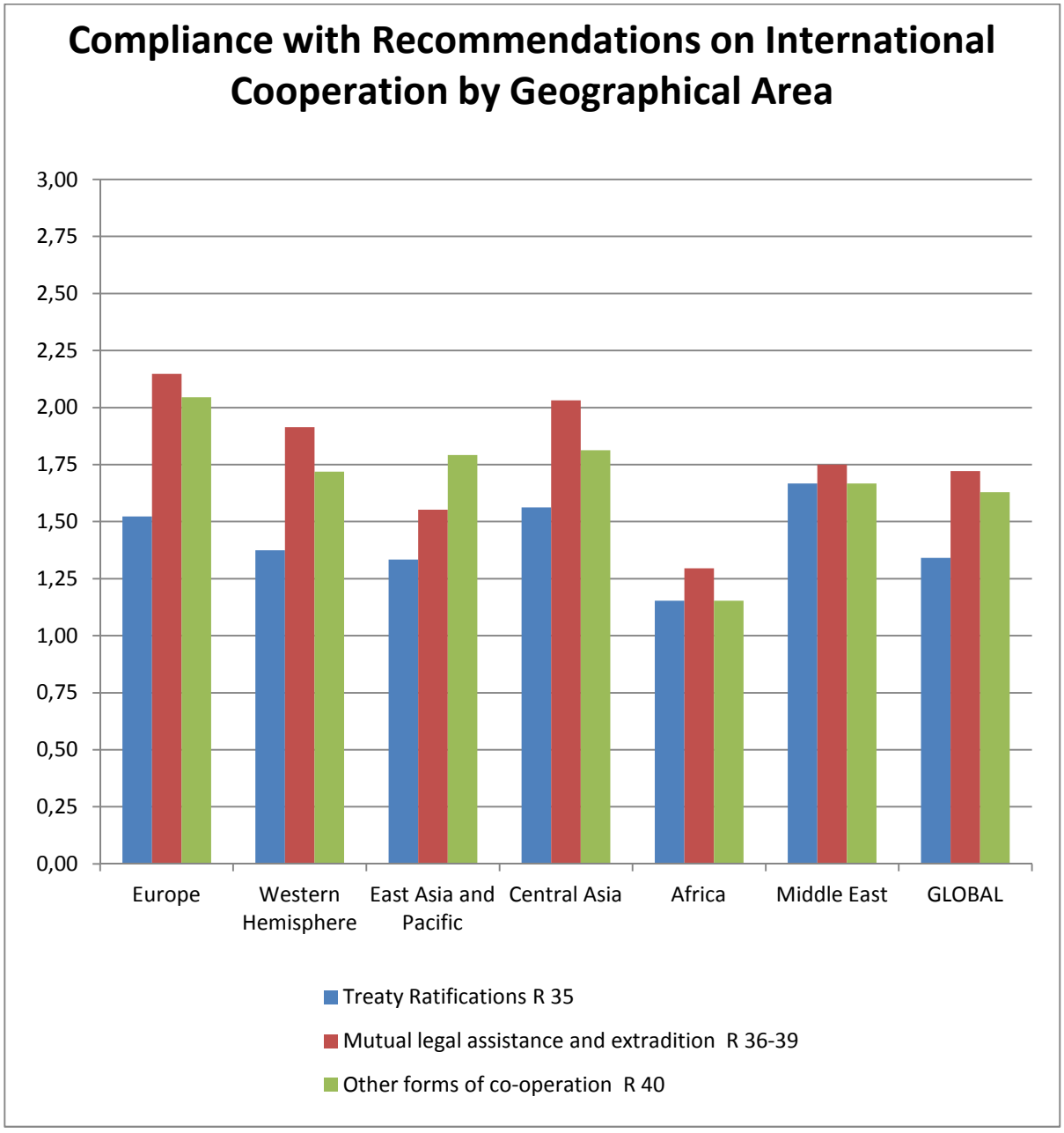
The analysis which follows is elaborated through the methodology conceived by other scholars in this field,[407] which is built on the scores assigned to different countries during the evaluation round of the 2003 FATF Recommendations. In particular, considering that for each recommendations countries are assessed as being compliant (C), largely compliant (LC), partially compliant (PC), or non-compliant (NC) (plus NA for not applicable), the above-mentioned authors have assigned numerical values ranging from 0 (for non-compliant) to 3 (for compliant). Through the latter method the elaboration of the numerical results of the analysis – which is carried out on a significant sample of 160 mutual evaluations – has given interesting indications as to the compliance of States to the Recommendations in the field of international cooperation, which for the sake of synthesis are grouped and labelled as follows: Treaty Ratifications (Recommendation 35); Mutual Legal Assistance and Extradition (Recommendations 36-39); Other form of Cooperation (Recommendation 40). Finally, one should note that the 160 States considered have been grouped in the following geographical areas: Europe (which includes Turkey and oversee territories); Western Hemisphere (which consists of the American continent); East Asia and Pacific; Central Asia; Africa; Middle East (including the Arabian peninsula); and 'Global', which consider all the countries scrutinized.

[406] FATF, 'Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations' (2004), available at http://www.fatf-gafi.org/media/fatf/documents/reports/methodology.pdf.

[407] See Arnone, M. and P. C. Padoan, 'Anti-Money Laundering by International Organizations: A Preliminary Assessment' (2008) 26(3) EJLE 361; and Arnone, M. and L. Borlini, 'International Anti-Money Laundering Programs. Empirical Assessment and Issues in Criminal Regulation' (2010) 13(3) Journal of Money Laundering Control 226.

2.5.4.2.2.2.Results and Remarks

In light of the latter methodological premises the elaboration of the evaluation reports generates the following graphic.



Generally speaking the graphic shows that the overall compliance with the entire group of Recommendations on International Cooperation is not fully satisfactory, as the Global columns demonstrates: in this sense the average results for the three groups of Recommendations is roughly around 1,5, which only represents half the way to full compliance. From the Global perspective one should also stress that 'Treaty Ratifications' is the weaker of the three columns, which can be explained as a low political commitment of States to International Conventions, but should also be read in light of the significance of bilateral treaties, which play an important role in this context. The third remark which easily emerges looking at the graphic is the weak results obtained by the African continent, which scores the most alarming results in all three sets of Recommendations; similarly, one should emphasize the results of the 'East Asia and Pacific' group which – together with Africa – scores results below or only slightly above the global average. On the other hand, Europe and Middle East can be noticed for they always have an average result above the 1,5 threshold. Fourthly, one should highlight that the 'East Asia and Pacific' group does not follow the pattern emerging from the results of the other geographical groups: in the former, the score for the mutual legal assistance and extradition's Recommendations is in fact lower than the ones on other forms of cooperation, and this should lead to infer that the level of cooperation afforded by those countries in terms of MLA and extradition is not a satisfactory one. Finally, the results related to Recommendations 36-39 for the countries of the 'Central Asia' area suggest a level of cooperation as advanced as the one afforded by the European group.

In conclusion, then, from the assessment of the FATF's contribution to enhance cooperation against corruption two impressions seem to emerge: on the one hand one could say that the Recommendations might be significant for the latter purpose, also considering the fact that some further improvements have been integrated in the 2012 Recommendations (e.g. requiring the ratification of the UNAC). On the other hand, the Recommendations' status of global standard against money laundering, and the development of a detailed and public system of evaluation make the FATF an important initiative to monitor States' efforts in developing international cooperation against corruption, especially if measures against the latter offence will be further integrated in the system of recommendations, and thus closely supervised.

2.6. Concluding Remarks

The present Chapter has attempted to illustrate several issues linked with the current degree of cooperation established at the international level to tackle transnational cases of corruption. A few provisional conclusions could be thus taken.

From a general standpoint, after addressing one of the principle sources of obstacles which hinders the possibility for States to obtain criminal assistance (that is differences among legal traditions and systems) as well as the general conditions applying cooperation in criminal matters (e.g. dual criminality, reciprocity), I found out that through a clear and constructive communication States could best overcome the difficulties arising from criminal cooperation.[408] In this sense, treaty-based agreements may represent an important element of success since they provide legal certainty, favour dialogue and mutual understanding, and they exclude a system of assistance based on the discretion of the requested State.

As for the international measures in the context of criminal law cooperation in corruption matters, at regional level I pointed out to the pioneer initiatives of the CoE and, most notably, to the EU experience, whose premises – as established in the TFEU – constitute a potentially effective frame to set up an system of assistance to prosecute transnational corruption throughout the EU. Accordingly, one should welcome the acknowledgment of the principle of mutual recognition as the cornerstone of cooperation and the two most extensive instruments which have embraced the latter approach, that is the European Arrest Warrant and the recent European Investigation Order, both applicable to the crime of corruption. The latter ones not only deal comprehensively with issues of criminal cooperation for the purpose of clarifying the legislative scenario, but they also provide for a swift and effective framework of cooperation, with tight deadlines and limited grounds to refuse a request. However, safeguards should be establish to assess and monitor the respect of the fundamental due process rights throughout the EU; plus, with specific regards to the prosecution of corruption,

[408] As stated by a French Liason Magistrate in the United Kingdom in respect of common legal issues that arise in mutual legal assistance, 'it is vital for practitioners (in both the requesting and requested states) to anticipate potential problems and to proactively address them. Communication between the two states is essential. Whenever there is doubt about an issue, making inquiries leads to better results than simply ignoring the problem'; Rabatel, B., 'The Role of Liaison Magistrates in International Judicial Cooperation and Comparative Law' (n. 385), 44.

the steps undertaken in the field of criminal cooperation need to be complemented by simultaneous efforts in the process of harmonization of the substantial provisions and sanctions pursuant to Article 83 TFEU, which considers corruption as one of those crimes 'with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'.

At the 'global' level the adoption of the UNCAC and of its Chapter IV has represented a turning point in the attempt to build a framework of cooperation for the fight against corruption. The UNCAC is the most modern and comprehensive international legal instrument, and the more countries sign and ratify the UNCAC, the more it will assume an increasingly central role in international cooperation in corruption cases. In this sense one should stress that, despite the fact the OECD Anti-bribery Convention has proved to be an highly effective instrument with a successful monitoring system which gives helpful information about the State Parties' degree of implementation, the UNCAC has a 'universal nature' and is not only limited to the crime of bribery of foreign officials as the OECD instrument. As a consequence, the UNCAC aims at constituting the common basis for co-operation between States in the field of corruption, attempting to bridge the differences among the world legal systems and to favour an advanced level of cooperation while leaving margins of flexibility to State Parties. On the other hand, as I have pointed out in previous paragraphs, the UNCAC as well as the OECD Anti-Bribery Convention is still source of uncertainties and challenges for States, which often fail to reach a uniform level of implementation for the lack of political will. As a consequence, several horizontal issues still undermine an effective system of cooperation in corruption cases such as:

(i) Excessive delays in affording cooperation, often favoured by incorrect requests and responses, lack of flexibility and unawareness of foreign legal systems and alternatives methods of cooperation;
(ii) Scarce level of informal exchange of information as well as the improper use of the most effective channels of communication (e.g. central authorities and international networks);
(iii) Lack of human and financial resources;

(iv) Persistence of potentially broad grounds of refusal and of the dual criminality requirement (in spite of the conduct-based approach);

(v) Risk to 'tip-off' the suspects and disclosing sensitive information;

(vi) Shortage of statistics to assess the efficiency and effectiveness of international cooperation;

(vii) Unsatisfactory cooperation in civil and administrative proceedings for corruption cases involving legal persons.

In this context the work of both the U.N.'s WG on International Cooperation and the OECD's WG on Bribery attempt to point out and address some of the most significant issues, but much of its success will depend on the effectiveness of the political bodies (i.e. the COSP for the UNCAC) to persuade States in implementing the obligations they have committed to.

As a conclusion then, considering that 'cooperation provisions are potentially the most significant tools of the conventions',[409] one should welcome the developments made in recent years by States to reach a closer level of assistance in criminal matters and, in particular, against transnational corruption.[410] Yet, one should also take into account that the ways corruption (and economic crimes in general) are committed evolve rapidly and have reached a global scale, also thanks to the developments in trade and investment, as well as well as to the improvements in technology. As a consequence States should consider committing further in this field, and putting forward more initiatives such as a convention on interstate cooperation between law enforcement agencies, multilateral cooperative task forces for outstanding cases

[409] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 19.

[410] In this sense, Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 250-1 notices that the current trend is rather effective insofar as it goes toward 'less formality, to greater speed, and to more forms of assistance at ever earlier stages in the investigation.' The author adds, however, that the process is 'still heavily dependent on authentication, adherence to the correct procedure, and, above all, only being able to exercise powers that a requested state can exercise in its own right.' A further weakness is identified in the fact that 'the system does not provide for the powers available in the party with the most extensive enforcement powers, but only the powers in the particular requested party.' As for extradition, the author remarks that reform is occurring in two main ways: firstly, the number of extraditable offences is expanding, and the focus is switching from 'enumerative' to 'evaluative' thresholds; secondly, efforts have been made to remove the barriers to extradition. In this context the 'goal of universally available extradition' is far from reality because some barriers, such as the refusal to extradite nationals, is still very much present.

of transnational corruption, and U.N.-led command for transnational corruption prevention.[411] Of course, the latter developments should not go without an appropriate degree of States' controls over their jurisdiction and the appropriate protection of suspected/accused persons' rights and interests. In searching for such a delicate and ever-changing balance, States could begin by setting up closer forms of legal and law enforcement assistance within regional organizations, where the approximation of laws and procedures is more feasible from both a legal and a political perspective. In this sense Europe could be taken as a reference for other continents:[412] although European States are far from being fully integrated at the criminal level, the fruitful work of the CoE and the entry into force of the Lisbon Treaty in 2009 have in fact posed the premises for the harmonization and the common prosecution of transnational crimes, including corruption.

However, the present Chapter has also identified two issues which are neither legal nor technical, and which may nevertheless override the process toward an 'ever closer' cooperation of States against corruption at the global level. Firstly, the lack of mutual trust in the underlying values of each other's legal system, which could be addressed by favouring the knowledge of foreign States' legal systems and the exchange of the most relevant practices. Secondly, since transnational criminal procedure is 'fundamentally relational'[413] and international cooperation a form of international relations, many challenges depend on diplomatic considerations, especially in relation to a politically-sensitive crime such as

[411] Cf. Mueller, G., 'The Globalization of Life on Earth, of Crime and of Crime Prevention : An Essay on how to Deal with the Major Criminals who Threaten the Continued Existence of Humankind' in Eser, A. and O. Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law : Documentation of an International Workshop in Freiburg, May 1991* (Max Planck Institute, Freiburg 1992).

[412] According to Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 252, signs that the European model is taken as a reference 'are clearly there' since the '*de facto* manifestations of sovereign control and reciprocity are slowly being eroded, while individuals struggle to erect human rights control of these processes in the hostile terrain of transnational procedural cooperation which treats them as objects, not subjects.'

[413] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 252 (emphasis added), which adds that transnational criminal procedure 'tries to overcome the parochial nature of criminal procedure by nudging states towards the mutual recognition of authoritative decision-making of other states, with the minimum of added conditions.'

corruption:[414] not surprisingly the key to resolve many problems related to mutual legal assistance and extradition has been considered 'primarily political, and secondarily legal.'[415]

[414] Cf. Neliken, D. and M. Levi, 'The Corruption of Politics and the Politics of Corruption' (1996) 23(1) Journal of Law and Society Vol 23, No 1, 1.

[415] Cf. Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 234, who mainly refers to the 'politics' of extradition, whereas 'States are notoriously sceptical of extradition' and some of them 'are eager to request it, but loath to grant it.'

III. THE CRUCIAL ROLE OF INTERNATIONAL COOPERATION IN THE PROCESS OF ASSET RECOVERY

3.1. Introduction

3.1.1. What does 'Asset Recovery' Mean?

As for the term 'corruption', the concept of 'asset recovery' does not have an univocal meaning[416] and it may be used in diverse fields of law such as insolvency, fraud, confiscation, and, of course, anti-corruption. Not even the UNCAC, which is the only treaty mentioning the term, provides for a definition of 'asset recovery', which may nevertheless be inferred by looking in good faith at the ordinary meaning of the words read in their context and in light of the UNCAC's object and purpose.[417] With the use of the latter tools, it has been suggested that 'asset recovery' may interpreted in a broad or narrow way, leading to denote it either as a purpose or a process of the UNCAC.[418] On the one hand, if one reads Article 1(b) of the UNCAC[419] and the provisions of its Chapter V together with the resolutions[420] which preceded the conclusion of the Convention, asset recovery may be seen as 'an ideal state of

[416] The 'Oxford English Dictionary' , available at http://www.oed.com/, does not report such concept.

[417] Article 31 of the Vienna Convention on the Law of Treaties, Vienna, May 23 1969, entered into force 27 January 1980, 1155 UNTS 331. According to Article 32 of the latter Convention one could also turn supplementary means of treaty interpretation such as the preparatory work and the circumstances of the treaty's conclusion in case the meaning remains obscure, ambiguous, or manifestly absurd or unreasonable.

[418] Ivory, R., *Corruption, Asset Recovery, and the Protection of Property in Public International Law. The Human Rights of the Bad Guys* (Cambridge University Press, 2014), 22-9.

[419] 'The purposes of this Convention are: [...](b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, *including in asset recovery*' (emphasis added).

[420] See, for instance, U.N. General Assembly, 'Preventing and Combating Corrupt Practices and Illegal Transfer of Funds and Repatriation of such Funds to the Countries of Origin' (25 January 2001) A/RES/55/188, para 3, available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010986.pdf, where States were called to increase international cooperation 'in regard to devising ways and means of preventing and addressing illegal transfers, as well as repatriating illegally transferred funds to the countries of origin, and calls upon all countries and entities concerned to cooperate in this regard.'

affairs to be achieved using a suite of preventive and repressive measures'.[421] On the other hand, the recovery of assets may also mean the legal process through which State parties obtain or regain property of corruption-related assets, as other documents illustrate it: an earlier draft of the UNCAC defined it, for example, as 'the procedure for the transfer or conveyance of all the property or assets, their proceeds or revenue, acquired through acts of corruption covered by this Convention from the receiving State Party where the assets are located to the affected State Party, even if they have been transformed, converted or disguised';[422] similarly, a joint report of the OECD and StAR described it as 'the process of tracing, freezing, and returning illegally acquired assets to the jurisdiction of origin'.[423]

For the purpose of the present work the latter, process-oriented, definition of 'asset recovery' is preferred and thus embraced because it better suits the aim and structure of the present Chapter, which intends to scrutinizes the framework and the challenges of the various steps which lead to secure and then repatriate the corruption-related assets in the country of origin. Furthermore, such definition allows me to focus more precisely on the international cooperation issues of asset recovery: if one had to consider the latter concept as one of the purposes of the UNCAC, it would be more difficult to relate it with the technical issues contained in the latter treaty as well as to consider other relevant international and regional treaties which do not have explicit asset recovery purposes but are nevertheless useful to address.[424]

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[421] R Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (Cambridge University Press 2014), 23.

[422] Article 2(p) of the U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Revised Draft United Nations Convention against Corruption' (5 February 2003) A/AC.261/3/Rev.3, available at https://www.unodc.org/pdf/crime/convention_corruption/session_5/3reve.pdf.

[423] OECD and StAR, 'Tracking Anti-Corruption and Asset Recovery Commitments A Progress Report and Recommendations for Action' (OECD/StAR, 2011), 23.

[424] Many of the instruments which I will refer to in this Chapter address important issues of 'cooperative confiscation', which is usually considered as a form of minor judicial or mutual legal assistance since it is often triggered by a request or a notice for mutual recognition. Although I dealt with issues of mutual legal assistance (and extradition) in Chapter II, I decided to analyse the issue of confiscation in the present part of my work because it forms part of, and plays a crucial role in the process of asset recovery. Furthermore cooperative confiscation poses peculiar challenges which is useful to treat separately from the ones generally arising from other MLA requests. On the issue of cooperative confiscation and on the differences with other means of mutual legal assistance see Bantekas, I., *International Criminal Law* (2010), 356-57; Donatsch, Heimgartner and Simonek, *Internationale Rechtshilfe: unter Einbezug der Amtshilfe im Steuerrecht* (2011), 33-4; Gless, S., *Internationales Strafrecht: Grundriss für Studium und Praxis* (2011), 259-260; Bassiouni, M. C., 'The Modalities of International Cooperation in Penal Matters' in Bassiouni, M. C. (ed), *International Criminal Law*

3.1.2. The Significance of Confiscation against Contemporary Transnational Crimes

A fundamental issue to address when elaborating a strategy to tackle any profitable crime is to set up a mechanism to deprive offenders the financial benefit of their unlawful actions. The latter proactive approach based on the 'follow the money' principle[425] represents a relatively recent evolution of the conventional criminal law and policy, whose strategies demonstrated to be incapable of facing the new features of crimes such as organized crime, corruption and terrorism.[426] In particular, the focus on the proceeds of crimes constitutes the answer to the increasingly transnational features of crimes which represents a crucial challenge of modern criminal law.[427] More generally, the shortcomings of the traditional systems of criminal procedure and punishment have lead States to focus on the financial assets of the offenders, who are highly affected by such measures 'in that it hurts where it hurts most: in their

(2008), 7-9; 13; Schomburg, W. and others, 'Einleitung' in Schomburg, W. and others (eds), *Internationale Rechtshilfe in Strafsachen* (2012), 15-8; Cryer, R. and others, *An Introduction to International Criminal Law and Procedure* (2010), 102-3.

[425] The vast literature on such strategy and particularly on money laundering – which constitutes its key element – includes Gilmore, W. C., *Dirty Money. The Evolution of International Measures to Counter Money Laundering and the Financing of Terrorism* (2011); Ryder, N., 'The Financial Services Authority and Money Laundering: A Game of Cat and Mouse' (2008) 67(3) Cambridge Law Journal 635; van Duyne, P. C., M. S. Groenhuijsen and A. A. P. Schudelaro, 'Balancing Financial Threats and Legal Interests in Money-Laundering and its Regulation' (2002) Annals of the American Academy of Political and Social Science 181; Blum, J. A. and others, *Financial Havens, Banking Secrecy and Money Laundering* (UNODC, 1998); Williams, P., 'Money Laundering' (1997) 5(1) South African Journal of International Affairs 71.

[426] See Kilchling, M., 'Tracing, Seizing and Confiscating Proceeds from Corruption (and other Illegal Conduct) Within or Outside the Criminal Justice System' (2001) 9(4) European Journal of Crime, Criminal Law and Criminal Justice 264; Jansen, F. E. and J. G. N. Bruinsma, 'Policing Organized Crime: A New Direction' (1997) 5(4) European Journal on Criminal Policy and Research 85. From a British perspective see U.K. Cabinet Office and Home Office, 'Extending Our Reach: A Comprehensive Approach to Tackling Serious Organized Crime' (2009); U.K. Home Office, 'New Powers Against Organized and Financial Crime' (2006); U.K. Home Office, 'One Step Ahead: A 21st Century Strategy to Defeat Organized Crime' (2004).

[427] On this issue see, among others, Edwards, A. and P. Gill, *Transnational Organized Crime: Perspective on Global Security* (2003); Andreas, P. and A. E. Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (2006); Madsen, G. F., *Transnational Organized Crime* (2009); UNODC, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* (2010); U.K. Home Secretary, 'Local to Global: Reducing the Risk from Organized Crime' (2011).; Bowling, B. and J. Sheptycki, *Global Policing* (2012).

pocket'.[428] Through the latter strategy States not only deny criminals the benefit of their acts, but also remove the motivation to commit them in the future.[429] Domestic and international legislation has thus developed over the years to find, seize, and confiscate the proceeds of crimes, which the UNCAC defines as 'any property derived from or obtained, directly or indirectly, through the commission of an offence'.[430] As it will be illustrated in the following paragraphs the first international multilateral instrument which committed States to adopt this kind of measures (so-called 'asset recovery' legislation) was the UN Drug Trafficking Convention of 1988; further treaties addressed the issue in relation to other transnational offences, and in 2003 the UNCAC introduced similar provisions to recover assets in relation to 'cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States'.[431]

3.1.3. The Theft of Public Assets as a 'Development Problem of the Greatest Magnitude'[432]

The theft of public assets is a development problem of the greatest magnitude. It is in fact common that corrupt public officials in developing countries commit 'kleptocratic

[428] Nicholls, C. and others, *Corruption and Misuse of Public Office* (2nd edn 2011), 436. From a policy perspective the deprivation of assets of criminal origin gained importance only in the last years. As noted by Cribb, N., 'Tracing and Confiscating the Proceeds of Crime' (2003) 11(2) Journal of Financial Crime 168, 180 one of the reasons for this is that the aim of criminal proceedings was essentially focused on the person rather than on the assets. Another reason may lay in the fact that judicial authorities had no proper tools to locate and identify the illicit assets. As the latter elements have been changing during the last few years, confiscation has taken an increasingly prominent role and it is now considered the 'main weapon' to deal with the proceeds of crime. On the this evolving attitude towards confiscation see Blanco Cordero, I., 'La Aplicación del Comiso y la Necesidad de Crear Organismos de Recuperación de Activos' (2007) Revista electrónica de la Asociación Internacional de Derecho Penal.

[429] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (Pieter Lang, 2013) xv, xxiii.

[430] Article 2(h) of the UNCAC.

[431] Preamble to the UNCAC.

[432] Greenberg, T. S. and others, 'Good Practices Guide for Non-Conviction Based Asset Forfeiture' (StAR, 2009), 7.

practices'[433] such as the theft from national treasuries, the systematic looting and illegal sale of natural resources or cultural treasures and the misuse of funds borrowed from international institutions through illicit activity and a different set of procedural and substantial rules applies. [434] The exact value of stolen state assets from developing countries is difficult to determine with any precision, even though it is estimated that corrupt public officials in developing and transition countries loot approximately $40 billion each year[435] and it is lost to various illegal activities between $1 and $1.6 trillion.[436] Furthermore one should consider the extra costs which are not immediately quantifiable such as the degradation and distrust of public institutions involved in managing public resources and governing the financial sector; the mistrust over the investment climate; and the effects on social services, especially health- and education- related.[437]

3.1.4. The Challenges of Global Corrupt Practices

Asset recovery is a complex area of law, especially when criminal assets are located in foreign jurisdiction.[438] The transfer of the assets in a foreign country complicates their identification and recovery because once they enter a new country a new jurisdiction becomes involved in their prosecution. From the side of developing countries, they often face serious challenges related to the legal, judicial and financial resources which limit their investigative

[433] According to the 'Oxford English Dictionary', available at http://www.oed.com/, the word 'kleptocracy' – which literally translated from Greek means 'rule by the thieves' – means 'a ruling body or order of thieves. Also, government by thieves; a nation ruled by this kind of government.'

[434] Although the transfer of profits may concern any kind of criminal practice involving large quantities of money (drug trafficking, money laundering, and more generally financial crimes), for the purposes of my work I will often refer to cases of 'grand corruption', a non-legal notion which is defined by Transparency International as 'acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.'

[435] This amount of money is close to the annual GDP of the world's 12 poorest countries, where 240 million people live.

[436] UNODC and The World Bank, 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan' (The World Bank, 2007), 10, referring to Baker, R., *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free-Market System* (2005).

[437] UNODC and The World Bank, 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan' (n. 436), 8.

[438] According to Greenberg, T. S. and others, 'Good Practices Guide for Non-Conviction Based Asset Forfeiture' (n. 432), 7, 'once the stolen funds have been transferred abroad, recovery is extraordinarily difficult.'

capacity and their ability to submit adequate international requests. On the other hand, if one consider the side of developed countries, where stolen assets are usually hidden, they may not be responsive to requests of legal assistance because of their evidentiary and procedural standards; in other cases problems arise in case the indicted person is death, fugitive, or immune from jurisdiction, as well as in relation to the return of the assets to the victim State. A further issue linked to the transfer of assets is that they are often transformed in multiple ways: they might be deposited in a bank account, they may be placed in a safe box, or they might be used to acquire property or establish businesses. Finally, assets of criminal origin might be even more complicated to trace when they are appear to be owned by third parties (figureheads or straw parties) who knowingly or unknowingly launder those assets. On top of all this one should also consider the difficult issue of political will, which concerns all States at different levels. In conclusion, then, the transfer of the corrupt assets in other countries doubles the difficulty of confiscating and returning the proceeds of crimes, including corruption.[439]

3.1.5. The International Consensus Leading to Chapter V of the UNCAC

In light of the fact that the corruption offences, especially when committed on a regular basis by the governments' elites have 'serious or even devastating consequences for the State of origin' in terms of foreign aid, currency reserves drains, tax base reduction, increase of poverty, harms to competition and to free trade,[440] States have gradually built up a broad international consensus on the need to trace and repatriate assets derived from corruption. However, since in this context 'good will and good intentions are not enough',[441] all States need to have in place a legislation which provides for specific legal proceedings and describes the steps to be taken when a foreign authority files a request of assistance to recover corrupt

[439] Cassella, S. D., 'The Recovery of Criminal Proceeds Generated in One Nation and Found in Another' (The 19th Cambridge International Symposium on Economic Crime Jesus College, Cambridge University 12 September 2001).

[440] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 193, which infers that 'all public policies, therefore, including those relative to peace and security, economic growth, education, health care and the environment, are possibly undermined.'

[441] Cassella, S. D., 'The Recovery of Criminal Proceeds Generated in One Nation and Found in Another' (n. 439).

assets.[442] The States' efforts to find an agreement in this context culminated with the UNCAC (especially its Chapter V), which in 2003 established detailed legal proceedings of asset recovery (i.e. identification, tracing, freezing, confiscation and recovery), and which is to be welcomed as a remarkable legal achievement in spite of the shortcomings and challenges which characterize such instrument and will be highlighted throughout the present Chapter.

3.1.6. The Need to Facilitate International Cooperation throughout the Asset Recovery Process

The relevance of the issue of asset recovery within my work rests in the fact that in many cases of corruption the proceeds of the offence are promptly transferred by the offender for concealment or lucrative purposes, and thus they are disguised in a factual state and/or geographical location which make it extremely hard to lead back to the crime itself. As a consequence the need to confiscate assets abroad and return them to the victim States (which usually are developing countries) is crucial and requires close collaboration and assistance between two or more States. In light of the fact that the corruption phenomenon has an increasingly transnational dimension, and following the research objective of the previous part of my work where I addressed issues of mutual legal assistance and extradition,[443] the present Chapter further examines the 'international cooperation dimension' of corruption by focusing on the process of recovery of corruption-related assets from foreign countries.

3.1.7. The Outline of the Chapter

The instruments and mechanisms of criminal law cooperation which I examined in Chapter II of my work constitute important yet not sufficient tools to carry out to the recovery of assets generated by corruption, and thus I will turn my attention to the specific legal responses

[442] In order to safeguard objects, documents or instruments which later may be confiscated or used as evidence, States may in fact need to enforce an order of search or seizure in another State.
[443] Cf. Chapter II.

elaborated for such purpose.[444] Following the design of the previous Chapter, the intention for the following part of the work is to deal with both the relevant international framework which has been developed so far to boost international cooperation for the purpose of asset recovery, as well as with the most critical issues which emerge in the latter context from a legal and a practical perspective.

For these purposes, in the first part of the present Chapter I will introduce some criminological arguments for asset recovery in order to frame the theoretical justifications underlying the process of repatriating corruption-related assets from foreign countries. After that it is my intention to deal with the origin and the structure of the asset recovery institution, which I will illustrate in general terms by dividing the process in two macro-phases ('asset confiscation' and 'asset recovery'). The final part of the Chapter addresses the provisions of the most advanced international instrument in the field of asset recovery, that is the UNCAC of 2003: in this context I lay particular emphasis on the analysis of the issues which deal with international cooperation, as well as on the most complex and controversial matters which States have to take into account when implementing the relevant parts of the Convention. The discussion of asset recovery issues will then continue in the following Chapter, where I will examine the work which is being carried out by the Conference of State Parties to the UNCAC in order to inquire the political priorities set by States as well as the outcomes of the experts' work stemming from the Working Group on Asset Recovery. At the same time, the next Chapter will be devoted to address the barriers which States experience in cooperating to recover assets, as well as the good practices and recommendations to overcome them and eventually establish a swift and effective system of asset recovery.[445]

[444] In spite of such international response rates of recovery are still dramatically low. Although developing states are estimated to lose up to US$40 billion per annum, in the period 1995–2010 only US$5 billion was recovered. See Canuto, O. and J. Devan, 'No Safe Havens for Stolen Funds' *International Herald Tribune* (26 March 2010), 8.

[445] This part of my work will draw, among other sources, from the findings of StAR, a joint initiative of the World Bank and the UNODC which has produced a considerable research work based on the practical experience of States in the field of asset recovery. 'Stolen Asset Recovery Initiative', available at http://star.worldbank.org/star.

3.2. Theoretical Justifications for Asset Recovery: a Criminologist Perspective

Before entering into the analysis of the legal dimension of asset recovery, at this introductory stage of the Chapter it is important to spend a few words on an issue which is often overlooked by the relevant literature, that is the theoretical criminology arguments which inform asset recovery as a form of punishment. In spite of the fact that the following paragraphs will also give account of the functional aims and reasons which guided the States to adopt international instruments to recover assets,[446] at the initial point of the discussion it is interesting to illustrate in brief the theoretical justifications behind asset recovery from a criminologist perspective, as well as the reasons to realize why it is an important and justifiable tool to tackle crimes such as corruption.[447]

3.2.1. Punishment

Firstly asset recovery can be explained by the will of society to punish those natural or legal persons who have unlawfully dissolved and/or appropriated assets, especially when they belonged to the public.[448] In particular one could perceive asset recovery as playing a retributive function from two perspectives: one the one hand the offender has to repay back to the State the 'debt' made with society;[449] on the other hand the punishment may be justified by the unfair advantage gained by the criminal.[450] In this context one should however notice that asset recovery intended as a mere punishment should be applied using the principle of proportionality, which means that a crime should not be punished more harshly than more

[446] See, in particular, para 3.3.

[447] Cf. Carr, I. and R. Jago, 'Corruption, the United Nations Conventions against Corruption ('UNCAC') and Asset Recovery' in King, C. and C. Walker (eds), *Dirty Assets. Emerging issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014) 203, 210-6.

[448] In relation to corruption, examples could be either the ones of a fraudulent company or a high public official embezzling public resources.

[449] According to Walker, N., *Why Punish* (OUP, Oxford 1991), the concept of 'reparation' should be preferred instead of the idea of 'debt'.

[450] However, as Duff, R. A., *Trials and Punishments* (Cambridge University Press, Cambridge 1986) quoted in Walker, N., *Why Punish* (n. 449), 76 put it, tackling assets should be justified as something more serious than a mere disapproval for taking advantage of an existing position.

serious ones, and that the punishment should take into consideration the factors characterizing the crime (e.g. the amount of stolen assets and the abuse of trust involved).[451]

3.2.2. Deterrence

The second justification which may be given for asset recovery is to deter other people from committing a crime. Two kinds of deterrence are usually considered: the first one is general and it refers to the effect that the threat of punishment creates in the society as whole, which as a consequence should refrain from carrying out the prohibited conduct.[452] Although being an apparently fair justification to punish, one should consider that it is extremely difficult to assess its effectiveness, and – more importantly – one could wonder whether a person should be punished disproportionately to deter the rest of society.[453] The second kind of deterrence is individual, targets those who have already committed a crime and aims at discouraging them to engage in the same conduct once the punishment is over. Critics of this approach to punishment argue that there is little evidence that a harsher conviction leads offenders to commit fewer crimes once they get out of prison.[454] Besides such critical remarks, if one transfers the deterrence arguments to the issue of asset recovery, one could agree with those who argue that deterrence may be cautiously considered as a theoretical justification.[455] Accordingly, should embezzlers such as Mubarak and Yanukovych had been trailed and imprisoned while in power,[456] their closest partners might have desisted to perpetrate the corrupt action of their leaders. Furthermore deterrence may be seen as part of the preventive

[451] See von Hirsch, A. and A. Ashworth, *Proportionate Sentencing* (OUP, Oxford 2004), 131-41.
[452] See von Hirsch, A. and A. Ashworth, *Proportionate Sentencing* (n. 451), 131-41.
[453] On these problematic issues linked to general deterrence see Ashworth, A., *Sentencing and Criminal Justice* (Cambridge University Press, Cambridge 2010), 78-84; Carr, I. and R. Jago, 'Corruption, the United Nations Conventions against Corruption ('UNCAC') and Asset Recovery' (n. 447), 213 make the example of the sentence imposed to Bernard Madoff, which amounts to 150 years in prison. In spite of the significant scale of his fraudulent conduct, the authors argue that the sentence 'was arguably disproportionate and contrary to the totality principle, which 'requires those who sentence to add up the number of offences to be sentenced and then consider the overall penalty to ensure a proportionate sentence'.
[454] Zedner, L., *Criminal Justice* (OUP, Oxford 2004), 93-95. On this topic see also Burnet, R. and S. Maruna, 'So Prison Works, Does It?' (2004) 43 Howard Journal of Criminal Justice 390.
[455] Carr, I. and R. Jago, 'Corruption, the United Nations Conventions against Corruption ('UNCAC') and Asset Recovery' (n. 447), 213.
[456] On the cases involving Mubrak and Yanukovych see paras 5.4. and 5.5., respectively.

action which States are bound to set up against corruption. Nevertheless, one should also bear in mind that the latter action should be always guided by the principle of proportionality and that further empirical research should be carried out to sustain the effectiveness of asset recovery as a method of deterrence.

3.2.3. Symbolic Denunciation

A third way to justify asset recovery which also lays in the realm of prevention consists in considering it as something to denounce publicly a corrupt activity and thus raise public awareness over its consequences. Plus, denouncing corruption through a symbolic message such as the deprivation of assets aims at communicating disapproval and creating social cohesion against those who commit the offence.[457] As for deterrence, denunciation should always be carried out keeping into account the principle of proportionality.

3.2.4. Incapacitation

A fourth way to justify asset recovery is to contend that by freezing assets or convicting the corrupt offender the prohibited conduct will stop.[458] However, one could easily argue that the current sophisticated financial and technological means question the effectiveness of this justification in so far as the imprisonment of a person may not prevent with certainty the dissipation of the assets. In other words, 'incapacitation does deprive the offender of their previously acquired lifestyle but the means of continued offending are arguably still within their grasp.'[459] A practical example confirming this risk comes from Italy, where the leaders of organized crime groups, although being convicted, have been able to rule, to buy back the

[457] See Moore, M., *Placing Blame: A Theory of Criminal Law* (OUP, Oxford 1997), 84-5.

[458] As contended by Walker, N., *Why Punish* (OUP, Oxford 1991), 34, the most extreme form to attain this objective is to impose the death penalty, which however it would be never justifiable for financial offences.

[459] Carr, I. and R. Jago, 'Corruption, the United Nations Conventions against Corruption ('UNCAC') and Asset Recovery' (n. 447), 215.

confiscated assets through figureheads, and to corrupt or recruit people for criminal purposes.[460]

3.2.5. Rehabilitation

A further justification which is usually put forward in criminology is that a punishment rehabilitates the offender, that means it cures or at least recovers him/her. As a case of 2006 involving Siemens demonstrates, rehabilitation may be also an argument to justify penalties involving corporation: the German engineering company was in fact required to pay €2 billion in fines and $100 million to anti-corruption NGOs to restore the trust of both the business community and the society. Although the rehabilitation may well be a valid justification, the penalties imposed should not be excessive for the sole purpose of diverting the offender from schemes of further offending behaviour.[461]

3.2.6. Reparation

Finally, as some cases of international asset recovery demonstrate, the repatriation of assets may be seen as a form of reparation to the community where the assets were stolen from: [462] despite of the fact that managing confiscate assets is far from being an easy and unproblematic task, especially when they are repatriated in developing countries,[463] the concept of giving back the assets to the State of origin is a sound way of explaining and justifying asset recovery.

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[460] UNODC, 'The Italian Experience in the Management, Use and Disposal of Frozen, Seized and Confiscated Assets' (2 September 2014) CAC/COSP/WG.2/2014/CRP.3, 4.

[461] Ashworth, A., *Sentencing and Criminal Justice* (n. 453), 86-7.

[462] In this sense see para 5.3.3.1. which illustrates the example of the BOTA Foundation established in Kazakhstan in response to a major case of transnational bribery.

[463] On this issue see Malizani Jimu, I., 'Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan' (October 2009) 6 International Centre for Asset Recovery Working Paper Series.

Overall, then, in light of all the considerations made so far, one could conclude by saying that asset recovery may be justified in several ways: willingness to punish, deterrence of others, public denunciation, incapacitation of the offender, as well as rehabilitation and reparation. Although the purpose of this paragraph was to briefly illustrate all the possible theoretical justifications rather than arguing in favour of any of them, one could conclude by saying that asset recovery may be understood in different ways according to the case of corruption at stake.[464] However, at the general level, one could say that affording reparation to the affected communities should be considered as one of the main drivers of asset recovery; furthermore no justification could lead to impose a punishment which punishes an individual or a company in violation of the principle of proportionality.

[464] In the same sense Carr, I. and R. Jago, 'Corruption, the United Nations Conventions against Corruption ('UNCAC') and Asset Recovery' (n. 447), 216 have concluded that 'declaring a primary justification is context specific'.

3.3. The Origin and Structure of the Process to Recover Criminal assets

3.3.1. The Repatriation of Cultural Property

Although the term ‘asset recovery’ is often associated with cases of powerful corrupt rulers from developing countries depredating public resources for private purposes, the first international mechanisms set up by States to the return goods originating from an illicit activity were agreed upon in order to protect cultural objects. In particular, the first instrument dealing with the restitution of illicitly-transferred goods was adopted by the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’) in 1970, whose Article 7(b)(ii) commits State Parties, at the request of another State, ‘to take appropriate steps to recover and return any such cultural property imported’. Furthermore, States should also ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner, but also to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners. In spite of the fact that the UNESCO Convention did not address key issues related to the restitution of property such as the relation between the action provided for by Article 7 and the ordinary claim of ownership, the criteria to determine the just compensation to third parties, and the exact content of the burden of proof, its underlying principles have been confirmed in the 1995 Convention on Stolen or Illegally Exported Cultural Objects adopted by the Institut international pour l’unification du droit privé (‘UNIDROIT’), which aimed at introducing an harmonized legal framework favouring the restitution of stolen cultural objects and the return of illegally exported cultural objects. Significantly, the Convention provides for the ‘fair and reasonable’ compensation of the possessor of a stolen cultural object in good faith; however, the burden of proof lays upon the possessor, who has to prove both his/her due diligence as well as his/her impossibility to know about the illicit origin of the object. Finally, it is interesting to stress that pursuant to its Article 8 the UNIDROIT Convention allows either a State or a private citizen to file a claim for restitution or return of cultural objects, which in principle are to be brought before the courts or other competent authorities of the State Party where the cultural object is located.

After having traced the origin of the asset recovery discipline in the international regulation of cultural objects' protection, one should now turn to the general structure of the recovery process of criminal assets and to the international response elaborated by the States to recover the instruments or the proceeds of a crime. In particular, the aim of the following paragraphs is to introduce the process to recover criminal assets and to illustrate its two fundamental phases as well as the most relevant international obligations. The latter overview, which provides the global framework governing the recovery of criminal assets in general, will then lead the Chapter to discuss in detail the provisions adopted to recover assets of corrupt origin,[465] with particular emphasis on the obligations concerning international cooperation.

3.3.2. The Overview of the Asset Recovery Process

Confiscation and recovery of criminal assets are two stages of a legal process whose objective is to give back criminal assets (proceeds or instrumentalities) to the victims of the crime, be them local communities or the central State. Although the core measure is represented by the confiscation of the criminal assets through a confiscation order, the whole process – which I describe in the following paragraphs by dividing it in two phases – can be outlined through the following steps:[466]

(i) *Identification*. Criminal assets have to be identified before initiating any confiscating action.[467] In this phase law enforcement investigations (usually under the coordination of a prosecutor) as well as integrated financial investigation[468] skills are crucial. When available, foreign

[465] Chapter V of the UNCAC.

[466] Cf. European Commission, 'Accompanying Document to the Proposal for a Directive of the European Parliament and the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union. Impact Assessment' (2012) Commission Staff Working Paper, 9.

[467] However, the identification should be carried out in parallel to the investigation dealing with criminal offence generating the proceeds. In this phase, intense cooperation is needed among all the domestic authorities involved.

[468] According to the Interpretative Note to Recommendation 30 of the 2012 FATF Recommendations, a 'financial investigation' is 'an enquiry into the financial affairs related to a criminal activity, with a view to:

Asset Recovery Offices may play an important role in providing information regarding assets located in their territory;

(ii) *Preservation*. Since obtaining a confiscation order may take a long time, the assets have to be preserved in the interim. This is usually possible through freezing (for bank accounts and real property) and seizure (for other moveable assets) orders. Between the time the assets are frozen and the issuing of the order of confiscation, their value should be maintained and thus the assets should be properly managed;

(iii) *Confiscation*. Only after an asset is officially confiscated, it becomes legally possible to recover or repatriate it. Confiscation determines the transfer of property to the State;

(iv) *Enforcement*. The further step is to enforce the confiscation order;

(v) *Redistribution*. The recovered assets may be returned to victims or deprived communities, or they may be repatriated to the State of origin which required assistance in the first place.

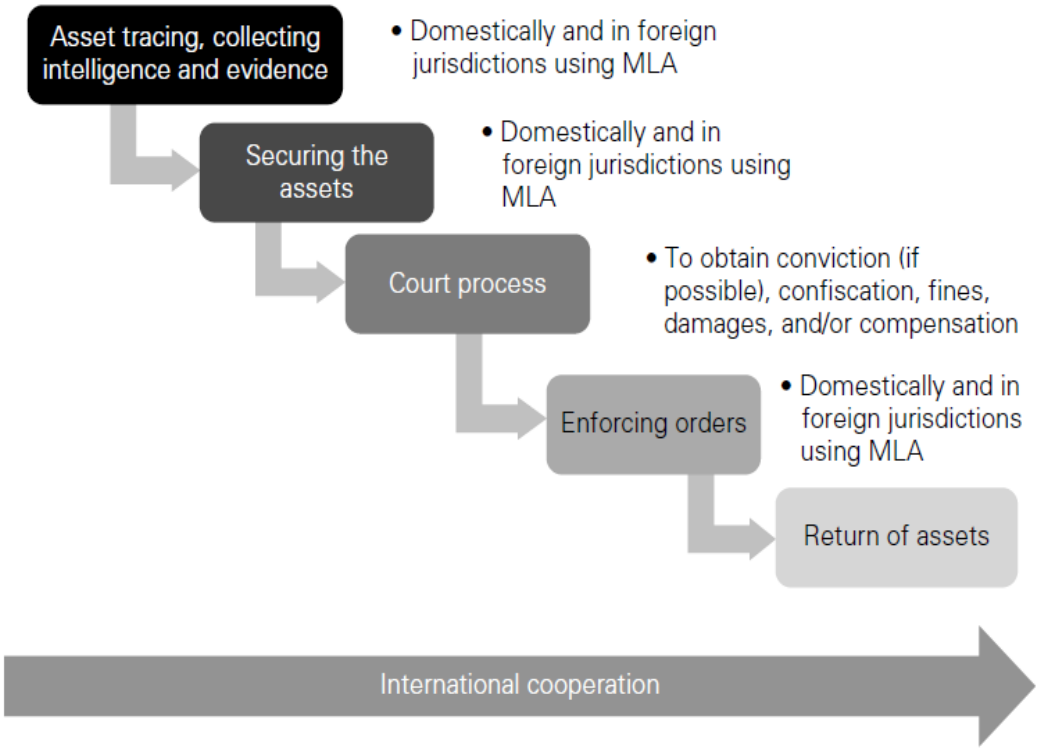
The latter steps could be also expressed effectively through the following illustration elaborated in a joint report of the StAR and the OECD.[469]

(i) identifying the extent of criminal networks and/or the scale of criminality;

(ii) identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation; and

(iii) developing evidence which can be used in criminal proceedings.'

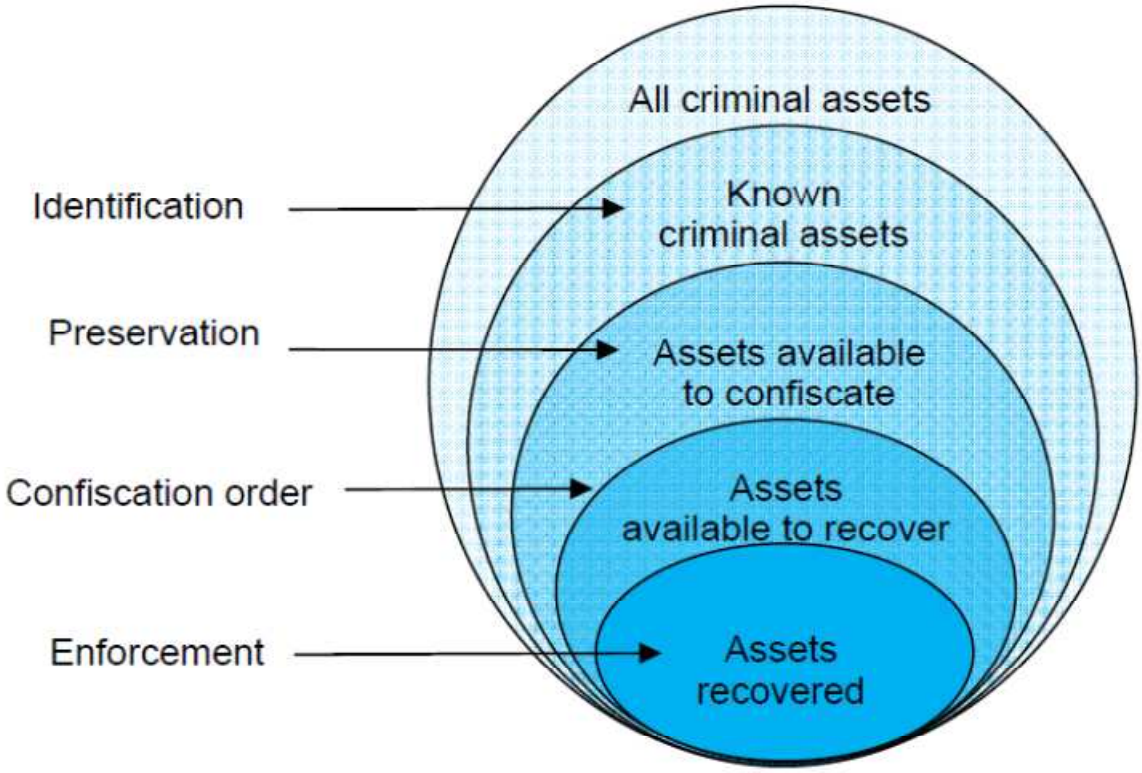
[469] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (StAR, 2014), 10 referring to Brun, J. P. and others, 'Asset Recovery Handbook: A Guide for Practitioners' (StAR, 2011), 6.



The latter graphic not only summaries the essential moments leading to the return of criminal assets which I describe above, but it is also able to communicate the constant importance of international cooperation in criminal (corruption) cases, which represents the focus of my research. Any step throughout the whole asset recovery process may in fact be characterized by the need to request legal assistance, and more generally, activate mechanisms of mutual assistance. The latter issue is thus considered 'essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions' because international cooperation may play a crucial role gather evidence, implement provisional measures, confiscate the eventual proceeds and instrumentalities of the crime and lastly return them.[470]

[470] Brun, J. P. and others, 'Asset Recovery Handbook: A Guide for Practitioners' (StAR, 2011), 6.

Finally, it is also useful to report a graphic sketched by the European Commission[471] which effectively pictures the 'stages of attrition' within the asset recovery process and the quantitative consequences of the challenges characterizing it. As I will address and discuss throughout the present Chapter[472] each of the asset recovery steps present some challenges and thus only part of the total criminal assets end up being recovered.



Although the steps and graphics considered so far are effective in summarizing the process leading to the recovery of criminal assets, the following paragraphs will illustrate it more in

[471] European Commission, 'Accompanying Document to the Proposal for a Directive of the European Parliament and the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union. Impact Assessment' (n. 466), 10.

[472] Emphasis is laid on those problematic issues related to international cooperation.

detail by dividing it in two main phases: the 'confiscation' phase and the 'recovery' phase.[473] In particular, the analysis will concentrate on those essential features of each phase which also have significance in the recovery of corruption-related assets (e.g. the issue of non-conviction based confiscation). For each phase I will also be provided the overview of the most relevant international instruments which govern them.

3.3.3. The First Phase: Asset Confiscation Phase

3.3.3.1. Identification, Tracing, Freezing or Seizure, and Confiscation of the Assets

The first phase of the asset recovery process, which I refer to as the 'asset confiscation (or forfeiture)',[474] takes such name because it ends up with confiscation, which is the 'permanent deprivation of property by order of a court or other competent authority'[475] and is a highly challenging step because it requires that States prove some king of nexus between the assets and the corruption offence.[476] However, since the proceeds of crimes may be converted or transferred into different kinds of assets such as bank accounts, real estate properties, vehicles, artworks, shares or businesses, State authorities need to adopt equally important measures of interim nature before confiscation such as identifying, tracing,[477] and freezing (or seizing)[478] the assets. Hence the 'confiscation phase' has wider contours than its name

[473] Cf. Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 235.

[474] Forfeiture and confiscation will be used interchangeably as they refer to the same legal concept. The difference lays in the fact that its name changes according to the jurisdiction.

[475] See Article 2(g) of the UNCAC defining 'confiscation'.

[476] Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 161, 168.

[477] The 'identification' and 'tracing' of assets usually has to deal with problems of access and banking confidentiality. As a consequence the removal of bank secrecy plays a key role in this context.

[478] Article 1(1) of the UN Drug Trafficking Convention of 1988 jointly defines freezing and seizing as 'temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of the property on the basis of an order issued by a court or competent authority'. However a difference lays between 'freezing' and 'seizing': while the former refers to intangibles such as money held in bank accounts and is considered less serious, the latter applies to tangibles such as cash and properties.

suggests. One should actually lay great emphasis on latter steps because the contemporary criminal practice has an increasingly transnational nature and thus it is often the case that the proceeds of the offence are hidden or swiftly moved (abroad) before the confiscation proceedings come to a final decision. In particular, with regards to the preliminary steps to confiscation, it is fundamental to give judicial authorities the possibility to expediently:

(i) Identify and trace suspected assets,[479] which is a lengthy and complex process. Firstly investigators need to be equipped with the necessary anti-money laundering measures.[480] In order to trace assets and link them to the underlying criminal conduct it is also essential that they have the tools to 'uncover and identify ownership interests often camouflaged by changes in the form and nature of the ownership.'[481] More generally, in order to prove the financial aspects of an investigation, it is crucial to put relevant authorities in the condition to trace all the financial flow and thus to 'follow the money'.[482]

(ii) 'Temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of

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From a national perspective it is interesting to note that some states such as Portugal do not foresee the possibility to freeze assets, but operations of accounts can be suspended. Other States such as Switzerland allow its institutions to freeze transactions for a few days and the decision is taken under the scrutiny of a investigative magistrate. Finally in the UK Section 41 of the UK's Proceeds of Crime Act 2002 permits the Crown Court to issue a restraint order 'prohibiting any specified person from dealing with any realisable property held by him' in case at least one of the conditions set out in section 40 are fulfilled (e.g. reasonable cause that someone under investigation or being prosecuted has benefited from criminal conduct).

[479] The purpose of this phase is to connect the assets to the corrupt/illegal activity; to establish sufficient evidence for prosecution; to gather sufficient evidence to trace and identify assets.

[480] In order to benefit from crimes generating profits, criminals usually need to launder the proceeds of corruption to hide them. For this reason there is an 'inevitable' link between corruption and money laundering. Cf. Atkinson, P., 'Asset Tracing' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 219, 223.

[481] Atkinson, P., 'Asset Tracing' (n. 480), 223.

[482] Cf. Atkinson, P., 'Asset Tracing' (n. 480), 227 ff who contends, at 232, that 'it is internationally recognized that a critical aspect of criminal investigations into corruption and related offences is the financial investigation. The main goal of the investigation is to follow the flow of money in order to prove the link between the origins of the money, the beneficiaries and the underlying criminal activity. The financial tracing will often penetrate the web of confusion by identifying the beneficial owner if corporate and trust entities have been formed to hide the true ownership of the funds.' In this context the author considers crucial the following elements: technical skills, expertise of forensic accounting experts, the ability to analyse bank records and to prove financial aspects of a case through circumstantial evidence and indirect methods of establishing corruption-related income.

> property on the basis of an order issued by a court or other competent authority.'[483]

The identification, tracing, seizure and freezing of assets constitute particularly sensitive legal steps since they are usually based on reasonable suspicions of enforcement authorities. Furthermore such orders restrict the basic rights of the owner such as the right to property, and thus require substantial arguments and procedural guarantees.[484]

Curiously the UNCAC Articles devoted to asset identification, tracing, freezing, seizure, and confiscation are not located in Chapter V with the other asset recovery provisions but rather in the 'Law Enforcement' part of Chapter III. Besides such formal aspect, which may be explained with the wider significance of seizure and confiscation in the fight against corruption, one should stress the comprehensive approach laid by Article 31 of the UNCAC which imposes States to enable the identification, tracing, freezing, seizure, and confiscation of:

(i) The proceeds of crime derived from offences established by the UNCAC and the property whose value corresponds to that of the proceeds;[485]

(ii) The property, equipment or other instrumentalities used in or destined for use in offences established by the UNCAC;[486]

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[483] Article 2(f) of the UNCAC defining 'freezing' (or 'seizure').

[484] Although in proceedings for 'traditional' transnational crimes such as corruption due process safeguards are usually guaranteed before the issue of an interim order, in this context one should recall the illustrative case Joined Cases C-402/05 P and C-415/05 P, 3 September 2008, European Court Reports 2008 I-06351 ('Kadi case') of 2008 where the European Court of Justice annulled a EU Council Regulation issued to comply with the U.N. Security Council 1267 Sanctions Committee (established by Security Council Resolution 1267) obliging U.N. Member States to freeze the funds of a list of individuals and organizations including the claimants. Since the U.N. Sanctions Committee (and thus the EU regulation) were silent on issues such as hearings or the grounds on which the decision to list them was to be made, the Court concluded that the EU instrument violated the right to be heard, to effective judicial review and to property. In this context one should see similar decisions taken at the domestic level such as Mohammed Jabar Ahmed and ors v HM Treasury [2010] UKSC 2 and Aboufasin Abdelrazik v The Minister of Foreign Affairs and the AG of Canada [2009] FC 580 where the UK and Canadian Federal Court quashed domestic measures for freezing accounts in compliance with the U.N. Security Council resolutions on grounds of *ultra vires* acts and violations of human rights.

[485] Article 31(1)(a) of the UNCAC.

(iii) The transformed or converted property and proceeds of corruption intermingled with legitimately obtained property (to the value of the proceeds in question);[487]

(iv) The benefits or income derived from the proceeds of corruption.[488]

According to the same provision, States should also set up mechanism to regulate the administration of frozen, seized or confiscated property,[489] as well as to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized regardless of any bank secrecy regulation.[490] However, none of the latter obligations should lead to prejudice the rights of bona fide third parties.[491]

As stressed by a Swiss practitioner the obligations of Article 31 of the UNCAC play a crucial role in the international process of asset recovery in so far as 'issuing a freeze order is most often the origin of successful international cooperation.'[492] In other words, considering that money can disappear in short amounts of time, cooperation may be frustrating and unsuccessful if freezing procedures are complicated, lengthy and demanding. Furthermore, the same practitioner has noticed that a proactive cooperation in this context can be particularly helpful in relation to politically motivated freeze orders, as the Tunisia and Egypt examples of spring 2011 demonstrate.[493] In particular, one has remarked that Switzerland should have had combined the freeze orders with additional information on the persons whose bank accounts were blocked or on the properties which were seized. However, the practitioner concludes that the lack of action by Switzerland in that context is a further example which demonstrates the 'passive attitudes and discouraging administrative barriers rather than effective and efficient support of countries in democratic transition.'[494]

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[486] Article 31(1)(b) of the UNCAC.
[487] Article 31(4)-(5) of the UNCAC.
[488] Article 31(6) of the UNCAC.
[489] Article 31(3) of the UNCAC.
[490] Article 31(7) of the UNCAC.
[491] Article 31(9) of the UNCAC.
[492] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 105, 109.
[493] The so-called 'Arab Spring' cases are further analyzed at para 5.4.
[494] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 110.

3.3.3.2. Conviction and Non-Conviction Based Asset Confiscation

As for the outcome of the current phase, that is confiscation, one should acknowledge that most national legal systems provide for the confiscation of both the instruments used to commit the offence and the proceeds of crime. However, two approaches to confiscation can be identified in this context and should be introduced at this point: conviction-based asset forfeiture and non-conviction asset forfeiture.

Conviction-based asset forfeiture is most common approach to asset forfeiture and its main features are:

(i) The criminal conviction of a person;
(ii) The confiscation order is part of the sentence of the Court;
(iii) It can be either object-based or value-based.

In other words, the latter kind of confiscation is possible when the holder of an asset has been convicted for a criminal offence and there is a connection between the asset and the criminal activity under scrutiny; however, in some cases States go beyond that and permit not only the confiscation of the actual proceeds of a specific crime but also the 'value confiscation' of property of equivalent value.[495]

A further crucial alternative set up by some States is the so-called non-conviction-based confiscation (also known as in rem forfeiture, civil forfeiture, civil recovery, or civil-based forfeiture),[496] where the State proceeds as plaintiff against the asset itself in a civil court in order to claim property. The subsequent confiscation is then possible if the asset is believed to

[495] Besides the above mentioned Article 31 of the UNCAC see also Article 5(1)(a) of the UN Drug Trafficking Convention of 1988 which provides for the confiscation of the proceeds of drug offences 'or property the value of which corresponds to that of such proceeds'. This kind of 'value confiscation' is depends on a rebuttable – problematic for the principle of the presumption of innocence –that all the property acquired by the defendant to conviction constitutes the proceeds of crime.

[496] This king of confiscation is an old remedy used inter alia to confiscate pirate and slaving ships reintroduced in its modern form by two U.S. statues (RICO, 18 USC §§ 1961–68; and CCE USC § 848 et seq), although such provisions were not used until the passage of the Comprehensive Crime Control Act of 1984.

be 'tainted',[497] that means derived in whole or part from a significant criminal activity. This flexible method of confiscation may be particularly helpful in cases the holder of the asset is fugitive, dead or immune from criminal prosecution, as well as if the proceeds of crime are broken up and dispersed. Plus it can be conveniently employed when it is believed that there is not enough evidence to proceed with a criminal prosecution or to obtain a conviction, and when there may be problem to enforce a confiscation order (e.g. the assets are held in the name of trusts). However it also presents some disadvantages in so far as it cannot be used to forfeit property that is not 'tainted' and thus it is not servable for value confiscation and for 'criminal' property which has been merged with other untainted property. The latter situation generates problematic issues in terms of third party rights, which should not be infringed if the holder has a legitimate belief of lawful possession:[498] as a consequence, all interested parties should be ensured the right to be informed of possible confiscation and of all their attendant rights, the right to be heard, the right to challenge the confiscation order when there was no opportunity to do it earlier, the right to legal assistance and to present testimony and other evidence, and the right to review of the order by a higher court. On top of this, concerns have also been raised because of the lack of adequate procedural safeguards typical of criminal proceedings, [499] especially in relation to double jeopardy, presumption of innocence, property rights, and excess of executive authority.[500] On the other hand, national courts and the ECtHR have justified non-conviction-based forfeiture on two sets of grounds: firstly, they have taken the view that the latter method does not entail a criminal process and thus criminal guarantees should not necessarily apply; [501] secondly, they have regarded non-conviction-

[497] Since a civil proceedings standard of proof applies, either the 'more likely than not' test (for civil law jurisdictions) or the balance of probability test (for common law jurisdictions) would apply.

[498] In this context international instruments only provide for some safeguards such as Article 12(7) of the UNTOC which recommends that parties should consider permitting an 'innocent owner' defence and provides that the provisions of that Article 'shall not be construed to prejudice the rights of bona fide third parties.' Similar discretionary countermeasures are suggested in Article 5(8) of the UN Drug Trafficking Convention of 1988, Article 31(9) of the UNCAC. On the other hand, Article 5 of the CoE Confiscation Convention obliges parties to provide effective legal remedies for such third parties in order to guarantee their procedural rights such as the right to be informed of the procedure and the right to challenge it in court.

[499] Young, S. N. M., 'Introduction' in Young, S. N. M. (ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar, Cheltenham 2009) 13, 13.

[500] In the English case Director of the Assets Recovery Agency v Green and others [2005] All ER (D) 261 the Court noted that pursuant to section 241 of the 2002 Proceeds of Crime Act regulating recovery orders in civil proceedings for a 'recovery order' it was necessary to set out the various kinds of unlawful conduct by which the property was obtained, and it was not enough to rely on the unexplained wealth of the defendant.

[501] According to the ECtHR non-conviction based asset forfeiture is a preventive measure intended to take criminal proceeds out of circulation and not as a criminal procedure under Article 6 of the ECHR. This

based forfeiture as a proportional response serving an overriding public interest.[502] In spite of such judicial assurances one should also consider that the power of States to interfere with property in tackling crimes is not unlimited:[503] in South Africa, for instance, the courts have contended that the interference with property rights must be proportionate to confiscation's goal of suppressing organized criminal activity.[504] Furthermore non conviction based forfeiture is only available in a limited number of countries,[505] even though the UNCAC has broken new ground by providing that State Parties should 'consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.'[506] The number of countries with non-conviction based forfeiture is

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conclusion is based on the facts that no new criminal offence is charged, there is no need to prove the *mens rea*, and no criminal law is involved. See, on these issues, Butler v United Kingdom, ECtHR, Application No 41661/98 (27 June 2002); M v Italy ECtHR Application No 12386/86 (15 April 1991); Air Canada v United Kingdom (1995) 20 EHRR 150; and AGOSI v United Kingdom (1987) 9 EHRR 1, 62.

[502] In the UK R v Benjafield [2002] 1 All ER 815, Lord Steyn called the procedure 'a fair and proportionate response to the need to protect the public interest'. Similarly the ECtHR in Phillips v United Kingdom [2001] ECHR 437, (2002) 11 BHRC 280 held that any interference with the right of peaceful enjoyment of possession under Article 1 of the First Protocol to the ECtHR was justified and not disproportionate. Although states have a broad discretionary power to interfere with property in the suppression of crime that power is not unlimited. In South Africa, for example, the courts have insisted that the severity of the interference with property rights must be proportionate to the goal of forfeiture to suppress organized criminal activity.

[503] See Alldridge, P., *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation Of The Proceeds Of Crime* (Hart, Oxford 2003), 115.

[504] Prophet v NDPP 2006(1) SA 38 (SCA); Mohunram and Another v National Director of Public Prosecutions [2007] ZACC 4 (26 March 2007).

[505] The US, UK, Ireland, Italy, Colombia, Slovenia, South Africa, Canada, New Zealand, Australia, and Jersey. The EU Freezing and Confiscation Directive has introduced a form of non-conviction based forfeiture in 2014, even though States have to enact domestic provisions in order for it to be effective. In some of these countries efforts have been made to ameliorate the impact of such measures: in England and Wales, for example, the discretionary decision to make a recovery order should now be taken by considering issues of justice and equity, as well as the respect for human rights. According to de Kluiver, J., 'International Forfeiture Cooperation' (2013) 61(5) United States Attorneys' Bulletins 36, 40 '[t]he number of nations that can assist in civil forfeiture matters is certainly rising and, given the new requirement of FATF Recommendation 38, civil forfeiture should one day be an option available in most countries.'

[506] Article 54(1)(c), emphasis added. Next to the latter obligation one should also recall the 2003 FATF Recommendation no 3(3) as well as the 2012 FATF Recommendation no 4, which provides that 'countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction'. Furthermore, Commonwealth Secretariat, 'Report of the Commonwealth Working Group on Asset Repatriation' (August 2005) has recommended that 'Commonwealth countries should put in place comprehensive laws and procedures for non-conviction based asset confiscation'. The most similar provision contained in the UNTOC is Article 12(1)(a), which obliges States to confiscate the proceeds and property of crime 'to the greatest extent possible'. Finally in this context one should also recall Article 53(a) of the UNCAC which mandates States to allow other parties to initiate 'civil action' in its courts to establish title to or ownership of property acquired through corruption offences.

also likely to raise at the European level since the recent EU Freezing and Confiscation Directive introduces a relevant provision which enables the confiscation of an asset in the absence of a final conviction for a criminal offence in cases of 'illness or absconding of the suspected or accused person'.[507]

Finally one should also take into consideration two issues which may explain the reluctance of many States to introduce non-conviction based confiscation: while from the UK perspective 'the main obstacle to such an international adoption appears to lie with civil law countries, which may have concerns over criminal matters being dealt in a civil court',[508] from another point of view the resistance to non-conviction based confiscation seems to be 'political rather than deriving from a concern for individual justice.'[509]

3.3.3.3.The Asset Confiscation Phase beyond the UNCAC

3.3.3.3.1. The UN Drug Trafficking Convention and the UNTOC

Coming to the international instruments which introduced relevant commitment to the 'asset forfeiture' phase beyond the scope of the UNCAC, one should firstly mention Article 5 of the UN Drug Trafficking Convention of 1988 which is one of the earliest provisions which requires State Parties to enact domestic confiscation and freezing provisions for proceeds, instrumentalities and intended instrumentalities of drug offences, and to provide international assistance in such areas; furthermore, financial records pertaining to such offenses should be made available to domestic and foreign investigators in spite of the presence of bank secrecy provisions. As for the destination of the confiscated assets, the Convention does not require to

[507] Article 4(2) of the EU Freezing and Confiscation Directive. An assessment of an earlier version of this provision is provided in Rui, J. P., 'Non-conviction Based Confiscation in the European Union—an Assessment of Art. 5 of the Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union' (November 2012) 13(3) ERA Forum 349.

[508] Cf. Monteith, C., 'Non-conviction Based Forfeiture' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 257, 263 who, more generally, illustrates issues of non-conviction based confiscation in the UK context.

[509] Boister, N., *An Introduction to Transnational Criminal Law*, 242.

share them with other countries, but rather to dispose them according to its domestic law and administrative procedures.[510] In other words, although the UN Drug Trafficking Convention demands State Parties to provide for the confiscation of drug-related assets and for legal assistance to other States, it only recommends that those assets should be shared with other countries.[511] Next to Article 5 of latter Convention one should also mention Article 13 of the UNTOC governing the obligations of States Parties in confiscation matters in relation to the offences of the UNTOC itself: similarly to the U.N. Drug Trafficking Convention, it requires States to take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities for the purpose of eventual confiscation to be ordered either by the requesting or by the requested State Party. At the same time it confirms that the disposal of confiscated assets should be carried out under domestic law and administrative procedures.[512]

3.3.3.3.2. The Conventions of the Council of Europe

At the regional level the regulation of the forfeiture phase is governed by several instruments. Focusing on the pan-European sources, one should firstly recall Article 13 of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

[510] According to Article 5(5)(b)(ii) of the UN Drug Trafficking Convention States are encouraged to enter into agreements with other State Parties in order to share such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedure or bilateral or multilateral agreements entered into for this purpose

[511] In the same sense see Article 8 of the U.N. Convention for the Suppression of Financing of International Terrorism ('Terrorist Financing Convention') (signed on 10 January 2000; entered into force on 10 April 2002), which commits States Parties to enact provisions for the identification, detection, freezing or seizure, and forfeiture of 'any funds used or allocated for the purpose of committing' any of the offenses therein, but does not mandate to share the forfeited proceeds, which is rather recommended.

[512] As it is illustrated later on in the Chapter, however, Article 14 of the UNTOC goes a bit further and encourages States – 'if so requested' – to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owner. Hence, despite the UNTOC confirms a mere encouragement to share confiscated assets, it also introduces the possible use of the confiscated assets as a compensation to the victims of crime, the latter constituting a novel issue in comparison to the U.N. Drug Trafficking Convention.

('CoE Confiscation Convention')[513] which was developed along the same lines of the Article 5 of the UN Drug Trafficking Convention of 1988, although its scope is wider insofar as the obligation to recover assets is extended to the 'predicate offences', that is those 'as a result of which proceeds were generated that may become the subject of an offence.'[514] Furthermore, the CoE Confiscation Convention establishes that the confiscate property 'shall be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned.'[515] Article 13 of the CoE Confiscation Convention represents the background of another provision agreed within the CoE, that is Article 19(3) of the CoE Anti-Corruption Convention. The latter prescribes a general obligation for States Parties to provide for adequate legal instruments to ensure the confiscation, or other forms of legal deprivation (such as civil forfeiture), of the instrumentalities and proceeds of corruption related to the value of offence.[516] The CoE Confiscation Convention is also important because it defines the scope of the CoE Anti-Corruption Convention in the asset confiscation phase: according to its Article 1, 'instrumentalities' should be intended as any objects that are used or intended to be used, in any way, wholly or in part, to commit the relevant criminal offences; the term 'proceeds' means any economic advantage as well as any savings by means of reduced expenditure derived from corruption; as for the term 'property' one should include both objects that (directly) form the proceeds of the offence and other property belonging to the offender that – although not (directly) gained by the offence – equals the value of the directly gained illegal proceeds.[517] Finally, Article 19(3) of the CoE Anti-Corruption Convention

[513] (signed on 8 November 1990; entered into force on 1 September 1993, ETS, No. 141). An instrument with similar content linked to the specific issue of terrorism financing is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (signed on 16 May 2005; entered into force on 1 May 2008).

[514] Article 1(e) of the CoE Confiscation Convention. An example of domestic legislation following the latter obligation is Article 240 of Italian Criminal Code which permits authorities to confiscate the proceeds of any crime.

[515] Article 15 of the CoE Confiscation Convention.

[516] Explanatory Report of the CoE Anti-Corruption Convention, para 92, where it also recalled the idea underlying the provision, that is that confiscation of the proceeds of crime is one of the effective methods in combating crime. The Report follows by explaining why the rationale which inspired the CoE Confiscation Convention also applies in the anti-corruption field and thus was transposed in the CoE Anti-Corruption Convention: 'Taking into account that the undue advantage promised, given, received or accepted in most corruption offence is of material nature, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be available in this field too.'

[517] So-called 'substitute assets'.

allows State Parties to provide for either the criminal confiscation of the corrupt assets or a system of civil forfeiture.[518]

3.3.3.3.3. The OECD Anti-Corruption Convention

Similarly to the latter instrument Article 3(3) of the OECD Anti-Corruption obliges States to apply seizure and confiscation or any monetary sanctions of comparable effect to 'the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds'. On top of this one should also recall the OECD Anti-Corruption Recommendation no XIII which stress the crucial importance of cooperation among State Parties, including through means such as the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials.

3.3.3.3.4. The European Union Framework

As introduced in the previous Chapter, both the freezing and confiscation of assets have been also addressed in the EU within the framework of criminal law cooperation:[519] with regards to the former issue, a Framework Decision was adopted in 2003 to establish the automatic recognition and immediate execution of a freezing order issued within a criminal proceeding by a judicial authority of another Member State.[520] The procedure for the execution of freezing orders is simplified because the principle of mutual recognition, the cornerstone of European criminal integration, applies and thus the executing authority does not need to verify the double criminality requirement in respect to large number of criminal acts

[518] According to Article 19(3) of the CoE Anti-Corruption Convention 'Each Party shall adopt such legislative and other measures as may be necessary to enable it *to confiscate or otherwise deprive*' (emphasis added).
[519] Cf. para 2.5.2.4.
[520] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ 2003 L 196 of 1.11.2003. In the this instrument a punishment threshold in the requesting State is set and the underlying criminal offence must be punishable by a maximum term of imprisonment of at least three year.

(including corruption); furthermore only a few grounds may justify the refusal of the request (e.g. immunity or privilege under the law of the executing State, breach of the *ne bis in idem* principle; absent or incomplete request). Thirdly, the property in principle may remain frozen until the executing State receives a request for execution of a confiscation order.[521] In this context one should finally note that when the recently adopted European Investigation Order Directive[522] will enter into force the latter Framework Decision will be replaced 'as regards freezing of evidence.'[523]

As for the 'twin' issue of confiscation, the EU firstly adopted a Framework Decision to harmonize the powers of confiscation throughout the Member States; however, the latter does not consider non-criminal forms of confiscation. Secondly in 2006 the EU Member States agreed on another Framework Decision which applies the principle of mutual recognition to any 'final penalty or measure imposed by a court following proceedings in relation to a criminal offence or offences, resulting in the definitive deprivation of property.'[524] Also for this instrument the double criminality requirement check has been abolished in relation to some offences including corruption, and only a few reasons justify the non-recognition/non-execution of the request.[525]

In the EU context one should lastly consider the most recent EU instrument elaborated so far in the realm of asset freezing and confiscation. It is the EU Freezing and Confiscation

[521] Articles 6(1) and 10(1) of the Council Framework Decision 2003/577/JHA. Some restricting conditions may nevertheless apply under certain circumstances.

[522] The EIO Directive is illustrated in para 2.5.2.4.

[523] Article 34(2), EIO Directive. Recital 2 of the latter Directive so explains the relationship between the two instruments and the reason to integrate the content of the Framework Decision: 'Council Framework Decision 2003/577/JHA addressed the need for immediate mutual recognition of orders to prevent the destruction, transformation, moving, transfer or disposal of evidence. However, since that instrument is restricted to the freezing phase, a freezing order needs to be accompanied by a separate request for the transfer of the evidence to the State issuing the order in accordance with the rules applicable to mutual assistance in criminal matters. This results in a two-step procedure detrimental to its efficiency. Moreover, this regime coexists with the traditional instruments of cooperation and is therefore seldom used in practice by the competent authorities.'

[524] Council Framework Decision 2006/783/JHA of 6 October 2006 on Application of the Principle of Mutual Recognition to Confiscation Orders, OJ 2006 L 328 of 23.11.2006, later amended by Council Framework Decision 2009/299/JHA of 26.2.2009 ('Framework Decision on Confiscation').

[525] Among these reasons one should lay the attention on the one provided for by Article 8(2)(d), that may be used when it is established that 'the rights of any interested party, including bona fide third parties, under the law of the executing State make it impossible to execute the confiscation order.' Another noteworthy ground for refusal is the one established by Article 8(2)(g) which includes the situation in which the executing State receives a confiscation order applying the extended powers of confiscation referred to in Article 2(d)(iv), that means the powers going beyond those referred to in Article 2(d)(i-iii)

Directive which attempts to harmonize the Member States' regimes in light of the 'increasing need for effective international cooperation on asset recovery and mutual legal assistance',[526] and in view of 'facilitating mutual trust and effective cross-border cooperation'.[527] In spite of the fact that the Directive emphasised the need to enhance international cooperation in its Preamble, the provisions do not contain any obligation dealing specifically with mutual assistance.[528] Accordingly one should note that it amends and expands the provisions of Framework Decisions 2005/212/JHA, but does not affect the scope of application of the other instruments dealing with the mutual recognition of freezing and confiscation orders.[529] However, the EU Freezing and Confiscation Directive, which applies in relation to a wide range of offences including corruption, organized and money laundering,[530] includes the following innovative features which are potentially relevant for the purposes of the present Chapter:

(i) Firstly, it introduces in the EU legal framework some elements of non-conviction based confiscation by providing for the forfeiture of an asset in the impossibility of a criminal confiscation 'at least where such impossibility is the result of illness or absconding of the suspected or accused person';[531]

[526] Recital 2 of the EU Freezing and Confiscation Directive.

[527] Recital 5 of the EU Freezing and Confiscation Directive.

[528] According to Borgers, M. J., 'Confiscation of the Proceeds of Crime: The European Union Framework' in King, C. and C. Walker (eds), *Dirty Assets Emerging Issues in the Regulation of Criminal and Terrorist Assets* (n. 447) 27, 45, who wrote when the EU Freezing and Confiscation Directive was being discussed, 'it is striking that hardly any new legislation is being proposed as regards the cooperation between member states.'

[529] Council Framework Decision 2003/577/JHA and Council Framework Decision 2006/783/JHA.

[530] See Article 3 of the EU Freezing and Confiscation Directive.

[531] Article 4(2) of the EU Freezing and Confiscation Directive. An assessment of an earlier version of this provision is provided in Rui, J. P., 'Non-conviction Based Confiscation in the European Union—an Assessment of Art. 5 of the Proposal for a Directive of the European Parliament and of the Council on the Freezing and Confiscation of Proceeds of Crime in the European Union' (n. 507), 349-360. Similar provisions in other international instruments are: Article 12(1)(a) of the UNTOC, which obliges States to confiscate the proceeds and property of crime 'to the greatest extent possible'; 2012 FATF Recommendation no 4, which provides that 'countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction'; finally, considering that non-conviction-based recovery of assets is of particular importance in corruption cases, Article 53(a) of the UNCAC mandates parties to allow other parties to initiate 'civil action' in its courts to establish title to or ownership of property acquired through corruption offences.

(ii) Secondly, Article 5 commits Member States to enable the so-called 'extended confiscation' which consists in the confiscation of 'property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit where a court, on the basis of the circumstances of the case [...] is satisfied that the property in question is derived from criminal conduct';

(iii) Thirdly, the Directive calls States to adopt domestic provisions which allow domestic authorities to freeze or confiscate assets from a third party in a number of suspicions situations;[532]

(iv) Finally, with regards to the management of the frozen and confiscated property Member States are left with the responsibility to ensure the adequate management of property frozen with a view to possible subsequent confiscation (including the possibility to sell or transfer it), and significantly are encouraged to use the confiscated properties for public interest or social purposes.[533]

3.3.3.3.5. Other Instruments

Next to the binding instruments addressed so far, two further tools have been developed by the U.N. in order to favour cooperation during the asset forfeiture phase, and they are an Optional Protocol to the U.N. Model Treaty on Mutual Assistance[534] and the U.N.'s Model Legislation on Laundering, Confiscation and International Cooperation in Relation to the

[532] Article 6 and 7(2) of the EU Freezing and Confiscation Directive. This is the case for the assets 'which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.'

[533] Article 10 of the EU Freezing and Confiscation Directive.

[534] Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the proceeds of crime, annexed to the U.N. Model Treaty, GA Res 45/117, 14 December 1990, 30 ILM 1434–41.

Proceeds of Crime:[535] while the former is concerned with the mechanisms enabling the identification and confiscation of assets in other jurisdictions, the latter provides several legislative models which may well adapt to the particular needs of any State's legal tradition and system. Finally, one should recall the 2012 FATF Recommendation 4 which suggests both the measures which should be adopted in the asset forfeiture phase,[536] as well as the property at which these measures should be directed.[537]

3.3.4. The Asset Recovery Phase

3.3.4.1. An Evolving Paradigm: From Discretionary Sharing to Mandatory Return

Once the 'asset confiscation' comes to a conclusion with a confiscation order and this is enforced upon the request of a foreign State, the assets are not automatically transferred to the latter authorities but they usually go first in the treasury or a specific fund of the requested State. [538] As a consequence the recovery or repatriation of the assets constitutes a further (last) step of the asset recovery process,[539] where a different kind of mechanisms apply and further challenges arise. One should consider, for instance, that there may be the risk that the recovered funds will be looted again once they are transferred back in the requesting

[535] Vienna: U.N., 1999.

[536] '(a) identify, trace and evaluate property which is subject to confiscation; (b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property; (c) take steps that will prevent or void actions that prejudice the State's ability to recover property that is subject to confiscation; and (d) take any appropriate investigative measures.'

[537] '(a) property laundered, (b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences, (c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or (d) property of corresponding value.'

[538] Brun, J. P. and others, 'Asset Recovery Handbook: A Guide for Practitioners', 8.

[539] As I will illustrate in Chapter V dedicated to practical cases, today the returned assets may be classified into three categories:

(i) assets which have been embezzled or misappropriated and laundered pursuant to Articles 17 and 23 of the UNCAC;
(ii) other proceeds of crime, mainly from the offence of foreign bribery;
(iii) voluntary reparation payments.

jurisdictions, especially if the corrupt official is still in power or exercises significant influence over the ruling class. Moreover, conflicts between requested and requesting jurisdictions may emerge in relation to the use and disposal of the confiscated assets.[540]

From an historical perspective the second phase of the asset recovery process 'began when it was recognized that recovering assets relates as much to the instruments and proceeds of corruption as to the proceeds of money laundering and terrorism.'[541] Furthermore, one has also noticed that while the first asset forfeiture phase (tracing, seizure and confiscation) was conducted by the 'global North' in order to attempt deterring the global supply of corruption, pressure for international cooperation in the second 'asset recovery' phase came from the 'global South', which was eager to take back the proceeds of corruption disguised in the banks of the developed world.[542]

In this scenario the UNCAC in 2003 was the first convention that provided for an entirely different and mandatory scheme for the recovery and repatriation of criminal (corruption-related) proceeds, and for this reason it will represent the focus of the analysis in the central part of the present Chapter, with special emphasis on those provisions favouring international cooperation. However it is also important to trace the evolution of the path which lead to the UNCAC obligations by surveying the previous international instruments which dealt with the international dimension of the asset recovery phase; at the same time one should also keep in mind that the repatriation of criminal assets may be also governed by other sources such as domestic legislation, MLA bilateral treaties, or other special agreements.

3.3.4.2.The UN Drug Trafficking Convention and the UNTOC

[540] In some of these cases, third actors such as international organizations and NGOs have played a meditating role for the return and monitoring of recovered funds. According to Brun, J. P. and others, 'Asset Recovery Handbook: A Guide for Practitioners', 8, in 2007, the U.S. Department of Justice filed a civil confiscation action against a U.S. citizen indicted in 2003 for allegedly paying bribes to Kazakh officials for oil and gas deals. The American citizen agreed to transfer those $84 million in proceeds to a World Bank trust fund for use on projects in Kazakhstan. See U.S. Department of Justice, 'Government Files Civil Forfeiture Action Against $84 Million Allegedly Traceable to Illegal Payments and Agrees to Conditional Release of Funds to Foundation to Benefit Poor Children in Kazakhstan' *United States Attorney Southern District of New York* (3 May 2007).

[541] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 236.

[542] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 236.

The novelty of the UNCAC in this context emerges if one considers the relevant provisions of its closest Conventions, the UN Drug Trafficking Convention of 1988 and the UNTOC, which do not compel States to give a specific destination to the confiscated property.

According to the former States are encouraged to enter into agreements with other State Parties in order to share such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedure or bilateral or multilateral agreements entered into for this purpose. In other words, although the UN Drug Trafficking Convention demands State Parties to provide for the confiscation of drug-related assets and for legal assistance to other States, it recommends – but does not require – that those assets should be shared with other countries. The UNTOC similarly confirms that the disposal of confiscated assets should be carried out under domestic law and administrative procedures; however, its Article 14 encourages States to share such assets insofar as it mandates – 'if so requested' – to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owner. Hence, despite the UNTOC confirms a mere encouragement to share confiscated assets, it also introduces the possible use of the confiscated assets as a compensation to the victims of crime, the latter constituting a novel issue in comparison to the U.N. Drug Trafficking Convention. Finally, Article 14(3) of the UNTOC demands States to consider donating the assets to provide technical assistance to developing states and states in transition, or to share them with other State Parties or intergovernmental bodies engaged in the fights against organized crime (e.g. UNODC, Interpol, and FATF).

Overall, then, in spite of the progresses made by the UNTOC, if one has to assess comparatively the three U.N. Conventions with regards to the international recovery of criminal assets one could already say that Chapter V of the UNCAC goes beyond the latter instruments, 'breaking new ground'[543] in this field and introducing further retributive and restorative elements of justice in the fight against transnational crime, especially grand corruption. However, before getting to the detailed analysis of Chapter V of the UNCAC both

[543] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 197.

in its innovative and problematic parts, a few words should be dedicated to illustrate the relevant provisions of the European instruments in the realm of asset repatriation.

3.3.4.3.The EU and Council of Europe Conventions

The European framework governing the final part of the asset recovery phase, that is the return and repatriation of confiscated assets, is not as innovative as the UNCAC, in spite of the fact that – as I highlighted in the previous Chapter – the level of cooperation in criminal matters represents a positive feature of the European continent.[544] One reason to explain the scarcity of action in this field may lay in the fact that the repatriation of criminal assets was allegedly conceived as a 'Global North – Global South' issue.[545] However, if one considers the significance of organized crime groups in some European States and the easiness to transfer the proceeds of crime throughout Member States, it is legitimate to hope for further action of the European legislator in this field.

At the EU level, the issue was not dealt with by the recent EU Freezing and Confiscation Directive, which only leaves States the responsibility to manage frozen property[546] and encourages them to use the confiscate properties for public interest or social purposes.[547] As a consequence one should turn to Article 16 of the Framework Decision on Confiscation which establishes rules on disposal of money and other property obtained from the execution of a European confiscation order.[548] Interestingly the general rule of the provision demands 'asset sharing' between the executing and requesting when the confiscation concerns an amount of money greater than € 10 000; in this case the money is shared 50-50. [549] In the event the confiscated asset consists of a property, the executing State may decide to sell it and share the

[544] Cf. para 2.5.2.6., which assesses the level of criminal cooperation to tackle corruption within the European Union.
[545] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 236.
[546] Article 10(1) and (2) of the EU Freezing and Confiscation Directive.
[547] Article 10(3) the EU Freezing and Confiscation Directive.
[548] Unless the issuing and executing States have agreed otherwise. See Article 16(4) of the Framework Decision on Confiscation.
[549] Article 16(1) of the Framework Decision on Confiscation. If the amount obtained is below such threshold the entire amount is kept by the executing State.

proceeds according to the latter rule, to transfer it to the requesting State, or to dispose of it according to its domestic provisions if the first two options are not available.[550] Although the latter provision may sound unfair from the perspective of the requesting State since it lays significant reward and discretion to the executing State, one should think that the mechanism set up by the Framework Decision on Confiscation may serve as an incentive for executing States to collaborate in expensive and demanding investigations; furthermore it should also be noted that according to its Article 20, States should not be refunded for the costs borne for the execution of a confiscation order unless otherwise agreed with the requesting State.

A final remark within the pan-European scenario should be made in relation to the CoE Confiscation Convention, which confirms the timid approach of the U.N. Conventions on drugs and organized crime in so far as it establishes that the confiscate property 'shall be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned.' [551]

[550] Article 16(2) of the Framework Decision on Confiscation.

[551] Article 15 of the CoE Confiscation Convention.

3.4. The UNCAC Asset Recovery Framework

3.4.1. Introduction: the Path to Chapter V of the UNCAC

The idea of the United Nations to address the recovery of assets related to cases of corruption was based on the belief that it can fulfil four essential functions:[552] firstly, it can operate as a powerful preventive tool in so far as it deters those intending to engage in corrupt practices; secondly, it aims at restoring domestic and international justice against corrupt behaviours; thirdly, it deprives offenders of their assets; finally, 'it furthers the goal of administration of justice'[553] and at the same time it repairs the harm caused in victim States affording countries of corrupt leaders the possibility to restore transparency, predictability and international confidence.

From an historical perspective the issue of asset recovery was first addressed within the U.N. system at the beginning of the years 2000, when a number of documents dealt with such theme. In this sense a report of the Secretary-General reviewing States and U.N.'s practices in this context stressed that both the cross-border transfers of illicitly obtained funds and the return of such funds was to be considered a priority of the international community.[554] At the same time several General Assembly resolutions called States to embrace policies aimed at preventing and combating corruption in general and the transfer of illicitly-gained assets; plus, governments were encouraged to facilitate the return of such assets to the States of origin affording due process guarantees.[555]

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[552] Cf. UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 195-6.

[553] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 196.

[554] See UNODC, 'Prevention of Corrupt Practices and Transfer of Funds of Illicit Origin Report of the Secretary-General' (2 July 2002) A/57/158, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/470/53/PDF/N0247053.pdf?OpenElement.

[555] See U.N. General Assembly, 'Preventing and Combating Corrupt Practices and Transfer of Funds of Illicit Origin and Returning such Funds to the Countries of Origin' (7 February 2003) A/RES/57/244; U.N. General Assembly, 'International Legal Instrument against Corruption' (4 December 2000) A/RES/55/61; U.N. General

A key contribution for the development of the asset recovery discipline was a global study requested by the Economic and Social Council to the Secretary-General in 2001[556] on the transfer of funds of illicit origin, especially those having origin from acts of corruption. The study which followed[557] touched upon the latter issues with a focus on grand corruption cases where the victim State was unable to recover the stolen assets. Generally speaking the report identified the fundamental difficulty of returning and disposing illicitly gained assets even when the latter had been located, frozen, seized and confiscated: concerns were in fact raised in relation to the motivation behind recovery efforts and competing claims. Furthermore the study identified a number of procedural, evidentiary and political obstacles which is worth to consider at this introductory point:[558]

(i) Anonymity of transactions;
(ii) Lack of technical expertise and resources;
(iii) Lack of harmonization and cooperation;
(iv) Problems in the prosecution and conviction of offenders as a preliminary step to recovery;
(v) Absence of institutional or legal avenues to pursue claims successfully, as well as the fact that certain types of conduct are not criminalized, and the existence of immunities and third party rights;
(vi) Questions of admissibility of evidence, the type and strength of evidence required, differences regarding in rem forfeiture, and time-

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Assembly, 'Preventing and Combating Corrupt Practices and Illegal Transfer of Funds and Repatriation of such Funds to the Countries of Origin' (25 January 2001) A/RES/55/188; and U.N. General Assembly, 'Preventing and Combating Corrupt Practices and Transfer of Funds of Illicit Origin and Returning such Funds to the Countries of Origin' (31 January 2012) A/RES/56/186. Further U.N. resolutions, reports and recommendations monitored and reviewed the Member States' measures and progresses on the issue of the transfer of funds of illicit origin and the return of such funds.

[556] U.N. Economic and Social Council, 'Strengthening International Cooperation in Preventing and Combating the Transfer of Funds of Illicit Origin, Derived from Acts of Corruption, Including the Laundering of Funds, and in Returning such Funds' (24 July 2001) 2001/13.

[557] U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Global Study on the Transfer of Funds of Illicit Origin, Especially Funds Derived from Acts of Corruption' (28 November 2002) A/AC.261/12, available at http://www.unodc.org/pdf/crime/convention_corruption/session_4/12e.pdf was submitted at its fourth session in accordance with Economic and Social Council resolution 2001/13.

[558] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 194-195

consuming, cumbersome and ineffective mutual legal assistance treaties, when the identification and freezing of assets must be done fast and efficiently;

(vii) Limited expertise to prepare and take timely action, lack of resources and training and other capacity constraints;

(viii) Lack of political will to take action or cooperate effectively, including lack of interest on the part of victim States in building institutional and legal frameworks against corruption;

(ix) The ability of corruption offenders to move their assets and criminal proceeds discreetly and to invest them in ways which make discovery and recovery almost impossible.

Despite of the fact that some of the latter points still constitute problematic issues of the asset recovery process and therefore will be dealt with in depth later on in the Chapter,[559] the political discussion and negotiation concerning the recovery of corrupt assets within the U.N. finally led to the adoption of Chapter V of the UNCAC, which attempts to tackle such issues by addressing comprehensively the impediments to effective preventive, investigative and remedial action on a global level.[560] In this sense a significant, yet symbolic,[561] commitment agreed upon by States was to declare at the beginning of Chapter V that asset recovery is a 'fundamental principle'[562] of the Convention, and that in such regard States shall afford each other the 'widest measure of cooperation and assistance'. The following paragraphs will assess the latter part of the UNCAC by illustrating the mechanism of asset recovery in corruption cases, and concentrating on those provisions which create a framework of international cooperation. The aim is to put the basis for the assessment of the UNCAC's

[559] Cf. Chapter IV, which illustrates in depth the challenges (and possible solutions) in cooperating to recover assets.

[560] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 196.

[561] As recalled in UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 191, 'in spite of the fact that an interpretative note to the Convention indicating that the expression "fundamental principle" would not have legal consequences on the other provisions of Chapter V of the Convention (A/58/422/Add.1, para 48), article 51 is a statement of intent indicating that any doubt concerning the interpretation of provisions related to asset recovery should be resolved in favour of recovery as a core international cooperation objective of the Convention.'

[562] Article 52 of the UNCAC

effectiveness in the context of asset recovery, especially in its cooperative dimension. However, before proceeding in the analysis of Chapter V, one should always keep in mind that the latter is not to be read in isolation but rather together with the other provisions of the UNCAC, especially its Article 14 on the prevention of money-laundering, Article 31 on the establishment of a regime for domestic freezing and confiscation of the proceeds of corruption,[563] Article 39 on cooperation between national authorities and the private sector, and Articles 43 and 46 on international cooperation and mutual legal assistance. The same holds true in the context of the present work, whose previous and following part(s) are fundamental in understanding the other international cooperation provisions governing cases of transnational corruption.

3.4.2. Preventing and Detecting the Transfer of Proceeds of Crime

The first substantive article of Chapter V of the UNCAC deals with issues of prevention and detection of transfers of proceeds of crime and it should be read closely with the preventive measures of Chapter II, especially Article 14 establishing basic operational anti-money laundering principles.[564] In particular, Article 52 requires States Parties to take necessary measures which compel their financial institutions to carry out the following tasks:

(i) Verify the identity of their customers;[565]

[563] On the crucial role of complying with Article 31 of the UNCAC see Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 109-10.

[564]. The provisions of Article 52 should be thus read in the context of the more general regulatory and supervisory regime that State Parties have to establish against money-laundering (e.g. customer identification, record-keeping and reporting requirements). Accordingly, the Article begins by saying: 'Without prejudice to article 14 of this Convention [...]'. Cf. Thelesklaf, D., 'Using the Anti-Money Laundering Framework to Trace Assets' in International Centre for Asset Recovery (ed), *Tracing Stolen Assets. A Practioner's Handbook* (Basel Institute on Governance, 2009).

[565] This duty, which is part of a wider standard of due diligence and prudential management of financial institutions, is also provided for in other relevant international documents such as the FATF Forty Recommendations and the Basel Committee on Banking Supervision's documents 'Prevention of criminal use of the banking system for the purpose of money-laundering' and 'Customer due diligence for banks'.

(ii) Set up adequate records and accounting systems over an appropriate period of time;[566]

(iii) Take reasonable steps in view of determining the beneficial ownership of high-value funds;

(iv) Scrutinize accounts linked to so-called politically exposed persons;[567]

(v) Report suspicious transactions regarding the latter scrutiny.

The preventive activity of the States should also be a guiding one, and in order to facilitate the implementation of these measures they should issue advisories to financial institutions as to the way they have to carry out such obligations. Furthermore, prevention should be directed against shell banks, [568] which are defined by the FATF as banks 'that have no physical presence and that are not affiliated with a regulated financial group that is subject to effective consolidated supervision'.[569] In order to discourage the transfer, diversion or conversion of illicitly obtained funds the UNCAC both prohibits the establishment of such banks and mandates financial institutions to avoid entering into relationships with them. Finally, paragraphs 5 and 6 of Article 52 require States parties to consider additional financial disclosure obligations for 'appropriate public officials' and in accordance with their domestic

[566]Although the specific period of time is to be set by State Parties, UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 204, rightly stresses that 'in several significant cases, corrupt practices occurred over a very long time'; hence 'the availability of financial records is essential for subsequent investigations, as well as asset identification and return.'

[567] PEPs are defined in para 1 as 'individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.' It is important to stress that the UNCAC, differently from the 2012 FATF Recommendation no 12, makes no distinction between domestic and foreign politically exposed persons. The element is crucial not only for the purposes of prevention and transparency, but also for the facilitation of investigations, asset identification and return. Not surprisingly, the Commonwealth Working Group on Asset Repatriation lamented the FATF distinction and welcomed the wider application of scrutiny imposed by the UNCAC.

[568] Article 52(4) of the UNCAC.

[569] See FATF, 'Glossary', available at http://www.fatf-gafi.org/pages/glossary/, which also clarifies that 'physical presence' is to be intended as 'meaningful mind and management' located within the jurisdiction, and that the mere existence of a local agent or low-level staff would not fulfil such condition. See also U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Ad Hoc Committee for the Negotiation of a Convention against Corruption on the Work of its First to Seventh Sessions. Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (7 October 2003), available at https://www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf, para 54, which adds that the concept of management is to be understood as encompassing administration (e.g. books and records).

law:[570] interestingly, paragraph 5 further invites countries to consider the adoption of necessary measures which enable competent authorities to share financial disclosure information with the other States Parties when necessary to investigate, claim and recover proceeds of offences established in the UNCAC.

In sum, then, Article 52 aims at preventing the proceeds of corruption from leaving the State where the offence has taken place, and to set up appropriate mechanisms for the authorities to the monitor suspicious transactions. In case the State Party of origin is not able to fulfil such function, the Article should also trigger adequate mechanisms to refuse and report relevant transactions in the receiving State Party.

3.4.3. The Role of Financial Intelligence Units

A further UNCAC's provision which aims at preventing the transfer of proceeds of corruption from happening is Article 58 which contains two parts: firstly it generically call States to cooperate with one another for the purpose of preventing and combating the transfer of proceeds of corruption and of promoting ways and financial means of recovering such proceeds; more significantly, it encourages State Parties to establish a Financial Intelligence Unit ('FIU') 'responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.' According to the Egmont Group,[571] States have begun establishing such kind of units since the 1990s and today the informal association of FIUs defines them as national centres 'for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and financing of terrorism, and for the dissemination of the

[570] It is up to the States parties to determine which public officials should be encompassed by such additional duties of disclosure. However, once a system is introduced, sanctions should be appropriate in case public official do not comply.

[571] The Egmont Group is an informal organization to facilitate the work of FIUs whose objectives are the stimulation of information exchanges, and the overcoming of obstacles preventing cross-border information-sharing. See the 'Egmont Group. 'Documents', available at http://www.egmontgroup.org/library/egmont-documents.

results of that analysis;'[572] plus, they also facilitate the exchange of information on unusual or suspicious financial transactions with foreign FIUs or domestic law enforcement, regulatory or judicial agencies.[573]

Since their structure, nature, and functions varies widely across countries,[574] States Parties are free to consider the creation of a new FIU, the establishment of a special branch, or the use of an existing one. Furthermore, the *travaux préparatoires* indicate that Article 58 should be read in a manner consistent with Article 14(1)(b) of the UNCAC on money laundering prevention.[575] Finally, even though there is no obligation to establish a FIU by law, one

[572] Egmont Group, 'Financial Intelligence Units ('FIUs')', available at http://www.egmontgroup.org/about/financial-intelligence-units-fius. In 2012 the Egmont Group released a paper which reported that 37 Financial Intelligence Units (around 30% of the FIUs in the Egmont Group) have a specific anti-corruption mandate; furthermore, it also described many cases in which Financial Intelligence Units identified corruption-related crimes as predicate offences. See Egmont Group, 'The Role of Financial Intelligence Units in Fighting Corruption and Recovering Stolen Assets' Egmont Group White Paper (2012).

[573] According to Thelesklaf, D. and A. Salihodzic, 'The Role of Financial Intelligence Units' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 209, 216, Financial Intelligence Units can enhance the value and solidity of anti-corruption investigations for the following reasons:

(i) Trained and experienced analysts can analyses complex financial information and link it to the original crime;
(ii) FIUs can elaborate typology, geographic and sector-specific reports;
(iii) FIUs can exchange information through the Egmont Secure Web and established channels of communication;
(iv) FIUs can provide relevant sensitive information on issues such as politically exposed persons to reporting entities from the private sector;
(v) FIUs are part of national, regional or international anti-money laundering and anti-corruption fora/working groups when they can report their experience and influence the policy debate.

[574] According to the Egmont Group, there are four models of FIUs: judicial, law enforcement, administrative, and hybrid. See UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 213 ff and Egmont Group, 'Financial Intelligence Units ('FIUs')', available at http://www.egmontgroup.org/about/financial-intelligence-units-fius, which describe such model in greater detail.

[575] See U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 71. According to Article 14(1)(b) of the UNCAC each State Party shall 'ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

should consider the elements of such legislation suggested by the UNCAC Legislative Guide in order to increase the effectiveness of cooperation for asset recovery:[576]

(i) The list of institutions that are subject to the obligation to report suspicious transactions and the definition of the information to be reported;
(ii) The powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports
(iii) The authorization to disseminate information to law enforcement agencies when it has evidence warranting prosecution, as well as the authority to communicate financial intelligence information to foreign agencies, under certain conditions;
(iv) The protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;
(v) The definition of the reporting arrangements and its relationship with other Government agencies, including law enforcement agencies and financial regulators.

In spite of the fact that following the latter suggestions the Financial Intelligence Units may well play a fundamental role in favouring cooperation to recover assets, one should also keep in mind the debatable effectiveness of other specialized units recommended by international instruments for corruption-related offences (the so-called anti-corruption agencies). One has in fact observed that the experience of these agencies has not lead to particularly successful results because these structures often suffer the lack of funding, expertise and, most importantly, independence.[577] Significantly, the latter problems seem to concern both

[576] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 222-3.
[577] Carr, I. and R. Jago, 'Corruption, the United Nations Conventions against Corruption ('UNCAC') and Asset Recovery', 223.

developing and developed countries, as some allegations to the UK Serious Fraud Office demonstrate.[578]

3.4.4. Direct Recovery of Proceeds of Corruption

A different and yet important tool provided for by the UNCAC for the return of assets is the possibility for other State Parties to recover them directly in other jurisdictions through civil proceedings, which has considerable advantages in terms of standard of proof and in case the alleged offender is death or fugitive. This kind of obligations should be considered together with Article 43(1) of the UNCAC, which was analyzed in the previous Chapter and requires States parties to consider cooperating also in investigations of and proceedings in civil and administrative matters relating to corruption.[579] However, as recalled by the Legislative Guide to the UNCAC, one should not confuse the kinds of civil litigation provided for in Article 53 with the use of a non-conviction based system for asset confiscation, an issue dealt with in the following provision. The latter two legal mechanisms should be 'kept separate, but the Convention against Corruption recognizes the need to have a range of flexible measures available for the return of assets.'[580]

Back to the very content of Article 53, through the latter provision the UNCAC aims at allowing States to initiate civil litigation in foreign jurisdiction for asset recovery or to intervene or appear in domestic proceedings to enforce their claim for compensation. For this purpose, States are obliged to adopt the necessary measures to allow a (victim) State Party to

[578] The UK Serious Fraud Office is accused of not having played its role properly in relation to a case involving the BAE Systems (see The Corner House, 'Secret Documents Reveal that Blair Urged End to BAE Investigation' (2007) referring to *R (Corner House research) v Serious Fraud Office* [2008] UKHL 60) as well as of using inadequate and unfair information to obtain warrants (see *Rawlison & Hunter Trustees, Vincent Tchenghuiz and Robert Tchenghuiz v SFO* [2012] EWHC 2254 (Admin); HM CPS Inspectorate *Report to the Attorney General on the Inspection of the Serious fraud Office November 2012* (London: HMCPSI Publication No CP001:71).

[579] Cf. para 2.5.3.2.2.1.

[580] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 207.

be part in three kinds of recovery actions. In particular a foreign State Party should be able to:[581]

(i) Initiate a direct action to establish title to or ownership of property acquired directly or indirectly through the commission of a corruption offences. In order to fulfil this obligation State may need to review their concepts of legal standing in civil and criminal jurisdiction, as well as the criteria for accessing the judicial system;[582]

(ii) Receive compensation or damage by those having committed a corruption offence for the harm suffered. Interestingly, this obligation departs from the notion that proceeds from corruption should be recovered only on confiscation grounds;[583]

(iii) Be recognized as legitimate third party owner of property acquired through the commission of a corruption offence within a confiscation procedure. Since in some instance States may not be aware of being victim, the confiscating State Parties should always ensure that other they are notified of such status and of its right to stand and prove its claim as soon as possible.[584]

As a consequence to these obligations, prior ownership, damage recovery and compensation should be three legal grounds upon which a victim State Party may claim a diverted asset. Furthermore, victim States Parties should be granted appropriate legal standing to act as a

[581] Despite the discussion during the negotiation phase, it was decided not to include public international organization among the actors to be recognized within direct recovery actions. See U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 56.

[582] Article 53(a). In this case the foreign State would act as plaintiff in a civil proceedings.

[583] Article 53(b). The foreign State would act as a party reclaiming damages. In this regard one should recall that States Parties to the CoE Civil Law Convention on Corruption have already established the right of individuals and legal persons to compensation for damage resulting from acts of corruption. As a consequence, they may just need to integrate its legislation providing for the standing of another State Party to such procedure. The Article does not specify which types of damages should be compensate, so States may either allow to claim only material damages or also loss of profits and non-pecuniary loss.

[584] Article 53(c). In this situation the foreign State would be third party claiming ownership rights.

plaintiff in a civil action on property, as a party recovering damages caused by criminal offences, and as a third party claiming ownership rights in any civil or criminal confiscation procedure.

3.4.5. Recovery through International Cooperation

The following part of Chapter V of the UNCAC deals with the international cooperation in confiscation matters for the purpose of asset recovery. I will concentrate on these measures not only because they touch on the central focus of my research objective – that is the international assistance dimension of corruption – but also because they constitute crucial powers against offenders which seek to hide proceeds, instrumentalities and evidence of corruption in more than one jurisdiction in order to frustrate domestic seizure or confiscation orders directed at his/her property. Cooperation among States to recover corruption-related assets is thus necessary or, as Boister put it, 'without it asset recovery is impossible.'[585]

3.4.5.1. International cooperation in the 'asset forfeiture' phase

Articles 54 and 55 of the UNCAC regulate the procedures for international cooperation in confiscation matters, whereas States often seek each other's assistance because criminals hide proceeds, instrumentalities and evidence of corruption in (one or more) foreign jurisdictions. The core obligation thus consists in the identification, tracing and freezing or seizing of the proceeds of crime, property, equipment or other instrumentalities for purposes of confiscation following a request from another State Party. A prerequisite for cooperation and the return of assets is the establishment of a basic regime for domestic freezing, seizure and confiscation of assets as provided for in Article 31 of the UNCAC.[586] However, since the latter measures have a mere domestic dimension and the UNCAC's provisions in the realm of confiscation

[585] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 243.

[586] On the crucial role of complying with Article 31 of the UNCAC see Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 109-10.

are not too far from the ones I have illustrated earlier when I described the 'asset forfeiture' phase of asset recovery,[587] my intention is to focus on the distinctive issues and measures contained in the U.N. anti-corruption convention. In this sense one should already note that Article 54 introduces some interesting novelties to favour international cooperation in confiscation matters: firstly, it compels States to confiscate property of foreign origin following an adjudication of money laundering, not a predicate offence conviction. Secondly, States should consider allowing the confiscation of foreign assets without a criminal conviction 'in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases' (so-called non-conviction based forfeiture).[588] Thirdly, Article 54(2) offers detailed guidance to State Parties in order for them to provide more effective mutual legal assistance pursuant to Article 55.

More specifically, the UNCAC sets a cooperation scheme which mandates States Parties the following obligations in relation to the asset forfeiture phase of corruption offences:

(i) Enable domestic authorities to recognize and give effect to orders of confiscation[589] and freezing or seizure[590] issued by another State party;[591]

(ii) Enable domestic authorities to order the confiscation of property of foreign origin on the basis of a money-laundering or other offence over which they have jurisdiction;[592]

(iii) Freeze or seize property upon request when there are sufficient grounds[593] for taking such actions;[594]

[587] Cf. para 3.3.3.

[588] On this issue cf. para 3.3.3.2.

[589] U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 57, clarifies that 'order of confiscation' may be interpreted broadly, as including monetary confiscation judgments, as long as the issuing Court has criminal jurisdiction.

[590] In the case of freezing or seizure orders, there should be reasonable basis for the requested State party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation

[591] Article 54(1)(a) and (2)(a).

[592] Article 54, (1)(b).

[593] 'Sufficient grounds' should be interpreted as referring to a prima facie case in States whose legal systems employ this term. See U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption,

(iv) Consider permitting non-conviction based forfeiture in case of death, flight or absence of the offender or in other appropriate cases;[595]

(v) Consider taking additional measures to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property;[596]

(vi) In case a request of mutual legal assistance is made, the provisions of Article 46 are applicable mutatis mutandis, even though additional information set out in Article 55(3)(a)-(c) should be provided.[597]

In spite of the fact that neither the direct enforcement of a foreign seizure order nor the seeking of such an order by a State party in the requested State is not unknown to previous global conventions,[598] one should notice that the UNCAC improves the situation as to the way freezing or seizure should be sought and obtained for the purposes of confiscation.[599] Furthermore one should stress that the system created by Articles 54 and 55 relies on a mix of obligations referring, respectively, to the domestic and the international cooperation regimes, whereas the former enables the exercisable and effective implementation of latter. As for the reference to Article 46 on international cooperation it is important to lay the emphasis on its

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'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 60.

[594] Article 54, (2)(b).

[595] Article 54(1)(c). U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 59 clarifies that, in the present context, the term 'offender' might be intended as including persons who may be title holders for the purpose of concealing the identity of the true owners of the property in question.

[596] Article 54(2)(c).

[597] According to Article 55(3): '(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law; (b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final; (c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.'

[598] See Article 12(2) of the UNTOC.

[599] Article 54(2) of the UNCAC.

paragraph 8, which may have a special relevance in the context of asset recovery since it prohibits parties to refuse mutual legal assistance on the ground of bank secrecy. According to Article 55(7) cooperation may be refused or provisional measures lifted if the requested State party does not receive sufficient and timely evidence or if the property is of a de minimis value.[600]

Finally, from a practical perspective, one should stress that in the context of international assistance for the purpose of confiscation the approach based on the direct enforcement of a foreign order should be preferred in comparison with the indirect approach because is less expensive, speedier and avoids duplication of procedures. More precisely, as purported by the UNODC informal expert working group on mutual legal assistance casework best practice, 'experience in this area clearly demonstrates that the direct enforcement approach is much less resource intensive, avoids duplication and is significantly more effective in affording the assistance sought on a timely basis. Consistent with the conclusions of the expert working group on asset forfeiture, the expert working group on mutual legal assistance strongly recommended that States that had not done so should adopt legislation to permit the direct enforcement of foreign orders for freezing, seizure and confiscation.'[601] However, the latter 'direct' approach touches some sensitive of criminal law since it precludes the opportunity to the requested State to reassess the link between the asset and the crime. Not surprisingly, then, the UNTOC maintained that direct enforcement had to be adopted 'to the greatest extent possible within its domestic legal system'. On the other hand, in spite of such flexible wording, many countries have enacted legislation allowing for direct enforcement of confiscation order: section 28 of 1997 Hong Kong's Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525), for example, admitted the registration of foreign confiscation orders, which nevertheless have to be authorized by its courts and be based on some evidence.[602] In some other cases, States may insist on double criminality and thus allow for

[600] An interpretative clarifies that the requested State party should consult with the requesting State party on whether the property is of *de minimis* value or on ways and means of respecting any deadline for the provision of additional evidence (A/58/422/Add.1, para 65).

[601] See UNODC, 'Report of the Informal Expert Working Group on Mutual Legal Assistance Casework Best Practices' (Vienna), available at http://www.unodc.org/pdf/lap_mlaeg_report_final.pdf.

[602]: Mutual Legal Assistance in Criminal Matters Ordinance, Hong Kong (China), available at http://www.oecd.org/site/adboecdanti-corruptioninitiative/39837934.pdf.

direct actions against proceeds of crime if the underlying offence is also provided for in its jurisdiction.[603]

3.4.5.1.1. Challenges in Implementing Confiscation-related Provisions

3.4.5.1.1.1. Enforceability of a Foreign Confiscation Order

Within the procedure outlined by the UNCAC to secure or facilitate the confiscation of the proceeds of corruption originating from another State Party, a number of challenges arise because of the different legal traditions of State Parties and the need to cooperate across them. The first issue concerns the enforceability of a foreign confiscation order, which is required by Article 54(1)(a) of the UNCAC and which may take two forms: direct recognition and enforcement after new proceedings in the requested State. As noted in the previous paragraph, direct enforcement is to be preferred in terms of costs, promptness and efficacy: however, as the Technical Guide to the UNCAC observes, there are instances in which the institution of new proceedings is desirable and necessary, such as the case of an order of confiscation issued against a legal person requested to a State Party where their criminal liability is not recognized.[604] In this context one should also bear in mind that in case of both direct and indirect enforcement the judicial decision of the requesting State should be final and not subject to appeal because of legal security and due process rights considerations. Furthermore, in implementing such Article, State Parties should maintain the broad scope of cooperation established therein, which concerns the property involved (and not only acquired) through the commission of an offence contained in the UNCAC. Finally, one should take into account the relationship between the confiscation procedures and the procedures established for assessing criminal responsibility in the predicate offence: in some case the procedure take place independently, and this may be justified as a way either to allow prosecutorial authorities

[603] See, for instance, Ontario's Civil Remedies Act 2001.
[604] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 207.

more time to investigate the origin of proceeds of corruption, or to permit a lower standard of proof in relation to the origins of the asset subject to confiscation.

3.4.5.1.1.2.Cooperation in Confiscation Through Money-laundering or Related Offences

Given the essential importance which anti-money-laundering mechanisms have played in recovering the proceeds of corruption, the UNCAC lays great emphasis on them throughout its Articles 14, 23 and 52: while the first and third Articles impose financial institutions the duty to report transactions which are suspected of involving corruption, Article 23(2)(c) requires that domestic judicial system should be always able to prosecute money laundering regardless of the place where the underlying offence had taken place. As a consequence, the obligation of Article 54(1)(b) concerning the obligation to enable the confiscation of proceeds of crime involving money laundering closes the circle of obligations in this field and it should thus be carefully complied with by States in order to take advantage of money laundering incrimination to recover assets deriving from corruption offences.

3.4.5.1.1.3. Confiscation without Criminal Conviction

As I already discussed earlier on in the present Chapter, the issue of non-conviction based forfeiture raises controversial legal challenges insofar as it permits the confiscation of proceeds of corruption regardless of any criminal conviction, in case of death, flight or absence of the offender. In implementing Article 54(1)(c) of the UNCAC, which only obliges to consider such form of confiscation, State Parties are likely to decide whether or not to comply with such recommendation according to the character assigned to the concept of confiscation: while some States consider the latter as a punitive sanction which necessitates the ascertainment of criminal responsibilities, other States have seen it as a remedial, restorative sanction which may apply as a non-criminal remedy. The latter approach may

particularly fit in the case of death of the offender since the transfer or conversion of the assets to his/her heirs cannot alter their illegality or the right of the victim State to reclaim them. In this context some European institutions have provided guidance and clarification: firstly, the European Commission on Human Rights declared that non-conviction based forfeiture is consistent with the presumption of innocence and the fundamental property rights;[605] secondly, the European Commission has contended that any recovery of assets must be reasonable, proportionate and challengeable in front of a court;[606] finally, the European Court of Human Rights when called to decide whether confiscation without criminal conviction complied with the ECHR, established that civil forfeiture laws are required to demand the proof of the illicit origin 'beyond reasonable doubt' but at least the high probability of the illicit origin together with the inability of the owner to rebut such presumption.[607] In line with the boundaries set by the latter European institution the 2012 FATF Recommendation 38 suggest to provide assistance to other countries 'on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.'[608]

In spite of these challenging elements one should reaffirm the advantages of non-conviction-based forfeiture for international cooperation. Firstly, it renders irrelevant the criminal conduct of the offender and thus the requirement of double criminality. Secondly, such confiscation can be carried out regardless of the death and disappearance of the alleged criminal. Thirdly, the establishment of jurisdiction over the proceeds of crime is straightforward if they (at least) passed from a State's territory, even if the underlying offence took place in another country.

[605] European Human Rights Commission, No 12386/1986.

[606] European Commission, 'Green Paper: The Presumption of Innocence' COM(2006) 174 citing *Welch v. United Kingdom* No. 17440/90 (9 February 1995), *Philips v.United Kingdom* No. 41087/98, (5 July 2001) estbalishing that any recovery of assets must be open to challenge in court, reasonable and proportionate.

[607] Greenberg, T. S. and others, 'Good Practices Guide for Non-Conviction Based Asset Forfeiture' (n. 432), 19 ff referring to Dassa Foundation v. Liechtenstein, Eur.Ct.H.R., Application no. 696/05 (July 10, 2007), saying that retrospective non conviction based forfeiture legislation did not breach the Convention, and Walsh v. Director of the Assets Recovery Agency, [2005] NICA 6, where the Court of Appeal in Northern Ireland.

[608] 2012 FATF Recommendation 38 (emphasis added).

3.4.5.1.1.4. Provisional Measures for the Eventual Confiscation of Assets

A few technical challenges may arise from Article 54(2) on the provisional measures to be released in view of enforcing a freezing or confiscation order. While its paragraphs (a) and (b) mention freezing and seizing as required provisional measures, paragraph (c) strongly recommends the possibility to release other measures to permit their competent authorities to preserve assets for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such assets and which may lead to confiscation proceedings. Since most criminal system provide for measures other than freezing and seizing such as sequestering, injunctions, restriction orders which enable the temporary restrictions on the use of assets, Article 54(2) encourages States Parties which intend to implement such recommendation to consider extending the use of those measures to the early stage of the asset recovery process, when States Parties get information about a foreign arrest or criminal charge related to the acquisition of such assets.[609] Furthermore, one should notice that although the Article 54(2) recognizes that foreign freezing or seizure orders may be issued by competent authorities other than the courts, States Parties are not require to enforce or recognize them when coming from an authority without criminal jurisdiction.[610]

3.4.5.2. International Cooperation for the Recovery of Assets into the Victim State

While all the UNCAC provisions examined so far in the realm of freezing, seizure and confiscation are based on and develop from previous international instruments, Article 57 on the 'asset recovery' phase represents an significant innovation as it deals with the disposal and return of 'corrupt' assets. In this sense within the UN Drug Trafficking Convention of 1988

[609] Cf. Article 56 of the UNCAC.

[610] See also U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 61.

and the UNTOC 'the concept that the confiscating State party had exclusive property in the proceeds was dominant'[611] and both the Conventions touched on the latter issue only tangentially: the former recommended (and not required) State Parties to share drug-related assets with other countries;[612] the latter confirmed that the disposal of confiscated assets should be carried out under domestic law and administrative procedures, but also added that States should give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party 'if so requested' in order to compensate the victims of the crime or return such proceeds of crime or property to their legitimate owner.[613] On the other hand, the UNCAC overturns the latter schemes and expresses a strong favour to the repatriation of confiscated proceeds in accordance with the fundamental principle established in Article 51. Accordingly, Article 57(3), which is addressed in detail in the following paragraph, prioritizes the return of the confiscated assets to the requesting States without disregarding the claim of prior owners and the sharing of expenses incurred in the confiscating party. For all these reasons, Article 57 is considered to be 'one of the most crucial and innovative parts of the Convention against Corruption'.[614]

3.4.5.2.1. The Return and Disposal of Assets

The rationale behind the return of corruption-related assets lays in the fundamental importance of deprive the proceeds of a crime from the perpetrators and return them to the legitimate owners: without the latter restorative element, issues of prevention, rule of law, governance and justice lose significance in the fight against corruption and are perceived as

[611] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 228.

[612] Article 5(5)(b)(ii) of the U.N. Drug Trafficking Convention; similarly see Article 8 of the U.N. Convention for the Suppression of Financing of International Terrorism ('Terrorist Financing Convention') (signed on 10 January 2000; entered into force on 10 April 2002), which commits States Parties to enact provisions for the identification, detection, freezing or seizure, and forfeiture of 'any funds used or allocated for the purpose of committing' any of the offenses therein, but does not mandate to share the forfeited proceeds, which is rather recommended.

[613] Article 14 of the UNTOC.

[614] UNODC, 'Legislative Guide for the Implementation of the United Nations Convention Against Corruption' (n. 333), 224.

worthless in punishing corruption perpetrators. Not surprisingly, asset recovery was established as a fundamental principle by Articles 1(b) and 51 of the UNCAC.

As for the requirements in the return and disposal of assets, after Article 57(1) generally mandates the disposal of property confiscated pursuant to Articles 31[615] or 55,[616] its second paragraph obliges State Parties to take legislative measures enabling their authorities to actually return the confiscated property, which sometimes is to be intended as the return of title or value;[617] in any case, such legislative measures should be designed taking into account the rights acquired by bona fide third parties. The following – third – paragraph constitutes the core provision on asset disposal and faces the key issue of whether requested States acquire the ownership of the asset through confiscation or whether such assets are the property of the requesting (victim) State. As it will be pointed out, the UNCAC gives general preference to the latter option and to the claims of pre-existing property ownership; in other cases Article 57(3) recognizes that some of the latter claims should be favoured more strongly than others according to the type of corruption offence involved, the strength of evidence and claims, and the presence of prior legitimate owners and victims other than the State parties. More particularly, the UNCAC establishes that:

(i) In case the underlying offence is embezzlement of public funds[618] or laundering of embezzled public funds pursuant to Articles 17 and 23 of the UNCAC State Parties are obliged to return the confiscated property to the requesting State. Further conditions are that the confiscation has to be executed in line with Article 55, on the basis of a final judgments in the requesting State party;[619]

[615] 'Freezing, seizure and confiscation.'

[616] 'International cooperation for purposes of confiscation.

[617] See U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 67.

[618] Examples of embezzlement of public property are the thefts of funds by senior public officials from the State banks; the diversion of profits from state-owned enterprises or tax revenues to private bank accounts owned or controlled by the public official.

[619] Article 57(3)(a) of the UNCAC, which adds that the latter requirement can be waived by the requested State Party. According to U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the

(ii) In presence of any other offence of the UNCAC State Parties should also return the confiscated property. Similarly to the previous paragraph, there are the requirements that the confiscation has to be executed pursuant to Article 55 on the basis on a final judgment;[620] on the other hand, an additional substantial condition for returning the confiscated property is that the requesting State has to either establish its prior ownership on the property or it has to be recognized damage by the requested State;[621]

(iii) For all the other cases, the return of confiscated property should also be given priority consideration, not only to the requesting State, but also to its prior legitimate owners or to compensate the victims of the underlying crime.[622]

Article 57 also contains a couple of optional yet practically-relevant measures which State parties may wish to consider. Firstly, unless States decide otherwise, the requested State may deduct 'reasonable expenses'[623] incurred in related investigations or judicial proceedings from the proceeds or other assets before they are returned.[624] Secondly, the Convention allows concerned States, 'when appropriate', to reach arrangements or mutually acceptable agreements on a case-by-case basis for the final disposal of confiscated property.[625] Finally, in

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United Nations Convention against Corruption' (n. 569), para 69, this should be the case when a final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

[620] Ibid.

[621] Certain offences such as bribery and extortion involve a criminal harm to the State; however, the related proceeds are not funds directly owned by the State, and thus claims to these proceeds have a compensatory nature rather than being based on pre-existing property ownership. As a consequence, this paragraph of Article 57 takes into account that claims of prior legitimate owners and other victims need to be considered alongside those of requesting States parties.

[622] Article 57(3)(c) of the UNCAC.

[623] According to an interpretative note, the expression 'reasonable expenses' should be intended as including the costs and expenses incurred and not generic finders' fees or other unspecified charges. In any case States parties are encouraged to consult on such issues linked to expenses . See U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (n. 569), para 70.

[624] Article 57(4) of the UNCAC.

[625] Article 57(5) of the UNCAC. On the controversial issues on this kind of agreements see Fenner Zinkernagel, G. and K. Attisso, 'Past Experience with Agreements for the Disposal of Confiscated Assets' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 329, who

the realm of disposal of proceeds of crime, one should make a cross reference to Article 62 of the UNCAC, which deals with issues of technical assistance funding to developing countries and countries with economies in transition. In this context, State Parties, besides being encouraged to make voluntary contributions, are also invited to give special consideration to the possibility of contributing by assigning a percentage of the money or of the corresponding value of proceeds of crime or property confiscated pursuant to the UNCAC.[626]

3.4.5.3. Special and Enhanced Cooperation

In the area of international cooperation for the purpose of asset recovery the UNCAC represents a significant step forward also because, prior to such instrument, assistance has been traditionally provided only at the request of another State Party. Thus the UNCAC introduces far-reaching spaces of proactive assistance, which has been defined as 'the cooperation that is given or offered with genuine interest in combating international crimes' and that is rooted in the belief that foreign colleagues should be informed about suspicious situations or activities with a possible criminal background.[627] Departing from the relevant provisions of both the UN Drug Trafficking Convention of 1988 and the UNTOC,[628] its Article 56, which is closely related with Article 46 in the realm of general MLA, strongly encourages State Parties (they 'shall endeavour') to embrace proactive cooperation toward other States and to enable their competent authorities to share spontaneous information on proceeds of corruption without prior request. [629] This duty should be carried out when a State considers that the disclosure of such information might assist the receiving State Party in

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notice that, although everybody agrees that stolen asset should be returned for the benefit of the population and should not go back in the criminals' hands, often times it is difficult to find a balance between the victim State's legitimate sovereignty and the need to ensure its responsibility, transparency and accountability in relation to the returned assets.

[626] Article 62(2)(c) of the UNCAC.

[627] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 107-8.

[628] The principle of spontaneous sharing of information is present UNTOC provisions concerning mutual legal assistance, but in the UNCAC is specifically extended to asset recovery for the first time.

[629] According to UNODC, 'Technical Guide to the United Nations Convention against Corruption'(n. 328), 210, the information to be shared may include suspicious transactions, activities of politically exposed persons or where a public official has a power of attorney, authorized signature, or any other authority to represent the State over its financial interests in another State Party and unusual payments by legal entities.

initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party. In particular, the form of spontaneous cooperation favoured by Article 56 of the UNCAC may result potentially effective in relation to high speed financial transactions.[630]

Although it is left to each State to decide the modalities of such exchange, it is suggested that direct channels of communication are set up in order to permit relevant authorities to provide such information as directly as possible to their respective counterparts. In this sense States Parties may consider utilizing already existing frameworks of cooperation such as the Egmont Group of FIUs, whose exchange of information takes place informally, rapidly, and with no excessive formal prerequisites, while at the same time guaranteeing the protection of privacy and confidentiality of the shared data.[631] Moreover, the exchange of information between Egmont FIUs should take place in a secure way through the Egmont Secure Web ('ESW').[632]

Finally, the last Article of Chapter V of the UNCAC provides States Parties the possibility to improve cooperation among them in line with principle set in Article 51 committing them to 'afford one another the widest measure of cooperation and assistance': in this sense, Article 59 invites them to 'consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this Chapter of the Convention.' As a consequence, if some States Parties have already adopted domestic legislation to implement multilateral or other regional agreements in the realm of asset recovery, they will just need to review those provisions and adapt them to Chapter V of the Convention. The same holds true for bilateral arrangements, which may be integrated through an additional protocol. According to the legislative guide to the UNCAC,[633] the review of existing agreements or the conclusion of new ones should first focus on those with whom mutual legal assistance in asset recovery is more likely to happen or technical difficulties

[630] UNODC, 'Technical Guide to the United Nations Convention against Corruption'(n. 328), 210.

[631] On the role of the FIUs within the asset recovery process cf. para 3.4.3.

[632] According to the Egmont's website, the Egmont's Secure Web system permits members of the group to communicate with one another via secure e-mail. For this purpose, Egmont members are able to exchange operational information knowing that the information is communicated in a secure way, will be safeguarded at the receiving end, and acted upon appropriately and in a timely fashion. This Egmont Secure Web system also allows Egmont members access to meeting minutes and related documents, contact information of all members, and sanitized case typologies. See Egmont Group, 'Membership' , available at http://www.egmontgroup.org/membership.

[633] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 218.

more significant. As for the content, they should either implement obligations ex Chapter V or go further and consider the recommendations contained therein; additional reference could be made to limits (i.e. confidentiality and specialty principles)[634] on the use of the information provided pursuant to Articles 56 and 58 on special cooperation and FIUs cooperation respectively. Other clauses to include in such agreements may be those establishing formal and informal procedures to exchange information or to handle mutual legal assistance requests, implementing further means of communication, and the set up of a system of judicial or other authorized agencies with specific responsibilities on the subject matter of the MLA request. Lastly, States are invited to publish such legal arrangements in a public website in order to spread the knowledge of these bilateral and multilateral treaties through the citizenship.[635]

[634] The use of the specialty principle may be balanced with the possibility of authorizing the use of information for other purposes upon request of the recipient State Party.

[635] In any case, Article 55 of the UNCAC requires all States Parties to notify the U.N. with a copy of all relevant treaties and agreements.

3.5. Assessing the Impact of Chapter V of the UNCAC

The discussion of the most significant elements of the UNCAC's section dedicated to asset recovery and, in particular, of the provisions which are most innovative with regards to international cooperation leads us to elaborate a few remarks on its Chapter V, a 'treaty within a treaty'[636] which broke 'entirely new ground in terms of multilateral treaty regimes.'[637] These provisional considerations will then lead us to consider the most pressing challenges posed by such provisions and the way States should act to face and overcome them in the following Chapter.

First of all it important to note that, although the UNCAC does not establish asset recovery as a fundamental right of States, it does consider it a 'fundamental principle' of the Convention and strongly encourages States to afford each other the widest degree of cooperation and assistance in that field.[638] Secondly, one should welcome the anti-money laundering-related preventive measures contained in the asset recovery Chapter, whose presence points out and highlights the fundamental importance of prosecuting money laundering to prevent the transfer of proceeds of corruption and to deal with cases of corruption. More generally, Chapter V lays particular emphasis on preventive measures based on the belief that their adoption may avoid or reduce the costly and difficult efforts to recover assets. Further positive elements of the UNCAC are represented by the mechanisms for the recovery of property through international cooperation in confiscation and the direct recovery of property, but also by the obligations concerning the disposal and return of the proceeds of corruption ex Article 57.

On the other hand, concerns have been raised in relation to the rights of bona fide owners and third parties which have acquired assets already 'tainted' by corruption. In that context there is in fact the possibility that the purchase of assets related to countries ruled by corrupt regimes lead to an increased need for companies to carry out due diligence and risk assessment. As a consequence, as contended by a practitioner in this field, 'although bona fide

[636] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 19.
[637] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 4.
[638] See Article 51 of the UNCAC.

purchasers may be protected, it seems unlikely companies will be able to shield themselves from acquiring that status by failing to do due diligence.'[639] Next to the latter implication, further practical difficulties may be involved in the asset recovery process: since the proceeds need to be identified before issuing a freezing or confiscation order, an evaluation of such property will be needed, and the specialist investigators and forensic accountants may turn out to be an additional burden. The time needed to recover assets pursuant to the provisions of Chapter V seems also to emerge as a problematic factor. However, what may be the most significant threat to asset recovery is the reluctance of requested States to afford cooperation and to engage with the necessary political will: in this sense it is not surprising that UNCAC reviews reveal that developing States show a more intense degree of political will in asset recovery cooperation than developed states, 'which place a premium on discretion when responding to a mutual assistance request in this regard.'[640]

[639] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 19.

[640] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 245, referring to Vlassis, V., 'International Economic Crime and Combating Corruption. Challenges and Responses' (Globalization of Crime— Criminal Justice Responses Ottawa, Canada 7–11 August 2011).

IV. CHALLENGES AND SOLUTIONS IN COOPERATING TO RECOVER ASSETS

4.1. Introduction

After having conducted the theoretical analysis of the global architecture of the UNCAC's asset recovery process and its 'cooperation' dimension in the previous Chapter, the present part of the work aims at addressing its dynamic dimension and thus at considering the most problematic issues which arise throughout the process of recovery. Furthermore, the following part of the work will also inquire into the best practices and proposals which could respond to the latter challenges and facilitate cooperation among States in this context. For these purpose I will first look into the latest technical and political outcomes of the activities surrounding the UNCAC, that is the work of the experts gathered in the Open-ended Intergovernmental Working Group on Asset Recovery ('WG on Asset Recovery') and of the Conference of the States Parties ('COSP') to the UNCAC. After that I will consider the analytical work of other organizations engaged in field, with particular emphasis on the reports released by the joint UNODC-World Bank project 'Stolen Asset Recovery Initiative'('StAR')[641] in relation to the barriers to cooperation in the process of asset recovery.

[641] The StAR Initiative was launched as a partnership agreement between the World Bank and the UNODC in 2007 to support international efforts to deny safe havens for corrupt funds and to facilitate more systematic and timely return of stolen assets. Three representatives of UNODC are members of the StAR Initiative Management Committee, which monitors the activities of the Initiative and establishes its overall policies and priorities. At the working level, two UNODC staff members work as part of the StAR secretariat in Washington, D.C., and contribute to the daily management, in close coordination with UNODC. The UNDOC also nominates peer reviewers for all StAR Initiative products and since its establishment, both the WG on Asset Recovery and the COSP have provided account of its activities. Recently the StAR Initiative has modified its main focus area from developing cumulative knowledge towards country-specific capacity-building. As of 2013, the Initiative has worked on country-projects at the request of 20 countries. The demand has increased rapidly, and only in 2012 eleven new requests have been filed. In order to face the latter request StAR has attempted to develop more hands-on assistance to respond to specific country requests, such as the facilitation of case coordination meetings, the placement of asset recovery advisors and the support of inter-agency groups. See also 'Stolen Asset Recovery Initiative' , available at http://star.worldbank.org/star.

4.2. Progress and Perspectives in the Implementation of the UNCAC's Asset Recovery Mandate

As I pointed out in the previous part of the work in relation to international cooperation,[642] a fundamental role in the development of the UNCAC is played by the Conference of State Parties ('COSP'), which monitors the progress made by State Parties in the implementation of the Convention and identifies the political priorities to pursue in each of its thematic issues.[643] The latter work is often assisted by groups of international experts, as it is also the case for asset recovery, whereas Resolution 1/4 of the COSP established the WG on Asset Recovery in order to advise the Conference in its mandate on the return of proceeds of corruption. Among the functions assigned to such Working Group one should notice the one aimed at building confidence and trust between requesting and requested States, and my analysis will concentrate on the results in such field; however one should also recall that further fundamental tasks of its mandate were identified in the development of cumulative knowledge and in the technical assistance, training and capacity-building.[644]

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[642] Cf. para 2.5.3.2.3.

[643] According to Article 63(1) of the UNCAC, the COSP aims 'to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.'

[644] According to Resolution 1/4 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session, held in Amman from 10 to 14 December 2006' CAC/COSP/2006/12, available at http://www.unodc.org/pdf/crime/convention_corruption/cosp/session1/V0659563e.pdf, the Working Group on Asset Recovery is responsible for the following functions:

> (i) Assisting the Conference of the States Parties in developing cumulative knowledge in the area of asset recovery, especially on the implementation of articles 52-58 of the Convention, such as through mechanisms for locating, freezing, seizing, confiscating and returning the instruments and proceeds of corruption, in particular, the provisions of article 57;
>
> (ii) Assisting the Conference of the States Parties in encouraging cooperation among relevant existing bilateral and multilateral initiatives and to contribute to the implementation of the related provisions of the Convention under the guidance of the Conference of the States Parties;
>
> (iii) Facilitating exchange of information among States by identifying and disseminating among States good practices to be followed to strengthen, both at the national level and in the framework of mutual legal assistance in criminal matters, efforts to prevent and combat corruption and facilitate the return of the proceeds of corruption;
>
> (iv) Building confidence and encouraging cooperation between requesting and requested States by bringing together relevant competent authorities and anti-corruption bodies and practitioners involved in asset recovery and the fight against corruption and by serving as a forum for them;

The following paragraphs aim at illustrating the latest priorities set by the WG on Asset Recovery,[645] as well as assessing the political resolutions adopted by the COSP in the field of asset recovery. Through the latter scrutiny my aim is to identify the most challenging areas in implementing the cooperation provisions of the UNCAC's Chapter V, as well as the political priorities which the Conference will concentrate on in order to increase international assistance in the recovery of corrupt assets.

4.2.1. The Perspective of the States' Experts on Cooperation in Asset Recovery

The first elements which is interesting to introduce in assessing the degree of implementation of Chapter V in relation to international cooperation is to look at the discussions which took place within the WG on asset recovery from the perspective of the States' experts. As a consequence in the present paragraph I will give account of the outstanding themes touched during such forum and, in particular, I will concentrate on the shortcomings and best practices emerging from discussion of the States' experts participating in the Working Group.[646]

(v) Facilitating the exchange of ideas among States on the expeditious return of assets, including ideas on plans for providing legal and technical expertise that requesting States need in order to follow international legal procedures for asset recovery;

(vi) Assisting the Conference of the States Parties in identifying the capacity-building needs, including long-term needs, of States parties in the prevention and detection of transfers of proceeds of corruption and income or benefits derived from such proceeds and in asset recovery;

[645] The Working Group held its first meeting on 27-28 August 2007, its second meeting on 25-26 September 2008, its third meeting on 14-15 May 2009, its fourth meeting on 16-17 December 2010, its fifth meeting on 25-26 August 2011, its sixth meeting on 30-31 August 2012, its seventh meeting on 29-30 August 2013, and the eight meeting on 11-12 September 2014.

[646] See COSP, 'Report on the Meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna on 30 and 31 August 2012' (5 September 2012) CAC/COSP/WG.2/2012/4; COSP, 'Report on the Meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna on 29 and 30 August 2013' (4 September 2013) CAC/COSP/WG.2/2013/4; and COSP, 'Progress Made in the Implementation of the Recommendations of the Open-ended Intergovernmental Working Group on Asset Recovery: Selected Highlights from Two Years of Asset Recovery Work under the Convention' (18 September 2013) CAC/COSP/2013/2.

With regards to the issue of cooperation in confiscation matters,[647] the U.S. panellists highlighted the dependency on the information submitted by the requesting States, which sometimes is difficult to evaluate when referring to a case happened after a long time from a regime change; in other instances requesting investigators and prosecutors did not provide evidence because of the fear of reprisals. Further difficulties exposed in this context were the difficulties in determining the link between the corrupt conduct and the assets, especially if the official under investigation had been a powerful political figure or in presence of limited financial investigative capacity. Problematic issues linked to dual criminality were also exposed, in particular with regard to the offences for which forfeiture could not be ordered in the United States such as false financial disclosure statements, malfeasance and illicit enrichment. Lastly, it was stressed the importance of respecting due process guarantees in the requesting country because their absence could undermine the enforcement of foreign judgements. From the French perspective the most significant challenges in his area were represented by the time required for translating the requests and to seek for additional information; to remedy such problem the French Ministry of Justice made use of informal communication, regular follow-ups with relevant authorities, and seminars on asset confiscation to both foreign authorities and French practitioners. Challenges were also noticed in relation to the relative short limitation period for most corruption offences, but in this regard it was also added that the Court of Cassation established that the starting point should be considered the day when the first elements of the offence have been discovered, and that charges for concealment were subject to the statute of limitations because is a continuous offence. Also the Indonesian panellists highlighted a number of difficulties relating to asset recovery, especially the transnational nature of corruption and differences in legal systems, and to face the latter difficulties the country created an Asset Recovery Task Force and benefited from inter-agency coordination. Some countries expressed mixed feelings in relation to non-conviction-based forfeiture: while positive experiences were exposed in relation to organized crime and grand corruption cases, some concerns were raised by referring to the right of ownership and the presumption of innocence. A the same time various panellists stressed the importance of disclosing spontaneous information by States where assets are located, and called for the strengthening of confidence and trust among countries in

[647] See COSP, 'Report on the Meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna on 30 and 31 August 2012' (n. 646).

order to foster spontaneous disclosures,[648] as well as greater information sharing and coordination on both asset information and legal systems procedures. Confronted with lengthy and diverse asset recovery procedures, the Belgian representative proposed an international standard procedure based on three phases which would help tackling the challenges arising from the lack of coordination between the multiple, parallel proceedings while respecting the States' sovereignty and domestic law:

(i) The *alerting* phase, where an international body (e.g. the StAR Initiative) sends an international alert to the State Parties' FIUs, which can then proceed with temporary freezing orders;
(ii) The *investigation* phase, where a database for every multijurisdictional case is set up and is made accessible by all focal points while ensuring the highest rule of law standards;
(iii) The *return* phase following the principles of integral return of assets and the legality of proceedings.

The panellist from Iran, besides identifying prevention as the most effective strategy to protect public funds, underscored a major impediment the denial of cooperation for economic interests or political consideration, as well as the lack of direct and open channels of communication at both the national and the international level. Furthermore he also stressed the challenges linked to delays in responding to requests for mutual legal assistance, the lack of informal cooperation in the drafting phase of mutual legal assistance requests, and the frequent requirement from requested countries of mutual legal assistance treaties, as well as the excessive use of grounds for refusal. Lastly, the speaker from the UK stressed the importance of prioritizing mutual legal assistance requests in light of restraints in resources and personnel, and explained that priority was given to most significant cases or to cooperation with countries with whom the UK enforcement authorities had established long-term relationships based on trust, or with similar legal systems, where similar standards in relation to the gathering of proof ensured its admissibility in domestic courts.

[648] On the importance of proactive cooperation cf. Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 107-9.

Within the thematic discussion of the Working Group on special cooperation[649] and on the role of Financial Intelligence Units[650][651] the representative from Liechtenstein and Kyrgyzstan exposed a successful experience shared by the two countries where it was of crucial importance both the spontaneous sharing of information[652] and the cooperation between FIUs. In particular, while the joint work of the Financial Intelligence Units played a crucial role in discovering the embezzlement of several million dollars from a public company in Kyrgyzstan, the former element of cooperation enabled Lichtenstein authorities to freeze a bank account linked to such corrupt practice. Furthermore, the two panellists stressed that the request of mutual legal assistance for the freezing of the bank account was based on Article 54(2)(b) of the UNCAC and it was drafted with the help of an expert provided by the Swiss authorities, which also represented Kyrgyzstan in front of the court in Liechtenstein. More generally, the panellists from the two countries draw some conclusions from their experience highlighting the importance of the following elements for an effective cooperation:

(i) Spontaneous transmission of information;[653]
(ii) Financial Intelligence Units' networks facilitating information exchange such as the Egmont Group;
(iii) Establishing direct contact between Financial Intelligence Units between financial intelligence units;[654]
(iv) Tracing assets spread in different jurisdictions in a timely manner;[655]
(v) Effective coordination among FIUs as well as between FIUs and law enforcement bodies;[656]

[649] Article 56 of the UNCAC.
[650] See Article 58 of the UNCAC.
[651] COSP, 'Report on the Meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna on 29 and 30 August 2013' (n. 646), 6.
[652] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 107-9.
[653] Reference is made to Article 56 of the UNCAC.
[654] Reference is made to Articles 58 and 59 of the UNCAC.
[655] Reference is made to Article 58 of the UNCAC.
[656] Reference is made to Article 38 of the UNCAC.

(vi) Empowering FIUs giving them the prerogative to obtain information and to suspend transactions and freeze bank accounts;
(vii) Gathering information from financial intelligence before initiating a formal mutual legal assistance process;
(viii) Having the support from donors, where relevant;
(ix) Ensuring open lines of communication throughout the asset recovery process.

The crucial role of FIUs was also stressed by the Executive Secretary of the Egmont Group, who underlined the facilitating role of its group in promoting effective communication and information-sharing between them. He also mentioned the establishment of a closer level of cooperation in the future with the observers to the Group (e.g. the UNODC), and called States to take advantage of the benefits deriving from the sharing of information before the official mutual legal assistance procedure is initiated. On the other hand, in the realm of cooperation between FIUs, some speakers of the Working Group pointed out to the challenges encountered by their authorities, that is bank secrecy, the use of offshore companies and the reluctance of some FIUs to cooperate in absence of any information available in their database.

Another recent thematic discussion was also held within the Working Group on cooperation in freezing and seizure, that is on Articles 54 and 55 of the UNCAC.[657] The representative from Switzerland illustrated the asset recovery regime in his country, which was defined as flexible and simple, and explained that normally Swiss authorities accepted the direct enforcement of a foreign freezing order, on the basis of the statements contained in the request order and without any additional evidence. As for the timing, it is possible to keep the freezing order in place for a long time in order to allow the requesting State to produce the final order of confiscation. From a different perspective the panellist from the United Kingdom lamented a considerable knowledge gap in relation to the procedural and substantive legal requirements to obtain mutual legal assistance creating false expectations

[657] COSP, 'Report on the Meeting of the Open-ended Intergovernmental Working Group on Asset Recovery held in Vienna on 29 and 30 August 2013' (n. 646), 7.

and delays on both sides. As for the proposals, he emphasized the importance of building regular dialogue between States with any means of communication (including personal meetings) in order to favour successful MLA requests; furthermore he advised that requests should be focused on those individuals for which there is significant suspicions, and recommended both the use of non-conviction based forfeiture and the creation of task force at the domestic level to favour cohesion, identify leadership, and share tasks. Some good practices in the area of asset recovery were shared by the expert from Lebanon who explained that the enforcement of a foreign civil decision is possible by providing a certified copy of the foreign judgement and the evidence that the decision was final and enforceable. She also presented a recent case of asset recovery where, upon the request of Tunisia, Lebanon returned 28 million dollars which were traced by the Lebanese FIU called 'Special Investigation Commission'. The experiences on assets' freezing and seizure from the latter three countries were discussed, and several speakers welcomed the Swiss legislation on spontaneous disclosure and (absence of fixed) time limitations on freezing orders. The importance of instruments for domestic coordination (i.e. national task forces or inter-agency offices) pointed by the United Kingdom was further highlighted by other speakers together with the establishment of direct liaison or cooperation agreements with international counterparts. As for the challenges emerging from the discussion one should recall the following ones:

(i) The control of the requesting authority's competence by some requested States;
(ii) The difficulty in localizing swiftly real estate through registries;
(iii) The long timing to obtain a final judgment;
(iv) The issues related to the statute of limitation for predicate offences to money laundering;
(v) The knowledge gap on legislation and requirements for mutual legal assistance through the relevant databases (e.g. the UNODC's TRACK online platform) which are not kept up to date by States.

Confronted with the latter issues two views emerged to tackle them: on the one hand some speakers proposed to develop standardized MLA procedures (especially the initial investigation phase) to harmonize the implementation of both UNCAC's Article 46 and Chapter V of the Convention; on the other hand some other speakers expressed the view that efforts should concentrate on enhancing the mutual understanding of existing requirements and procedures within the framework of the UNCAC.

4.2.1.1. Issues Raised by the WG on Asset Recovery and Actions Taken

Since the establishment of the WG on Asset Recovery in 2006,[658] several issues have been dealt with by the latter group of experts within its threefold mandate.[659] The first of the WG's functions, that is the development and availability of cumulative knowledge, has improved through the creation of a number of databases, manuals, best practice guides and policy studies (e.g. TRACK[660] and Asset Recovery Watch[661]). Also the development of specialized capacity for asset recovery has received much attention in relation to capacity-building and training, gap analyses, assistance in drafting new legislation and the facilitation of the mutual legal assistance process, even though this function is likely to require increased efforts in terms of creativity and resources from all the actors involved. As for the WG's objective to enhance trust and confidence between requesting and requested States, many challenges remain although the importance of cooperating to recover assets has been repeatedly stressed and much work has been done to increase the political will, to develop a culture of mutual legal assistance and to favour international cooperation. In this context a few issues have

[658] See Resolution 1/4 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session, held in Amman from 10 to 14 December 2006' (n. 644), which also established the WG's mandate and functions.

[659] The latest official documents illustrating the progresses and the challenges of the WG on Asset Recovery are COSP, 'Progress Made in the Implementation of Asset Recovery Mandates' (28 June 2013) CAC/COSP/WG.2/2013/3; COSP, 'Progress Made in the Implementation of Asset Recovery Mandates ' (25 June 2014) CAC/COSP/WG.2/2014/3 .

[660] UNODC, 'Tools and Resources for Anti-Corruption Knowledge ('TRACK')', available at http://www.track.unodc.org/Pages/home.aspx.

[661] StAR, 'Asset Recovery Database' , available at http://star.worldbank.org/corruption-cases/?db=All.

received special attention by the WG on Asset Recovery[662] and it is thus significant to discuss them in depth.

4.2.1.1.1. Central Authorities and Asset Recovery Networks

Over the years of its activity the Working Group has stressed the importance of central authorities for mutual legal assistance, the need to create a global network of contact points on asset confiscation and recovery, and the importance of collaboration and coordination between regional networks. Furthermore, it was often recommended to adopt a help-desk approach which would afford informal advice during the initial stages of a case and would direct requesting States to those responsible of providing further assistance in the requested State. Plus, the WG on Asset Recovery highlighted the potential effectiveness of cooperation between law enforcement agencies and financial intelligence units, even though it was also made clear that any international cooperation procedure should be eventually handled by the judiciary which ensures the respect of accountability and due process guarantees.

As a result of the Working Group's efforts on the latter issues 105 State Parties have so far notified the Secretariat of their central authorities, and the UNODC has set up a database of the asset recovery focal points communicated by 55 State Parties and 2 signatories;[663] the latter U.N. agency is also working on the development of a directory which will consolidate the lists of competent national authorities under the UNCAC, UNTOC and the UN Drug Trafficking Convention of 1988. Similarly, the UNDOC developed a web community called 'practitioners corner' within the TRACK portal which intends to 'the entry point to the shared community of practice for registered practitioners in the field of anti-corruption and asset

[662] See COSP, 'Progress Made in the Implementation of Asset Recovery Mandates ' (25 June 2014) (n. 659); COSP, 'Progress Made in the Implementation of Asset Recovery Mandates' (28 June 2013) (n. 659); and COSP, 'Strengthening International Asset Recovery Efforts: Progress Report on the Implementation of Asset Recovery Mandates' (27 June 2012) CAC/COSP/WG.2/2012/3.

[663] UNODC, 'On-line Directory of Competent National Authorities under the United Nations Convention Against Corruption', available at http://www.unodc.org/compauth_uncac/en/index.html. The access to the latter directory is restricted to competent authorities and government agencies with a user account.

recovery.'[664] In particular, the latter group aims at bringing together practitioners from anti-corruption authorities as well as central authorities for mutual legal assistance and asset recovery focal points in view of sharing information, schedule events, identify their counterparts and interact directly with each other. In this context one should also take note of the Global Focal Point Initiative set up jointly by Interpol and StAR in 2009 to support the investigation and prosecution of corruption and economic crime through international cooperation and informal assistance, and to favour the identification, tracing, freezing and ultimately recover of the proceeds of crimes. An interesting feature of such Initiative is the virtual platform on the secure INTERPOL website, which is connected to the INTERPOL I-24/7 secure communication network and enables focal points to exchange information and technical knowledge on corruption and asset recovery in a timely and effective manner.[665] Finally, emphasis should be laid on further initiatives supported by the UNODC and the StAR to strengthen regional networks in asset recovery and confiscation such as the Financial Action Task Force of South America against Money-Laundering ('GAFISUD'),[666] the recent Asset Recovery Inter-Agency Network for Eastern Africa,[667] the Asset Recovery Inter-Agency Network for Asia and the Pacific,[668] the Asset Recovery Inter-Agency Network of Southern Africa, the Camden Inter-Agency Network on Asset Recovery, and the future regional network for the West Africa region.[669]

4.2.1.1.2. Cooperation between Financial Intelligence Units and Anti-Corruption Agencies

[664] UNODC, 'Tools and Resources for Anti-Corruption Knowledge ('TRACK')', available at http://www.track.unodc.org/Pages/home.aspx.

[665] As of September 2014, 196 dedicated focal points representing 108 countries are participating in the platform. The fourth Global Focal Point Conference on Asset Recovery was held from 3 to 5 July 2013 in Bangkok. In January 2014, partners in the Global Focal Point Initiative participated in a two-day meeting to discuss key issues relating to the Initiative. The fifth annual general meeting of the Initiative was held in Vienna on 8 and 9 September 2014. For further information on the Global Focal Point Initiative see para 4.3.1.2.3.1.1. See also INTERPOL, 'The Global Focal Point Initiative', available at http://www.interpol.int/Crime-areas/Corruption/International-asset-recovery.

[666] The last meeting was held in Costa Rica from 26 to 30 May 2014.

[667] Inaugurated in November 2013

[668] The first meeting was held in November 2013 in Seoul.

[669] The StAR Initiative has observer status in these regional networks on asset recovery.

A second form of cooperation which the WG on Asset Recovery recommended to strengthen in its years of activity is between financial intelligence units, anti-corruption authorities and central authorities responsible for mutual legal assistance at the national and international levels. In this regard, positive elements of information exchange were identified in the work of existing networks and institutions such as the Egmont Group of FIUs and the International Association of Anti-Corruption Authorities ('IAACA'). On the other the Working Group took also note of some recurrent challenges faced by FIUs engaged in international cooperation in relation to bank secrecy and the use of offshore companies.

Both the UNODC and the StAR Initiative encourage States to enhance cooperation between their financial intelligence units in view of facilitating the exchange of information and informal cooperation on financial investigations. While the former works closely with the IAACA on themes such as anti-corruption agencies, non-selective anti-corruption law enforcement and key prevention strategies, the latter – together with the UNODC Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism – has assisted FIUs to accelerate accession to the Egmont Group and to implement the relevant standards against money-laundering and the financing of terrorism. More recently representatives of the StAR Initiative intervened at the 22nd Egmont Plenary[670] in order to discuss the potential roles of financial intelligence units in asset recovery, and conducted a workshop for FIUs on asset tracing and recovering.

4.2.1.1.3. Dialogue among States

The third issue which the Working Group has emphasized in the field of asset recovery is the need to promote dialogue between States through trust and confidence, and to remove barriers to asset recovery by simplifying and strengthening domestic procedures in order to prevent their misuse.

As for the actions taken so far in this context one should notice that the UNODC is actively engaged in several international forums to strengthen political will, as well as to stress the

[670] The meeting was held in Lima (Peru) from 1 to 6 of June 2014.

importance and benefits of ratifying the UNCAC. [671] The same holds true for the StAR initiative, which has recently supported the Arab Forum on Asset Recovery[672] to establish a roadmap for 2014 focusing on issues of beneficial ownership,[673] the role of the private sector and networks for asset recovery, as well as capacity-building and the development of guides for asset recovery. A recent initiative of the G-7 which goes in the same direction is the adoption, in June 2014, of a Summit Declaration focusing on the misuse of companies and other legal arrangements to hide financial flows stemming from corruption and other crimes, as well as on the swift availability of beneficial ownership information to FIUs, tax collection and law enforcement agencies. Finally, representative of the StAR Initiative have participated in the Ukraine Forum on Asset Recovery in order to support the Ukrainian Government's efforts to recover its assets.[674]

4.2.1.2. International Cooperation in Asset Recovery as a Priority of the Conference of the State Parties to the UNCAC

[671] The UNODC participates in international meetings organized by INTERPOL, the European Union and Eurojust, the Group of Seven (G-7) and the G-20 Anti-Corruption Working Group, and it supports the Arab Forum on Asset Recovery and the Ukrainian Forum on Asset Recovery.

[672] The 'Arab Forum on Asset Recovery', available at http://star.worldbank.org/star/ArabForum/About, is a network which brings together the G-8 countries, the Deauville Partnership with Arab Countries in Transition and countries in the Arab World. While the first of such forum took place in Doha on 11-13 September 2012 and was co-organized by Qatar and the United States presidency of the G-8 and supported by the StAR Initiative, the second forum was held in Morocco on 28-30 October 2013. According to COSP, 'Progress Made in the Implementation of the Recommendations of the Open-ended Intergovernmental Working Group on Asset Recovery: Selected Highlights from Two Years of Asset Recovery Work under the Convention' (18 September 2013) (n. 646), 9, the commitments of Arab countries in this forum include: legal and institutional reforms; pursuing membership of the Egmont Group and other international forums; adoption and enforcement of rules on customer due diligence, beneficial ownership, asset declarations, conflict of interest and politically exposed persons; and the creation of asset recovery task forces that comprise dedicated, experienced law enforcement officials and have access to all relevant financial documents.

[673] On the fundamental importance of identifying beneficial ownerships in the context of asset recovery from the perspective of the private sector see Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 75.

[674] The forum, convened by the U.K. and U.S. Governments, was held in London on 29-30 April 2014. See also 'Ukraine Forum on Asset Recovery', available at http://star.worldbank.org/star/UFAR/ukraine-forum-asset-recovery-ufar.

As we observed in the previous paragraphs, the conclusions and recommendations of the WG on Asset Recovery in the realm of international assistance were followed by a number of concrete actions which aim at building confidence and encouraging cooperation between requesting and requested States. On top of that one should also take note of the legal and political consequences generated by the advising role of the Working Group towards the Conference to the States Parties, which was established by the UNCAC 'to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.'[675]

4.2.1.2.1. Resolution 5/3 on International Cooperation in Asset Recovery

In spite of the fact that asset recovery has been always a major topic of discussion and commitments among State Parties to the UNCAC,[676] one should take a closer look to the latest resolution dedicated to international cooperation in asset recovery by the fifth (and latest) session of the COSP which was held in Panama City in November 2013, and which is essential to discuss it for its topicality as well as for its political and practical significance.

Resolution 5/3 of the COSP,[677] under the heading 'Facilitating international cooperation in asset recovery', opens up with a series of preambles which recall the States obligations under Chapter V of the UNCAC and take note of the legal and practical difficulties involved in the recovery of asset in spite of the efforts and initiatives endeavoured so far. In this context the

[675] Article 63(1) of the UNCAC.

[676] See, in chronological order, Resolution 1/4 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its first session, held in Amman from 10 to 14 December 2006' (n. 644); Resolution 2/3 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its second session, held in Nusa Dua, Indonesia, from 28 January to 1 February 2008 ' (27 February 2008) CAC/COSP/2008/15, Resolution 3/3 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its third session, held in Doha from 9 to 13 November 2009' (n. 369), Resolution 4/4 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fourth session, held in Marrakech, Morocco, from 24 to 28 October 2011' (n. 368). All the documents, resolutions and decisions of the COSP's sessions are available at http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.

[677] Resolution 5/3, in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fifth session, held in Panama City from 25 to 29 November 2013' (n. 383).

COSP stresses the critical importance of effective international cooperation in efforts to combat corruption, particularly with respect to offences with a transnational element, and calls upon States to mobilize the necessary political will and to afford assistance in absence of dual criminality as well as to cooperate in the recovery of proceeds of corruption. Plus, the preamble lists the following factors as crucial causes to the States' considerable challenges in recovering assets:

(i) The differences between legal systems;
(ii) The complexity of multijurisdictional, investigations and prosecutions;
(iii) The limited implementation of effective domestic tools such as non-conviction-based forfeiture for asset recovery, as well as other administrative or civil procedures leading to confiscation;
(iv) The lack of familiarity with the mutual legal assistance procedures of other States;
(v) The difficulties in identifying the flow of corruption proceeds.

After its introductory phase, the Resolution enters into its 'ruling' part and touches upon a number of issues in relation to international cooperation which are identified by the COSP as political priorities to be addressed in the next future. Firstly States are urged to set up adequate law and mechanism to ensure the 'widest possible' assistance pursuant to Article 51 of the UNCAC, also in relation to civil and administrative proceedings. Particular consideration should be given to urgent mutual assistance requests, especially when coming from Middle East and Northern African countries. Similarly, cooperation in asset recovery should not be refused on grounds of the absence of a bilateral treaty since the UNCAC can be considered a legal basis for the purposes of confiscation.[678] Several paragraphs are dedicated to the investigative phase, where States are called upon to improve the development and exchange of information, and are encouraged to make use of joint investigative teams in the terms set by Article 49 of the UNCAC; furthermore they are strongly recommended to embrace a proactive approach and thus to initiate requests for assistance, make spontaneous disclosure of information, as well to adopt and recognize non-conviction-based forfeiture

[678] Article 55(6) of the UNCAC.

judgments. At the same time, requesting States should ensure to provide an adequate basis for the submission of requests for mutual legal assistance by initiating and substantiating investigative procedures; and requested States should strive to assist requesting counterparts to meet the procedural requirements needed to provide legal assistance, which should also be made widely available in a practical and easily accessible guide, eventually in other languages. As for the crucial issue of communication, Resolution 5/3 invites States which have not yet done so to designate a central authority and to make use of other opportunities for cooperation such the practitioners-based-network created by the Global Focal Point Initiative and the group of focal points of the WG on Asset Recovery. In these contexts States are also encouraged to develop and use existing secure information-sharing tools such as Interpol's Secure Communications for Asset Recovery (I-SECOM).[679] The use and promotion of informal channels of communication before making an official request are also encouraged and for this purpose it is suggested the designation of officials or institutions with technical expertise in international cooperation and asset recovery to assist their counterparts in meeting requirements for formal mutual legal assistance. Plus, the resolution identifies the share and the spontaneous exchange of information[680] as an effective complementary practice to cooperation to trace and confiscate proceeds of corruption, and in relation to shell companies and other complex legal mechanisms State Parties are called upon to enable themselves to obtain reliable information on such legal structures, including trusts and holdings. Finally, a few paragraphs touch on other issues of cooperation: firstly, States are encouraged to form networks of financial intelligence units to embrace a coordinated approaches to issues measures towards political exposed persons, their family members and close associates to prevent the concealment of their illicitly acquired assets;[681] secondly States should sharing their experience in dealing with the challenge of the transliteration of names in tracing assets,

[679] In July 2013 the Interpol launched a new system known as I-SECOM, which intends to assist the specialized anti-corruption community with a secure web-based email capability. The purpose of the latter system is to provide a password-protected, encrypted channel to the Focal Point of the Global Focal Point Initiative and to encourage the exchange of sensitive data within the current and future investigations. For more information see INTERPOL, 'Enhancing Global Cooperation in Asset Recovery Investigations Focus of INTERPOL-StAR Conference' *Media Release* (3 July 2013). For an overview of the Global Focal Point Initiative see para 4.3.1.2.3.1.1.

[680] See Articles 46(4), 48(1)(f), and 56 of the UNCAC. On the importance of the latter provisions which aim at fostering proactive cooperation cf. Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 107-9.

[681] On the importance of special proactive forms of cooperation in investigations against politically exposed persons see Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 112-3.

which is source of significant practical problems; thirdly, the COSP urges States to use the tools provided for by Chapter V also when dealing with cases of transnational bribery.

4.3. The StAR Initiative and the Barriers to Cooperation in the Asset Recovery Process

The second perspective which I take to identify the most problematic issues in the cooperation to recover corruption-related assets is to examine the work of the StAR Initiative in the field of asset recovery, not only because it produces a rich and insightful source of knowledge but also because it represents a unique and potentially crucial initiative to support the asset recovery efforts of States at the technical level. After a brief introduction where I will illustrate the activities and organization of StAR, I will then consider the main outcomes of its research and practical work by focusing on the critical issues and proposals which relate to international cooperation and mutual legal assistance.

4.3.1.1. The General Activity of StAR

The Stolen Asset Recovery Initiative was launched in September 2007 by the World Bank and the United Nations Office on Drugs and Crime[682] 'to help ensure that there are no havens for the proceeds of corruption'.[683] In particular the latter initiative was established once it was realized that three set of practical problems surrounded the asset recovery process and hampered its feasibility:[684]

[682] Next to the World Bank and the UNODC, which are the principal partners of StAR, its activity is also supported by one or more trust funds which I will refer to as 'the trust fund'. As for its governance StAR has a two-tier decision-making structure: firstly a Management Committee chaired by the World Bank's Vice President for Poverty Reduction and Economic Management and consisting of two permanent members from the World Bank and two from the UNODC, which provides strategic guidance to StAR; secondly the StAR Secretariat, which manages day-to-day activities of StAR in accordance with the StAR's Charter and the World Bank's standard operational and administrative policies and practices. In addition to the latter governance structure, StAR is supported by two consultative and advisory bodies such as the StAR Donor Consultative Group, consisting of representatives of the partners contributing to the trust fund and reviewing its implementation, and the Friends of StAR which assist the Management Committee in its duty to provide strategic guidance and to set overall policies and priorities. Cf. also Borlini, L. and G. Nessi, 'International Asset Recovery: Origins, Evolution and Current Challenges' (2014) 2 Diritto del Commercio Internazionale 397.

[683] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469), ix.

[684] Cf. Nicholls, C. and others, *Corruption and Misuse of Public Office*, 437.

(i) Although asset recovery poses challenges to all States, developing countries may encounter particularly serious problems in recovering stolen assets;

(ii) The lack of political to pursue stolen assets is not the only problem of the asset recovery process; serious obstacles are represented by limits in the legal, investigative, and judicial capacity of countries, as well as in the inadequacy of the financial resources;

(iii) Developed countries, which are often the destination where assets are hidden and concealed may not be responsive to requests or proactive in initiating proceedings.

Before addressing the latter issues and examining StAR's substantial work in the field of asset recovery, it is interesting to take a look at its principles, objectives and main activities.

4.3.1.1.1. Principles

First of all one should take note of the principles which guide the activity of StAR. One of these is the close relationship with the UNCAC's provisions, which represents the most comprehensive legal framework against corruption; as a consequence the ratification and implementation of the U.N. Convention should also be encouraged and promoted by the work of StAR. Another principle is that StAR is an international initiative to recover stolen assets, but at the same time it is crucially linked with domestic issues having an international scope such as national forfeiture and anti-money laundering regulations. Furthermore, one should also stress that StAR, together with the support of the donors to the trust fund, provides assistant to countries which request it in order to build institutional capacity; thus its activity is 'demand-driven and country led'.[685] A final principle of StAR's activity is it gives

[685] The World Bank and UNODC, 'StAR Partnership Charter' (7 November 2008), available at http://star.worldbank.org/star/sites/star/files/StAR_Partnership_Charter_0.pdf, 1.

assistance on technical issues of asset recovery drawing from good practices, international experience and sound technical analysis; as a consequence it avoids any political interference with the requesting countries and, at the same time, it also takes into account the risks and benefit of engagement.

4.3.1.1.2. Objectives

Secondly one should consider the objectives guiding the actions of the UNODC-World Bank partnership together with the trust fund. Promoting commitment at the highest level of requesting and requested jurisdictions in order to recover assets and prevent them from leaving a country is one of the StAR's aims. Another purpose is developing knowledge products, procedures and tools which could be adopted systemically at the global level. Next to that, another intention of the initiative is to promote the building of networks to gather practitioners in order to create opportunities to exchange information, knowledge and collaboration at an operational level. Finally, if one considers StAR's role in technical assistance, it becomes clear that it also part of its strategy to build institutional capacity and, more generally, favour progress in the asset recovery efforts of partner countries.

4.3.1.1.3. Activities

Thirdly it is important to illustrate how, in concrete, StAR operates to put into action the latter principles and objectives, that is its three groups of activities.

4.3.1.1.3.1.Training and Capacity-Building

The first set of activities concerns training and support of States in their effort to build capacity. On the one hand StAR organizes workshop to raise awareness and advanced training courses for institutions, practitioners and stakeholders involved in the asset recovery process.[686] On the other hand it is also actively engaged with countries requesting assistance in developing legislation to strengthen the relevant legal framework, enhancing their institutional framework, and strengthening their capacity to conduct investigations and carry out the asset recovery process.

In particular, specific initiatives in this group of activities may include:

(i) Analytical work on the asset recovery process, including legal analysis of successful and unsuccessful asset recovery cases;
(ii) Analysis of requesting countries' overall anti-corruption institutional arrangements, capacities, and vulnerabilities in the area of asset recovery;
(iii) Assisting countries in developing a coherent set of policies to recover stolen assets;
(iv) Design of models which best integrate all the steps of the asset recovery process into the existing institutional arrangements, that is within the judiciary, anticorruption agencies, and financial intelligence units;
(v) Advising on drafting or amending the legislative and regulatory framework necessary for successful asset recovery, including regulation in the fields of anti-money laundering, asset forfeiture, and income and asset declaration laws;
(vi) Development and implementation of information systems to support those aspect of the recovery process which relate to investigations, legal documentation, and case management;
(vii) Training, mentoring, and advisory services on asset recovery to enable recipient agencies to identify and handle suspicious transactions,

[686] According to the 'Stolen Asset Recovery Initiative', available at http://star.worldbank.org/star, as of 2014 more than 720 participants from 70 countries have participated in regional and national training in Latin America, Africa, South Asia, East Asia, Central and Eastern Europe, and the Middle East.

prepare cases, as well as to manage and handle mutual legal assistance requests.

4.3.1.1.3.2. Global Knowledge and Advocacy

The second group of initiatives which StAR undertakes within its mission relate to policy analysis and knowledge building. StAR has published a number of policy papers and has set up a database of asset recovery cases together with a wide range of experts from diverse professional backgrounds, regions and legal traditions. In this group of activities one could recall TRACK ('Tools and Resources for Anti-Corruption Knowledge'), developed by UNODC and the StAR Asset Recovery Watch[687] to help practitioners working in the field of asset recovery and to promote policy development in international asset recovery. These tools also represent crucial source of information for the research, campaigns and advocacy work of civil society organizations and the media. In this context one should also notice that StAR is also engaged in developing practitioner networks such as the Global Focal Point Initiative, which is a joint initiative with INTERPOL to facilitate the exchange of information among practitioners at an early stage of the investigation, before a request of mutual legal assistance is filled.[688]

Activities under this component of the work of the StAR Initiative might include:

(i) Conducting research and consultations with stakeholders to favour the policy dialogue and advancement of the UNCAC implementation, its asset recovery Chapter, and the related legal innovations;

[687] See UNODC, 'Tools and Resources for Anti-Corruption Knowledge ('TRACK')', available at http://www.track.unodc.org/Pages/home.aspx.

[688] For an overview of the Global Focal Point Initiative see para 4.3.1.2.3.1.1.

(ii) Developing tools to support and assess the status of implementation of the UNCAC provisions concerning mutual legal assistance, dual criminality, and other key elements of its Chapter V;

(iii) Researching and disseminating knowledge to expand and develop best practices in asset recovery;

(iv) Supporting international networks engaged in asset recovery, including the creation of a web of contact points in each country to facilitate communication and cooperation;

(v) Identifying and facing institutional and legislative obstacles to asset recovery in the major financial centres (usually developed countries), particularly their ability and promptness in respond to requests of mutual legal assistance in corruption cases.

4.3.1.1.3.3. Technical Assistance to Countries

The third group of activities within the mandate of StAR concerns assistance to countries engaged in the process of asset recovery. Upon request of a country, StAR provides technical assistance by working with all the institutions involved in the process, including financial centres and anti-corruption agencies. The added value of StAR is represented by the technical advice and the availability of best practices to develop a tailor-made case strategy; furthermore StAR is able identify and activate the most appropriate tools to trace assets in the realm of mutual legal assistance, seizing and confiscating assets; finally it may assist countries in accelerating and smoothing the process of international cooperation. In other words, through its assistance activities, StAR performs 'the role of a neutral convener or facilitator among parties in the international asset recovery process, to promote effective "quiet diplomacy" '.[689]

In order to fulfil its task of assisting countries, StAR may undertake the following activities:

[689] 'Stolen Asset Recovery Initiative', available at http://star.worldbank.org/star.

(i) Sponsoring meetings and workshops bringing together all the actors involved at the national, regional, and international level;
(ii) Supporting the preparation of analytical reports, legal research, assistance with audits and financial analysis;
(iii) Providing assistance in preparing mutual legal assistance requests;
(iv) Advising countries on how to manage and monitor recovered assets.

4.3.1.2. Challenges and Priorities in Recovering Stolen Assets

In spite of the fact that all the activities of StAR touch upon crucial elements of the asset recovery process and, thus, would be interesting to elaborate on, I will mostly focus my analysis on those outcomes of its 'global knowledge' activities which aim to identify the most problematic issues as well as the key priorities in the field of asset recovery. Drawing from StAR's extensive research work on the subject,[690] which is crucially supported by the practical experience built through all its other activities, the following paragraphs will provide an overview of the main barriers in the process of asset recovery by dividing them into three categories (general, legal, operational).[691] In illustrating them I will lay the emphasis on those issues which are linked to international cooperation and on the recommendations which could help States assist each other in a more effective and swifter way. However, before beginning with this analysis, one should recall that StAR has often stressed the fact that the asset recovery process is a complex and multifaceted issue which is closely related to the context where it takes place; accordingly, it is not surprising to read in one of its early reports that 'addressing the problem of stolen assets is an immense challenge'.[692]

[690] StAR, 'Publications', available at https://star.worldbank.org/star/?q=publications&keys=&sort_by=field_date_value&sort_order=DESC&items_per_page=20.
[691] This classification is used in one of StAR's most comprehensive works on asset recovery, which is Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (The World Bank, 2011).
[692] UNODC and The World Bank, 'Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan' (The World Bank, 2007).

4.3.1.2.1. General Barriers

The first set of barriers refers to issues which relate to general context within in which asset recovery takes place, thus they are often institutional in nature.

4.3.1.2.1.1. Lack of Political Will

Within the first general group of barriers to the recovery of the proceeds of corruption, the lack of political has been pointed out, as already stressed by the 5th COSP to the UNCAC,[693] as a 'key impediment'[694] or 'arguably the most relevant precondition for successful and effective international cooperation in asset recovery cases.'[695] In spite of being one of the most elusive and ambiguous terms discussed in international forums, it is interesting to report StAR's attempt to define the latter concept as 'a lack of a comprehensive, sustained, and concerted policy or strategy to identify asset recovery as a priority and to ensure alignment of objectives, tools, and resources to this end.' Concrete actions which give evidence of a country's effective strategy for combating corruption and recovering stolen assets may include the allocation of sufficient resources to the relevant agencies and the creation of incentives for practitioners to prioritize such cases.

In the discussion concerning the political will in the asset recovery process one should also take into account the dissenting arguments put forward by a Canadian governmental practitioner, who contends that the lengthy timing needed to build up cooperation between domestic authorities should not be considered as an element which demonstrates the lack of

[693] COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fifth session, held in Panama City from 25 to 29 November 2013' (n. 383), 7, where it is stressed 'the critical importance of mobilizing political will for effective implementation of Chapter V of the Convention' and it is called upon all State Parties 'to continue to commit the political will to act together to recover the proceeds of corruption and to work together to overcome obstacles to effective asset recovery'.

[694] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 2.

[695] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 24.

political will. In his view, this is so for three set of reasons: firstly, because transnational criminal law is a new area of international law which is still developing and does not have automatic solutions to its challenges; secondly, because the time to find appropriate models of cooperation is unavoidable and necessary in so far as the domestic experts need to learn how to deal with cooperation with foreign counterparts; thirdly, because States often times cannot disclose and clarify in the public domain the real reasons of the delays in the asset recovery process for confidentiality reasons and to keep the integrity of ongoing investigations.[696]

While one may agree on the latter arguments to justify, in part, the length timing of the asset recovery process, one should also stress that the allocation of resources and the policy initiative for asset recovery highly rely on political choices of the governments and thus eventually on the political will of the States.

4.3.1.2.1.2. Mistrust between States

As constantly stressed by the COSP[697] and the WG on Asset Recovery, building a relationship of trust between States is a fundamental precondition to ensure that international cooperation throughout all the asset recovery steps (collecting data, gathering evidence, freezing, confiscation and repatriation, etc.) is carried out successfully and proactively. The absence of trust is in fact source of delays or even refusal to provide assistance to requesting States seeking to recover stolen assets. Some particular factors linked to differences in the legal, political or judicial systems may render trust an even more crucial element in the dynamics of cooperation.

4.3.1.2.1.3. Insufficient Resources

[696] Davies, M., 'Asset Recovery: An Ongoing Dialogue' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 117, 119-121.

[697] See, for instance, Resolutions 1/4, 2/3, and 3/3 in COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its third session, held in Doha from 9 to 13 November 2009' (n. 369).

A recurrent issue of general nature which emerge from the testimony of practitioners from around the world is the fact that authorities engaged in the asset recovery process often lament the lack human and financial resources, as well as expertise in dealing with requests from other countries. On top of this it is also remarked that when more than one agency is involved in the recovery process within the same jurisdiction one could notice the lack managerial resources in terms of poor definition of roles and functions. In this context StAR refers to an EU-wide study which defines the working methods of some competent authorities as inert, non-transparent, or unclear, and which found that one of the most important obstacles to cooperation was the lack of qualified experienced investigators. In turn, the latter issue is considered to stem from poor financial resources, the incapacity to organized complex financial investigations. The same study has also found that in the 21 EU States under review there are generally insufficient prosecutorial resources for asset recovery work, a lack of relevant knowledge, and inadequate training of prosecutors and judges.[698]

4.3.1.2.1.4. Deficient Compliance and Enforcement of Anti-Money Laundering Measures

Another impediment which belongs to the group of general barriers refers to the preventive phase of the asset recovery process, when anti-money laundering legislation may play a crucial role in tracing and identifying stolen assets, which often flee from the victim States to be laundered and used to buy new 'clean' assets. As a consequence anti-money laundering measures regulate the gateways into financial centres and constitute 'means to prevent and detect the proceeds of corruption in the first place'.[699] In order to overcome the barrier represented by the lack of anti-money laundering compliance and enforcement, StAR suggested that States should coordinate its AML action with the anti-corruption efforts, and integrate relevant agencies and bodies into 'multi-agency teams' working either on specific

[698] Borgers, M. J. and H. Moors, 'Targeting the Proceeds of Crime: Bottlenecks in International Cooperation' (2007) 15(2) European Journal of Crime, Criminal Law and Criminal Justice 10, 42-3.

[699] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 69), 2.

cases or in permanent structures.[700] Moreover, at the policy level, States should also develop guidance on the risk-assessment of the sources of the proceeds of corruption, and integrate anti-money laundering and corruption issues in their development assistance programs. In the latter regard it is also suggested that the international community (i.e. the UNCAC bodies and FATF) could provide appropriate supervision.

4.3.1.2.1.4.1. Inadequate Monitoring of Politically Exposed Persons

The issue of money laundering legislation within the context of asset recovery assumes particular relevance in relation to politically exposed persons ('PEPs'),[701] who should be

[700] StAR, 'Towards a Global Architecture for Asset Recovery' (2010), 21.

[701] In this context it is interesting to report the examples of the definitions provided by two countries, Canada and the UK. On the one hand, Article 2(1) of the Canadian Freezing Assets of Corrupt Foreign Officials Act (S.C. 2011, c. 10) states that ' "politically exposed foreign person" means a person who holds or has held one of the following offices or positions in or on behalf of a foreign state and includes any person who, for personal or business reasons, is or was closely associated with such a person, including a family member:

(a) head of state or head of government;
(b) member of the executive council of government or member of a legislature;
(c) deputy minister or equivalent rank;
(d) ambassador or attaché or counsellor of an ambassador;
(e) military officer with a rank of general or above;
(f) president of a state-owned company or a state-owned bank;
(g) head of a government agency;
(h) judge;
(i) leader or president of a political party represented in a legislature; or
(j) holder of any prescribed office or position.'

On the other hand, according to Section 14(5) of the UK Money Laundering Regulations 2007, No. 2157, ' "a politically exposed person" means a person who is—
(a)an individual who is or has, at any time in the preceding year, been entrusted with a prominent public function by—
(i)a state other than the United Kingdom;
(ii)a Community institution; or
(iii)an international body, including a person who falls in any of the categories listed in paragraph 4(1)(a) of Schedule 2;
(b)an immediate family member of a person referred to in sub-paragraph (a), including a person who falls in any of the categories listed in paragraph 4(1)(c) of Schedule 2; or
(c)a known close associate of a person referred to in sub-paragraph (a), including a person who falls in either of the categories listed in paragraph 4(1)(d) of Schedule 2.' Furthermore Schedule 2 specifies that politically exposed persons:

given special attention by the financial institutions and their supervisor. Noting the 'surprisingly low compliance with FATF requirements on PEPs, especially among FATF members',[702] StAR has undertaken a specific study on the issue, which well illustrates the international standards on the matter and elaborates the following strategy to better address the risk that corrupt PEPs access the financial markets and launder their illicit gains:[703]

(i) Enhanced due diligence should be applied to both foreign and domestic PEPs in spite of the fact that laws and regulations do not make such distinction;

(ii) Within due-diligence requirements, a declaration regarding the identity and details of the natural person(s) representing the ultimate

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'(1) for the purposes of regulation 14(5) are:

(a) individuals who are or have been entrusted with prominent public functions include the following—

i. heads of state, heads of government, ministers and deputy or assistant ministers;

ii. members of parliaments;

iii. members of supreme courts, of constitutional courts or of other high-level judicial bodies whose decisions are not generally subject to further appeal, other than in exceptional circumstances;

iv. members of courts of auditors or of the boards of central banks;

v. ambassadors, *chargés d'affaires* and high-ranking officers in the armed forces; and

vi. members of the administrative, management or supervisory bodies of state-owned enterprises;

(b) the categories set out in paragraphs (i) to (vi) of sub-paragraph (a) do not include middle-ranking or more junior officials;

(c) immediate family members include the following—

i. a spouse;

ii. a partner;

iii. children and their spouses or partners; and

iv. parents;

(d) persons known to be close associates include the following—

i. any individual who is known to have joint beneficial ownership of a legal entity or legal arrangement, or any other close business relations, with a person referred to in regulation 14(5)(a); and

ii. any individual who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit of a person referred to in regulation 14(5)(a).

(2) In paragraph (1)(c), "partner" means a person who is considered by his national law as equivalent to a spouse.'

[702] Greenberg, T. S. and others, 'Politically Exposed Persons. Preventive Measures for the Banking Sector' (The World Bank, 2010), 15.

[703] Greenberg, T. S. and others, 'Politically Exposed Persons. Preventive Measures for the Banking Sector' (n. 702).

beneficial owner(s) of the business relationship or transaction should be required in a written form;[704]

(iii) Public officials should be required to provide a copy of any asset and income declaration forms filed with their authorities, as well as subsequent updates;

(iv) Customers of banking services who are also PEP should be reviewed by senior management using a risk-based approach (at least once a year) and the results of the review should be put on the record;

(v) On top of the latter recommendations, the current international framework and requirements on PEPs should be clarified and harmonized in order to provide helpful guidance, but also to afford sounder and more consistent parameters for jurisdictions and the banking sector.

Another fundamental issue related to PEPs which may represent a barrier to recover assets is the lack of proactive cooperation which follows the embargo-blocking orders which some States have started to issue in the recent years.[705] An obstacle pointed out by a practitioner in this context from the Swiss perspective is that in Switzerland banking secrecy laws do not allow the government to indicate the details of the blocked assets' specific bank account to the victim State, which is thus obliged to investigate the criminal behaviour of the PEP separately and eventually request mutual legal assistance through the relevant legal framework.[706] For this reason the Swiss practitioner criticizes the barrier to recover assets from PEPs by

[704] On the fundamental importance of 'piercing the corporate veil' and identifying beneficial ownerships see Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429), 67; and Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' (n. 673), 75.

[705] Through this orders States request all persons and legal entities to freeze accounts and seize patrimonial values or financial resources belonging to an alleged corrupt person for a limited period of time, and to report their existence to the authorities. From the Swiss perspective, which was the first to issue this kind of orders, see, for example, Ordinance of the Swiss Federal Council of 11 February 2011 concerning measures against certain persons of the Arabic Republic of Egypt (SR 946.231.132.1) with an initial freezing time of three years and significant fines for those who do not comply with the obligations established therein (up to ten times the value of the blocked assets).

[706] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 112-3.

describing the latter situation as one where a dog 'is allowed to smell a steak but never allowed to eat it.'[707]

4.3.1.2.1.4.2. Ineffective Systems of Income and Asset Disclosure

A further element of key importance in relation to PEP and, more generally, to public officials is to set up an effective system of income and asset disclosure, which is considered to be increasingly helpful as a tool against corruption, both at the preventive and enforcement level. In this sense financial disclosure laws not only point out potential discrepancies between personal financial interests and the public interest, but they also allow to alert law enforcement authorities about sudden changes in a person wealth which may be due to corruption.[708] Furthermore, systems of income disclosure may be also useful within civil actions which are brought to recover assets located abroad.[709]

This kind of systems should require that public officials declare all of their income, assets, and financial interests, and should aim at preventing and detecting the use of public office for private gain. Moreover, by providing guidance about the ethical principles and behaviours to be followed while holding public office, such systems could build a climate of integrity within the public administration and prevent the occurrence of conflicts of interests. Finally, for the purposes of enforcement, income and asset declarations may integrate probatory evidence and a valuable source of information for financial or corruption investigations, and they may also constitute key elements in situations where the underlying corruption offence is difficult to prove.

The latter are few of the factors which have driven StAR to elaborate a specific guide on the issue of income and asset disclosure, which is not only relevant to detect corruption but it has also a broader scope insofar as it may 'contribute to broader anticorruption efforts, such as

[707] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 113.

[708] Messick, R. E., 'How Financial Disclosure Laws Help in the Recovery of Stolen Assets' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 235, 235.

[709] Messick, R. E., 'How Financial Disclosure Laws Help in the Recovery of Stolen Assets' (n. 708), 239, who brings the example of two successful civil recovery cases initiated by Nigeria in the UK during the 2000s.

national and international financial investigations and prosecutions, international asset recovery efforts, the prosecution of illicit enrichment, and the identification of politically exposed persons.'[710] Through this work on income and asset disclosure, StAR fulfils a twofold aim: firstly to initiate a reasoned debate on the issue and, more generally, to promote interest and awareness in it; secondly, to provide a practical tool for policy makers and practitioners which are in charge of developing systems of income and asset disclosure in order for them 'to establish the capacities and institutional links required for this potential to be realized.'[711] As for the strategy which is suggested to attain such purposes, the study recalls the importance of contextual choices and the considerations which should be taken into account when facing the design and implementation challenges such as the scope and coverage of disclosure, the verification and monitoring mechanisms (i.e. operational issues), the enforcement of sanctions (i.e. effectiveness and credibility), and the public access to declarations of information and the role of civil society. In this context reference could be also taken by the practice of the U.S. Office of Government Ethics, which administrates the financial disclosure laws and 'shows how a government agency can make financial disclosure laws a more effective tool for asset recovery.'[712]

Considering that the work of StAR lays great importance on the fact that there is not a one-fit-all solution and that it is expressively a descriptive rather than a normative guide, it is sound to conclude by noting that the effectiveness of the system set up by each State is likely to depend 'on the right questions being asked and addressed at the right moment.'[713]

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[710] StAR, 'Public Office, Private Interests. Accountability through Income and Asset Disclosure' (The World Bank, 2012), ix.

[711] StAR, 'Public Office, Private Interests. Accountability through Income and Asset Disclosure' (n. 710), 1.

[712] Messick, R. E., 'How Financial Disclosure Laws Help in the Recovery of Stolen Assets' (n. 708), 242, who reports that the U.S. Office of Government Ethics offers regular training programs to law enforcement personnel and circulates regular updates on the way the Courts have relied on financial disclosure laws to convict officials or to order the return of stolen assets. Cf. U.S. Office of Government Ethics, 'Public Financial Disclosure', available at http://www.oge.gov/Financial-Disclosure/Public-Financial-Disclosure-278/Public-Financial-Disclosure/, where it is stated that 'although a financial disclosure report sometimes reveals a violation of law or regulation, the primary purpose of disclosure is to assist agencies in identifying potential conflicts of interest between a filer's official duties and the filer's private financial interests and affiliations. Once a reviewing official identifies a potential conflict of interest and consults with the filer's supervisor as necessary, several remedies are available to avoid an actual or apparent violation of Federal ethics laws and regulations.'

[713] StAR, 'Public Office, Private Interests. Accountability through Income and Asset Disclosure' (n. 710), 2.

4.3.1.2.1.5. Inadequate Domestic Coordination

A significant impediment to timely response to requests of mutual assistance is represented by the cumbersome process which they go through among government agencies or departments, slowing the process unnecessarily. In case of letters rogatory, the communication must also go through diplomatic channels, which can further delay action on the request. In order to address this coordination-related issue practitioners recognized the importance of a central control but also cautioned that this should not constitute an additional administrative step impairing efficiency or timely responses to the implementation of requests for assistance.

Domestic coordination plays also a crucial role during the investigation phase, since many agencies may be involved in corruption cases (Prosecutors, FIU, Anti-corruption Commission, Asset Recovery Office, etc.). Since each of the latter subjects holds specific information, it is essential that all the relevant agencies have the chance to cooperate, and one of them takes the leadership defining clear roles and responsibilities.[714]

4.3.1.2.1.6. Scarce Use of Informal Assistance

Generally speaking a formal MLA is required (and thus fundamental) where a victim States needs assistance which involves the use of coercive power by the requested jurisdiction (e.g. search and seizure orders). However, at the beginning stages of an investigation and during the collection of information and intelligence, one should prefer informal assistance, that is assistance through non- channels such as formal written MLA request. Examples of informal assistance which have already been mentioned throughout the present Chapter because they are also provided for in the international legal framework are direct communications between

[714] Monteith, C., 'Case and Investigation Strategy' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 183, who proposed a strategy based on the following pillars: cooperation, leadership, allocation, sharing, and proactivity.

the FIUs,[715] police, and prosecutors, or intelligence discussions between investigating magistrates of the relevant jurisdictions in view of elaborating an effective MLA request.

4.3.1.2.2. Legal Barriers

The second group of challenging issues which can be identified within the asset recovery process is represented by the barriers linked to the legal framework, which is obviously an essential element of the whole process. In this category one should include the (onerous) requirements which usually arise when States have to deal with mutual legal assistance, banking secrecy, overly burdensome procedural and evidentiary laws, and non-conviction based asset confiscation procedures. Since these requirements are not mere formal issues but touch upon practical matters, one should recall StAR's straightforward idea that 'absent a clear and sound legal framework, asset recovery becomes, in a best-case scenario, arduous and, in a worst-case scenario, impossible.'[716] Since some of the most controversial issues linked to the legal framework have been already addressed in the previous paragraphs dedicated to the analysis of Chapter V's provisions, I will only touch upon on those legal barriers which have not be discussed yet.

4.3.1.2.2.1.Different Legal Traditions

As I introduced in paragraph 2.2. of the present work, the differences charactering the legal traditions of requesting and requested jurisdictions introduce challenges and frustrations in general criminal law cooperation and thus also throughout the asset recovery process. Not surprisingly, it often represents a source of problems leading to the refusal of legal assistance requests. Typical differences creating barriers to asset recovery concern the terminology, the

[715] For instance Egmont Group, 'Egmont Group of Financial Intelligence Units Principles for Information Exchange between Financial Intelligence Units' (July 2013) encourages its members to share financial information related to suspect money laundering and proceeds of crime.

[716] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 3.

tools and procedure for asset seizure and confiscation, evidentiary requirements, conditions of admissibility, and procedures to obtain assistance.

4.3.1.2.2.2. Disregard of International Obligations

According to the study of StAR, many jurisdictions are still lacking the proper implementation of the relevant Conventions (especially the UNCAC and the UNTOC) in so far as they do not criminalize the offences provided therein or do not extend the scope of the confiscation framework to them. States should promptly comply with all the relevant international instruments and thus ensure the complete and accurate transposition of all their provisions in their domestic legal system. The consequences of disregarding the international obligations are fewer type of assistance, overly broad grounds for refusal, or stringent evidentiary requirements.

4.3.1.2.2.3. Impossibility to Promptly Freeze Assets

A legal issue which hinders the possibility to restrain asset before they are moved to another jurisdiction is the impossibility to seize assets before the initiation of criminal proceedings. According to some practitioners which shared their experience with StAR, the procedure may significantly affect the process of asset recovery because it provides notice to the asset holder before the restraining measure actually takes place; as a consequence assets are likely to be transferred before a response of assistance is received. In order to overcome this procedural barrier, States should adjust their legal framework and afford legal assistance independently from the imposition of criminal charges.[717] More generally, States should adopt mechanisms that allow for the swift freezing of assets.

[717] Article 43 of the UNCAC takes into account the need to allow for MLA before criminal proceedings are initiated by calling States to consider expanding their cooperation not only in criminal but also in civil and

4.3.1.2.2.4. Notice Requirements that Allow Dissipation of Assets

In light of the fact that notice or disclosure of ongoing proceedings is an important due process requirement, especially when a property is restrained or seized, some States require notification to the asset holder when a request of assistance is received, giving the latter the possibility to contest if before any information is shared with the requesting State. StAR criticizes such approach in so far as it creates lengthy delays and provides an opportunity to hide and transfer funds. Accordingly, notwithstanding the fact that notification should be always required in confiscation proceedings, State should avoid communicating the asset holder a request of assistance during the investigation phase, when disclosure should be balanced against the need to preserve evidence and favour the repatriation of corruption-related assets. Moreover, investigative measures are never permanent, contain sufficient safeguards to protect the rights of the asset holder, and do not permanently prejudice the rights of the asset holder.

4.3.1.2.2.5. Banking Secrecy Laws

Banking secrecy laws is some jurisdictions prevent law enforcement agencies from sharing banking information and documents upon the request of a foreign State, even where the domestic agencies wish to assist the foreign jurisdiction. This kind of laws hinders the possibility to gather crucial information in cases of corruption or money laundering, and thus should not protect against investigations into conducts criminalized in both the requesting and requested State. Furthermore the obligation for States should to provide requested information on bank account activities is provided for by multilateral convention such as the UNCAC,

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administrative matters relating to corruption. More precisely, ‘States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.’

whose Article 46(8) provides that States parties shall not decline to render MLA on the ground of bank secrecy.[718]

A delicate issues involving banking secrecy laws may represent a barrier to recover assets of PEPs, that is the lack of proactive cooperation which follows the embargo-blocking orders which some States have started to issue in the recent years.[719] In particular, as pointed out by a practitioner from his domestic perspective, Switzerland banking secrecy laws do not allow the government to indicate the details of the blocked assets' specific bank account to the victim State, which is thus obliged to investigate the criminal behaviour of the PEP separately and eventually request mutual legal assistance to the State issuing the embargo-blocking order through the relevant legal framework.[720] In light of these circumstances the Swiss practitioner criticizes this barrier to recover assets from PEPs by comparing the latter situation to the one where a dog 'is allowed to smell a steak but never allowed to eat it.'[721]

According to a practitioner from the International Centre for Asset Recovery of the Basel Institute on Governance, there is a useful strategy to overcome the difficulties in obtaining financial information from States with laws which make difficult to provide information without a solid legal basis. In particular, the requesting State should persuade the requested State to open its own investigation under its money laundering regulation. In this way the authorities of the latter State may formulate its own request of information to the requested State, and at the same time supply the information or evidence which was not possible to provide in the first place.[722]

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[718] Similarly Article 40 of UNCAC provides that each State party shall ensure that, for domestic criminal investigations, appropriate mechanisms are available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws; and Article 31 stipulates that States parties shall not decline to freeze, seize, or confiscate property on the ground of bank secrecy.

[719] Through this orders States request all persons and legal entities to freeze accounts and seize patrimonial values or financial resources belonging to an alleged corrupt person for a limited period of time, and to report their existence to the authorities. From the Swiss perspective, which was the first to issue this kind of orders, see, for example, Ordinance of the Swiss Federal Council of 11 February 2011 concerning measures against certain persons of the Arabic Republic of Egypt (SR 946.231.132.1) with an initial freezing time of three years and significant fines for those who do not comply with the obligations established therein (up to ten times the value of the blocked assets).

[720] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 112-3.

[721] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 113.

[722] Monteith, C., 'Case and Investigation Strategy' (n. 714), 190, who adds that 'moreover, based upon its own investigation, the requested country would then generate suspicious activity reports relating to the suspect's assets, which would then be passed to the requesting country's FIU.'

4.3.1.2.2.6. Arduous Procedural and Evidentiary Laws

Request of confiscation of the proceeds of corruption usually imply that requesting authorities seeking court orders for evidence or asset restraint must meet the evidentiary threshold established by the requested State's domestic legislation. The amount of evidence required varies from country to country, and from the kind of assistance sought (international MLA or domestic). Generally speaking, the more intrusive the measure is, the more evidence will be required (or the higher the threshold). In this context StAR notes that requiring a sufficient evidentiary basis is an important element of due process; however, it also stresses that overly strict requirements can create a serious impediment to asset recovery. For this reason it is suggested that the requirements in the early phases of an investigation, i.e. when gathering evidence, tracing assets, and determining whether and which assets need to be frozen or seized, should always be less onerous than the requirements needed to proceed with the actual confiscation.

4.3.1.2.2.7. Absence of Equivalent-Value Restraint and Confiscation

The concept of equivalent-value seizure and confiscation holds that when the actual proceeds or instrumentalities of a crime are no longer available or cannot be located, the State may proceed to tackle those legitimate (substitute) assets whose value is equivalent to proceeds or instrumentalities of the crime. This kind of confiscation is considered particularly useful and is also provided for in Article 31(5) and (6) of the UNCAC;[723] on the other hand, State which do not have this institution create a significant barrier to the recovery of corruption-related assets cases because proceeds and instrumentalities of crime are frequently commingled with

[723] These provisions say that where proceeds of crime are intermingled with other assets, all the intermingled assets are liable to confiscation up to the assessed value of the intermingled proceeds of crime.

legitimate assets. Hence all States should make the necessary legislative modifications to apply this principle.

4.3.1.2.2.8. Lack of a Non-Conviction Based Confiscation Mechanism

As I already remarked in the course of the present work,[724] non-conviction based confiscation is a particularly valuable asset-restrain regime because it is not dependent on a criminal conviction and it can thus apply regardless of the death, flight, or any immunity/protection the corrupt official might enjoy. Accordingly, practitioners have highlighted the usefulness of this kind of confiscation because it can be quicker and more efficient but also the only recourse when the offender is dead, has fled the jurisdiction, or is immune from prosecution. Furthermore, it is provided for as an obligation by Article 54(1)(c) of the UNCAC, which constitutes the only instrument containing a specific provision on this matter, urges State parties to 'consider taking such measures as may be necessary to allow confiscation [...] without a criminal conviction.' Several sensitive issues for national jurisdictions arise in this context, ranging from the presumption of innocence to the respect of fundamental rights:[725] the guidance provided by special report of StAR,[726] (2009b) not only addresses the latter challenges but it also provides practical indications stemming from the analysis of the relevant domestic jurisprudence, and from the illustration of the ways to implement the obligation coping with national procedural impediments. Lastly, States should introduce domestic legislation permitting the use of non-conviction based confiscation not only because it would broaden the measures available to combat corruption and the laundering of proceeds domestically, but also because it could assist requesting States in international cases for it

[724] Cf. paras 3.3.3.2. and 3.4.5.1.1.3.

[725] For an illustration of issues of non-conviction based confiscation in the UK context see Monteith, C., 'Non-conviction Based Forfeiture' (n. 508), 263, concludes by stressing the importance of such tool to overcome legal and practical challenges, but who also contending that 'the main obstacle to such an international adoption appears to lie with civil law countries, which may have concerns over criminal matters being dealt in a civil court.'

[726] Greenberg, T. S. and others, 'Good Practices Guide for Non-Conviction Based Asset Forfeiture' (StAR, 2009).

represents a more efficient and sometimes the only available way to recover assets when the offender is dead, has fled the jurisdiction, or is immune from prosecution.

4.3.1.2.2.9. Immunity Laws

International immunities conferred by law upon some categories of public officials (especially when they refer to foreign officials) may represent barriers to requests of assistance for corruption cases because they may prevent investigations and prosecution by precluding unlawfulness, punishment or damage compensation. Although immunities are historically an important to protect officials from meritless and unfounded actions as well as to promote their freedom of action and self-determination, today they are often considered privileges, [727] especially in States where the rule of law and fair trails are guaranteed.[728] Without entering into a detailed analysis of the different types and extents of immunities – which often protect public officials beyond the traditional scope guaranteeing the exercise of their functions – it is sufficient to note that a revision of the system of immunities seems to be necessary within an effective fight against serious crimes committed by public officials such as corruption. In particular, in order to avoid that immunities are means to delay adjudication or generating impunity, this protection should be balanced against the public interest in combating public corruption, especially the episodes of so-called grand corruption which have devastating consequences on developing countries. Accordingly StAR proposes that in the latter cases the overwhelming public interest in stopping public corruption should lead to set aside immunity toward permitting prosecution.[729] As for the political immunities of members of Parliaments,

[727] Marques, S. A., 'Political immunities: Obstacles in the Fight against Corruption' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 93, 103, citing Hans Kelsen who considered immunity an 'absolutely anachronistic privilege' and Carl Schmitt's opinion who called immunity an 'amazing privilege'.

[728] According to Marques, S. A., 'Political immunities: Obstacles in the Fight against Corruption' (n. 727), 104, 'in democratic regimes, such guarantees are not justified today'.

[729] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 73

some other author contends that they should be scrapped or at least reformed in order to defend their freedom of expression 'in the same manner as its original justification.'[730]

4.3.1.2.2.10. Statutes of Limitations

If the period of prescription of a crime has expired in either the requesting or the requested State, the authorities of the latter may refuse to afford assistance, fail to prosecute corruption and money laundering cases, or decline to enforce foreign confiscation orders. Hence limitations periods may reward offenders and constitute a barrier to recover assets. This hold particularly true when one deals with corruption, which is a crime particularly difficult to discover, investigate, and prosecute while the violator (often times a public official) is in office. In light of the fact that eliminating limitation periods appears difficult to realize given the traditional principles that justify them, those States with too short limitations periods should at least lengthen the prescription periods in view of permitting the prosecution of money laundering and corruption offenses and favouring the asset recovery process. Where the limitation period on a criminal offense has expired, StAR also suggests authorities to put forward a potentially effective practice, that is to consider whether there are related offenses that can be prosecuted or any civil action that can be taken (e.g. civil actions). Another suggestion to overcome the problems related to the statute of limitations is for the requested State to provide mutual legal assistance without consideration of their own limitation period but only the one governing in the requesting State.[731]

4.3.1.2.2.11. Obstacles in Recognizing and Enforcing Foreign Confiscation and Restraint Orders

[730] Marques, S. A., 'Political immunities: Obstacles in the Fight against Corruption' (n. 727), 104.

[731] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 76.

Requested States which do not give effect to foreign seizure or confiscations orders create barriers in the international process of asset recovery by requiring the requesting State to prove its case again before assets can be seized and eventually confiscated. In order to ensure the efficient and timely management of corruption cases where the time and coordination are crucial, all jurisdictions should comply with Article 54(2)(a) of the UNCAC and thus have mechanisms in place to give effect to foreign freezing, seizure, and confiscation orders. In this context StAR contends that direct enforcement should be preferred and that it should also apply to legal persons in spite of the fact that some jurisdictions do not impose criminal liability on entities such as corporations.[732]

4.3.1.2.2.12. Inability to Return Assets to Victim States

As I noticed in the previous paragraphs, the UNCAC introduced the landmark obligation to set up legislative and other measures as may be necessary to enable its competent authorities to return all confiscated property (minus expenses incurred) to the jurisdiction from which it was stolen.[733] StAR reports that only a very limited number of jurisdictions have the legal authority to return 100 percent of the stolen assets in cases relating to UNCAC offenses based on domestic law.[734] States should increasingly comply with the UNCAC's obligation and allow for the return of confiscated assets based on domestic law; this is particularly so also because the other available option, that is negotiating bilateral asset-sharing agreements, implies a lengthy and resource-intensive process where either one of the contracting parties is usually in a weak negotiating position.

4.3.1.2.2.13. Lack of Transparency in Settlements of Foreign Bribery Cases

[732] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 77.

[733] Article 57 UNCAC. The previous obligation in this context, Article 14(3)(b) of UNTOC, only requires States to consider entering into an agreement to share recovered assets with requesting (victim) State.

[734] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 78.

A last legal mechanism which poses several problematic issues in the recovery of the proceeds of corruption is represented by the way many cases of international terminate, that is through settlement, which StAR defines as 'any procedure short of a full trial'.[735] StAR conducted a specific study on the latter issues[736] starting from the empirical observation that, considering 395 settlements cases in the period 1999-2012, out of nearly $6 billion of monetary sanctions imposed by a country different from the one of the corrupt official, only about 3 percent of such amount (approximately $197 million) has been returned to State of the official.

On the one hand one could say that the overall amount of sanctions inflicted through settlement procedures is a remarkable result and testifies the progresses made in recent years in prosecuting foreign bribery cases; on the other hand too little of them have been recovered by States – mostly in the developing world – whose officials have been bribed. The research carried out by StAR acknowledges that the latter countries should take more efforts in the domestic investigations and prosecutions, and that all the States should pursue legal proceedings regardless of the settlement which might have taken place elsewhere. It also observes that part of the problem lies in some other barriers to asset recovery such as the lack of timely communication and exchange of information.

More substantially, the study finds that settlement procedures constitutes a (legal) barrier to asset recovery insofar as the victim States are not involved in the procedure and they do not obtain any kind of redress. Moreover, one should notice that in countries such as Switzerland this kind of procedure is used in case of bribery involving multinationals enterprises, creating a doubtful disparity of treatment with other cases of corruption 'where affected jurisdictions enjoy large procedural rights with a view to recover ill-gotten assets'. [737]

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[735] Oduor, J. A. and others, 'Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery' (The World Bank, 2014), 1.

[736] Oduor, J. A. and others, 'Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery' (n. 735).

[737] Solorzano, O. and P. Gomes Pereira, 'The Swiss Plea-bargaining Practice and Asset Recovery: The Alstom Case' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 279, 288, where the authors analyse the Swiss 'Summary punishment Order' against the company Alstom where the enforcement method followed a 'domestic-centred logic', and notice that Swiss authorities appear to 'draw a clear line between foreign bribery against companies and other forms of corruption when it

In order to allow victim States to recover its assets without influencing the anticorruption commitments by other States, but also to favour dialogue and coordinated action among jurisdictions during settlements procedures, StAR has elaborated some options and recommendations to tackle the challenges related to settlement procedures:[738]

(i) All States should developing a clear legal framework regulating the conditions and process of settlements;

(ii) When settlements are agreed upon, the competent domestic authorities should transmit information proactively to other affected States regarding basic facts of the case, in line with Articles 46 (4) and 56 of the UNCAC;[739]

(iii) When deciding to pursue a foreign corruption case, States should mutually inform each other on the legal avenues available to participate in the investigation and to claim damages suffered as a result of the corruption;

(iv) In line with Article 53 (c) of the UNCAC, States should allow courts to recognize the claims of other affected States when deciding on confiscations in the context of settlements;

(v) States should proactively share information on concluded settlements with other potentially affected States (i.e. the terms of the settlement, the underlying facts, the content of any self-disclosure, and evidence);

(vi) States which have been informed should consider undertaking further action such as initiating enforcement actions; seeking mutual assistance; pursuing the recovery of assets through international cooperation in criminal matters or private civil litigation; intervening in the case in order to purse compensation for damages; annul or rescind any public

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comes to the application of enforcement strategies.' In light of such disparity and the lack of any distinction in Article 57 of the UNCAC, the authors come to the conclusion that, although it may be hard to evaluate the harm, States victims of foreign bribery should have the chance to request 'their' assets back by having legal standing and presenting the damage suffered as in any other corruption-related proceeding. Cf. para 3.4.4. on the direct recovery of proceeds of corruption.

[738] Oduor, J. A. and others, 'Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery' (n. 735), 97.

[739] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 108-9.

> contracts that were concluded in the context of bribery cases; debar companies which have been found guilty as well as withdrawing them concessions and permits which are the result of the corruption; monitoring the compliance of companies with any resolutions linked to the settlement; and obligating them to establish or reinforce their internal anticorruption policy with respect to the operation within the affected State's jurisdiction.

In sum, the analytical work of StAR on the barriers created by the settlements of corruption cases underlines that in many cases such arrangements between judicial authorities and the involved parties takes place in an informal and opaque manner.[740] As a consequence the study calls for greater transparency in settlements procedures, whose negotiations should be communicated to affected jurisdictions and whose outcomes should be made available to the public.

4.3.1.2.2.14. Misuse of Corporate Vehicles

An appeal to afford greater transparency was formulated by StAR also in relation to a further (legal) issue linked to asset recovery, that is the ownership and control of companies, legal arrangements and foundations. The use of different kinds of corporate vehicles is one of the most commonly used devices to launder the proceeds of cases of grand corruption because it allows to cover the real person in control of a company. Not surprisingly, then, the latter represents 'one of the greatest obstacles to recovering stolen assets'[741] and StAR has undertaken a specific research which has addressed the challenges posed by shell companies,

[740] In this sense StAR recalls that, although in some jurisdictions the outcomes of settlements are publicly available, different forms of settlements observed in the different jurisdictions (non-prosecution agreements, deferred prosecution agreements, penalty notice, or a guilty plea) have varying degrees of publicity. Moreover, most settlements provide little oversight by a judge and sometimes without any public hearing at the conclusion.
[741] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 74.

but also the most and least effective laws and standards in this context.[742] The study provides some practical guidance for States to avoid that corrupt official successfully launder illicit proceeds of corruption through corporate vehicles. In sum, in order to overcome the problem, it has been suggested that States should oblige service providers to hold beneficial ownership information or, more ambitiously, to request company registries to hold and make public beneficial ownership information for all companies.[743] However, it was also noticed that to address this problem 'is not a question of passing new laws but rather to better enforcing those we already have.'[744] A further strategy proposed to make illicit assets more traceable in spite of the use of corporate vehicles is for the public sector to share critical information with the private sector in order to help the latter to identify politically exposed persons and beneficial owners of shell companies.[745]

4.3.1.2.3. Operational Barriers

In spite of the presence of an effective legal framework, a third set of problems within the asset recovery procedure may arise in relation to the processes and communications between two or more States. In this context a crucial role is played by the international expertise of investigators, investigative magistrates, prosecutors, and judges on the various tools available for asset recovery, as well as by the experience gained from actual cases. Furthermore, it is essential that communication between two States begin before a formal request is issued in order to make the exchange of information more effective, and to improve the quality of the cooperation sought or provided.

4.3.1.2.3.1.Absent or Ambiguous Focal Points

[742] van der Does de Willebois, E. and others, 'The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It' (StAR, 2011).
[743] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 74.
[744] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 74.
[745] Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' (n. 673), 81.

One of the first issues which may impede the initiation of an effective request for assistance is to identify a focal point or point of contact for asset recovery purposes. Since it is not possible that States are experts in each other's systems, it is crucial 'to know who to talk to in order to navigate the legal requirement of each system'.[746] Although mutual legal assistance treaties and multilateral conventions increasingly require that States designate a central authority (generally the Ministry of Justice) to whom requests can be sent,[747] the lack of clarity regarding the focal point in the requested State may affect the whole process of cooperation and cause delays in those authorities seeking informal assistance.

In order foster cooperation is essential that all State designate a central authority, in order to enable domestic authorities to communicate directly between each other. Furthermore, it is equally important that those authorities know how to formulate a request and thus that are competent, legally trained, experience, and ensured access to up-to-date information.

Information about contact points, should always be up-to-date can be disseminated in a number of ways, including on their websites and through INTERPOL or other international and regional networks promoting the exchange of information and good practices. Examples of existing asset recovery networks are the Camden Asset Recovery Inter-Agency Network ('CARIN'), the Asset Recovery Inter-Agency Network for Southern Africa ('ARINSA'), and the *Red Iberoamericana de Cooperacion Juridica Internacional* ('IBERRED').

Finally, from a practical perspective, it has also been suggested that it could be extremely helpful for States to designate a local point of contact in the embassy of the embassy of the State where the asset are sought for two set of reasons: firstly, to overcome language and time barriers; secondly, to have more opportunities to discuss issues and challenges directly.

4.3.1.2.3.1.1. The Global Focal Point Initiative

[746] Davies, M., 'Asset Recovery: An Ongoing Dialogue' (n. 696), 122.
[747] See Article 46(13) of the UNCAC.

A recent joint initiative of StAR and INTERPOL[748] to facilitate the identification of focal points is the Global Focal Point Platform, which aims at promoting and increasing the cooperation among law enforcement agencies and anti-corruption entities around the world with regards to corruption data. The Platform was founded in 2009 and consists of a global network of asset recovery expert practitioners (so-called Focal Points) which can exchange information and ask for assistance through the INTERPOL's network. More precisely, each INTERPOL member country may nominate a maximum of two Focal Points, one working in a law enforcement agency engaged with corruption, the second either from the judiciary or another governmental entity responsible for anti-corruption and asset recovery. Annual conferences and meetings bring together the Focal Points to discuss successes and lessons learned, and to ensure that the initiative constitutes an effective tool to fight corruption and recover stolen assets.

The Global Focal Point Platform works on several fronts: not only it aims at enhancing and strengthening trust among anti-corruption practitioners, but it also serves as a venue to assist practitioners and investigators in locating and recovering assets which have flown out of the country. Finally, it also provides a technical and strategic anti-corruption knowledge database, and constitutes a bridge by encouraging mutual understanding of the different systems.

To reach the latter objectives, the initiative makes use of the services provided by the INTERPOL, and, in particular, of its secure communications network, which enables Focal Points to access:

(i) Information and contact details of Focal Points from other States;
(ii) Legislative, administrative, investigative and judicial frameworks about asset recovery for each registered jurisdiction;
(iii) A secure e-mail platform (SECOM) to exchange information concerning ongoing corruption and asset recovery cases;

[748] While the knowledge input to the concept as well as the content for the Platform is provided by StAR, financial support for the Platform comes from the U.S. Department of State, through the Bureau of International Narcotics and Law Enforcement Affairs.

(iv) A knowledge library on asset recovery and a library of best practices on anti-corruption produced by the INTERPOL Group of Experts on Corruption;

(v) All valid INTERPOL notices published for corruption-related offences;

(vi) INTERPOL notices to freeze assets in order to alert immediately member countries to temporary asset freezing while waiting the longer time need to coordinate;

(vii) A 24-hour 'initial action checklist' for asset recovery investigations: considering that time is crucial in recovering stolen assets, the checklist gives Focal Points a guide to use when initiating a stolen asset investigation, and to ensure that the crucial steps are taken (e.g. identifying and interviewing witnesses, freezing and seizing proceeds of crime, and obtaining relevant documents).

4.3.1.2.3.2. Onerous Legal Requirements and Broad Grounds for Refusal

Dual criminality, reciprocity and other grounds of refusal represent further operational barriers to the process of asset recovery. Since I already touched upon the latter issues in Chapter II of the present work in relation to mutual legal assistance, one should just recall that States should limit the scope of such barriers by using those grounds which are absolutely necessary and fundamental, triggering them reasonably in relation to the request, and most importantly not going beyond those grounds set out in UNCAC.[749]

4.3.1.2.3.3. Scarce Information on the Requirements for Assistance

[749] Article 46 of the UNCAC. For further policy recommendations on this issue see Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 81-4.

A procedural gap which may obstacle or delay a request of assistance concerns the access or the explanation of the applicable laws, procedures, and other evidentiary requirements to seek international cooperation in the recovery of assets. According to StAR, practitioners have pointed out the importance of having the relevant information accessible and understandable.[750] For these reasons States should use their Web sites, focal points, and third-party databases to make available their laws, regulations, and tools, along with explanatory guidelines and sample requests for assistance, preferably in at least one of the internationally accepted languages.[751]

A good practice identified by StAR in this context are the 'how to' guides to asset recovery prepared by some States to illustrate the necessary content of a request of assistance, sample forms, focal points, and the process for making a request. In particular it has proved to be of real and practical assistance the appointment and communication of points of contact for each stage of the process.[752]

4.3.1.2.3.4. Incomplete Requests of Assistance

Requests for assistance may be affected by problems and deficiencies which affect the whole process of international cooperation. In this sense common issues which are reported in relation to the request are the lack of appropriateness, the irrelevancy of the information, the lack of clarity and focus, the poor level of the translation.[753] To address these practical issues,

[750] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 85.

[751] Examples of outlets are the 'International Money Laundering Information Network', available at http://www.imolin.org/, the UNCAC Legal Library in UNODC, 'Tools and Resources for Anti-Corruption Knowledge ('TRACK')', available at http://www.track.unodc.org/Pages/home.aspx, as well as the 'Stolen Asset Recovery Initiative', available at http://star.worldbank.org/star> and the 'International Centre for Asset Recovery ('ICAR')', available at https://www.baselgovernance.org/icar/.

[752] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 86, where it reported that the United Kingdom and Hong Kong SAR, China, provide such kind of guides upon request.

[753] In this context a Canadian governmental practitioner has pointed out the challenge represented by the consistency in translating names, which is important to ensure to avoid confusion, especially for financial institutions which can only act on the information provided to them. Providing consistent transliteration and clear identifiers, as well as the possible presence of corporations where the assets may be hidden may also turn

many jurisdictions from the developing world suggest that developed countries could assist less resourced countries in overcoming these problems, and this is what already happens in some cases at the bilateral level. Some other practitioners suggest that the World Bank or UNODC, through the StAR Initiative, could assist directly those countries which are in need of resources or expertise.

In this context StAR identified two good practices: firstly, the national translation centre established by Estonia to undertake legal translations on behalf of the central authority; [754] secondly, the UK provides direct technical assistance to requesting States through experts are who funded by the UK Department for International Development and who help build the capacity of those who will actually execute the request.

4.3.1.2.3.5.Delays in Responses to Requests of Assistance

A significant barrier to recover stolen assets is represented by the delays in processing and responding to a request of assistance, which often times are linked to the due process rights of the accused person. Despite forming a fundamental part of any criminal proceedings which should be thus guaranteed and protected, such rights are often abused by the accused and should be thus balanced against the investigators' need to secure evidence. In this sense StAR proposes that States should be able to issue investigative and preservation measures without notice to the asset holder as long as the latter is ensured sufficient due process protections at other stages of the proceedings.[755] Furthermore, State may consider introducing penalties against those parties that submit groundless applications for the sole purpose of delaying the procedure.

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out to be extremely helpful when requesting the freezing of assets belonging to politically exposed persons. In this sense Davies, M., 'Asset Recovery: An Ongoing Dialogue' (n. 696), 126 concludes that 'the more information provided, the better chances that assets can be identified, frozen and ultimately seized for asset recovery.'

[754] See Republic of Estonia, 'Ministry of Justice', available at http://www.just.ee/en.

[755] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 91.

More generally, in order to keep the requesting States updated on the status of a certain request for assistance, one should notice the practice of Switzerland, which has established a website where practitioners instantly obtain information about the status of any request.

4.3.1.2.3.6.Lack of Publicly Available Registries

In order for the requesting State to file a request of assistance, a detailed description of the property to be seized or confiscated is needed pursuant to Article 55 of the UNCAC.[756] In order to facilitate this task and avoid creating barriers States should develop and maintain publicly available registries for companies, properties and non-profit organizations. In this way delays are avoided because the requested State would not be asked to carry out investigatory measures outside the usual course of MLA assistance. StAR suggests that these registries should be available electronically at any time, and they should include at least the following information: names, personal data, corporate director and officer information, shareholder information, and beneficial owner information.[757]

4.3.1.2.3.7.Identifying Foreign Bank Accounts

Similar problems may arise in relation to the identification of bank accounts, which in some States may be seized or confiscated only providing specific information. In line with the solutions of the previous paragraph, States should establish a national bank registry containing account identification information, including beneficial owners and powers of attorney.[758] In order to make process swifter, it is also proposed that State make available from its national

[756] E.g. its location and estimated value.

[757] Stephenson, K. M. and others, 'Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action' (n. 691), 93. On the fundamental importance of identifying beneficial ownerships in the context of asset recovery from the perspective of the private sector see Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' (n. 673).

[758]For further proposals in this context cf. Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704); and Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' (n. 673).

bank registry account identification data, as well as information over beneficial ownership and powers of attorney without the submission of a formal request.

4.3.1.2.3.8. Insufficient Guidance on the Management of Returned Assets

A different set of operational issues which does not concern the communication between States related the management of assets once they have returned to the requesting State: on this important phase of the asset recovery procedure, StAR has dedicated a policy note which explores and guide States on how to manage the repatriated funds and assets.[759] Starting from the assumption that the use of the repatriated resources is a sovereign decision of the State which has recovered them, StAR aims at contributing to the understanding of an important issue in two ways. Firstly by offering an overview of each policy option available to States (enhancing already existing national procedures, creating autonomous funds through the establishment of public entities, awarding the task to nongovernmental organizations) with the respective advantages/disadvantages and the considerations which should guide an appropriate choice. Secondly by affording methodological guidance: an approach guided by openness and transparency in designing the arrangements to manage the returned assets is in fact considered desirable, especially in presence of high-profile returns. In addition to that, a final part of the study highlights the importance of effectively monitoring performances of asset management: not only it helps identify strengths and weaknesses in the arrangements which have been put in place, but it is also deemed helpful to build confidence in the system and to foster the engagement of all the actors involved in the managerial process.

4.3.1.2.3.9. Technical Difficulties in Identifying and Quantifying the Proceeds of Corruption

[759] StAR, 'Management of Returned Assets. Policy Considerations' (StAR, 2009).

In the realm of operational barriers one could finally encompass the difficulties which courts face in identifying and quantifying the proceeds of corruption, especially the benefits obtained by the bribe payer. To help practitioners, but also legislators and policy makers to deal with such obstacle, the OECD and StAR have undertaken a joint study which illustrates valuable practical information and examples on the technical issues which often constitute barriers in recovering assets.[760] Besides providing the legal framework for the treatment of the proceeds of bribery, the range of legal remedies available in several jurisdictions and the challenges linked to the interaction of remedies, it is the second part of the research which constitutes the most original contribution for the improvement of the asset recovery procedure. First of all the study lists and illustrates the methods which could be used in practice to quantify the five most common proceeds of active bribery;[761] furthermore, it also provides concrete examples where the latter methods have been used as well as some comments on the practical challenges posed by some crucial factors such as the relevant time period and the interest rates for the calculation of proceeds, agent fees, administrative costs, indirect benefits, partial transactions, and the bribe payments. The analysis of OECD and StAR concludes by noting that the identification and quantification of the proceeds is neither too complicated nor expensive: rather, in many cases there are multiple alternatives and reasonable approaches. The same could be said also for those jurisdictions which do not have extensive experience in this field: as notice by the research, many States have effectively developed their expertise by applying existing traditional legal principles that were already available to practitioners. As a consequence, States can build quantification methods in different ways (applying existing legislation, enacting new legislation, as well as developing case law or guidelines), without renouncing to the legal certainty inherent in their laws, legal principles and established practices.

[760] OECD and StAR, 'Identification and Quantification of the Proceeds of Bribery' (OECD, 2012).
[761] OECD and StAR, 'Identification and Quantification of the Proceeds of Bribery' (n. 760), 29 ff.

4.3.1.2.4. Overall Recommendations

The previous paragraphs have illustrated the most important barriers which obstacle the process of asset recovery, mostly from the StAR's perspective. In particular, I laid emphasis on those issues related to international cooperation, whose complexity can be now fully intended. To summarize the analysis of the challenges emerged so far, I elaborate a few overall considerations on some key priorities and recommendations which States should address in order to enhance cooperation and thus make the whole procedure more effective.

4.3.1.2.4.1. Committing Political Will and Resources

First of all one, one of the most fundamental problem which impairs assistance and, more generally, the asset recovery process is the lack of political commitment, which often times is expressed in the modest mobilization of financial and human resources. To overcome these barriers, States should set up comprehensive plans to improve the recovery of the proceeds of corruption, including the allocation of sufficient resources to train authorities, carry out complex financial investigations and establish specialized teams. This kind of plans could greatly benefit from defining clear accountability mechanism for the results.

4.3.1.2.4.2.Cultivating Trust among Countries

A compelling theme which repeatedly emerged in the reports of StAR as well as throughout my work is the need to build relationships of trust among countries by cultivating mutual confidence and improving communication. The lack of trust severely impedes the process of assistance because it leads countries to hesitate in sharing sensitive data, gathering evidence, as well as in imposing measure on assets. Similarly, cooperation may be hindered if

communication is poor and if there is lack of confidence in each other laws, procedures, requirements and standards. In order to address these issues States should:

(i) Permit the sharing of spontaneous information;
(ii) Cultivate personal contacts and exchanges with foreign authorities;
(iii) Encourage the participation of practitioners in relevant international and bilateral meetings and in asset recovery networks;
(iv) Identify and communicate focal points within the central authority;
(v) Provide comprehensive, easy to obtain, and public information on issues related to mutual legal assistance (e.g. how to obtain it and how to check the status of a request).

4.3.1.2.4.3.Updating the Seizure and Confiscation Framework

The legal framework of States concerning seizure and confiscation should comply as much as possible with the international instruments. In this way judicial authorities would have a wider range of possibilities to afford international assistance and accomplish the recovery of corruption-related assets. In particular, legislative reforms should address the following issues:

(i) Set a lower burden of proof for cases of confiscation which concern the offences provided for by the UNCAC and the UNTOC, and shift the burden of proof to the alleged offender;
(ii) Introduce non-conviction based confiscation, as well as substitute- and equivalent-value confiscation;
(iii) Enable the direct and indirect enforcement of foreign confiscation orders, including the non-conviction based.

4.3.1.2.4.4. Introducing the Offence of 'Illicit Enrichment'

In light of the fact that the process of asset recovery is complex and characterized by the barriers which I illustrated in the previous paragraphs, States should consider introducing the offence of 'illicit enrichment' in their system, that is criminalize 'a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.'[762] Although the latter offence established by the UNCAC is only optional ('each State Party shall consider adopting'), it can be extremely helpful to prove the link between an asset and a corrupt behaviour. While the State has to prove that some funds of a public official do not come from a legitimate source of income, the public official has to provide a 'reasonable and legitimate source'[763] to prove his/her untraceable and sudden wealth.

StAR recently published a study on this issue, illustrating the origins, the development and the characteristics of illicit enrichment in 44 countries.[764] More significantly, it highlights benefits and challenges deriving from the introduction of the latter offence in order for States to consider key-questions and best practices in implementing it at the domestic level. In this context it is relevant to mention the challenges related to international cooperation, that is issues of dual criminality, due process and evidentiary standards.[765] However, as it has frequently emerged in the course of the present Chapter, 'the real challenge is lack of understanding and miscommunication.'[766] Overall, illicit enrichment provisions have proven to be potentially effective tools in both fighting corruption and recovering stolen assets. In particular, its utility is considered to be more significant in presence of a robust criminalization of corruption, a proper mechanism of public officials' oversight, clear

[762] Article 20 of the UNCAC.

[763] Muzila, L. and others, 'Illicit Enrichment: An Emerging Tool in the Asset Recovery Process' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 245, 245.

[764] Muzila, L. and others, 'Illicit Enrichment: An Emerging Tool in the Asset Recovery Process' (n. 763).

[765] Other problematic issues pointed out by the authors are related to the human/constitutional rights and the operational hurdles (e.g. collection of evidence).

[766] Muzila, L. and others, 'Illicit Enrichment: An Emerging Tool in the Asset Recovery Process' (n. 763), 254.

objectives, as well as a transparent and independent judicial system which also monitors the occurrence of potential abuses.[767]

4.3.1.2.4.5. Complying with Anti-Money Laundering Regulations and Standards

Anti-money laundering legislation is essential to avoid that politically exposed people and corrupt public officials successfully transfer the stolen assets into another State. In order to intercept such asset and trigger the proper mechanisms of international cooperation to prosecute the corrupt officials, State should implement the relevant conventions and standards such as the UNCAC and the FATF Recommendations and focus on issues such as customer due diligence and suspicious transactions reporting. In this context particular attention should be placed by States on the application of anti-money laundering standards and obligations by financial intermediaries,[768] as well as on the scrutiny of politically exposed persons.

4.3.1.2.4.6. Eliminating or Narrowing the Grounds for Refusing Mutual Legal Assistance

Mutual legal assistance can be provided pursuant to multiple bases such as conventions, bilateral treaty, and domestic legislation. In most cases, all such basis allow for some circumstances which permit the requested State to refuse extradition. As emerged from the

[767] Muzila, L. and others, 'Illicit Enrichment: An Emerging Tool in the Asset Recovery Process' (n. 763), 254-5.

[768] Taking the Swiss perspective Longchamp, O. and M. Herkenrath, 'Money Laundering, Liability and Sanctions for Financial Intermediaries – the Issue of Having the Assets of Politically Exposed Persons in Switzerland' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429), 127, contend that States should be required to conduct regular surveys on the implementation of anti-money laundering standards since it is difficult to know the extent the latter are applied. Furthermore, according to the latter article, States should also publish the sanctions on financial intermediaries for breaching their duty of care in light of the fact that 'the threat of damaging their reputations by disclosing sanctions imposed in offending establishments is probably as effective as the application of hypothetical criminal penalties.'

previous paragraphs, these grounds of refusal may create obstacles in the asset recovery process, especially if they are not properly defined or too broad. In order to overcome such barriers States should refuse to provide assistance only in the cases provided for in the UNCAC and the UNTOC, and, in any case, avoid mandatory grounds for refusal. Furthermore, they should not grant assistance dependant from the dual criminality principle[769] or, if that is not possible, to determine the existence of such requirement through a concrete approach which does not look at the label of the offence but rather at the elements of the conduct.

4.3.1.2.4.7.Improving the Rapidity in Tracing and Seizing Assets

Timing is crucial throughout the asset recovery process and therefore any delay in tracing and seizing assets may allow the holder of the stolen asset to conceal it or transfer it in another jurisdiction. In particular, the presence of strict banking secrecy laws and the lack of public registries is considered problematic because they make very difficult for foreign authorities to identify the property or the bank account holding the stolen asset.

To overcome these problems, States should limit the scope of banking secrecy laws, and permit investigators to access information for the purpose of asset recovery and to disclose data on land records and companies without a formal request of mutual legal assistance. More generally, the identification and seizure of assets would greatly benefit from the availability of public registries on companies as well as a registry which records accounts identification information and the names of beneficial owners.[770] Finally, the current delays in freezing assets could be overcome by providing temporary administrative freezes lasting at least 72 hours or giving the freezing authority to investigating magistrate, prosecutor, or other competent authority.

[769] According to the dual criminality principle, a requested State may grant assistance or extradition to a requesting State only if the underlying conduct is criminalized in both jurisdictions.

[770] On this issue cf. Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704); and Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' (n. 673).

4.3.1.2.4.8. Using Channels of Informal Assistance

Informal assistance is a valuable tool to seek some kind of assistance which does not require a written request of mutual legal assistance. Its great potential lays in the fact that is informal, quicker and can be crucial in building the necessary basis to issue a formal request. In light of these attractive elements, informal assistance should be pursed more often both before and during the elaboration of a request of mutual legal assistance while respecting the confidentiality of the information, also through specific agreements. Examples of informal assistance include direct communication between FIUs, police, prosecutors, and investigating magistrates.

4.3.1.2.4.9.Cooperating with Less-Experienced Jurisdictions

In some jurisdictions the lack of knowledge and experience about asset recovery leads to formulate incomplete or inappropriate requests which are likely to be refused by the requested State. Such shortcomings, which may be also due to the lack of political will and financial/human resources in the requesting State, may be filled by experience jurisdictions which could provide assistance and training through the placement of liaison magistrates, hosting officers which intend to formulate an MLA request, or integrating asset recovery assistance into technical assistance programs.[771] The exchange of specialized personnel and experts, or the use liaison officers should be especially considered in large and complex cases which involve large amounts of money and/or potential political consequences. In this way the chances that wrong acts are committed within the cooperation relationship are minimized. From a practical perspective this kind of assistance could be provided either by the requested State or by other international actors such as StAR if the latter does not wish to be involved in

[771] Donor agencies may also play an important role in this context. From the UK perspective see Mason, P., 'Being Janus: A Donor Agency's Approach to Asset Recovery' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 197.

the case for political or legal reason. Either way the experts assisting a requesting State should operate within a clear legal framework setting the detailed terms and conditions of the service.[772]

[772] Wyss, R., 'Proactive Cooperation Within the Mutual Legal Assistance Procedure' (n. 492), 110-1, who calls requested States to afford this kind of cooperation because, among other reasons, 'some cases' highly political nature can have implications and impacts on society that a without doubt comparable to ecological disasters.'

4.4. Concluding Observations

Asset recovery is considered to be 'the most effective way to curb corruption because it denies criminals the benefits of their acts and effectively removes any motivation for such criminal action in the future.'[773] The previous and present Chapters have addressed the most significant issues involved in the complex asset recovery process, which is based on the idea that profit-oriented criminals should not be only reliable at the personal level, but they should also be tackled at the asset level 'in that it hurts where it hurts most: in their pocket'.[774] Moreover, asset recovery increasingly emerged as an issue of justice and development for the 'global South', which too often sees the proceeds of corruption of their élites laundered abroad and never returned to the population to whom they belong, taking away resources from infrastructures, heath care, education, homeland security, and, most significantly, democracy.[775]

In line with the overall purpose of my work, I stressed the importance as well as the problematic aspects of international cooperation in this context. Given the fact that a large amount of the proceeds of corruption do not remain in the country where the offence occurred, it is correctly contended that asset recovery cannot be effective without 'an underlying ethos of cooperation between the concerned authorities of all the States involved'.[776] As intricate puzzles, asset recovery cases can be solved only by collecting the right pieces from the right jurisdiction, and then by putting them together in the proper place.[777] From a different perspective, recovering asset is a 'collective undertaking' between practitioners from different jurisdictions which need to work together within a complex process consisting of investigations, law enforcement activities and requests of mutual legal assistance dealing with different cultural, linguistic, legal and political environments.[778]

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[773] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' (n. 429), xxiii.
[774] Nicholls, C. and others, *Corruption and Misuse of Public Office* (n. 428), 436.
[775] According to International Centre for Asset Recovery, 'Development Assistance, Asset Recovery and Money Laundering: Making the Connection' (2011), 24, it is calculated that 30% of development disbursement disappears in bribes to corrupt individuals and organizations.
[776] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' (n. 428), xxiii
[777] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' (n. 428), xxiii
[778] Davies, M., 'Asset Recovery: An Ongoing Dialogue' (n. 696), 120.

In the recent years the international community has slowly, yet steadily, introduced obligations to bring States closer in the asset recovery process in order to favour the return of the proceeds of corruption to the victim States. In this sense in 2003 the UNCAC, and in particular its Chapter V, although being the result of long negotiations and compromise, has broken an 'entirely new ground in terms of multilateral treaty regimes'[779] because it systematized the concept of asset recovery by putting together obligations in the realm of money-laundering, prevention, seizure and confiscation, and, crucially, international cooperation. As a prominent practitioner argued, 'in the end, the UNCAC is and must be about actual recoveries.'[780] On top of that it is also significant that the UNCAC considers asset recovery as a 'fundamental principle' of the Convention:[781] in spite of the fact that the latter is a symbolic statement of intent, one should emphasize that it does imply 'that any doubt concerning the interpretation of provisions related to asset recovery should be resolved in favour of recovery as a core international cooperation objective of the Convention.'[782]

At the regional level important steps have also been taken by the EU with regards to seizure and confiscation, and, as already stressed, to mutual legal assistance.[783] The results achieved by the EU are favoured by the fact that its Member States have built up an advanced level criminal cooperation; however, one should notice that no EU instrument addresses the obligation to return the proceeds of corruption to the victim State and so the most relevant obligation in this context remains Article 57 of the UNCAC.

Another interesting element emerging from the present Chapter is the policy discourse facilitated by the Conference of the States Parties to the UNCAC, which also relies on the debate and exchange of views which takes place within the Working Group on Asset Recovery where experts from all the States Parties participate. As the relevant paragraphs

[779] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 4.
[780] Claman, D., 'The Promise and Limitations of Asset Recovery under the UNCAC' in Pieth, M. (ed), *Recovering Stolen Assets* (Peter Lang, Bern 2008) 333, 350.
[781] Article 51 of the UNCAC.
[782] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (2009) 191, which refers to U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Ad Hoc Committee for the Negotiation of a Convention against Corruption on the Work of its First to Seventh Sessions. Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (7 October 2003), para 48, where it is pointed out that the expression 'fundamental principle' would not have legal consequences on the other provisions of Chapter V of the UNCAC.
[783] Cf. para 2.5.2.6.

have illustrated, the latter intergovernmental fora are crucial for three linked sets of reasons: firstly, because they favour the development of the States' institutional and legislative framework through resolutions and recommendations in view of facilitating the asset recovery process; secondly, because they represent occasions where States' Ministries and experts can discuss issues from different perspectives, and build networks of cooperation to be used in practical cases; thirdly, because they identify the most significant problematic issues faced by States in implementing the UNCAC, and they attempt to give some answers or provide best practices in order to overcome them.

After analysing the relevant legal framework and the policy dialogue taking place at the level of the Conference of State Parties to the UNCAC, the present part of the work has discussed in detail the challenges which currently obstacle asset recovery cases both by looking at the outcome of the most recent meetings of the Working Group on Asset Recovery as well as by examining the rich research work of StAR, a joint initiative of the UNODC and World Bank focused on asset-recovery issues. As one has contended, while the existing international norms and standards suffice, 'challenges remain as to their implementation in practice, be it because of lack of capacity, lack of political will or hurdles to swift cooperation domestically and internationally.'[784]Although I considered all kinds of challenges in the asset recovery process, the focus has been laid on those issues linked with international cooperation. Furthermore, I provided the best-practices and strategies proposed by the relevant bodies to overcome the problematic issues arising from the need to cooperate in asset recovery cases. In this context, there are recurrent issues and recommendations emerging from my analysis and which is worth to recall in brief.[785] At the general level it is crucial that States enhance their political will, as well as the trust and communications among them: although they might sound like generic concepts, they represent the very essential elements to boost asset recovery worldwide. From a legal perspective States should comply more strictly with the relevant anti-corruption and anti-money laundering framework, and they should carefully take into consideration the introduction in their legal systems of innovative tools and practices such as non-conviction based confiscation, the offence of illicit enrichment. Other crucial issues to address at the legislative level is to put in place mechanisms to enable the identification of

[784] Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira, 'Conclusion' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 347, 348.
[785] Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira, *Emerging Trends in Asset Recovery* (n. 429).

beneficial ownership and to require enhanced diligence on public officials, especially the category of 'politically exposed persons'. At the operational level, States should be more proactive and swift in establishing dialogue (and trust) with other States by employing to the fullest extent, and with the due precautions, the communication possibilities available through informal channels, intelligence exchanges and financial intelligence units.

In spite of these challenges, one should notice that practitioners and experts are increasingly approaching asset recovery as a process based on mutual learning, expertise and constructive dialogue and 'are witnessing and orchestrating a shift towards ever more effective enforcement and cooperation'.[786] Asset recovery is no longer as a novel issue but rather as something 'that has come to be accepted and expected'.[787] As a consequence one can also predict a growing trust and confidence as well as consensus on the operational mechanisms among practitioners once mutual legal assistance with respect to asset tracing, freezing and confiscation will assume the feature of a standard procedure.[788] Regrettably, it will possible to assess States' progress in implementing Chapter V of the UNCAC only after 2019, when the second cycle of the Mechanism for the Review of Implementation will come to a conclusion.[789] However, it is believed that 'the review of Chapter V will created an unprecedented momentum for asset recovery, which will complement and continue the positive developments of the last years.'[790]

To conclude, although it is still not possible to asses States' implementation of the UNCAC's asset recovery Chapter, the overall picture which seems to emerge from the present Chapter gives evidence of a positive evolution of asset recovery, which nevertheless has produced too

[786] Davies, M., 'Asset Recovery: An Ongoing Dialogue' (n. 696), 126.

[787] Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 171 who sustain that countries around the world are setting up policy, legislation and institutions to facilitate the recovery and return of stolen assets. At the same time it is also observed an increased number of professionals who have worked on asset recovery cases and who are gaining experience 'in navigating the complex terrain of multijurisdictional recoveries.

[788]Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 171.

[789] From 2015 until 2019 every State Party will be reviewed by two other State Parties in relation to the implementation of Chapter V. Although the peer-reviewing Parties will elaborate a country report, only its executive summaries will be made public.

[790] Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 172.

few tangible results[791] and has wide room for improvement. As I will explore in the following Chapter[792] dedicated to the illustration of some significant practical cases, the political unrest which has affecting North Africa in the last years has made the international community more sensible towards the issue[793] and successfully persuaded many States about the urgency and need of cooperating further to tackle potentates' assets.[794] Accordingly, one can currently

[791] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469).

[792] See Chapter V.

[793] One should also take note of the initiatives promoted by the G-8 and by the G-20, which particularly significant because their members include many financial centres which are the harbour of illicit flows of money and thus the targets of many requests of international cooperation. The G-8 launched the so-called Deauville Partnership in 2011 to support those Arab countries which were affected by political turmoil. The following year in Camp David, the leaders of the G-8 adopted an action plan where countries committed to a comprehensive list of actions aimed to promote cooperation, capacity building and technical assistance in support of the efforts of Arab countries in transition to recover the assets looted by past regimes (G-8, 'Deauville Partnership with Arab Countries in Transition - Governance Pillar: Action Plan on Asset Recovery', available at http://www.state.gov/j/inl/rls/190483.htm). In 2013 each G-8 country made public an 'Asset Recovery Action Plan', and they can be found in the 'Arab Forum on Asset Recovery', available at http://star.worldbank.org/star/ArabForum/About. As for the G-20, its Anti-Corruption Working Group took the several steps on the issue of asset recovery. Firstly, in 2012 it published a step-by-step guide for States seeking mutual legal assistance from G20. Secondly, the same year the Working Group published a guide reporting the assets tracing country profiles in G-20 countries focusing on the complex issue of asset tracing and identification. Lastly, in 2013 the Working Group has reviewed the G-20 countries' approach relative to the asset recovery principles adopted in Los Cabos in 2012 and published the 'Nine Key Principles of Asset Recovery Benchmarking Survey'. The latter G-20 documents are available in G-20 Anti-corruption Working Group, 'G-20 Resources', available at http://star.worldbank.org/star/about-us/g20-resources. For remarks and recommendations on the work carried out so far by the G-20 in the field of asset recovery see Transparency International, 'G20 Position Paper', May 2014, available at http://www.transparency.ca/9-Files/2014-New/201405-TI-G20PositionPapers-AssetRecovery.pdf.

[794] Two countries can be taken as examples in this context. Firstly Canada, whose 'Freezing Asset of Corrupt Foreign Officials Act' of March 2011has introduced measures which target the assets of politically exposed persons when 'the foreign nation is a situation of "internal turmoil" and the freezing of assets is in the best interests of the "international community" '. Secondly, Switzerland adopted a 'Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means' ('RIAA') of 1 February 2011 which allows, among other things, to confiscate the funds of dictators' assets on behalf of a failed State pursuant to Swiss administrative court procedures, and reverses the burden of proof as to the legal or illegal origin of the assets at stake. According to two practitioners from the Swiss Foreign Ministry, 'in doing so, despite its European continental legal tradition, Switzerland introduced a kind of administrative "non-conviction-based forfeiture" in certain asset recovery cases. Thereby, Switzerland consciously went beyond its legal obligation under UNCAC', Adam, R. and V. Zellweger, 'The Proposed Swiss comprehensive Act on Asset Recovery' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 173, 179. Moreover, one should also take note that, as of October 2014, Switzerland is discussing a new act which takes over existing legislation and practice in the field of asset recovery and reworks them into a single body of law, that is the Draft Federal Act on the Freezing and Restitution of Potentates' Assets. On the ongoing law-making process see Swiss Federal Council, 'The Federal Council Adopts the Dispatch to Parliament Concerning a Federal Act on the Freezing and Restitution of Illicitly Acquired Assets of Foreign Politically Exposed Persons' http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53048.

witness a significant change of attitude in the latter respect, together with a growing institutional capacity and practical expertise. On the other hand, some of the cases which I will consider in the final part of my work give evidence of some persisting barriers which have been hardly scratched by the political momentum which has been building around asset recovery in these years. As a consequence States are called to further widen the paradigm of traditional domestic investigation 'towards a much more interconnected, international, more complex, but ultimately more effective approach.'[795]

[795] Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira, 'Conclusion' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 347, 354.

V. ASSESSING THE COOPERATING DIMENSION OF REAL-WORLD CORRUPTION CASES

5.1. Introduction

The attention of the international community towards issues of transnational corruption can be inferred not only from the increasing number of norms and standards adopted at the international level and discussed in the previous Chapters, but also from the increasing number of cases adjudicated at the domestic level and reported by both international organizations and the media.[796] The possibility to assess court cases is particularly helpful because it allows to scrutinize and understand the concrete dynamics of corrupt practices, as well as the problems and obstacles created and/or encountered by States to hold responsible those abusing the public office for private gains.

Although the previous part of my work already laid emphasis on the practical challenges in establishing cooperation between States, the present Chapter of my work intends to assume a more 'real-world' perspective by taking into consideration some significant cases which illustrate the importance of the international cooperation dimension in corruption cases, particularly the problems and the strengths of the strategies set up by States to tackle such offence and to recover its proceeds from foreign countries. For this purpose I will provide the analysis of four sets of corruption cases with transnational elements where cooperation among States played (or should have played) a crucial role.

[796] With regards to the cases reported by international bodies and organization one can turn to periodical review made by Transparency International about the enforcement of the OECD Anti-Bribery Convention at the domestic level. The last two reports are Transparency International, 'Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery' (7 October 2013), and Transparency International, 'Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery' (23 October 2014). For a list of completed and ongoing cases of corruption which deal with international asset recovery one can consult StAR, 'Asset Recovery Database', available at http://star.worldbank.org/corruption-cases/?db=All. A valid source of news and information is also the 'Risk and Compliance Journal' published by the Wall Street Journal and available at http://online.wsj.com/public/page/risk-compliance-journal.html.

In particular, in paragraphs 2 and 3 of the present Chapter I will first consider two sets of foreign bribery cases which involved actors from multiple countries, and thus where a high level of cooperation among several authorities was needed, especially mutual legal assistance and extradition. After that – in paragraphs 4 and 5 – I will address two more set of cases where international cooperation was established in order to recover the proceeds of 'grand corruption' practices, thus developing the framework and analysis elaborated in Chapters III and IV of my work. In light of the fact that such cases are rather complex and (some of them) still on-going, my intention is firstly to provide the available factual background of the domestic proceedings, and to ascertain the judicial outcomes reached in multiple jurisdictions for the underlying facts. On top of that my aim is to observe the impact of the current international legal framework as well as to address what are perceived as the most impairing obstacles and useful tools from the point of view of States. When appropriate I will also formulate some policy considerations as to the way States may enhance the international cooperation strategies to tackle transnational corrupt practices.

In short, taking into consideration the analysis of the previous Chapters, the following paragraphs will test their findings on real cases laying special emphasis on the barriers as well as on the most effective practices set up by States to enhance cooperation in mutual legal assistance, extradition, and asset recovery. In doing so, the present Chapter will also serve to formulate some provisional conclusions as to the effectiveness of the relevant international provisions as well as to the outstanding issues which emerged throughout the present work.

5.2. TSKJ Consortium Cases

The first set of cases which I will consider concern the activities of a consortium of four multinational corporations known as TSKJ. Since the underlying facts were estimated to involve a potential of twelve jurisdictions,[797] it is interesting to assess to what extent the prosecutions carried out so far have made use of international assistance tools to provide mutual legal assistance, extradite people or recover the proceeds of corruption.

5.2.1. Factual Background

The TSKJ Consortium was private limited liability company registered in Madeira, Portugal whose members were Technip SA of France, Snamprogetti Netherlands B.V., an affiliate of ENI SpA of Italy, M. W. Kellogg (which became Kellogg, Brown & Root or KBR after the 1998 Halliburton acquisition of M. Kellogg) of the U.S., and JGC Corporation of Japan, each of which owns 25% of the venture. Its steering committee, where high-level executives of the latter companies participated, made major decision on behalf of the consortium. The purpose of the joint venture was to bid and eventually perform a series of engineering, procurement and construction contracts to design and build a liquefied natural gas plant and other expansions on Bonny Island, Nigeria.

In order to operate the TSKJ Consortium acted through three Portuguese special purpose corporations based in Madeira, Portugal, two of whom were equally owned by companies. The third one, which was used to enter into consulting agreements with TSKJ's agents, was owned by U.K. incorporated M.W. Kellogg Ltd, by Snamprogetti and by Technip. One of its agents, Mr Tesler from the UK, who operated for both the consortium and each of the companies, was hired to obtain the business in Nigeria, also through bribe offering and bribe paying to Nigerian governmental officials. Mr Telser concluded the contracts with TSKJ through a Gibraltar corporation called Tri-Star Investments Ltd, which received over $130

[797] Spahn, E. K., 'Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention' 53(1) Virginia Journal of International Law 1, fn 140.

million from the consortium to bribe Nigerian officials. Another agent of TSKJ was Marubeni Corp., a global trading company based in Tokyo, which received $50 million for the same corrupt purposes.

From the Nigerian side, the Government created the entity Nigeria LNG Limited to develop the Bonny Island Project and award the related engineering, procurement and construction contracts. Among its shareholder, the Nigerian National Petroleum Corporation exercised control over the latter company.

Between 1995 and 2004, TSKJ was eventually awarded four engineering, procurement and construction contracts to build the Bonny Island Project corresponding to each of the four phases of the project. The first $2 billion contract was awarded only in December 1995, after the hiring Mr Tesler as agent. In 1999 the Nigerian government awarded a $1.2 billion contract to TSKJ to expand construction of the natural gas plant in order to increase the plant's capacity by 50 percent. By 2004 the total value of the contracts was estimated a value of over $6 billion, while the alleged payment of bribes to Nigeria officials was of $180 million.

5.2.2. Legal Consequences in Multiple Jurisdictions[798]

5.2.2.1. France

The first elements of the complex bribery scheme perpetrated by the TSKJ Consortium emerged in 2002 from a preliminary investigation carried out by the French *Police Judiciaire* who received information from a Technip official[799] about a 'slush fund' when the latter was

[798] The information contained in this paragraph mostly build on the information publicly provided by the U.S. Department of Justice on www.justice.gov/ and by the U.S. Security Exchange Commission on www.sec.gov. Further sources of information are Transparency International, 'Exporting Corruption: Progress Report 2013'(n. 796), and Transparency International, 'Exporting Corruption: Progress Report 2014' (n. 796). Lastly, I relied on the 'Risk and Compliance Journal' published by the Wall Street Journal and available at http://online.wsj.com/public/page/risk-compliance-journal.html.

[799] Isikoff, M., 'Terror Watch: Another Halliburton Probe' *Newsweek* (4 February 2004).

questioned about his role in the alleged acts of fraud by the French oil company, Elf Aquitane (which later become Total).[800] The case was then transferred to French magistrates Renaud van Ruymbeke and Eva Joly, who began the investigation in October 2003[801] and eventually informed the U.S. counterparts in the Department of Justice ('DOJ') and Security and Exchange Commission ('SEC') regarding the investigation. The known outcome of the French investigation is the imposition of fines to Jean-Marie Deseilligny, Technip's general manager, and Etienne Gory, the company's commercial manager for Africa (€10,000 and €5,000 respectively).[802]

5.2.2.2. United States

While the outcome of the French prosecution is modest, from 2004 onwards the U.S. DOJ and SEC became the leading enforcement agency towards the corrupt conduct of the TSKJ Consortium's participants and its agents. Up until 2012 the latter U.S. enforcement agencies obtained more than $1.7 billion in penalties and forfeiture orders from the prosecution of four joint venture partners, two third-party intermediaries, and other culpable individuals for breaches of the Foreign Corruption Practice Act (FCPA).[803] In particular, starting with the individuals involved in the case, Mr Tesler, the agent in the scheme who admitted to handling and paying more than $130 million in bribes, was sentenced to 21 months in prison and forfeited $149 million in March 2011. Mr Stanley, who used to be the head of Kellogg Brown

[800] According to Clark, N., 'Appeal Hearings Open for 2 Former Elf Chiefs Court to Review Corruption Convictions' *International Herlad Tribune* (7 October 2004), 3, there was an 'eight-year investigation of the formerly state-owned group [Elf Aquitiane] and a colorful public trial that exposed tales of bribery, adultery and influence peddling that extended from plush government offices in Paris to the capitals of France's former West African colonies.'

[801] The present case was the first one after France implemented the OECD Anti-Bribery Convention through an amendment to the Criminal Code. See French Criminal Code, Art. 435, translated at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20060701, and Law No. 2000-595 of June 30, 2000, *Journal Officiel de la République Française* [J.0.] [Official Gazette of France] 9944 (2000).

[802] See 'Corruption au Nigeria: Deux Anciens de Technip Condamnés à Des Amendes' Afrique Expansion Magazine (30 January 2013).

[803] For a synthetic overview of the overall judicial and enforcement actions related to the TSKJ Consortium bribery scheme in the U.S. (as of February 25 2013) see U.S. Department of Justice, 'Steps Taken by the United States to Implement and Enforce the OECD Anti-Bribery Convention', 20-2.

& Root Inc. was sentenced in February 2012 to 30 months in prison and three months of supervised release for his role in the scheme.[804] The other agent of the scheme, Murabeni Corp. agreed to pay a $54.6 million criminal penalty to resolve charges related to the Foreign Corrupt Practices Act ('FCPA') in January 2012.[805]

As for the companies participating in the consortium, in 2009 Halliburton and the KBR entities agreed to pay total penalties of $ 579 million to settle the DOJ and SEC enforcement actions. In September 2012, foreign bribery charges on Snamprogetti Netherlands BV were dropped by the DOJ after it established that in court papers the company fulfilled terms of a settlement signed in July 2010. However, according to the latter deferred-prosecution agreement, Snamprogetti paid a criminal fine of $240 million to the Justice Department; plus, both Snamprogetti and its mother company Eni paid $125 million in disgorgement to the Securities and Exchange Commission.[806] The France company of the consortium Technip agreed to settle the investigation paying $338 million criminal penalty in June 2010,[807] while Japanese JGC Corp., 'the final domino to fall in the Bonny Island scandal'[808] paid $218.8 million in 2011 for its role and entered into a deferred-prosecution agreement with the DOJ.

5.2.2.3. United Kingdom

In the United Kingdom, it is only know that a subsidiary of KBR, MW Kellogg (MWKL) was ordered by the U.K. High Court to pay over £7 million in connection with the TSKJ bribery

[804] See Rubenfeld, S., 'KBR CEO, UK Middleman Sentenced Over Nigeria Bribery' *Wall Street Journal* (23 February 2012).

[805] See U.S. Department of Justice, 'Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $54.6 Million Criminal Penalty' (17 January 2012). Interestingly, in March 2014 Marubeni Corp. pleaded guilty to eight FCPA charges and admitting it bribed Indonesian officials to win an electricity contract for itself and a partner, Alstom SA. See U.S. Department of Justice, 'Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine' (19 March 2014).

[806] See Rubenfeld, S., 'DOJ Drops FCPA Charges on Former Eni Unit as DPA Term Ends' *Wall Street Journal* (19 September 2012).

[807] See U.S. Department of Justice, 'Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty' (28 June 2010).

[808] See Rubenfeld, S., 'JGC Corp Settles With Justice Department Over Bonny Island Bribery' *Wall Street Journal* (6 April 2011).

scheme after a civil settlement in February 2011.[809] Plus, between 2010 and 2011 the U.K. authorities extradited Mr Tesler and another U.K. citizen to the United States.[810] On the side, Mr Tesler was also disbarred by the U.K. Solicitors Regulation Authority in May 2014 whereas the Solicitors Disciplinary Tribunal found that Tesler's actions 'constituted a failure to act with integrity and a failure to uphold the confidence the public has in the profession.'[811]

5.2.2.4. Italy

In Italy charges were formulated against the Italian company Saipem s.p.a., a subsidiary of Eni which incorporated Snamprogetti, as well as against five managers of the time. Due to the expiry of the statute of limitations in February 2012, the case against the managers was dismissed;[812] however, the proceedings against Saipem s.p.a. continued and the latter company was eventually ordered to pay a € 900 thousand fine and the confiscation of € 24,5 million in July 2013.[813] On the side one should also take note of a similar, yet unrelated, criminal investigations initiated by the Italian prosecutors in September 2014 toward ENI's Chief Executive Officer and its Chief Development Operations and Technology Officer for an alleged episode of corruption related to the ENI's 2011 acquisition of 50% of a Nigerian deep-water offshore oil field block.[814]

[809] See U.K. Serious Fraud Office, 'MW Kellogg Ltd to Pay £7 Million in SFO High Court Action' (16 February 2011).
[810] See 'Court Backs Briton's Extradition to U.S. Over Bribery' *Reuters* (20 January 2011).
[811] SeeRose, N., 'Solicitor Struck Off After US Bribery Conviction' *Legal Futures* (20 May 2014).
[812] 'Saipem: Tribunale, Prescrizione per Manager su Tangenti Nigeria' *Corriere della Sera* (5 April 2012).
[813] See Mincuzzi, A., 'Tangenti in Nigeria, per Saipem Multa e Confisca da 24,5 milioni' *Il Sole 24 Ore* (12 July 2013).
[814] See 'Eni execs hit by Nigeria block purchase corruption probe' *Petro Global News* (11 September 2014), which explains that 'the probe comes after a British court allowed Milan prosecutors to freeze two bank accounts belonging to Emeka Obi that contain a combined $190 million. Obi is thought to have served as an intermediary for the OPL 245 deal. [...] Last year, Obi won a lawsuit against Malabu for allegedly failing to pay him $110 million for bringing Eni into the OPL 245 deal.'

5.2.2.5. Nigeria

Lastly in Nigeria, the House of Representatives Committee on Public Petitions begun to investigate the alleged bribery activities of TSKJ and held hearings starting in early 2004 to identify those who may have benefited from the alleged bribe money and to determine the extent the Nigerian Government might have suffered losses in the transactions.[815] This was followed by a public inquiry into the same matter by the National Assembly.[816] Furthermore, the Nigerian Economic and Financial Crimes Commission, which is a Nigerian law enforcement agency part of the Nigerian Government investigating financial crimes such as advance fee fraud and money laundering, started to examine the case.[817] The Halliburton Quarterly Report of October 2005 also reported that 'TSKJ notified the Nigerian Attorney General that TSKJ would not oppose the Attorney General's efforts to have sums of money held on deposit in banks in Switzerland transferred to Nigeria and to have the legal ownership of such sums determined in the Nigerian courts.[818]

As from December 2010 the Federal Government of Nigeria began settlement negotiations with TSKJ consortium's companies which lead to the following results: in December 2010 Snamprogetti entered into a settlement and non-prosecution agreement agreeing to a criminal penalty of US$32.5 million[819] while Halliburton reached a settlement paying a US$35 million fine;[820] later on, at the beginning of 2011 Technip and JGC Corp reached settlement of

[815] Crutchfield George, B. and K. A. Lacey, 'Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement' (2005-2006) 96 Journal of Criminal Law & Criminology 503, 509 citing Zagaris, B., ' French Investigate Halliburton & Technip's Energy Payments in Nigeria' (2004) 20 International Enforcement Law Reporter 4, 4 and Ogbu, A., 'House Probes Halliburton Bribery Scandal' *This Day* (16 February 2004). As a result of difficulties encountered in obtaining cooperation from witnesses, the House Committee on Public Petition sought a Nigerian court order to request that the French judge allow the committee to inspect the documents in the TSKJ case file. See Oduniyi, M., 'TSKJ Probe: "Court Ruling on French Judge Delivered" ' *This Day* (24 January 2005).

[816] Igbikiowubo, H., 'N/A Opens Public Hearing into TSKI's $180M Bribery Scandal' *Vanguard* (19 October 2004).

[817] Halliburton Corporation, 'Quarterly Report (Form l0-Q)' (31 October 2005).

[818] Halliburton Corporation, 'Quarterly Report (Form l0-Q)' (n. 817), 16.

[819] See Saipem, 'Snamprogetti Netherlands BV Enters Agreement with Federal Government of Nigeria' (20 December 2010).

[820] Rubenfeld, S., 'Halliburton To Pay $35 Million To Settle Nigeria Bribery Charges' *Wall Street Journal* (21 December 2010).

respectively $30 million and $28.5 million.[821] Besides the latter penalties, investigations were carried out by both the Nigerian House of Representatives and of the Senate in 2004 and 2009 respectively, [822] while the Economic and Financial Crimes Commission (EFCC) in November 2010 arrested and detained 23 executives, including ten employees of Halliburton Energy Services Nigeria Limited in Lagos as well as two employees from Saipem Contracting Nigeria (a subsidiary of an ENI subsidiary) and Technip Offshore Nigeria.[823]

5.2.3. Analysis of the 'Cooperation' Dimension

Generally speaking the bribery scheme perpetrated by the TSKJ Consortium in Nigeria gives evidence of the plague of corruption which affects the extractive industries, but also of the questionable relationships between multinationals corporations and the ruling class in developing countries such as Nigeria. The overall results of this kind of practices is not only the award of contracts without fair competition but, most significantly, the personal enrichment of some high-level political figures which exploit the natural resources of their countries and then divert public resources from their use in crucial sectors such as health, education and infrastructures. In other words, the present case describes the effects of what I defined earlier a 'kleptocracy'.[824]

However, for the purpose of the present work, it is important to assess other aspects of TSKJ Consortium cases, that is the level of cooperation accomplished by States to tackle a corruption scheme involving natural and legal persons from multiple jurisdictions.

As I mentioned earlier, the leading role in the enforcement action was taken by the United States, which obtained more than $1.7 billion in penalties and forfeiture orders from the

[821] See Templars Law Firm, 'JGC Corp Reaches US$ 28 Million Settlement' (1 February 2011), and Rubenfeld, S., 'JGC Nears Settlement in Bribery Case' *Wall Street Journal* (1 February 2011).

[822] See Nigerian House of Representatives Petition Commission, 'Interim Report: The Halliburton/Tskj/Lng Investigation', available at http://halliburtonwatch.org/news/nigeria_parliament_report.pdf, and Ojeifo, S., 'Senate to Wade into Halliburton Bribery Scandal' *This Day* (20 March 2009), 7.

[823] See 'Nigeria Detains 12 in Halliburton Bribery Case' *Reuters* (27 November 2010).

[824] Cf. para 3.1.3.

prosecution of four companies, two third-party intermediaries, and other culpable individuals.[825] This is due, in part, to the U.S. domestic legislation (i.e. the Foreign Practice Corrupt Act) which, for instance may held criminal liable those companies which are listed in the U.S. Stock Exchange, as it was the case for the Snamprogetti. Some authors have also pointed out the importance of enforcement capacity since complex cases of grand corruption such as the one which involved TSKJ require a significant investment in both human and financial resources.[826]

Most significantly, the U.S. benefitted from an effective level of cooperation by foreign judicial authorities, which surely contributed to the success of its enforcement action. First of all, the initial information about the alleged episodes of bribery by the TSKJ Consortium were gathered by the French law enforcement authorities and prosecutors, who were the ones to inform the U.S. counterparts in the DOJ and the SEC. Hence, without the input of the French authorities the whole stream of cases could not have been initiated. Secondly, the United Kingdom provided assistance to the United States by extraditing the U.K. national Mr Tesler to the US.[827] Lastly, the U.S. authorities themselves acknowledged the importance of cooperation by foreign authorities when in the most recent settlement with the agent company Murabeni the DOJ stressed that 'significant assistance was provided by authorities in France, Italy, Switzerland and the United Kingdom.'[828]

On the other hand, one should also notice that some countries neither initiated prosecution no provided international assistance, notably Japan and the Netherlands which were the home jurisdictions of two of the four companies composing the Consortium (Snamprogetti Netherlands B.V. and JGC Corporation). Although, as argued by some author, it may be the

[825] According to Cassin, R. L., 'Alcoa Lands 5th on our Top Ten List' *FCPA Blog* (10 January 2014), four of the ten largest FCPA enforcement actions in history involved the four corporations which formed the FCPA Consortium (2nd KBR / Halliburton (USA) with a $579 million fine in 2009; 6th Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy) with a $365 million fine in 2010; 7th Technip S.A. (France) with a $338 million fine in 2010; 8th JGC Corporation (Japan) with a $218.8 million fine in 2011).

[826] Spahn, E. K., 'Multijurisdictional Bribery Law Enforcement'(n. 797), 30, where the author also sustain that State should add 'overall enforcement capacity, appropriate staff levels, and funding for expert prosecutors and investigators who are highly valued in the private sector as important factors in any comparative enforcement effectiveness assessment.'

[827] The final decision of the U.K. High Court of 20 January 2011 rebutted Mr Tesler's opposition to extradition based on the argument that in the United States he would have not received a fair trial. Mr Tesler was extradited to the United States on 10 March 2011 and the following day he pleaded guilty in the District Court in Houston.

[828] See U.S. Department of Justice, 'Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation'(n. 805).

case that States should ensure a better coordination when multiple jurisdictions are involved in a corruption case in order to observe the outmost respect to the *ne bis in idem* principle,[829] the cooperative efforts the developed countries such as Japan and the Netherlands could have greatly contributed to the overall prosecution of the TSKJ Consortium case(s). Furthermore, some serious concerns have been raised from the Nigerian side, whereas Chief Godwin Obla, who serves as Special Prosecutor for the Nigerian Economic and Financial Crimes Commission and the Federal Government of Nigeria,[830] recently exposed two sets of problems concerning the TSKJ cases.[831] From one side, he noticed that at the domestic level, the high ranking public officials indicted are protected by immunity or are shielded from prosecution by their allies even when they leave office. From the other side, he made some important remarks in relation to the level of cooperation provided by third countries. Firstly, he lamented that the proceeds of corruption were moved to countries which have no extradition treaty with Nigeria and which thus shield the offenders from the law. Secondly, he criticized particular countries which allegedly did not afford assistance to Nigeria: the U.S. refused a request of mutual legal assistance; the German authorities withhold information to aid trails of its citizens abroad; lastly, France refused an application for mutual legal assistance from Nigeria because the request was written in English. Thirdly, he stressed the limited efforts of States receiving corrupt assets to return them to the victims States by giving the example of part of the TSKJ's bribe ($100 million) seized by the Swiss authorities and still not returned to Nigeria,[832] as well citing the freezing of over $450million dollars of the former Nigerian President Abacha by the U.S. DOJ.[833]

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[829] According to Spahn, E. K., 'Multijurisdictional Bribery Law Enforcement'(n. 797), 30, 'other jurisdictions may pile on multiple prosecutions, seeking political credit for anticorruption efforts, revenge against opposition groups, or revenues for depleted national treasuries from large fines and penalties.'

[830] See Obla & Co Law Firm. 'Godwin Obla's Biography', available at http://oblaandco.com/our-team/godwin-obla.

[831] See Obla, G., 'Prosecuting Trans-border Crime: Challenges and Prospects' (Capacity Building seminar for DPPs and Heads of Prosecution in the Africa Region Commonwealth Anti-corruption Centre, Gaborone, Botswana 29 April - 2 May 2014).

[832] Interestingly, one of the companies of the TSKJ Consortium, Halliburton, when reached an agreement to settle the case with the Nigerian authorities agreed, among other things, to provide reasonable assistance in Nigeria's effort to recover amounts frozen in a Swiss bank account of a former TSKJ agent. See Halliburton Corporation, 'Halliburton Confirms Agreement to Settle with Federal Government of Nigeria' Press Release (21 December 2010).

[833] See U.S. Department of Justice, 'U.S. Forfeits Over $480 Million Stolen by Former Nigerian Dictator in Largest Forfeiture Ever Obtained Through a Kleptocracy Action' (7 August 2014), which explains that 'the forfeited assets represent the proceeds of corruption during and after the military regime of General Abacha, who

In light of these considerations the overall impression of the 'cooperation dimension' of the TSKJ cases is a mixed one. One the one hand one can notice a discreet level of international cooperation among developed countries such as France, United States, United Kingdom, Italy and Switzerland which led to significant enforcement actions, especially by the U.S. Department of Justice. In this context the reason for such high level of trust among those authorities might be found in the OECD Anti-Bribery Convention, which sets a few effective obligations against bribery of foreign officials and creates several possibilities for State Parties to meet, exchange their experience and eventually gain confidence in each other work.[834]

On the other hand, some other jurisdictions such as the Japanese and the Dutch ones are notably absent despite the possibility to provide important information concerning the two companies seated in those countries such as JGP Corp and Snamprogetti Netherlands B.V. Furthermore, one should also take note of the critics raised by Chief Godwin Obla, Special Prosecutor for the Nigerian Economic and Financial Crimes Commission and the Federal Government of Nigeria, who expressed some shortcomings in the cooperation with 'western' authorities which may be interpreted as deriving from a lack of trust and problems in communication, the latter being two of the fundamental barriers which hinder the establishment of international cooperation

A final remark is dedicated to the recovery of asset to the victim State, which in this case was Nigeria. From the analysis of the TSKJ's cases it emerges that the level of cooperation to recover asset is still unsatisfactory in spite of the fact that some assets of former high-level Nigerian politicians have been frozen in some foreign States. Again, the lack of trust and problems in communication, together with some barriers at the domestic level and the concern

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assumed the office of the president of the Federal Republic of Nigeria through a military coup on Nov. 17, 1993, and held that position until his death on June 8, 1998. The complaint alleges that General Abacha, his son Mohammed Sani Abacha, their associate Abubakar Atiku Bagudu and others embezzled, misappropriated and extorted billions of dollars from the government of Nigeria and others, then laundered their criminal proceeds through U.S. financial institutions and the purchase of bonds backed by the United States.' However the press release does not make any consideration about the possible return of the seized assets in the victim State, that is Nigeria.

[834] Cf. Spahn, E. K., 'Multijurisdictional Bribery Law Enforcement'(n. 797).

that the returned assets will be used again in a corrupt way[835] may be the source of problems leading to this situation.

5.2.3.1. Repatriating the Proceeds of Foreign Bribery

However, one should also point to another issue which may be relevant in the present case and which concerns States' obligations to recover corrupt assets. As discussed in a side event to UNCAC Working Group on Asset Recovery by the UNCAC Coalition of Civil Society Organizations in September 2014,[836] there is an increasing awareness that asset recovery is not only 'about recovering stolen or embezzled public funds stashed away by corrupt agents, or confiscating the lavish properties they illicitly acquired abroad.'[837] Asset recovery should also be about any proceeds of corruption, including the one deriving from active bribery (i.e. illicit profit, benefit, or advantages). Hence it is hard to understand why authorities appear to 'draw a clear line between foreign bribery against companies and other forms of corruption when it comes to the application of enforcement strategies.'[838] As correctly recalled, the UNCAC establishes that asset recovery process involves the 'proceeds of offences established in accordance with the Convention'[839] that have been transferred abroad, that is 'any property derived from or obtained, directly or indirectly, through the commission of an offence'.[840]

[835] The following case which I will consider – the 'Kazakhgate' – proves, at least in part, the contrary.

[836] See UNCAC Working Group on Asset Recovery CSO Side Event, 'Foreign Bribery Proceedings and Asset Recovery Under UNCAC: Legal analysis, Challenges and Prospects' (11 September 2014).

[837] Pedriel-Vaissier, M., 'Is There an Obligation Under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' *UNCAC Coalition Blog* (5 September 2014) discussing the return of the fines imposed through foreign bribery settlements. See, *contra*, Stephenson, M., 'UNCAC Does Not Require Sharing of Foreign Bribery Settlement Monies with Host Countries' Global Anticorruption Blog.

[838] Solorzano, O. and P. Gomes Pereira, 'The Swiss Plea-bargaining Practice and Asset Recovery: The Alstom Case' (n. 737), 279, 288 analysing the Swiss 'Summary punishment Order' against the company Alstom, where the enforcement method followed a 'domestic-centred logic'.

[839] Article 3 of the UNCAC.

[840] Article 2(e) of the UNCAC.

In particular, from a systematic perspective, the UNCAC considers three kinds of returned assets, each of whom may be repatriated in a different way and according to a different provision:[841]

(i) *Embezzled or misappropriated funds*, and more generally, public funds which are laundered abroad, which States are obliged to return pursuant to Article 57(3)(a);

(ii) *Other proceeds of crime*, which may results from offences of foreign bribery and related cases, which States should return to the victim State when prior ownership is 'reasonably' established over confiscated property or when the requested State recognizes damage to the requesting State as a basis for returning the confiscated property;[842]

(iii) *Voluntary reparation payments*, which State may give to a victim State in order to compensate the victims of the crime.[843]

For the purpose of the TSKJ's bribery scheme it is relevant to lay emphasis on the second category of assets which may be recovered. More precisely, one should stress the potential effectiveness of the mechanism envisaged by Article 53(b) of the UNCAC, which provides for the direct recovery of property through compensation claims and which is exactly aimed at those situations where the proceeds of corruption involve funds of private origin, to which the State had no prior ownership and thus was never entitled.[844] Although the procedural aspects of this provision were discussed earlier in the work,[845] it is important to recall that 'in cases of bribery, trading in influence and other offences where the claimed assets have a private origin, the claim may be based on the harm caused by the defendants or the right of the State Party to

[841] See Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 161, 169. For an in-depth analysis of the asset recovery process and of the UNCAC's provisions see Chapter III of the present work.
[842] Article 57(3)(b) of the UNCAC.
[843] Article 57(3)(c) of the UNCAC.
[844] Pedriel-Vaissier, M., 'Is There an Obligation Under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' (n. 837).
[845] Cf. para 3.4.4.

seek the return of any illicit advantage gained from misuse or misrepresentation of public office or any authority vested in it.'[846]

The StAR's database of cases[847] only reports a few foreign bribery cases where asset recovery took place, such as in the context of the U.N. Oil-for-Food cases where criminal proceeds were forfeited to the U.S. and then transferred to the Development Fund for Iraq for the benefit of the Iraqi population.

With specific regard to the TSKJ Consortium, Nigeria should not only expect that the public funds laundered abroad by its politicians are repatriated, but should also consider tackling the property derived from or obtained through the commission of foreign bribery. To do that Nigeria should file, when possible, a compensation claim in the home States of the TSKJ' Consortium companies and of its agents, which may then lead to return some proceeds of the bribery scheme pursuant to Article 57(3)(b) of the UNCAC. According to some authors States are bounded to permit the latter strategy also towards the fines imposed through foreign bribery settlements, but the reading of the UNCAC is debated in this respect:[848] however one should agree with the fact that States 'victim' of foreign bribery 'should be given both legal standing and the opportunity to present the harm they suffered in any proceedings',[849] including summary proceedings and settlements.

Although this way to recover asset has not received particular attention by the general public, which regards asset recovery as only linked to grand corruption, one should take into consideration this potential tool to recover proceeds of foreign bribery. At the same time one should also consider the (ambiguous) political message contained in the Resolution 5/3 of the 5th Conference of the States Parties to the UNCAC, which 'urges States parties to consider the

[846] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 204.

[847] StAR, 'Asset Recovery Database', available at http://star.worldbank.org/corruption-cases/?db=All.

[848] See Pedriel-Vaissier, M., 'Is There an Obligation Under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' (n. 837)*; contra*, Stephenson, M., 'UNCAC Does Not Require Sharing of Foreign Bribery Settlement Monies' (n. 837).

[849] Solorzano, O. and P. Gomes Pereira, 'The Swiss Plea-bargaining Practice and Asset Recovery' (n. 737), 293.

use of the tools set out in Chapter V of the Convention when resolving cases involving offences outlined in the Convention, including transnational bribery.'[850]

[850] COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fifth session, held in Panama City from 25 to 29 November 2013' (n. 383), 12.

5.3. The Kazakhgate

The second case which I will consider in this Chapter is also about episodes of foreign bribery like in the previous one. Although it does not involve as many jurisdictions as the previous set of cases, it is highly interesting insofar as it concerns three jurisdictions whose cooperation led to some positive outcomes, especially in relation to the recovery of the proceeds of corruption.

5.3.1. Overview of the Case[851]

The specific bribery episode which I will consider is part of bigger scheme which was denominated 'Kazakh-gate'.[852] A crucial role in the latter scheme was played by the Mercator Corporation, a small merchant bank based in the U.S. and in Kazakhstan which was founded in 1984 for the purpose of arranging transactions first in the Soviet Union and then, from 1991, in the newly independent Republic of Kazakhstan. The Chairman of this company, Mr James H. Giffen, represented and advised Kazakhstan in various capacities, generally involving the negotiations and sale of interests in Kazakh natural resources.[853][854] In particular,

[851] For a detailed reconstruction of the factual background of the case up until 2004 see Global Witness, 'Time for Transparency. Coming Clean on Oil, Mining and Gas Revenues', (March 2004) 7-17.

[852] According to Human Rights Watch, the name 'Kazakh-gate' is widely used in Kazakhstan and is derived from the Watergate political scandal in the U.S. in the early 1970s. See Human Rights Watch, 'Political Freedoms in Kazakhstan' Volume 16(3) (April 2004), fn 14. As of October 2014, a similar term is used in the French media to refer to an alleged case of corruption related to the purchase of 45 helicopters of the company Airbus Helicopter (formerly 'Eurocopters') by Kazakhstan in 2010 for €2 billion. Notably, some of the allegations also concern the former French President Nicolas Sarkozy. On the latter 'French' Kazakhgate see Lillis, J., 'Kazakhstan: Will French Kickback Probe Dog Nazarbayev's Brussels Trip?' *Eurasianet* (7 October 2014).

[853] According to U.S. Department of Justice, 'United States v. James H. Giffen, et al.', available at http://www.justice.gov/criminal/fraud/fcpa/cases/giffen-etal.html, Mr Giffen allegedly made corrupt payments to senior Kazakh officials in relation to the following contracts : 1) Mobil Oil's 1996 purchase of a 25% share in the Tengiz oil field; (2) Mobil Oil's 1995 agreement to finance the processing and sale of gas condensate from the Karachaganak oil and gas field; (3) Amoco's 1997 purchase of a share in the Caspian Pipeline Consortium; (4) Texaco and other oil companies' purchase of a share in the Karachaganak oil and gas field in 1998; (5) Mobil and other oil companies' 1998 purchase of exploration rights in the Kazakh portion of the Caspian Sea, and; (6) Phillips Petroleum's 1998 purchase of Caspian Sea exploration rights.

pursuant to a comprehensive advisory agreement reached between Mercator Corporation and the Kazakh Ministry of Oil and Gas Industry, the former company took the role of advising the latter Ministry on planning and developing foreign investment projects relating to the exploration, development, production, transportation and proceeding of oil and gas. Every time a transaction was made, the company retained a fee and Mr Giffen was awarded titles by the Government, which eventually made him counsellor to the President of Kazakhstan.

The complaint of the U.S. prosecutors focused on one $1.05 billion transaction in particular, by which Mobil Oil purchased a stake in the Tengiza oil field. According to the charges, Mobil oil agreed to pay the success fees owed by Kazakhstan to Giffen and his company Mercator, and out of those fees, Giffen made unlawful payments of $22 million dollars to secret Swiss accounts beneficially owned by two high level Kazakh officials ('KO1' and 'KO2'). J. Bryan Williams, a former executive at Mobil Oil Corporation (now Exxon-Mobil) and a personal friend of Giffen, allegedly received a $2 million kickback from Giffen as part of this transaction.[855] More generally, between 1995 and 2000, Giffen allegedly received approximately $70 million paid by various oil companies into escrow accounts in Switzerland in connection with the purchase of oil and gas rights in Kazakhstan to be diverted into secret Swiss bank accounts under his control. Giffen then used this money to make additional unlawful payments of approximately $55 million to the two senior officials of the Kazakh Government ('KO1' and 'KO2').

However, the investigation of the U.S. DOJ could only be launched after the Swiss judicial authorities of Geneva tipped off and provided documentation to the U.S. about unusual bank transactions in 30 accounts at four of its banks in 1999. In turn, the Swiss authorities were contacted by a new Kazakh government accusing a former prime Minister of embezzling several $ millions of governmental funds into offshore accounts that he controlled. The

[854] According to Michaud, J., 'From Astana to "Syriana" ' *New Yorker* (12 Aprile 2011), 'a character based on Giffen and played by Tim Blake Nelson appeared in the 2005 oil and espionage drama, "Syriana".'

[855] According to U.S. Department of Justice, 'United States v. James H. Giffen, et al.' (n. 853), Williams was sent by Mobil's Chairman to finalize the negotiations with Kazakhstan regarding Mobil's purchase for approximately $1 billion of a 25% interest in the Tengiz oil field in 1996. After the Tengiz deal closed, Mobil paid $41 million to a New York merchant bank that represented the Republic of Kazakhstan in the transaction. The merchant bank's Chairman kicked back $2 million of that payment to Williams, by transferring money through a secret Swiss bank account.

mutual legal assistance between the U.S. and Switzerland was thus highly fruitful insofar as the joint efforts of the investigators from the two countries revealed a pattern of criminal transactions between Kazakhstan and American and European oil companies.

5.3.2. Legal Outcomes of the Case

5.3.2.1. United States

Following the investigations, Mr Giffen was accused by the U.S. authorities of being 'the architect of a $78m (£49m) scam whereby signature payments on six key Kazakh oil and gas schemes, including the huge Kashagan field were routed to Swiss bank accounts belonging to the country's president, Nursultan Nazabayev, and other top officials.'[856] After more than the seven of prosecution, in August 2010 prosecutors allowed Giffen to plead guilty to failing to report a foreign bank account in a 1996 tax return while his firm Mercator Corporation, pleaded guilty to one count of violating the Foreign Corrupt Practices Act by giving two snowmobiles to officials in Kazakhstan in 1999.[857] As part of plea agreements, the U.S. citizen James Giffen and the Mercator Corporation relinquished any right or title they may have to additional Swiss accounts.

Notwithstanding the tax charge, Mr Giffen was finally released from any criminal charge in November 2009 and his Mercator Corporation pleaded guilty to one count violation of

[856] Macalister, T., 'Swiss Join Oil Bribery Inquiry' *The Guardian* (7 May 2003). Cf. also U.S. Department of Justice, 'United States v. James H. Giffen, et al.' (n. 853).

[857] See U.S. Department of Justice, 'New York Merchant Bank Pleads Guilty to FCPA Violation; Bank Chairman Pleads Guilty to Failing to Disclose Control of Foreign Bank Account' (6 August 2010), as well as Levine, S., 'James Giffen's Trial Ends: A Slap on the Wrist, and the Triumph of American Putinism' *Foreign Policy* (6 August 2010), and Glovin, D., 'Seven-Year Kazakh Bribery Case Ends With `Sputtering' Misdemeanor Plea' *Bloomberg* (7 August 2010), which reports the opinion of R Cassin, Editor of the FCPA Blog, according to whom 'It's a sputtering end for such a high-profile prosecution. The case shows how complicated FCPA prosecutions can be. Foreign rulers and governments are always involved, evidence is overseas, and in Giffen's case, the shadowy world of intelligence and energy policy all converged.'

Foreign Corrupt Practices Act and was fined with the $32,000.[858] The reasons for such modest criminal consequences emerges from the word of U.S. District Judge William H. Pauley in New York, who actually praised the role of Mr Griffen as a 'valued foreign asset of the American intelligence'[859] within the delicate U.S. - Soviet Union relationship by emphasizing that:

> 'Mr. Giffen was a significant source of information to the U.S. government and a conduit of secret information from the Soviet Union during the Cold War.'

Furthermore the Judge added that the classified information showed that he:

> 'Advanced the strategic interests of the United States and American businesses in Central Asia. Throughout this time (he) continued to act as a conduit for communications on issues vital to America's national interest in the region.'

Remarkably, the Judge went as far as apologizing for the effects of the prosecution on Mr Giffen, who:

> 'Was one of the only Americans with sustained access to' high levels of government in the region, Pauley said. 'These relationships, built up over a lifetime, were lost the day of his arrest. This ordeal must end. How does Mr.

[858] See U.S. Department of Justice, 'United States v. James H. Giffen, et al.' (n. 853), Case No. 1:03-cr-00404-WHP (S.D.N.Y.).
[859] Cf. Levine, S., 'Was James Giffen Telling the Truth?' *Foreign Policy* (19 November 2010).

Giffen reclaim his reputation? This court begins by acknowledging his service.'[860]

Besides Mr Griffen and his company Mercator Corporation, the U.S. prosecuted J. Bryan Williams, a former executive at Mobil Oil Corporation (now Exxon-Mobil) and a personal friend of Giffen, who allegedly received a $2 million kickback from Giffen as part of the transaction.[861] In September 2003 he was sentenced to three years and 10 months in prison on income tax evasion charges, after he pleaded guilty to a two-count felony in June 2003.[862] Interestingly, the bribe was 'only' punished because Mr Williams did not pay any tax on it.

Lastly, the company eventually benefitting the most from the deal, that is Exxon Mobil, was not accused of any wrongdoing, nor have the other oil companies with which Mr Giffen engaged in transactions.[863]

5.3.2.2. Kazakhstan

As for the related proceedings in other countries in Kazakhstan, former Prime-Minister of Kazakhstan from 1994 to 1997 and current leader of the oppositional Kazakh Republican People's Party living in Europe in exile was sentenced in absentia to 10 years hard labour in September 2001 on charges of abuse of office, tax evasion, taking bribes, and illegal possession of weapons. The opposition has called the trial a farce, while the office of the

[860] See U.S. Department of Justice, 'United States v. James H. Giffen, et al.' (n. 853), Judgment of 23 November 2010. Cf. Levine, S., 'Was James Giffen Telling the Truth?'(n. 859), and Cassin, R. L., 'No Punishment For "Hero" Giffen' *FCPA Blog* (22 November 2010).

[861] See U.S. Department of Justice, 'United States v. J. Bryan Williams', available at http://www.justice.gov/criminal/fraud/fcpa/cases/williamsjb.html.

[862] See U.S. Department of Justice, 'Former Mobil Executive Sentenced on Tax Evasion Charges in Connection with Kazakhstan Oil Transactions' (18 September 2003). As part of his sentence, he had also to pay a fine of $25,000 and to pay more than $3.5 million in restitution to the U.S. Internal Revenue Service as well as penalties and interest.

[863] Exxon Mobil does not appear among the subjects which have been interested by FCPA and related enforcement actions in U.S. Department of Justice, 'FCPA Cases and Related Enforcement Action', available at http://www.justice.gov/criminal/fraud/fcpa/cases/a.html. Cf. also Glovin, D., 'Seven-Year Kazakh Bribery Case Ends With `Sputtering' Misdemeanor Plea' (n. 857).

Organization for Security and Cooperation in Europe in Kazakhstan has expressed doubt that the sentence conforms to international standards of justice. Interestingly Akezhan Kazhegeldin received an honorary document by the European Parliament in Strasbourg, France to 'support for the democratic opposition in Kazakhstan, as well as anyone who is being persecuted for their political views in the country.'[864] On the other hand, although the briberies' beneficiaries of the frozen accounts were identified no further inquiries were initiated by Kazakh authorities.[865]

5.3.2.3. Switzerland

Finally, although the Swiss authorities were active from the beginning of the case, Switzerland formally joined the U.S. investigation in 2003 in what back then was the biggest case of bribery of foreign officials.[866] Thanks to the mutual legal assistance treaty between the U.S. and Switzerland,[867] in August 1999 the Swiss authorities froze approximately $84 million which were first held on deposit in the account of Orel Capital Ltd. ('Orel') at Credit Agricole Indosuez in Geneva[868] and then transferred to an account held in the name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan at Pictet & Cie, Geneva, Switzerland.[869] Following a civil forfeiture action filed by the U.S. DOJ in 2007,[870] the $84 million of proceeds from Giffen's alleged scheme to bribe senior Kazakh officials were eventually confiscated by Swiss authorities in 2011. However, before that in 2007, the United

[864] 'Kazakhstan: European Parliament Singles Out Opposition Leader For Recognition' *Eurasianet* (14 June 2002).

[865] Cf. Asset Recovery Knowledge Centre, 'Kazakhstan Country Profile', available at http://www.assetrecovery.org/kc/node/6c5456d7-80c2-11dd-aec8-83823fa6e881.html.

[866] Macalister, T., 'Swiss Join Oil Bribery Inquiry' (n. 856).

[867] Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, 27 UST 2019, TIAS 8302 (May 25, 1973; January 23, 1977), available in English (unofficial translation) at http://www.rhf.admin.ch/etc/medialib/data/rhf/recht.Par.0010.File.tmp/sr0-351-933-6-e.pdf.

[868] Orel was a British Virgin Islands corporation beneficially owned by a Liechtenstein foundation, the sole beneficiaries of which were individuals.

[869] AMENDED MEMORANDUM OF UNDERSTANDING Among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan, April 2008, available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_Switzerland_MOU-CH-US-KZ_BOTA_FDN_2008.pdf.

[870] U.S. Department of Justice, 'United States v. Approximately $84 Million' (5 March 2007).

States, Switzerland and Kazakhstan agreed[871] to use the latter amount of money to create a non-governmental organization in Kazakhstan, independent of the Kazakh government, to benefit underprivileged Kazakh children.[872]

5.3.3. International Cooperation Issues of the Case

The present case of bribery reveals once again the essential role played by international cooperation to investigate and prosecute corrupt practices, as well as to recover assets.

To begin with, it appears that the whole investigation arose from the communication of the Kazakh authorities to the Swiss counterparts in 1999 regarding the possibility that the former Prime-Minister of Kazakhstan had embezzled several millions of U.S. dollars of governmental funds into offshore accounts that he controlled.[873]

After that, the cooperation between the U.S. and Swiss authorities was fundamental to detect the pattern of transactions between Kazakhstan and American/European oil companies where Mr Giffen was involved, including the $1.05 billion contract by which Mobil Oil purchased a stake in the Tengiza oil field. In spite of the fact that in the U.S. the latter oil company was not prosecuted and the case against Mr Giffen did not lead to any conviction, mostly because it was acknowledged his 'diplomatic' role in the delicate balances created by the Cold War, the cooperation between the U.S. and Switzerland brought to remarkable results and shows that a reciprocal assistance can be beneficial for both sides of the cooperating relationship. Firstly, one should stress the proactive communication of the Geneva judicial authorities which tipped off and provided documentation to the U.S. authorities about unusual bank transactions in 30 accounts at four Swiss banks and, at the same time, proceeded with the freezing of more than a dozen accounts concerning the findings of possible violations of the Foreign Practice Corrupt Act. The latter information turned out to be fundamental to enable the U.S. counterparts to initiate criminal proceedings against Mr Giffen and his company Mercator

[871] Amended Memorandum of Understanding by the Swiss Confederation, United States and the Republic of Kazakhstan (May 2008), available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_Switzerland_MOU-CH-US-KZ_BOTA_FDN_2008.pdf.
[872] 'Kazakh Child and Youth Development Foundation', available at http://www.bota.kz/en/.
[873] Cf. Asset Recovery Knowledge Centre, 'Kazakhstan Country Profile' (n. 865).

Corporation,[874] as well as the civil forfeiture action against the $84 million.[875] Secondly, the Swiss authorities opened a formal investigation in 2003 thanks to the elements gathered by the U.S. prosecutions against Mr Giffen and Mr Williams. Thirdly, the U.S. and Switzerland showed an effective level of cooperation in relation to asset tracing, freezing, seizure and confiscation since the Swiss authorities froze an $84 million-worth account of a senior Kazakh official following a mutual legal assistance request from the U.S. pursuing a restraint order for purpose of confiscation.[876] As a consequence Switzerland provided prompt and effective assistance by forfeiting an account nominally belonging to the Treasury of the Ministry of Finance of the Republic of Kazakhstan which nevertheless contained assets subject to the power of disposal by a high official of the Kazakh Government. From the UNCAC perspective, the latter kind of cooperation is an example of the kind of assistance which States are obliged to provide pursuant to Article 54(2)(b) of the UNCAC, which require States Parties to implement a foreign confiscation order 'upon a request that provides a reasonable basis for the requested State Party to believe there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation'. [877]

5.3.3.1. The Agreement Establishing the BOTA Foundation

One of the most interesting aspects of the international cooperation dimension of the present case is the innovative agreement concluded between the U.S., Swiss and Kazakh authorities to return the bribes to the country whose officials were bribed (i.e. Kazakhstan). Interestingly, the returned assets were not funds stolen from Kazakhstan, but rather bribes paid by a U.S. businessman to Kazakh officials.

In 2007 the latter countries signed a Memorandum of Understanding ('Memorandum') concerning the assets that had been frozen and seized by Switzerland at the request of the

[874] U.S. Department of Justice, 'United States v. James H. Giffen, et al.' (n. 853).
[875] U.S. Department of Justice, 'United States v. Approximately $84 Million' (n. 870).
[876] U.S. Department of Justice, 'United States v. Approximately $84 Million' (n. 870).
[877] Cf. COSP, 'Digest of Asset Recovery Cases', CAC/COSP/2013/CRP.10 (2013), 46-7.

United States in a forfeiture action.[878] Pursuant to the Memorandum, the funds had to be used to establish and implement three programs, one of whom was the establishment of the BOTA[879] Foundation, an independent, non-profit, and non-governmental foundation created to improve the lives of children and youth suffering from poverty in Kazakhstan.[880] In particular, the BOTA Foundation had to support activities aimed at improving child and youth welfare, including: reducing child labour, provision of community-based services to disabled children, shelters for runaway and homeless children, improving child nutrition, promoting and developing family-based care for children deprived of parental care, raising awareness of and decreasing child abuse and violence, reducing juvenile delinquency, expanding youth activities and resource centres, and skills development for school drop-outs. For this purpose the Foundation has set up three sub-programs, namely 'Conditional Cash Transfers Program', 'Social Services Program' and 'Tuition Assistance Program'.[881]

Particular emphasis was laid in the Memorandum to define the organizational structure and the overview mechanisms to ensure the independence of the BOTA Foundation and its activities. Accordingly, the BOTA Program is monitored by the U.S. and Swiss Governments together with the World Bank, which supervises and monitors the Program, its administration and its expenditures. At the operative level the administration, management, and expenditures of the BOTA Foundation have to be conducted by a reputable international non-governmental organization serving as the BOTA Program Manager. As for the founders of the Foundation, the Memorandum prescribed that they 'must be completely independent of the Government of

[878] Amended Memorandum of Understanding by the Swiss Confederation, United States and the Republic of Kazakhstan (May 2008), available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_Switzerland_MOU-CH-US-KZ_BOTA_FDN_2008.pdf.

[879] Bota means 'young camel' in Kazak.

[880] 'Kazakh Child and Youth Development Foundation', available at http://www.bota.kz/en/. According to the Memorandum of Understanding (CIT), the other two agreed programs consisted in:
(i) a 'Public Finance Management Review (PFMR) Program,' through which the Government of the Republic of Kazakhstan, with the support of the World Bank, shall undertake a programmatic Public Finance Management Review over a period of five years to examine and analyze the budget management process in order to formulate a comprehensive, realistic and strategic plan for improving public financial management in Kazakhstan;
(ii) an 'Extractive Industries Transparency Initiative (EITI) Program,' through which the Government of the Republic of Kazakhstan, with the support of the World Bank, will prepare and implement a comprehensive strategy and action plan to increase transparency over payments and revenues of the extractive industries operating in Kazakhstan (including oil, gas, and mining).

[881] For an overview of these programs of the BOTA Foundation as well as the results accomplished up until 31 December 2013 see BOTA Foundation, 'Independent Auditor's Report and Special Purpose Financial Statements for the Year Ended 31 December 2013' (April 2014).

the Republic of Kazakhstan, its officials, and their personal or business associates. The Founders must be respected community figures and preferably shall be known for their championing of children's causes.'[882] The latter criteria must be also respected by the seven-member Board of Trustees (five Kazakh citizens, one representative from the U.S. Government and one from the Swiss Government), which is the permanently operating collegial managing body of the BOTA Foundation in charge of monitoring the expenditure of the money.'[883]

The BOTA Foundation was funded so far with $ 115 million[884] held on account No. T-94025 with Pictet and Cie in Switzerland in the name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan. The assets are transferred in tranches and deployed under the supervision of two internationally recognized institutions ('IREX Washington' and 'Save the Children') together with the advice of the World Bank. The program should finish in December 2014, even if the latest Independent Auditor's Report declared that to continue the activities of the Foundation, memoranda of understating 'are being extended.'[885]

5.3.4. An Assessment

The establishment of the BOTA Foundation through a trilateral memorandum of understanding is an innovative solution in relation to the return and disposal of confiscated assets centred into the cooperating efforts of three States. In this context a few remarks can be made.

[882] Amended Memorandum of Understanding by the Swiss Confederation, United States and the Republic of Kazakhstan (May 2008), available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_Switzerland_MOU-CH-US-KZ_BOTA_FDN_2008.pdf.

[883] For further information on the BOTA Foundation's organizational structure see Malizani Jimu, I., 'Asset Recovery and the Civil Society in Perspective: Nigeria, Peru, the Philippines and Kazakhstan Cases Considered' in Fenner Zinkernagel, G., C. Monteith and P. Gomes Pereira (eds), *Emerging Trends in Asset Recovery* (n. 429) 317, 324-6, and Fenner Zinkernagel, G. and K. Attisso, 'Past Experience with Agreements for the Disposal of Confiscated Assets' (n. 625), 339-41.

[884] Including all interest, income, benefits or other proceeds traceable thereto.

[885] BOTA Foundation, 'Independent Auditor's Report and Special Purpose Financial Statements for the Year Ended 31 December 2013' (April 2014). Should the BOTA Foundation operations not continue, one could question the sustainability of their impact.

Firstly, the BOTA Foundation is to be considered as a balanced way to deal with the two opposite arguments which usually emerge in relation to States' obligations to return stolen assets. On the one hand there is the idea that the population of victim States should have back the bribes taken by its politician to sell out public resources; on the other hand there is concern that the confiscated assets are sent back to the victim State in order to be looted again by the same corrupt political elite. As it emerges from the Memorandum, the latter arguments could well apply to the present case, where Kazakhstan claimed that 'it is the sole beneficiary of the Funds and that the Funds are its property', but also where high officials of the government of Kazakhstan turned out to be the beneficial owners of accounts into which bribes on behalf of American oil companies were paid over a period of years.[886] Going beyond the latter conflicting dynamics through the establishment of a foundation to the benefit of the victim State can be thus regarded a positive development in the realm of asset recovery.

Secondly, the wording of the Memorandum of Understanding is rather neutral and non-accusatory, and it is rather focused on the projects and programs which State intend to establish and implement.[887] The absence of any responsibility emerging from the latter document may sound unsatisfactory because it seems to ignore the fact that the contracts and transactions from U.S. companies to Kazakh politicians were concluded through bribery. Hence, the lack of any reference to domestic proceedings and investigations related to the underlying facts puts a layer of hypocrisy on the whole agreement. On the other hand, one should consider that the aim of the Memorandum was not to establish responsibilities and that – if the latter was the case – the three States would have probably not come to any agreement.

[886] Amended Memorandum of Understanding by the Swiss Confederation, United States and the Republic of Kazakhstan (May 2008), available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_Switzerland_MOU-CH-US-KZ_BOTA_FDN_2008.pdf, where one can also read that 'the Government of the United States asserts that if it were to forfeit the Funds, in keeping with its practice of using forfeited funds, where practicable and not inconsistent with law, to restore forfeited property to victims of the underlying criminal violation or to protect the rights of innocent persons in the interest of justice, it would endeavor to have the Funds used for the benefit of the people of Kazakhstan.'

[887] Amended Memorandum of Understanding by the Swiss Confederation, United States and the Republic of Kazakhstan (May 2008), available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Kazakhstan_Oil_Switzerland_MOU-CH-US-KZ_BOTA_FDN_2008.pdf.

Thirdly, the mechanisms and requirements set in the Memorandum prescribe and seem to ensure the independence[888] and the effective monitoring[889] of the Foundation's activities. Thus they should be preferred to those agreements which lead to the return of funds to the national Treasury without monitoring or with monitoring of government expenditures, but not independent administration of the funds. In this sense a 2009 paper of the Basel Institute on Governance's International Centre for Asset Recovery examined four experiences in asset recovery, where it emerged that unmonitored programs have their own set of problems and expenses.[890] On the other hand, as evidenced in the annual independent audit reports, one should also take into account that independent, monitored programs consume a large percentage of the resources and thus the funds which are actually allocated to grants are only a percentage of the whole budget.[891] Furthermore, the monitoring mechanisms did not prevent that two former staff of BOTA Foundation embezzled some of the funds, even though they were arrested in April 2014 and are going to negotiate a repayment plan in relation to the stolen funds.[892]

[888] In this context Fenner Zinkernagel, G. and K. Attisso, 'Past Experience with Agreements for the Disposal of Confiscated Assets' (n. 625), 341, notice that 'apart from the tripartite arrangement, the most striking difference of this arrangement is that the agreements explicitly prescribe that BOTA has to remain independent from the Kazakh government. BOTA further cannot fund activity of this government, its ministries or national public institutions.'

[889] As for the monitoring, Fenner Zinkernagel, G. and K. Attisso, 'Past Experience with Agreements for the Disposal of Confiscated Assets' (n. 625), 341 stress the fact that it is carried out ex ante (rather than ex post) and that it is carried out independently under the oversight of the World Bank. Cf. also the qualitative evaluations of the BOTA Programme such as Oxford Policy Management, 'Kazakhstan: External Evaluation, BOTA Programmes. Analysis of BOTA Programme Costs, Oct 2008–Jun 2011' (February 2012).

[890] Malizani Jimu, I., 'Managing Proceeds of Asset Recovery: The Case of Nigeria, Peru, the Philippines and Kazakhstan' (n. 883).

[891] See BOTA Foundation, 'Reports', available at http://www.bota.kz/en/index.php/pages/index/90. For example, as explained in COSP, 'Digest of Asset Recovery Cases' (n. 877), 86, in 2011 grants for the various programs were 9 million dollars out of total net expenditures of nearly 16 million dollars. Treating not just grants but all expenses allocated to programs activities as delivery of services to the intended recipients accounted for 13 million dollars. The remaining 3 million dollars went primarily for a management fee to an American non-government organization and an evaluation contract. According to Fenner Zinkernagel, G. and K. Attisso, 'Past Experience with Agreements for the Disposal of Confiscated Assets' (n. 625), 341, administrative costs amount to one third of the total fund returned to Kazakhstan, even though in the last years the latter costs have been reduced by the progressive replacement of all foreign specialists with local managers.

[892] BOTA Foundation, 'Independent Auditor's Report and Special Purpose Financial Statements for the Year Ended 31 December 2013' (n. 881).

In conclusion, then, one should acknowledge the significant level of cooperation established by the U.S., Switzerland and Kazakhstan in the realm of asset recovery which brought to the creation of an independent and monitored institution using the confiscated funds to the benefit of the population in the victim States.[893] Although some controversial issues have emerged in relation to the administration costs[894] and the lack of any political responsibility in the Memorandum of Understanding, the idea of establishing the BOTA Foundation can be regarded as 'an artfully and carefully expressed compromise agreement in the spirit of Article 57(5) of the Convention.'[895]

[893] According to Pedriel-Vaissier, M., 'Is There an Obligation Under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' (n. 837), who comments the experience of the BOTA Foundation, 'by all accounts, their work has been extraordinarily successful and, notably, substantially corruption-free.'

[894] With regards to this issue the analysis carried out by Oxford Policy Management, the external evaluator of the BOTA Programs, concludes that: 'Cash transfer programmes elsewhere in the world that have been running for several years, have very large numbers of beneficiaries or are operated by government agencies tend to report lower cost–transfer ratios [...]. This is because their design costs are offset against a greater number of enrolments and/or payments. It could also be because governments may not report their own running costs, such as the cost of the time of existing staff, since they may view these as sunk costs. The *Bolsa Familia* programme in Brazil reserves 4% of its budget for administration, while the *Oportunidades* programme in Mexico uses 9% of its budget on administration. The BOTA [...] is unlikely to be able to reach these economies of scale because it is a much smaller programme and gives money to beneficiaries for shorter periods of time. See Oxford Policy Management, 'Kazakhstan: External Evaluation, BOTA Programmes' (n. 889).

[895] COSP, 'Digest of Asset Recovery Cases' (n. 877), 86, whereas Article 57(5) provided that '[w]here appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.'

5.4. The 'Arab Spring' Cases

The third set of cases which I will address in the following paragraphs do not deal with episodes of foreign bribery like the previous one, but rather with cases of embezzlement of public money. In this context my analysis of their cooperative dimension will not concentrate on the investigations of the underlying facts but rather on the joint efforts of different States to repatriate the proceeds of corrupt practices to the victim States. Interestingly, the cases which I will consider have arisen out the so-called 'Arab Spring', that is the political upheavals which swept over several States in the Middle East and North Africa ('MENA') Region in the last years and which are still producing consequence within and beyond that region. Like in many other situations, the following cases of asset recovery have arisen after the collapse of a kleptocratic regime[896] in view of pursuing the proceeds of corrupt practices perpetrated by former heads of State, their relative and associates.[897] Although there were high expectations in relation to the recovery of stolen assets belonging to former presidents of the States where the Arab Spring took place, the persisting political instability of the region and other issues of international cooperation and technical competence still represent significant challenges in the asset recovery process.

5.4.1. The Uprisings in Tunisia, Egypt and Libya

The so-called Arab Spring identifies a series of anti-government uprisings in various countries of the North Africa and the Middle East, and which first erupted in Tunisia in December 2010. Since it is not within the purpose of the present work to analyse all the events which followed from a historical and political perspective, in this paragraph I merely intend to report

[896] According to 'Oxford English Dictionary' <http://www.oed.com/>, the word 'kleptocracy' – which literally translated from Greek means 'rule by the thieves' – means 'a ruling body or order of thieves. Also, government by thieves; a nation ruled by this kind of government.' Cf. also para 3.1.3.
[897] Cf. StAR, 'Towards a Global Architecture for Asset Recovery' (2010), 24.

those consequences which are most relevant for the purpose of asset recovery, that is the one concerning the former leaders of Tunisia, Egypt and Libya.[898]

In Tunisia, the widespread discontent which led to the mass demonstrations in December 2010 sparked after a young, unemployed man, Mohamed Bouazizi, set fire to himself after officials stopped him selling vegetables in Sidi Bouzid. In the following unrest around 300 people were killed and in January 2011 Tunisia's President Ben Ali was forced to resign after 23 years in power and go into exile in Saudi Arabia. He was later sentenced to life in prison in absentia. After that elections were held in October 2011 and October 2014, and a new Constitution was adopted in January 2014.[899]

Protests in Tunisia were followed shortly after by the uprising in Egypt, where after eighteen days of mass protests, the then President Hosni Mubarak was forced to resign in February 2011. Following Mubarak's resignation, the Supreme Council of the Armed Forces assumed presidential powers, and the following parliamentary elections saw the affirmation of the Islamist Muslim Brotherhood's Freedom and Justice Party and Salafist al-Nour party. In June 2012, the Brotherhood's Mohammed Morsi was elected president, but public opposition against him grew rapidly, especially in relation to measures granting himself far-reaching powers and to the passage of what many considered an Islamist-leaning draft constitution. Mr Morsi was deposed by the military in July 2013 after massive protests and replaced by an interim government. Security forces then launched a crackdown on the Muslim Brotherhood, killing almost 1,000 people in Cairo.[900] In the meantime, Mubarak was sentenced to life imprisonment in June 2012 on charges related to corruption and the killing of protesters. However, he was later granted a retrial in January 2013 and in November 2014 a court in Cairo has dropped the case against him for both the involvement in corruption and the killing of protesters during the 2011 uprising.[901]

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[898] For an updated list of academic works on the Arab Spring please refer to 'Elliott School of International Affairs' Project on Middle East Political Science', available at http://pomeps.org/category/academic-works/arabuprisings/. See also Cornell University Library. 'Arab Spring: A Research & Study Guide', available at http://guides.library.cornell.edu/arab_spring.

[899] See Amara, T., 'Arab Spring Beacon Tunisia Signs New Constitution' *Reuters* (27 January 2014).

[900] According to 'Arab Uprising: Country by Country - Egypt' *BBC News*, 'Egypt is polarised between supporters of the interim government and the military on the one-hand, and supporters of the Muslim Brotherhood and those who fear the authorities have become too repressive on the other. Some analysts say Egypt has returned to the kind of police state which the revolution aimed to remove.'

[901] See 'Egypt Court Dismisses Charges against Mubarak' Al Jazeera (29 November 2014).

Political uprising in Libya begun in February 2011 after security forces in the eastern city of Benghazi opened fire on a protest. Shortly after anti-government demonstrations erupted in other towns and they swiftly evolved into an armed revolt seeking to remove Muammar Gaddafi from power. Following a U.N. Security Council resolution of March 2011, the NATO powers imposed a no-fly zone and launched air strikes on government targets. Supported by military assistance from the West and several Arab states, rebel forces took Tripoli after six months of fighting in which several thousand people were killed. After four decades in power, Gaddafi went on the run and was captured and killed outside Sirte in August 2011. The National Transitional Council, which led the revolt, declared Libya officially 'liberated' and promised a pluralist, democratic state and in July 2012, it organised elections for an interim parliament, the General National Congress, in which liberal, secular and independent candidates won over the Muslim Brotherhood-aligned Justice and Construction Party. In spite of the elections, after Gaddafi's overthrow Libya has been characterized by severe instability, with some 300 revolutionary militias clashing repeatedly, defying requests to disarm and besieging government buildings.[902]

What brings together the latter events from the perspective of asset recovery is that all the three former Presidents of Tunisia, Egypt and Libya (Ben Ali, Mubarak and Gaddafi), once they have been overthrown have been accused of corruption and embezzlement of public money, which have then been secreted in foreign jurisdictions across the world (Belgium, Canada, France, Germany, Italy, Lebanon, Spain, Switzerland, the U.K. and the U.S.) or used to buy properties and luxurious assets.[903] According to the StAR's Asset Recovery Watch Database[904] and the Economist,[905] Mubarak is considered to have looted up to $70 billion, while in Tunisia it is estimated that $3 to 5 billion was embezzled by former president Beni Ali.[906] As for Libya, Gaddafi has allegedly transferred $30 to 80 billion of public money in

[902] See, for instance, recent news of uncontrolled violence such as 'Libya Violence Escalates with 22 Killed in Battle for Tripoli Airport' *The Guardian* (3 August 2014).

[903] Cf. Marshall, A., 'What's Yours Is Mine: New Actors and New Approaches to Asset Recovery in Global Corruption Cases' (April 2013) 018 Center for Global Development Policy Paper.

[904] StAR, 'Asset Recovery Database', available at http://star.worldbank.org/corruption-cases/?db=All.

[905] 'Making a Hash of Finding the Cash' *The Economist* (11 May 2013).

[906] Cf. also Perry Danziger, M., 'Corruption, Tax Evasion, Criminal Activity Cost Tunisia US$1.16 Billion Per Year From 2000-2008' *Global Financial Integrity Press Release* (15 January 2011).

financial centres around the globe.[907] As I will illustrate in the following paragraphs, although those leaders' assets have been relatively rapidly frozen in foreign jurisdictions, serious problems arose in the process of confiscation and repatriation, contributing to lead the affected countries to further political unrest and frustration. While I will go through each phase of the process (asset identification, tracing, freezing, confiscation and repatriation) in relation to the assets stolen by Ben Ali, Mubarak and Gaddafi and their relatives, my aim is to enquire the most significant challenges and, especially, the issues arisen in relation to international cooperation between victim States (Tunisia, Egypt and Libya) and the States were assets were transferred (mostly 'western' countries).

5.4.2. Asset Tracing, Identification and Freezing

As I illustrated in the previous Chapters,[908] any process of asset recovery begins by locating the assets and establishing their link with the individual's criminal activity in order to proceed with their freezing. In this phase, multiple jurisdictions come into play and thus need to be highly cooperative to target the assets, which may be either in the control of the suspect or in the possession of third parties.

5.4.2.1. Unilateral Measures to Freeze Assets

The first way States and international organizations aimed at tracing, identifying and freezing assets in the 'Arab Spring' cases under consideration was the issuing of unilateral orders to provisionally freeze the assets connected to the political leaders of fallen States, as well as their family members and associates. As from the flight of Ben Ali from Tunisia in January 2011, Switzerland, the EU, Canada and other States passed important measures to prevent that assets linked to an allegedly corrupt leader were transferred into other (safer) States.

[907] Martini, M., 'Lessons Learnt in Recovering Assets from Egypt, Libya and Tunisia' (30 July 2014) Transparency International Anti-corruption Helpdesk.
[908] Cf. para 3.3.3.

5.4.2.1.1. Tunisia and Egypt

Switzerland, for instance, was one of the promptest to adopted measure imposing the freezing of Ben Ali and Mubarak's assets: shortly after the fall of the Tunisian and Egyptian regimes, the Federal Council made use of its constitutional emergency powers and imposed a three-year freeze[909] on 'monies and economic resources owned or under the control of [listed] natural persons, enterprises, and organizations'[910] and it established that concealing, dealing with, or transferring such monies and resources without the Swiss government authorization would have represented a criminal offence.[911] The EU and other States such as Canada and the U.K. also issued equivalent measures in relation to the Tunisian[912] and Egyptian[913]

[909] Later extended three more years until 2017.

[910] See Article 184(3) of the Swiss Federal Constitution; Article 1(1) of the Verordnung über Massnahmen gegen gewisse Personen aus Tunisien vom 19. Januar 2011 (SR 946.231.175.8) as amended lastly on 19 Janaury 2014; Article 1(1) of the Verordnung über Massnahmen gegen gewisse Personen aus der Arabischen Republik Ägypten vom 2. Februari 2011 (SR 946.231.132.1) as amended lastly on 11 February 2014. See Swiss Department of Foreign Affairs, 'Federal Council Orders Freeze of Any Assets held by Former Tunisian President Ben Ali in Switzerland', available at http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=37285; Swiss Department of Foreign Affairs, 'Update of Annex to the Ordinance on Measures Against Certain Individuals from Tunisia' available at http://www.admin.ch/aktuell/00089/?lang=en&msg-id=37454; Swiss Department of Foreign Affairs, 'Amendment to the Ordinance on Measures against Certain Persons from the Arab Republic of Egypt', available at http://www.uvek.admin.ch/dokumentation/00474/00492/index.html?lang=en&msg-id=45866.

[911] Articles 1(2) and 5(1)-(2) of the Verordnung über Massnahmen gegen gewisse Personen aus Tunisien vom 19. Januar 2011 (SR 946.231.175.8); Articles 1(2) and 5(1)-(2) of the Verordnung über Massnahmen gegen gewisse Personen aus der Arabischen Republik Ägypten vom 2. Februari 2011 (SR 946.231.132.1).

[912] For the EU see Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, OJ L 28, 2.2.2011, 62, later amended by Council Decision 2012/724/CFSP (OJ L 327, 26 November 2012) and Council Decision 2014/49/CFSP (OJ L 28, 30 January 2014). As for Canada see Freezing Assets of Corrupt foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78, 23 March 2011, last amended on 28 February 2014. In the U.K. see Tunisia (Asset-Freezing) Regulations 2011 No. 888 of 22 March 2011.

[913] For the EU see Council Decision 2011/172/CFSP (22 March 2011), OJ L 76, 22.3.2011, 63, later amended by Council Decision 2014/153/CFSP (20 March 2014), Council Decision 2013/144/CFSP (21 March 2013), Council Decision 2012/723/CFSP (27 November 2012), and Council Decision 2012/159/CFSP (20 March 2012); Council Regulation (EU) No 270/2011 (22 March 2011) OJ L 76, 22.3.2011, 4, later amended by by Council Regulation (EC) No 517/2013, Council Regulation (EU) No 270/2011, and Council Regulation (EU) No 1099/2012 (27 November 2012). As for Canada see Freezing Assets of Corrupt foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78, 23 March 2011, last amended on 28 February 2014. In the U.K. see Egypt (Asset-Freezing) Regulations 2011 No. 887 of 22 March 2011.

upheavals against those persons who have been identified as being responsible for the misappropriation of Tunisian and Egyptian state funds.[914]

5.4.2.1.2. Libya

Later on, similar measures were taken by Switzerland,[915] the EU[916] against members and associates of the Gaddafi's regime in Libya. Differently from the latter two cases, also the U.N. Security Council intervened in the Libyan scenario and took two sets of decisions: firstly, U.N. Member States had 'to freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed' in the annex,[917] as well as those of the 'Libyan authorities, as designated by the Committee, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them'.[918] Secondly U.N. Member States had to make sure that funds, financial assets, or economic resources were available to or for the benefit of listed parties by their nationals or individuals within their territories.[919]

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[914] Similar legislation has been adopted in other States/territories such as Lichtenstein, Canada, the British Overseas Territories, Jersey, Guernsey and the Isle of Man.

[915] Switzerland imposed such measures, as for the ones against Bashar al-Asaad's regime in Syria, pursuant to the Federal Act of 22 March 2002 on the Implementation of International Sanctions. See also Verordnung über Massnahmen gegen gewisse Personen aus Libyen vom 21 Februar 2011 (SR 946.231.149.82); Swiss Department of Foreign Affairs, 'Freezing of Assets', available at https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/financial-centre-economy/illicit-assets-pep/freeze-assets.html; Swiss Secretariat for Economic Affairs, 'Sanctions Against Libya', available at http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=en&msg-id=37958; Swiss Secretariat for Economic Affairs, 'Weitere Sanktionsmassnahmen gegenüber Libyen', available at http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=de&msg-id=38351.

[916] Council Decision 2011/137/CFSP (OJ L 58, 28 February 2011), last amended by Council Decision 2014/727/CFSP (OJ L 301, 21 October 2014); Council Regulation (EU) No 204/2011 (OJ L 58, 2 March 2011), last amended by Council Implementing Regulation (EU) No 1103/2014 (OJ L 301, 21 October 2014). According to Martini, M., 'Lessons Learnt in Recovering Assets from Egypt, Libya and Tunisia' (n. 907), 6, the latter EU regulation allowed the U.K. to freeze $3,36 billion in funds.

[917] U.N. Security Council, Resolution 1970 (2011), UN Doc. S/RES/1970(2011) of 26 February 2011, para 17.

[918] U.N. Security Council, Resolution 1973 (2011), UN Doc. S/RES/1973(2011) of 17 March 2011, para 19.

[919] U.N. Security Council, Resolution 1970 (2011), para 17, and U.N. Security Council, Resolution 1973 (2011), para 19. Further measures which were decided and were not strictly relevant to asset freezing were the decisions to authorize military intervention and to refer the Libyan situation to the Prosecutor of the International Criminal

5.4.2.1.3. Challenges of Unilateral Measures to Freeze Assets

5.4.2.1.3.1. Timeliness

One of the most recurring challenges in the analysis of the asset recovery procedure carried out in the previous Chapter is the promptness of States to take action upon request of another State but also proactively, that is driven from its own initiative based on suspicious transaction or media report.[920] The latter issue emerged also in relation to the cases I just introduced, whereas some States took the freezing measures with significant delay and thus gave time to renowned corrupt leaders in Tunisia, Egypt and Libya to move their asset and avoid their possible confiscation in the future.

Critics have focused, in particular, on the response of the international community towards the situation in Egypt: while in Switzerland the ordinance on measures against certain persons from the Arab Republic of Egypt entered into force the day after Mubarak stepped down and handed the power to the military supreme council on 10 February 2011,[921] the EU adopted its measures forty days later, on 21 March 2011.[922] According to experts, the slowness or lack of

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Court ('ICC'). Cf. U.N. Security Council, Resolution 1970 (2011), para 4, and U.N. Security Council, Resolution 1973 (2011), para 4.

[920] See OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (2014), stating that successful asset recovery cases have usually stemmed from proactive law enforcement agencies launching their own foreign bribery or money laundering investigations. Cf. also para 4.4.

[921] Verordnung über Massnahmen gegen gewisse Personen aus der Arabischen Republik Ägypten vom 2. Februari 2011 (SR 946.231.132.1) as amended lastly on 11 February 2014.

[922] Council Decision 2011/172/CFSP (22 March 2011), OJ L 76, 22.3.2011, 63, later amended by Council Decision 2014/153/CFSP (20 March 2014), Council Decision 2013/144/CFSP (21 March 2013), Council Decision 2012/723/CFSP (27 November 2012), and Council Decision 2012/159/CFSP (20 March 2012); Council Regulation (EU) No 270/2011 (22 March 2011) OJ L 76, 22.3.2011, 4, later amended by Council Regulation (EC) No 517/2013, Council Regulation (EU) No 270/2011, and Council Regulation (EU) No 1099/2012 (27 November 2012). In this context the U.K., which implemented the EU Regulation with the Egypt (Asset-Freezing) Regulations 2011 No. 887 of 22 March 2011 was particularly criticized because of the crucial role of its financial sector.

proactivity of some States and organizations is to be explained with Mubarak's close ties with global business elites and powerful figures.[923]

5.4.2.1.3.2.The Different Legal Nature of the Freezing Measures

Although the initiatives I just described are important ones, one should consider that these kind of unilateral measures only apply to a limited number of individuals and are limited in time. Moreover, one should notice that the measures taken by the U.N. and the EU have a specific legal nature which has consequences on their effects.[924]

5.4.2.1.3.2.1. The U.N. and EU Measures

On the one hand the U.N. Security Council Resolutions concerning Libya have been adopted by the under Chapter VII of the U.N. Charter in order to end the armed conflict in Libya, and the EU decisions were foreign policy instruments and as such had been adopted to prevent the members of the former regimes in Tunisia, Libya and Egypt to interfere with the political transition processes ongoing in these countries. As a consequence, such administrative freezing orders did not prescribe how they should interact with parallel procedures nor could they specify whether and whom to inform in the countries seeking the recovery of such assets; furthermore, these acts did not require the authorities of the issuing State to initiate an investigation into the origin of the assets, nor did they require States to inform transition countries of any procedures initiated by the respective owners of the assets for the de-freezing of such assets.

[923] Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (March 2013).
[924] Cf. Arab Forum on Asset Recovery, 'Report of the Second Session of the Arab Forum on Asset Recovery' (2013).

5.4.2.1.3.2.2. National Administrative Measures

On the other hand, national States used administrative procedures to temporarily freeze assets of those suspected of being involved in the grand corruption schemes of Egypt, Libya, and Tunisia. In other words the administrative freezing measures adopted by individual countries such as Switzerland[925] and Canada have been issued with the clear objective of securing the assets to transition countries with the opportunity and time to launch investigations and initiate mutual legal assistance procedures for the freezing and recovery of any assets which could be proven to be linked with an offence of corruption.

5.4.2.2. Formal Request of Mutual Legal Assistance

Next to provisional measures adopted unilaterally by States and international organizations, the alternative way to freeze assets is through mutual legal assistance requests. Since much has been already said on the meaning, scope and significance of mutual legal assistance requests within corruption cases earlier on in the work,[926] in this context is important to emphasize the most problematic issues related to the mutual legal assistance requests submitted by the governments of Tunisia, Egypt and Libya, as well as the corresponding good practices which emerged from the latter experiences and may help to overcome the latter obstacles.

[925] According to Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (n. 923), 24, in order to temporarily freeze assets and reverse the burden of proof, Swiss authorities made use of the old legal framework aimed at tackling Sicilian and Russian mafia by considering Mubarak and his affiliates as part of an organized criminal network with an hierarchical structure and a degree of secrecy in their decisions.

[926] See especially Chapter II.

5.4.2.2.1. Challenges in 'Arab Spring' cases

5.4.2.2.1.1. Lack of Trust and Political Will

As pointed out in the previous Chapter when describing the general barriers to asset recovery, the lack of trust and political will are two general, yet fundamental, elements which hinder the possibility for State to cooperate effectively in view of recovering assets.[927]

The lack of trust may be justified by the fact that some the Arab Spring's States have been criticized for the undue influence on and lack of autonomy of their law enforcement authorities, which hinder their independence and thus the overall success of an asset recovery operation.[928] On the other hand, according to the Egyptian judicial authorities, 'the major impediment'[929] is represented by the fact that the requested States have shown reluctance in sharing investigations findings and in notifying relevant money laundering with them. Furthermore, when the latter States detect funds belonging to an indicted person whose funds are to be frozen, Egyptian authorities were not disclosed the amounts of the detected, thus making it difficult for Egypt's Prosecutor General to assess the significance of the request, prioritize work and give the due importance to such request.[930]

As for the lack of political will towards asset recovery, one should recall that it may emerge from both sides of a request, that is the submitting and the receiving State. However, in the context of the 'Arab Spring' cases, one has noticed that such problem has affected more the requesting States: firstly, the Tunisian government has requested to lift the freeze of some assets carried out by Switzerland in spite of the fact that the individuals holding them had

[927] Cf. paras 4.3.1.2.1.1. and 4.3.1.2.1.2.

[928] According to the Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (n. 923), 32-4, Egypt has been criticised for the lack of independence of its asset recovery committee and its subordination to the executive power.

[929] Permanent Mission of Egypt to the United Nations, 'Note Verbale dated 7 October 2011 from the Permanent Mission of Egypt to the United Nations (Vienna) Addressed to the United Nations Office on Drugs and Crime, Corruption and Economic Crime Branch' (12 October 2011) CAC/COSP/2011/13, available at http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4.html, 4.

[930] Permanent Mission of Egypt to the United Nations, 'Note Verbale dated 7 October 2011 from the Permanent Mission of Egypt to the United Nations (n. 929), 3.

connections with the fallen regime; secondly, Egyptian NGOs have raised similar concerns about the risk that the same might happen in relation to some individuals belonging to the former regime and now part of the Ministry of Justice.[931] On the other hand, one should also mention that an increased political will was showed by Tunisia when, with the support of the StAR Initiative, established a committee for the recovery of assets in view of setting up a better strategy and coordination to recover assets from abroad. Through a comprehensive strategy combining various investigative and legal tools, including domestic criminal prosecution, informal international cooperation, mutual legal assistance requests, as well as participation as a civil party in criminal proceedings in France and Switzerland, the committee is considered to have reached relatively successful results.[932]

5.4.2.2.1.2. Poor Technical Capacity

Another 'general' barrier to corruption investigation and asset recovery which has also consequences in the process of international cooperation is the lack of skilled professionals and advanced investigative techniques, that is what I referred earlier as 'insufficient resources'.[933] Egypt, Tunisia, and Libya face significant gaps in terms of human and financial resources, which are crucial in the complex cases they face and whose absence hinders the possibility to build expertise and experience in the multi-faced field of asset recovery.

Although the shortcomings in terms of technical capacity and expertise can be considered structural and can only be filled with long-term strategies and investments, one can notice that the international community has provided technical assistance through initiative such as StAR, which supports countries in developing the legal framework, institutional expertise, and skill necessary to recover assets but also works with partners in jurisdictions all around the world to develop the most effective and appropriate tools to tackle and prevent the theft of

[931] Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (n. 923).
[932] Brun, J. P., 'Tracking Tunisia's Stolen Assets: The Balance Sheet Three Years On' *StAR* (13 January 2014).
[933] Cf. para 4.3.1.2.1.3.

assets critical to development.[934] As for the efforts of single States the OECD[935] and the G8[936] report that:

(i) *Switzerland* has sent judicial experts to both Egypt and Tunisia;

(ii) *The United States* investigators and prosecutors have visited Egypt, Libya and Tunisia to work directly with their requesting country officials; the U.S. have also sent a justice attaché in Egypt in order to facilitate asset recovery issues, and has designated and funded a 2013-2014 asset recovery advisor position to be based in the region

(iii) *Canada* has provided assistance on asset recovery to Tunisian officials;

(iv) *The United Kingdom* launched a cross-government task force on asset recovery to Arab Spring countries, and posted a Crown Prosecution Service prosecutor as well as a Metropolitan Police Financial Investigator to Egypt; lastly, in 2013, the U.K. posted a regional asset recovery adviser to Egypt to provide expert technical and legal assistance to countries in the region, and brought a delegation of Libyan public prosecutors, lawyers and judges who serve on the Libyan Asset Recovery Committee to the U.K. for technical training and assistance.

5.4.2.2.1.3. Meeting Legal Requirements and Processes

Judicial representatives from Egypt and Tunisia seeking legal assistance in other countries have struggled to obtain information concerning the requirements and the processes to file a request for mutual legal assistance.[937] Similarly, States have often submitted requests without any previous contact with the requested State. From a more substantial perspective, the

[934] StAR, 'Our Work', available at https://star.worldbank.org/star/about-us/our-work/.

[935] OECD, 'Illicit Financial Flows from Developing Countries: Measuring OECD Responses' (n. 920).

[936] G-8, 'The Deauville Partnership with Arab Countries in Transition: Progress Report 2013' (2013), 17-9.

[937] Kettis, A. and P. Hakala, 'Recovering Tunisian and Egyptian Assets: Legal complexity Challenges States in Need', European Parliament Quick Policy Insight.

pervasive system of power characterizing the previous regimes makes it hard to identify the proof of specific wrongdoings and, thus, to establish the relationship between the assets and the crimes.[938] In order to deal with such issue, two set of strategies are suggested.

5.4.2.2.1.3.1. Establishing Clear Procedures and Communication

Firstly, States should clearly establish the contact points, the channels of formal communication and the procedures for the asset recovery process, and the initiatives of the G-8 and G-20 countries go in the right direction.[939]

5.4.2.2.1.3.2. Exploring Alternative Means of Communication

An effective way to avoid problems related to MLA requests is to explore alternative means of communication with the requested State before sending a formal request for assistance. As highlighted in the previous parts of the present research, the latter may not be the best way to get in contact with another State during the initial part of the investigation unless the requesting State has already sufficient grounds to prove where the assets are and how they are connected to the (allegedly) corrupt individual.[940] As a consequence States such as Tunisia, Egypt and Libya should first contact the authorities of a foreign State through informal channels in order to share information with them and collect as much evidence as possible.

[938] In Egypt the regime of Mubarak manifested its corruption in almost any act of the State (i.e. passing laws, granting tax exemptions, favouring his family and apparatus). However, the blurred definition of 'corruption' makes it hard to prove such kind of corrupt acts. Cf. Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (n. 923), 29 ff.

[939] See the Country Guides in G-20 Anti-corruption Working Group, 'G-20 Resources', available at http://star.worldbank.org/star/about-us/g20-resources, and the Asset Recovery Action Plans of the G8 countries in 'Arab Forum on Asset Recovery', available at http://star.worldbank.org/star/ArabForum/About.

[940] Cf. para 4.3.1.2.4.8.

Only when solid elements are gathered a request of mutual legal assistance is likely to be successful.[941]

Other alternative means to seek assistance from other States when there are not coercive powers at stake is to establish contact through financial intelligence experts or international networks and organizations. With regards to the former, I already stressed[942] the strategic role which Financial Intelligence Units and networks may play in asset recovery investigation and enforcement.[943] Tunisia, in this sense, benefitted significantly from the access of its Financial Intelligence Unit in the global financial network in terms of access of information and investigation capacity.[944] As for the latter, States should take advantage of asset recovery networks such as the StAR/INTERPOL Global Focal Point Initiative, CARIN, ARINSA, and IBERRED. From the EU perspective, the European External Action Service has also facilitated the creation of asset recovery networks by organising an expert seminar in June 2012 with 48 participants, including the Governor of the Tunisian Central Bank, senior members of the Tunisian judiciary, representatives from the World Bank, the U.N. Office on Drugs and Crime, as well as other international organisations and delegates from France, Italy, Spain, Canada and Switzerland.[945]

5.4.2.2.1.4. Content of the Request

The content of the request of assistance may be problematic from the point of view of both the requested and the requesting States. On the one hand, requesting State complain about the detailed level of information needed by a requested State: in this sense one can take the

[941] Cf. COSP, 'Progress Made in the Implementation of the Recommendations of the Open-ended Intergovernmental Working Group on Asset Recovery: Selected Highlights from Two Years of Asset Recovery Work Under the Convention' CAC/COSP/2013/2, available at https://www.unodc.org/documents/treaties/UNCAC/COSP/session5/V1386515e.pdf.

[942] On FIUs and networks such as the Egmont Group see para 3.4.3.

[943] Cf. Arab Forum on Asset Recovery, 'Report of the Second Session of the Arab Forum on Asset Recovery' (n. 924), 7, where it was stressed that 'pre-MLA information sharing was designed to determine the most efficient and effective channel to obtain certain information and/or assistance and to ensure that, if required, MLA requests would meet the legal requirements of the requested country.'

[944] Brun, J. P., 'Tracking Tunisia's Stolen Assets: The Balance Sheet Three Years On' (n. 932).

[945] Kettis, A. and P. Hakala, 'Recovering Tunisian and Egyptian Assets: Legal complexity Challenges States in Need' (n. 937).

example of Egypt which saw several requests of assistance regarding the existence of some funds refused because Egyptian judicial authorities were asked 'to determine the location in the requested State of the funds to be frozen, or account numbers, banks or financial institutions where those funds were deposited.'[946] On the other hand, the quality and content of the requests has been considered by requested countries too poor, generic or without the necessary level of evidence.[947]

Even though both sides put forward reasonable arguments, one could say that requesting States, which detain resources and capacity to gather information, should show some degree of flexibility and availability toward requests of assistance, which nevertheless should be circumstantiated and based on solid grounds of suspicion.

5.4.2.2.1.5. Identification of the Beneficial Owner

Another issue which relates to the difficulties in specifying the content of an MLA request is the complex layers of companies where assets are placed and the jurisdiction where such companies are established, usually tax heavens. Once again, the possibility to obtain information regarding the beneficial ownership from the latter kind of States is dependent on the level of cooperation which they are willing to afford.

According to an Egyptian NGO Mubarak's assets were easily, discretely and lawfully transferred abroad in the form of corporate profits accrued from stakes held in Egyptian companies through an intricate network of overseas investment funds. For example, one of Mubarak's son, Gamal, used to one the British company Med-Invest Associates Ltd, which,

[946] Permanent Mission of Egypt to the United Nations, 'Note Verbale dated 7 October 2011 from the Permanent Mission of Egypt to the United Nations' (n. 929), 3. According to 'Making a Hash of Finding the Cash' *The Economist* (n. 905), the U.K. has refused 15 of the 25 requests for assistance. In one of these cases, Egypt sued the British Treasury to obtain information concerning frozen bank accounts worth $135 million, but it was responded that, to make that possible, Egypt had to provide exact information concerning crimes that may have been undertaken. Cf. Wei, J., 'Global Crime, Illicit Funds and Nowhere to Hide' *Chinese Newspaper* (8 April 2013).

[947] Arab Forum on Asset Recovery, 'Report of the Second Session of the Arab Forum on Asset Recovery' (n. 924), 10; COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fifth session, held in Panama City from 25 to 29 November 2013' (n. 383), 12.

although having a capital of mere £50,000, nevertheless controlled and managed millions of pounds sterling in the form of shares owned in Egyptian companies operating in various fields, including information technology, tourism, cement, banking, foodstuffs and agricultural products. Besides the U.K. and the Egyptian companies a complex network of companies based across the world made it extremely difficult to identify the ultimate owner and his share or to trace his assets and profits, 'which usually come aground in a country renowned for the secrecy of its accounts and reluctance to disclose the identities of shareholders.'[948]

A further way Egyptian politically exposed persons (obtained and) moved capitals abroad through complex corporate mechanisms is explained by Nicholas Hildyard, the founder of the British-based NGO Corner House. He explained that:

> 'The most important means for illicitly obtaining and moving capital abroad is for an associate or a representative of a politically-exposed person (PEP) to obtain an unsecured loan from a state-controlled bank—backed by a recommendation from the PEP—upon an announcement to privatize a public sector company or land holding. This loan is then used to purchase the company or land at a knockdown price, drawing on the very same power circles which secured the loan. The next step is to sell these assets to a foreign investor at an inflated price. Often the asset is sold to a private equity fund, which is difficult to trace, with a share of the fund going to the PEP (sometimes via an associate). According to Hildyard, this renders it extremely difficult to prove the PEP's complicity because his name usually does not appear on the loans or company registration documents. [Plus] many of the funds through which stolen wealth is moved are registered in tax havens, which typically do not reveal the identity of the shareholders in funds registered in their

[948] Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (n. 923), 15, which adds that 'the most famous examples of countries that guarantee confidential bank transactions are Mauritius, the British Virgin Islands, the Cayman Islands, and Panama, and it is unsurprising to discover that assets and funds belonging to Mubarak are often connected to these countries in one way or another.'

jurisdiction. Even in instances where shareholder names are revealed, they will often be "nominees," holding the shares for others who are unnamed.'[949]

5.4.2.2.1.5.1. Unveiling the Wall of Secrecy

Although the Arab Spring's States' attempts to track down the origin of the latter kind of assets or to obtain information on the beneficial owner of a company are likely to encounter a brick wall of secrecy which hinders any possible cooperation, the Arab Forum on Asset Recovery has pointed out a way to face this challenge apart from calling for the effective implementation of the existing international standards and policies regarding beneficial ownership and for closer cooperation between national legislators, the financial sector as well as regulatory and supervisory bodies. In particular, States were suggested, firstly, to focus on the structure of the company; secondly, to look at all the possible connections in other jurisdictions; and finally, to attempt accessing the information sought from a more regulated and transparent jurisdiction.[950]

5.4.2.2.1.6. Delays and Unclear Grounds in Responding to MLA Requests

States affected by the 'Arab Spring' have complained about the lack of any (reasoned) response to their requests from requested States,[951] which clearly clashes with both the

[949] Egyptian Initiative for Personal Rights, 'Can We Recover Our Stolen Assets?' (n. 923), 15-6, which continues illustrating an example of such scheme.

[950] Arab Forum on Asset Recovery, 'Report of the Second Session of the Arab Forum on Asset Recovery' (n. 924).

[951] Arab Forum on Asset Recovery, 'Report of the Second Session of the Arab Forum on Asset Recovery' (n. 924), 10. According to Permanent Mission of Egypt to the United Nations, 'Note Verbale dated 7 October 2011 from the Permanent Mission of Egypt to the United Nations' (n. 929), 5, 'in some cases request applications for legal assistance are returned long after their submission on the ground of failure to index and place them on file.'

principle of Article 51 of the UNCAC stating that States parties should afford one another the widest measure of cooperation and assistance in asset recovery, and with Article 46(23) of the UNCAC, whereby States parties are obligated to give the reasons for any refusal of mutual legal assistance. In this context Egypt has even declared that some States failed to recognize the UNCAC as basis to provide mutual legal assistance in spite of the contrary provisions provided for by its Chapter IV.

To overcome such obstacles, States should send the request directly through central authorities rather than going through the traditional diplomatic channels which may delay the process. In this context the Arab Forum on Asset Recovery has also pointed out the effectiveness of initiatives of informal contact points networks such as the StAR/INTERPOL Global Focal Point Initiative which I illustrated in the previous Chapter.[952] Moreover, since little information is available on statistical information on requests and timing, States should lay more emphasis on this kind of information, as often pointed out by the OECD Working Group on Bribery's assessment reports.[953]

5.4.2.2.1.7. Procedural Issues

Lastly, from a procedural perspective, the cases at stake show two further set of procedural issues which create problems in freezing assets for the purpose of recovery. Firstly, as pointed out by Egypt, (wealthy) asset holders have the resources to appeal the asset-freezing decisions multiple times, thus hindering the possibility to eventually confiscate and repatriate those assets. Although the due process guarantees should be the basis of any procedure, requested States should balance the latter necessity with the need to avoid the abuse of the rights of the defendants for the sole purpose of delaying the process. [954] Secondly, challenges have arisen in relation to translation of requests, the order of applications and annexes, as well as to transliteration of Arab names. In order to deal with such issues it is contended that requests

[952] See para 4.3.1.2.3.1.1.
[953] Cf. para 2.5.3.1.3.
[954] Martini, M., 'Lessons Learnt in Recovering Assets from Egypt, Libya and Tunisia' (n. 907), 10.

should be always accepted if submitted in one of the main languages,[955] that State should show some degree of flexibility as to the order of annexes in the application, and that investigative authorities are given the information that allows them to look beyond names and aliases.[956]

5.4.3. Asset Confiscation

The confiscation and repatriation of assets which were successfully traced, identified and frozen represents the second half of the asset recovery process and the most tangible part of the overall asset-recovery efforts. As for the previous paragraphs, my present intention is not to recall the fundamental issues and provisions in this context, but rather to refer to the most controversial matters which emerged from the asset recovery cases related to the 'Arab Spring'. As I will illustrate, some of the challenges which I identified in the previous Chapters[957] have also taken place in relation to Egypt, Libya and Tunisia.

5.4.3.1. Establishing the Link between Convictions and Assets

Even if the corrupt assets belonging to a former dictator have been identified and restrained, the requested State usually proceeds with confiscation if the asset holder has been convicted in the requesting/victim State for the underlying offence and the assets are 'proceeds' of the crime. Such requirements turn out to be very difficult to attain in countries in transition because of number of reasons such as: the new government's ambivalence toward the former ruling power; the lack of access to evidence; the death, flight or immunity of the suspected official. In other cases, when the proceedings do take place, the requested State may reject a request of mutual legal assistance because of the procedural standards applied by the

[955] E.g. English, French, German or Spanish.

[956] Arab Forum on Asset Recovery, 'Report of the Second Session of the Arab Forum on Asset Recovery' (n. 924), 8, which stressed the importance of numerical identifiers such as dates of birth, dates of issue/expiry of passports as well as information relating to travel, bank accounts.

[957] Cf. Chapters III and IV.

prosecutorial or judicial authorities of the requesting State. Further difficulties impairing the confiscation are also the requested States' scepticism/ lack of political will toward asset recovery and the expiry of statute of limitations.

With specific reference to the cases related to the 'Arab Spring', one can see that the latter issues may constitute impediments for the successful confiscation and repatriation of assets in Egypt. Firstly, in 2012 Mubarak and his sons were acquitted of corruption by Egyptian judges and in November 2014, after retrial, a court in Cairo dropped the case against him for both the involvement in corruption and the killing of protesters during the 2011 uprising.[958] Secondly, as authoritatively contended by Professor Bassiouni, the numerous Egyptian judgments rendered in absentia against fugitive members of the Mubarak family would have problems to be recognized in European States if challenged in front of the European Court of Human Rights.[959]

On the other hand, a successful example of cooperation in the region is represented by the parallel proceedings which took place in Tunisia and Lebanon and which led to the successful recover of $28,8 million held by Laila Trabelsi (Ben Ali's wife) in a Lebanese bank account. The latter example is not only remarkable because it was the first recovery of stolen assets taking place within the Arab World, but also because it built up through a fruitful cooperation between Lebanese and Tunisian authorities in freezing, confiscating and returning the funds where they originally came from. In this context the initiatives of the international community such as StAR and the Arab Forum on Asset Recovery facilitated the successful outcome of the case through the organization of bilateral meetings and, more generally, providing technical assistance to the countries. [960]

[958] See 'Egypt Court Dismisses Charges against Mubarak' Al Jazeera (29 November 2014).
[959] 'Making a Hash of Finding the Cash', *The Economist* (n. 905).
[960] Brun, J. P. and R. Miron, 'Tunisia's Cash-back The start of More to Come?' *StAR* (12 April 2013).

5.4.3.2. Non-conviction Based Confiscation

As I observed in the previous Chapter,[961] many of the international cooperation challenges which arise in relation criminal confiscation may be overcome through the so-called non-conviction based confiscation, a type of confiscation which is independent from the conviction of the asset holder and which thus eases the burden on the authorities of both requesting and requested States. Although the latter method of confiscation is based on the proof that the frozen assets represents the proceeds or an instrumentality of crime, a lower standard of proof applies in comparison with 'traditional' criminal forfeiture.[962]

This kind of confiscation seems to have played little or no role in the cases related to the 'Arab Spring' and this can be explained, in part, with the low number of States which provide for such mechanism.[963] However, one should recall that though the UNCAC has broken new ground by providing that State Parties should 'consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.'[964] At the same time, at the European level, the recent EU Freezing and Confiscation Directive introduced a relevant provision which enables the confiscation of an asset in the absence of a final conviction for a criminal offence in cases of 'illness or absconding of the suspected or accused person'.[965]

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[961] See paras 4.3.1.2.2.8. and 4.3.1.2.4.3.

[962] Usually the standard of proof is represented by a 'balance of probabilities'.

[963] The US, UK, Ireland, Italy, Colombia, Slovenia, South Africa, Canada, New Zealand, Australia, and Jersey.

[964] Article 54(1)(c),. Next to the latter obligation one should also recall the 2003 FATF Recommendation no 3(3) as well as the 2012 FATF Recommendation no 4, which provides that 'countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction'. Furthermore, Commonwealth Secretariat, 'Report of the Commonwealth Working Group on Asset Repatriation' (n. 506), has recommended that 'Commonwealth countries should put in place comprehensive laws and procedures for non-conviction based asset confiscation'. The most similar provision contained in the UNTOC is Article 12(1)(a), which obliges States to confiscate the proceeds and property of crime 'to the greatest extent possible'. Finally in this context one should also recall Article 53(a) of the UNCAC which mandates States to allow other parties to initiate 'civil action' in its courts to establish title to or ownership of property acquired through corruption offences.

[965] Article 4(2) of the EU Freezing and Confiscation Directive. An assessment of an earlier version of this provision is provided in Rui, J. P., 'Non-conviction Based Confiscation in the European Union' (n. 507), 349-360.

5.4.3.3. Private Civil Actions

A further remedy to recover assets acquired illegally without the need for a conviction is for a State to seek damages in front of the Court of the requested State by initiating a private civil action based on a breach of contract or illicit enrichment. This option is provided for by Article 53 of the UNCAC, which requires State parties to enable other States to initiate a direct action or receive compensation or damage for corruption. As for non-conviction based confiscation, less-demanding requirements for linking the assets to the wrongdoing apply; plus, promoting a civil law suit enables the State to claim damages generally (rather than claim particular assets), and to have a wider choice of the parties to sue.[966]

One of the States affected by the 'Arab Spring' has actually made use of such mechanism and it is particularly relevant to mention it because it was the first successful case of asset recovery by Libya.[967] In March 2012, the Libyan government was in fact accorded a £10 million townhouse in an affluent North London suburb[968] through a civil law suit brought in front of the English High Court. Significantly, it is worth to recall the very (few) words of the Court through which it discusses the burden of evidence needed to prove that the company owning the house was eventually of one of Gaddafi's son:

> 'I am satisfied, on the evidence which has been put before me, that Saadi Quaddafi is the sole ultimate beneficial owner of the Defendant company

[966] Brun, J. P. and others, 'Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets' (StAR, 2015), 5.

[967] Although it is known that in May 2012 a Swiss court allowed Egypt to become a plaintiff in a case accusing Hosni Mubarak's family and nine of his aides of money laundering, it was not possible to trace whether the case led to a successful outcome. See Federal Criminal Court, decision no BB.2011.107/108/110/111/112/115/116/117/128, 10 May 2012, available (in French) at http://bstger.weblaw.ch/pdf/20120430_BB_2011_107.pdf, and 'Federal Court Rules in Favour of Egypt' (10 May 2012) Swissinfo. The same is true Tunisia, which according to StAR 'hired lawyers in the main jurisdictions concerned to intervene as *partie civile* in the criminal case. That allowed a direct discussion with the investigative judge and close monitoring of the criminal proceedings.' See Brun, J. P. and others, 'Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets' (n. 966), 18. In this context a few information could only be found with respect to the a decision of the Swiss Federal Criminal Court which admitted Tunisia as *partie civile* in a criminal case against some Tunisian PEPs. See Federal Criminal Court, decision no. BB.2011.130, 20 March 2012, available (in French) at http://bstger.weblaw.ch/pdf/20120320_BB_2011_130.pdf.

[968] StAR, 'Asset Recovery Database', available at http://star.worldbank.org/corruption-cases/?db=All.

> [Capitana Seas Limited] [and that] the property was wrongfully and unlawfully purchased with funds belonging to [Libya]. In those circumstances, the beneficial interest in the property is held by the Defendant, for the Claimant, as constructive trustees.'[969]

Although such method to recover assets may be highly costly, especially for a State coming out from a revolution, the latter example can be regarded as 'best practice' in the context of the Arab Spring asset recovery cases. However, one should also notice the specific circumstances which brought to such result according to the Libya's U.K. attorney in the suit interviewed by StAR, and which are:

(i) The media publicity surrounding the purchase of the mansion by Gaddafi's son;
(ii) The wide disparity between Saadi Gaddafi's official salary as a member of the armed forces and the purchase price of the mansion, as well as strict bar on ownership of foreign property by members of Libyan armed forces;
(iii) The failure of Saadi Qaddafi and Capitana Seas Limited to appear and challenge the suit.

Lastly, it is meaningful to note that StAR dedicated one of its most recent report to the issue of private civil action to recover stolen assets, and, in particular, to the 'various topics and steps for states to consider when contemplating civil action in foreign courts. To this end, it describes the various strategic, tactical, and technical issues of the legal action and discusses answers to very practical issues'. [970]

[969] The State of Libya v. Capitana Seas Limited, [2012] EWHC 602 (Com), 9 march 2012, available at http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/Libya_v_Capitana_Seas_UK_High_Ct_Judgment_Mar_2012.pdf.

[970] Brun, J. P. and others, 'Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets' (n. 966), xii.

5.4.3.4. Administrative Confiscation

One last method to overcome the challenges implied in the process of confiscating corrupt assets through criminal proceedings the 'administrative confiscation', which unlike criminal or non-conviction based confiscation, does not involve any criminal conviction, court proceedings, or even a judicial determination, as it constitutes a non-judicial mechanism for confiscating assets. According to StAR, 'it is often used to address uncontested confiscation cases'[971] However, there are few examples of States which effectively use such remedy in corruption cases: besides the case of Switzerland, which is addressed in detail below, one can mention Germany, which has used it to enforce anti-bribery laws and confiscate assets,[972] and Tunisia, whose relevant legislation[973] permitted the confiscation of billions of dollars of assets in the weeks following the end of the Ben Ali regime.

5.4.3.4.1. The Case of Switzerland

5.4.3.4.1.1. The Limited Scope of the 'Restitution of Illicit Assets Act'

The 'administrative confiscation' regime introduced by Switzerland in 2011 with the Federal Act on the Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means

[971] Brun, J. P. and others, 'Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets' (n. 966), 4.
[972] According to Brun, J. P. and others, 'Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets' (n. 966), 4, in Siemens Telecom and Other Sectors Cases (decision of the German Regional Court [Landgericht] of Munich I, October 4, 2007; decision of Public Prosecution Office Munich I in proceedings regarding an administrative off ense, December 15, 2008), for example, Siemens was imposed administrative fines in Germany for paying bribes in a number of countries to win contracts.
[973] Decret-loi No 2011-13 mars 2011 portant confi scation d'avoirs et de biens meubles et immeubles, 14 March 2011, available at http://www.legislation-securite.tn/fr/node/30884.

('Restitution of Illicit Assets Act' or 'RIAA')[974] deserves particular attention because of the crucial role of that country in many asset recovery processes.

Through the latter instrument Switzerland provided for the possibility to repatriate assets of knowingly corrupt PEPs when international cooperation with the foreign country is not possible to be established because of the 'total collapse, or the unavailability of the national judicial system' in the State of origin of the looted assets.[975] In these cases the burden of proof is reverted, the Swiss Federal Council is entitled to order the freezing, and the Swiss Federal Administrative Court may confiscate such assets. In other words, if the PEP of failed/fragile States does not provide the proof that the assets identified by the Swiss authorities were acquired by legal means, the assets may be repatriated by an administrative Court, that is without a criminal conviction in the country of origin.

Although this kind of 'administrative confiscation' is an interesting way to deal with the challenges of criminal asset confiscation, regrettably the latter instrument was not deployed during the 'Arab Spring' cases because the judiciary system of Tunisia, Egypt and Libya was not considered enough critical to use the RIAA. This was so in spite of the serious difficulties of those countries in the post-revolutionary period: in the case of Egypt, for instance, 'it is difficult to convict most of the former regime figures for corruption, because of the lack of institutional accountability. It is important to bear in mind here that this is neither the money of the Egyptian institutions nor the current leadership, so the lack of political will and functionality should be beside the point. Lack of political will to return the money could well be because Mubarak's criminal network still controls a large part of Egypt's bureaucratic body. The focus instead should be on the people of Egypt, by associating the money with them and investing the repatriated funds for the good of the Egyptian people.'[976]

Such limited scope of the RIAA may thus be questioned, especially if one consider that according to some authors the Restitution of Illicit Act was adopted after the 'disastrous

[974] Cf. Federal Authorities of the Swiss Federation, 'Restitution of Illicit Assets Act (RIAA)', 1 February 2011, available at http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=37478.

[975] These are the so-called 'failed or fragile States' which are either unable or unwilling to issue a request for legal assistance. The definition used by the Swiss legislator is the same one provided for in Article 17(3) of the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (signed on 17 July 1998; entered into force 1 July 2002) ('Rome Statute') in the realm of admissibility.

[976] Egyptian Initiative for Personal Rights, 'Critique of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means' (2013), 4-5.

experiences' of Switzerland with the Duvalier[977] and Mobutu[978] cases, where mutual legal assistance could not be rendered because of the expiration of the limitation period.[979] Accordingly, the latter critics consider that the RIAA is more like a 'façade law'[980] because through the latter instrument Switzerland has put 'its focus on a very narrow range of cases where the damage to the Switzerland's reputation could be devastating'.[981]

5.4.3.4.1.2. The Draft Federal Act on the Freezing and Restitution of Potentates' Assets

However, one should lastly take note of a new Swiss draft law on the matter, the Draft Federal Act on the Freezing and Restitution of Potentates' Assets, which consolidates current Swiss practice and legal framework by taking over existing legislation and practice and reworking

[977] Jean-Claude Duvalier was President of Haiti from 1971 until 1986 and he is considered to have embezzled up to $900 million. He died on 4 October 2014. According to the Swiss Federal Department of Foreign Affairs, 'in the case of Haiti's former dictator, Jean-Claude Duvalier, Switzerland froze assets totalling approximately CHF 6 million. Following the judgement of the Swiss Federal Supreme Court of 12 January 2010, which put an end to the mutual assistance in criminal matters between Haiti and Switzerland, this freezing order prevented the assets from being returned to the Duvalier family. With the entry into force of the Federal Act on the Restitution of Assets obtained unlawfully by Politically Exposed Persons (RIAA) on 1 February 2011, the Duvalier assets were automatically frozen on the basis of this law. In April 2011, based on the RIAA, Switzerland initiated forfeiture proceedings in its Federal Administrative Court. On 24 September 2013, the court accepted this forfeiture claim. The task now is to find appropriate restitution methods that will allow the assets to be returned for the benefit of the Haitian people.' See Swiss Department of Foreign Affairs, 'Freezing of Assets', available at https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/financial-centre-economy/illicit-assets-pep/freeze-assets.html.

[978] Mobutu Sese Seko was President of Zaire from 1965 until 1997 and he allegedly embezzled up to $5 billion. According to the Swiss Federal Department of Foreign Affairs, 'in the Mobutu case, Switzerland tried over a period of 12 years to return the frozen funds to the DRC, but finally failed because of the lack of cooperation from this state. In 2009, the Federal Criminal Court of Switzerland ruled against pursuing further a complaint regarding these assets. As a result, the freeze on Mobutu's assets expired.' See Swiss Department of Foreign Affairs, 'Freezing of Assets' (n. 915), where it is also available a link to a document containing the Chronology of the Mobutu Assets Frozen in Switzerland.

[979] Richter, D. and P. Uhrmeister, 'Returning "Politically Exposed Persons" Illicit Assets from Switzerland – International Law in the Force Field of Complexity and Conditionality' (2013) 56 German Yearbook of International Law 457, 477.

[980] Richter, D. and P. Uhrmeister, 'Returning "Politically Exposed Persons" Illicit Assets from Switzerland' (n. 979), 499.

[981] Richter, D. and P. Uhrmeister, 'Returning "Politically Exposed Persons" Illicit Assets from Switzerland' (n. 979), 491, who substantiate their point by referring to Article 2(c) of the RIAA according to which the assets shall only be frozen if Switzerland's interest so demands.

them into a single body of law.[982] In light of the fact that the freezing orders issued in the context of the Arab Spring were based on general (exceptional) powers entrusted by the Swiss Federal Constitution 'to defend Switzerland's interests'[983] the draft law provides a formal legal basis for governmental action outside the framework of mutual legal assistance proceedings[984] and treats asset recovery as a matter of foreign policy rather than a judicial matter.[985]

Generally speaking, it extents the scope of the RIAA beyond failed State situations and applies to foreign corrupt PEPs. As a consequence, with specific reference to asset confiscation, the latest version of the law[986] enables the Federal Council to file a claim with the Federal Administrative Court for confiscation, which may grant forfeiture if it is proved that:

(i) The assets at issue are controlled or beneficially owned by a PEP or related party;
(ii) The assets were acquired unlawfully; and
(iii) The assets had been blocked by order of the Swiss government with a view to their confiscation.

As for the RIAA, 'unlawfulness' would presumed if the total wealth of the person who has control of the assets at issue increased extraordinarily in connection with the PEP's exercising

[982] Swiss Federal Council, 'The Federal Council Adopts the Dispatch to Parliament Concerning a Federal Act on the Freezing and Restitution of Illicitly Acquired Assets of Foreign Politically Exposed Persons', available at http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53048.

[983] Article 184(3) of the Swiss Constitution provides that '[w]here safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.'

[984]Giroud, S. and H. Rordorf, 'Draft Federal Act on the Freezing and Restitution of Potentates' (September 2013) 5(2) International Bar Association Legal Practice Division's Anti-Corruption Committee News 39.

[985] Lötscher, B., 'Proposed Legislation on Freezing and Restitution of Ill-gotten Assets of Potentates' (22 July 2013) International Law Office.

[986] See the latest version of the Draft Federal Act on the Freezing and Restitution of Potentates' Assets , available (in German) at http://www.news.admin.ch/NSBSubscriber/message/attachments/34992.pdf.

of his or her office, and the country of origin was notoriously corrupt during the term of the PEP's office. [987]

5.4.3.4.1.3. An Assessment of the Recent and Prospective Swiss Asset Recovery Legislation

Although the new Swiss draft law on asset recovery does not introduces substantial novelties in the realm of asset recovery, it is noteworthy that it aims at clarifying the whole discipline by extending the scope of the RIAA to more post-regime scenarios like the 'Arab Spring' ones. [988] On the one hand, one has to acknowledge that Switzerland was one of the first States which took action by adopting administrative freezing order with respect to the assets of PEPs from Tunisia, Egypt and Libya. On the other hand many problems of cooperation arose in relation to asset confiscation, and the impossibility to apply the RIAA is likely to have impaired the overall asset recovery efforts towards North Africa States. Furthermore, from a practical perspective, one should also consider that timing is crucial in all the phases of the asset recovery process[989] and thus one can doubt whether the new law (once adopted) will have practical effects on the on-going cases involving North African countries.

Overall, then, it seems fair to conclude that in recent times Switzerland has displayed significant efforts to update its asset recovery legal framework and that the draft federal act is significantly extending the scope of the asset recover discipline introduced by the RIAA. At the same time, one should notice that Switzerland should give further emphasis on prevention and, thus, 'take greater steps to make their system less attractive to hide the fact that it had been the most popular safe haven for dictators and their extensive assets for a number of years.'[990]

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[987] Lötscher, B., 'Proposed Legislation on Freezing and Restitution of Ill-gotten Assets of Potentates' (n. 985).

[988] According to Martini, M., 'Lessons Learnt in Recovering Assets from Egypt, Libya and Tunisia' (n. 907),11, such new law 'would make it easier for Switzerland to engage in the recovery of assets from countries undergoing conflict, such as countries in the MENA region.'

[989] Cf. para 4.3.1.2.4.7.

[990] Tickner, J., S. Gabriel and A. Bacarese, 'Asset Recovery. Global Overview' (2014) Getting the Deal Through 3, 4. For further analysis on the draft law see Ivory, R., *Corruption, Asset Recovery, and the Protection of*

5.4.4. The Asset Recovery Experience in the 'Arab Spring' Cases: Strengths and Weaknesses

Although asset recovery is a lengthy and complex process whose concrete results can be often assessed and valued only many years after its inception, the analysis carried out in previous paragraphs allows me to formulate some provisional remarks on the first four years of international efforts to return the corrupt asset of the former political leaders and families of Tunisia, Egypt and Libya. In this context one can find some positive developments, but also some significant challenges which States have not been able to overcome yet.

5.4.4.1. A Proactive Approach in Freezing Assets

On the one hand, one could welcome the promptness of 'western' States and Institutions in freezing the assets of politically exposed persons linked to the old regimes: Switzerland, for example, issued ordinances requiring banks to identify and freeze the assets of targeted individuals few days after the political changes which took place in Northern Africa in 2011.[991] Such timeliness in freezing was also coupled by relatively significant results because, according to a joint StAR/OECD study of 2014, out of the total assets reported frozen by OECD members, 39 percent originated in either Tunisia or Egypt ($542.8 million of the total

Property in Public International Law (n. 421), 53-4; Lötscher, B., 'Proposed Legislation on Freezing and Restitution of Ill-gotten Assets of Potentates' (n. 985); Egyptian Initiative for Personal Rights, 'Critique of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means' (n. 976).

[991] See Verordnung über Massnahmen gegen gewisse Personen aus Tunisien vom 19. Januar 2011 (SR 946.231.175.8) as amended lastly on 19 Janaury 2014; Verordnung über Massnahmen gegen gewisse Personen aus der Arabischen Republik Ägypten vom 2. Februari 2011 (SR 946.231.132.1) as amended lastly on 11 February 2014; Verordnung über Massnahmen gegen gewisse Personen aus Libyen vom 21 Februar 2011 (SR 946.231.149.82).

$1.398 billion).[992] A reason explaining such results is the administrative nature of the measures adopted by Switzerland, but also by Canada,[993] the European Union,[994] and the United States[995] to freeze the potentially corrupt assets. As a result of the latter 'good practice', the United Kingdom has also announced the possibility to introduce similar kind of measures 'following the examples of Switzerland and Canada, whose legislation allows administrative freezing of the proceeds of corruption in circumstances such as have been experienced by the Arab countries in transition.'[996] Contrary to the past experiences, States did not look for a judicial order by a Court nor waited for a request of mutual legal assistance from the victim State, but they ordered banks and other financial entities to freeze assets directly. This effective freezing method was justified by the particular (yet not exceptional) situation of the countries at stake, characterized by political upheaval or severe internal turmoil, and it was aimed at both preserving and preventing assets from being transferred and hidden somewhere else.

In other words, such measure do not exclude the need of mutual legal assistance since States have necessarily to trigger it in order to prove money laundering or to enforce the final judgment in domestic courts. That said, one should recall that traditional mutual legal assistance methods may turn out to be 'slow, formalistic, and complicated even for experienced jurisdictions, and more so for developing jurisdictions or those in transition.'[997] Overall then, in relation to freezing measure, one should favour the proactive approach

[992] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469), 27 which also specify that the value of such amount is likely to be higher, given that Libyan corruption proceeds could not be included because they could not be distinguished from the broader Libyan asset freezes issued by States.

[993] See Freezing Assets of Corrupt foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78, 23 March 2011, last amended on 28 February 2014.

[994] With regards to Tunisia see Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, OJ L 28, 2.2.2011, 62, later amended by Council Decision 2012/724/CFSP (OJ L 327, 26 November 2012) and Council Decision 2014/49/CFSP (OJ L 28, 30 January 2014). As for Egypt see Council Decision 2011/172/CFSP (22 March 2011), OJ L 76, 22.3.2011, 63, later amended by Council Decision 2014/153/CFSP (20 March 2014), Council Decision 2013/144/CFSP (21 March 2013), Council Decision 2012/723/CFSP (27 November 2012), and Council Decision 2012/159/CFSP (20 March 2012); Council Regulation (EU) No 270/2011 (22 March 2011) OJ L 76, 22.3.2011, 4, later amended by Council Regulation (EC) No 517/2013, Council Regulation (EU) No 270/2011, and Council Regulation (EU) No 1099/2012 (27 November 2012). For the EU see.

[995] See the U.S. President's Executive Order 13566 'Blocking Property and Prohibiting Certain Transactions Related to Libya' of 25 February 2011.

[996] U.K. Foreign and Commonwealth Office, 'Opening Statement by Mr. Dominic Grieve, Attorney General of the United Kingdom to the Arab Forum on Asset Recovery' (26 October 2013), 4.

[997] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469), 41.

displayed by many 'western' countries[998] and the use of administrative orders, which are then to be complemented by mutual legal assistance requests at a later stage of the asset recovery process.

5.4.4.2. Difficulties in the Confiscating Assets

On the other hand, many challenges still hinder the process of asset recovery in the 'Arab Spring' cases, especially in the confiscation and return phases. Starting with the former, one can notice the difficulties of satisfying the requirements of this kind of mutual legal assistance requests. First of all, it turns out to be complex for post-revolutionary States in transition to obtain conviction as well as satisfying the high burden of proving the link between the asset and the crime, and this may be due to a number of issues such as the new government's ambivalence toward the former ruling power (Egypt experience is particularly meaningful in this regard), the lack of access to evidence in the requested State, as well as the death, flight or immunity of the suspected person. Other elements which impair the possibility to afford mutual legal assistance in confiscation are related to the procedural standards applied by the prosecutorial or judicial authorities of the requesting State, but also to the requested States' scepticism/ lack of political will toward asset recovery and the expiry of statute of limitations.

In order to overcome the latter problems, the UNCAC and the practice of some countries offer some valid alternative strategies to traditional confiscation-based confiscation which States should consider make available (or use) to enhance the effectiveness of their asset recovery policies towards North African countries.

[998] On the importance of a proactive approach throughout the asset recovery process see the concluding observations of para 4.4.

5.4.4.2.1. Overcoming the Problems of 'Traditional' Criminal Confiscation

5.4.4.2.1.1. Non-conviction Based Confiscation

Firstly, pursuant to Article States should consider introducing the so-called non-conviction based confiscation, at least 'in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases' as provided for by Article 54(c) of the UNCAC.[999] Although the latter non-conviction based confiscation necessitates the proof that the frozen assets represent the proceeds or an instrumentality of crime, it represents a form of confiscation which applies a lower standard of proof and is independent from the conviction of the asset holder.[1000] In spite of the advantages and the availability in an increasing (yet limited) number of countries,[1001] there is no evidence that this method has been used in relation to any of the 'Arab Spring' cases.

5.4.4.2.1.2. Civil Lawsuit to Recover Stolen Assets

Secondly, States should allow other countries to seek damages in front of their Court by initiating a private civil action in line with Article 53 of the UNCAC.[1002] Significantly, the latter method was used by the Libyan government in the United Kingdom, and in March 2012

[999] On the main features of non-conviction based confiscation see para 3.3.3.2.

[1000] Usually the 'balance of probabilities' standard applies.

[1001] The US, UK, Ireland, Italy, Colombia, Slovenia, South Africa, Canada, New Zealand, Australia, and Jersey. Article 4(2) of the EU Freezing and Confiscation Directive has also introduced a form of non-conviction based confiscation in 2014, even though States have to enact domestic provisions in order for it to be effective. In some of these countries efforts have been made to ameliorate the impact of such measures: in England and Wales, for example, the discretionary decision to make a recovery order should now be taken by considering issues of justice and equity, as well as the respect for human rights. Cf. also de Kluiver, J., 'International Forfeiture Cooperation' (n. 505), 40, who contends that '[t]he number of nations that can assist in civil forfeiture matters is certainly rising and, given the new requirement of FATF Recommendation 38, civil forfeiture should one day be an option available in most countries.'

[1002] Cf. para 3.4.4.

the English High Court accorded it a £10 million townhouse in an affluent North London suburb.[1003] The same year Tunisia and Egypt were also admitted as plaintiffs in criminal cases by the Swiss Federal Criminal Court, although it is not known whether those States were finally able to recover some assets.[1004]

5.4.4.2.1.3. Administrative Confiscation

Thirdly, in light the effectiveness of administrative freezing measures, one should also take in consideration the administrative confiscation of assets, which, in spite of not being addressed by the UNCAC, it was successfully used by Tunisia in the aftermath of the revolution[1005] to confiscate billions of dollars of assets in the weeks following the end of the Ben Ali regime. As for an important financial centre like Switzerland, which emerged to be a 'haven' State for former North African leaders, one should stress that it also introduced administrative confiscation in 2010 for those situation where it is not possible to establish international cooperation because of the 'total collapse, or the unavailability of the national judicial system' in the victim State.[1006] Regrettably, although the latter tool could have helped the asset recovery process in the cases under consideration, the judicial systems of Tunisia, Egypt and Libya were not considered as belonging to the latter situation in spite of the difficulties characterizing those States during their (ongoing) transitional phase. However, one should welcome the fact that Switzerland is currently negotiating a new (consolidated) act on asset recovery which would extent the scope of the RIAA (and thus the possibility of administrative confiscation) when there is reason to presume that a foreign PEP or a close associate is guilty

[1003] StAR, 'Asset Recovery Database', available at http://star.worldbank.org/corruption-cases/?db=All.

[1004] With respect to Egypt see Federal Criminal Court, decision no BB.2011.107/108/110/111/112/115/116/117/128, 10 May 2012, available (in French) at http://bstger.weblaw.ch/pdf/20120430_BB_2011_107.pdf; as for Tunisia see Federal Criminal Court, decision no. BB.2011.130, 20 March 2012, available (in French) at http://bstger.weblaw.ch/pdf/20120320_BB_2011_130.pdf.

[1005] Decret-loi No 2011-13 mars 2011 portant confiscation d'avoirs et de biens meubles et immeubles, 14 March 2011, available at http://www.legislation-securite.tn/fr/node/30884.

[1006] Article 1 of the RIAA. These are the so-called 'failed or fragile States' which are either unable or unwilling to issue a request for legal assistance. The definition used by the Swiss legislator is the same one provided for in Article 17(3) of the Rome Statute in the realm of admissibility.

of corruption or other crimes.[1007] As a consequence, after the adoption of the letter act, when Switzerland will be faced with situations similar to the ones of Tunisia, Libya, and Egypt, a presumption of illicit origin would apply for their PEPs and thus it will be possible to issue administrative confiscation measures against them.[1008] Such presumption leading to unilateral measures may be nevertheless rebutted 'if it can be demonstrated that in all probability the assets were acquired by lawful means';[1009] furthermore, it will not be possible to seize and confiscate those assets to which a person who is not a close associate of the politically exposed person has acquired rights in rem in good faith.[1010]

In conclusion, then, since States experienced significant problems in confiscating assets through the 'traditional' criminal way in the 'Arab Spring' context, careful consideration should be given to the alternative strategies which may help confiscate corrupt assets and thus make the overall asset recovery process more effective. From an international law perspective, while there is no obligation with respect to administrative confiscation, non-conviction based confiscation and private civil action are two tools provided for by the UNCAC and thus should they be adopted by all State parties to the Convention.[1011]

[1007] The Draft Federal Act on the Freezing and Restitution of Potentates' Assets. On the ongoing law-making process see Swiss Federal Council, 'The Federal Council Adopts the Dispatch to Parliament Concerning a Federal Act on the Freezing and Restitution of Illicitly Acquired Assets of Foreign Politically Exposed Persons' http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=53048. For a preliminary comment on the latter draft see R see Ivory, R., *Corruption, Asset Recovery, and the Protection of Property in Public International Law* (n. 421), 53-4; Lötscher, B., 'Proposed Legislation on Freezing and Restitution of Ill-gotten Assets of Potentates' (n. 985); Egyptian Initiative for Personal Rights, 'Critique of the Federal Act on the Freezing and Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means' (n. 976).

[1008] See Article 15(1)-(2) of the latest version of the Draft Federal Act on the Freezing and Restitution of Potentates' Assets , available (in German) at http://www.news.admin.ch/NSBSubscriber/message/attachments/34992.pdf.

[1009] Article 15(3), ibid.

[1010] Article 16, ibid.

[1011] However one should notice that, pursuant to Articles 53 and 54 the UNCAC, non-conviction based confiscation is optional ('[…] consider taking such measures as may be necessary to […]') and only private civil action is mandatory ('[…] shall, in accordance with its domestic law […]').

5.4.4.3. Limited Amount of Returned Assets

The second major problem which emerges from the 'Arab Spring' cases is represented by the actual restitutions of assets to Tunisia, Egypt and Libya four years after the first set of freezing measures were adopted by 'western' States.

5.4.4.3.1. Tunisia

According to a StAR/OECD Report of September 2014, which examines the overall results of the asset recovery efforts and is unambiguously titled 'Few and Far: the Hard Facts on Stolen Asset Recovery',[1012] despite of all the efforts described so far Tunisia was able recover two planes from Switzerland and France, and two yachts from Spain and Italy. Quite optimistically StAR declared that 'while the value of these assets represent only a small portion of what is estimated to have been stolen from Tunisia, their recovery was critically important in showing that property located in foreign jurisdictions can be returned even before the finalization of the legal cases.'[1013] Interestingly, one should notice that the biggest asset recovery success for Tunisia did not come from cooperation with OECD States, but rather with Lebanon, which in April 2013 returned $28.8 million hidden in a Lebanese bank account controlled by Ben Ali's wife.[1014]

5.4.4.3.2. Egypt

As for Egypt, in spite of the swift freezing of $ 474 million by Switzerland, no asset has been reported to be returned to that country.[1015] While such poor result may due to the unstable

[1012] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469).
[1013] Brun, J. P., 'Tracking Tunisia's Stolen Assets: The Balance Sheet Three Years On' (n. 932).
[1014] Brun, J. P., 'Tracking Tunisia's Stolen Assets: The Balance Sheet Three Years On' (n. 932).
[1015] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469), 24-5.

situation which has characterized Egypt ever since the upheavals begun and its effects (e.g. lack of political will, unreliable judicial system), some responsibility may be also found in the 'western' States approach, such as the exclusion of the 'Arab Spring' cases from the scope of the RIAA that precluded the adopting of extraordinary measures such as administrative confiscation.

5.4.4.3.3. Libya

The assessment of assets recovery with respect to the Libyan case is more complicated and this is not just because the political climate of the country has not yet stabilized, but also because United Nations Security Council Resolutions 1970 (2011) and 1973 (2011) imposed the freezing on a broad range of assets belonging to the Libyan government,[1016] and not only on the proceeds of corruption. As a consequence, it is difficult to distinguish them and gather data on this.[1017]

Having this in mind, it is known that four OECD members (Netherlands, Sweden, Switzerland, and the United Kingdom) froze assets for a value of $25.6 billion. As for actual return, the only asset which were given back to Libya was a £10 million townhouse in North London which was obtained by the authorities of the latter country through a civil action brought into the courts of the U.K.[1018] Having already discussed the potentiality of such alternative way to recover assets, one can wonder whether the Gaddafi's stolen wealth will ever be given back into the hands of the Libyan population.

5.4.4.4. An Unsatisfactory Balance

[1016] E.g. Central Bank, Libyan Investment Authority, and Libyan National Oil Corporation.

[1017] Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469), 23.

[1018] See StAR, 'Asset Recovery Database', available at http://star.worldbank.org/corruption-cases/?db=All, and para 5.4.3.3.

More generally, the limited amount of assets which have been repatriated in the cases addressed in the present section of the Chapter lead to question the overall willingness of the international community to tackle the proceeds of gran corruption as well as the efforts of the single States to cooperate with other States in compliance with the international framework. Confronted with such situation and keeping in mind that the UNCAC establishes the 'fundamental principle' of asset recovery,[1019] the following steps of the international community should be to carry out a cost-benefit analysis of the global policy against grand corruption, and to consider new innovative strategies. In this sense consideration should be given to the proposal of some authors, who contend that more 'success control' is needed and thus that States should be 'accountable for not repatriating illicit assets effectively within a reasonable period of time.'[1020]

[1019] See Article 51 of the UNCAC.

[1020] Richter, D. and P. Uhrmeister, 'Returning "Politically Exposed Persons" Illicit Assets from Switzerland (n. 979), 499.

5.5. The Yanukovych Case

The last case which I will address in this Chapter is the most recent one and, as for the 'Arab Spring' cases, it is linked to some events of political nature which led to a radical change of regime. In particular, it is about the recovery of the assets of Viktor Yanukovych, who was the president of Ukraine from 2010 until 21 February 2014, when he was removed from office after months of severe political unrest and mass demonstration in the country. Since the recovery process of Yanukovych's assets only started ago after he left power, only a few steps have been taken by the international community to repatriate any stolen assets to Ukraine. However, it is interesting to assess them and to elaborate some comparative considerations, especially in relation with the 'Arab Spring' cases.

5.5.1. The Ukrainian Political Crisis of 2014[1021]

The major political issue which sparked protests in Ukraine in November 2013 was the decision of Yanukovych to suspend the negotiations of a trade agreement with the EU and thus to seek closer political ties with Russia and the Commonwealth of Independent States. However, one should recall that the country has been politically unstable for a longer period,[1022] and that the popular discontent was not only due to the government's geopolitical strategy but also to the widespread corruption of the political system and the country as a whole.[1023]

[1021] The sources for the brief chronology of events contained in the present paragraph are 'Ukraine Crisis: Timeline' *BBC News* (13 November 2014) and 'Timeline: Ukraine's Political Crisis' *Al Jazeera* (20 September 2014).

[1022] In 2004-2005 mass protests known as the 'Orange Revolution' helped bring to power pro-western President Viktor Yushchenko, who defeated the Yanukovych, then elected President in 2010. For a comparison of the two Ukrainian political crisis see Karpyak, O., 'Ukraine's Two Different Revolutions' *BBC News* (3 December 2013).

[1023] See, for instance, Lally, K. and W. Englund, 'Ukraine's Protesters Move Goal Post, Demand Systemic Change' *The Washington Post* (8 December 2013).

Starting from November 2013 public support grew against the government and in favour of EU-oriented policies. Massive demonstrations took the street of Ukrainian cities and several people were injured or killed in the following three months. Between 21 and 23 February 2014, after 88 people were killed in Kiev on 20 February, protesters took control of the presidential administration buildings, President Yanukovych disappeared and the Ukrainian Parliament voted to remove him from power with elections set for 25 May. A few days after Yanukovych appeared in Russia, where he was granted refuge.

5.5.2. The Theft of Ukrainian Assets

Ukraine is considered to be a country where corruption is a widespread phenomenon.[1024] High-level corruption during the Yanukovych era, in particular, took several forms, as illustrated in a 2014 study by the Institute of Modern Russia.[1025] Interestingly, some of the information about the massive misappropriation of public funds carried out by the former Ukrainian elites was discovered in the post-revolutionary days of February 2014 when some documents were rescued from Yanukovych's abandoned mansion outside Kiev.[1026] In spite of the fact that putting together all such documents is a complex process, a Ukrainian civil society organization[1027] and other investigative journalists[1028] were able to trace some further episodes of corruption committed by Yanukovych and the methods used by him to loot public assets and accumulate an enormous amount of personal wealth.

[1024] In Transparency International, '2013 Corruption Perception Index', available at http://www.transparency.org/cpi2013/results, for example, Ukraine scored 144th out of 177 countries with a score of 28, whereas 0 means 'highly corrupt' and 100 'very clean'.

[1025] Bullough, O., 'Looting Ukraine: How East and West Teamed up to Steal a Country' (Legatum Institute, July 2014).

[1026] Some 200 folders were found in a lake behind the former residence of Yanukovych after he fled Ukraine in February 2014. Since such documents had not sunk yet, a group of journalists and activists which entered the presidential estate right after his escape fished them out of the lake, dried them in one of the presidential saunas and then scanned each page meticulously in order to hold Yanukovych responsible and allow other people to analyze them. See 'Yanukovychleaks Project', available at http://yanukovychleaks.org/en.

[1027] The Anti-Corruption Action Centre is a Ukrainian civil society organization, which unites experts from legal, media and civic-political sectors fighting corruption as a root cause of the key state-building problems in Ukraine. See 'Anti-corruption Action Centre', available at http://antac.org.ua/en/.

[1028] The following examples are also taken from V., M., 'Ukraine Stolen Assets. A Long, Hard Slog' *The Economist* (5 March 2014).

5.5.2.1. The VAT Fraud

One of the schemes to seek rents from private actors was the VAT fraud,[1029] according to which foreign companies used to bribe Ukrainian officials in order to obtain the VAT refunds that the Ukraine government was withholding. The amount of bribes was estimated by the U.S. Security and Exchange Commission ('SEC') to be between 18% and 20% of the corresponding VAT refunds.[1030] According to the same Commission, to transfer the bribes the subsidiaries of a company 'artificially inflated commodities contracts with a Ukrainian shipping company to provide bribe payments to government officials. Alternatively the subsidiaries created phony insurance contracts with an insurance company that included false premiums passed on to Ukraine government officials.'[1031] As for the magnitude of the VAT fraud scheme, according to the new chief of the Ukraine's tax service Ihor Bilous, under Yanukovych the latter fraudulent practices which let (public) money flow into the officials' pockets amounted to a quarter of the national budget.[1032]

5.5.2.2. Embezzlement from State Budget

Another corrupt practice in Ukraine was to embezzle money directly from the State budget and, in particular, from procurement, 30% of which is estimated to be looted by Ukrainian ruling politicians.[1033] According to the same source, the following is an example of the typical 'legal' scheme to carry out a competitive tender:

[1029] Bullough, O., 'Looting Ukraine: How East and West Teamed up to Steal a Country' (n. 1025), 8.
[1030] U.S. Securities and Exchange Commission, 'SEC Charges Archer-Daniels-Midland Company With FCPA Violations' *Press Release* (20 December 2013).
[1031] U.S. Securities and Exchange Commission, 'SEC Charges Archer-Daniels-Midland Company With FCPA Violations' (n. 1030).
[1032] Verstyuk, I., Golovin, V., 'New Tax Man Wants to Turn Ukraine into Investment Bank' *Kyiv Post* (22 April 2014).
[1033] Bullough, O., 'Looting Ukraine: How East and West Teamed up to Steal a Country' (n. 1025), 8.

> 'A state body announces a $200 million tender; six big companies want to take part. Two come from the "family" and four are just normal. These four are phoned and told that if they take part they will be checked for taxes tomorrow and forever. Two of them pull out. The other two stay, and problems are found in their documents, and they are excluded from the auction. For example, we found that a document was refused because it was printed in font 13, not 14, and another because the stamp did not fully cover the director's signature. Two firms are left, both with high prices, and they win. And when you ask why the government paid twice what it had to, officials answer that it was all legal, in accordance with the law.'

5.5.2.3. Illegal Privatizations

Privatization of State property in an illegal and fraudulent way is another way Yanukovych and his entourage accumulated a significant amount of money to the expenses of the population. One example of this practice is represented by Yanukovych's former private residence at Mazhyhirya and his haunting lodge at Sukholuchya, which were both privatized without any legal formality. In particular, Mazhyhirya – a former natural reserve outside Kiev – was first sized and then sold without any official tender nor announcement to a Ukrainian company named 'Tantalit', owned by an Austrian company (Euro East Beteiligungs GmbH), which in turn was owned both by the British shell company Blythe (Europe) Ltd (35%)[1034] and by an Austrian bank (65%).[1035]

5.5.2.4.The Use of Shell Companies to Launder Stolen Assets

[1034] Blythe (Europe) Ltd was controlled by a nominee director, Reinhard Proksch, an Austrian lawyer resident in Lichtenstein who, after Yanukovych flight, denied any connection with the former Ukrainian President and declared in to an Austrian newspaper that Blythe and Astute (another company allegedly owned by him) belonged to 'a Dubai-based Russian investor'. See Hollingsworth, M., D. Gadher and M. Campbell, 'Harley Street Link to Ukraine Plunder' *The Sunday Times* (1 March 2014).

[1035] Leshenko, S., 'The Secrets of Mezhyhirya' *Pravda Blog* (5 June 2012).

The documents found in Yanukovych's estate not only show episodes of corrupt practices by also show that stolen assets were allegedly diverted to, or transited through, foreign 'western' companies – especially Austrian and British – which in turn were held by corporate partners in small offshore secrecy jurisdictions.

One example of this kind of companies was 'Astute Partners', the vehicle through which Yanukovych concealed the ownership of his 'private' haunting space (Sukholuchya) and which was a British shell company created in 2004 and made available by a Trust and Company Service Provider.[1036] Similarly, the British limited-liability partnership ('LLP')[1037] – suspected of having been used in a $150 million gas drilling fraud – was owned by two British Virgin Islands entities and then by a firm from Belize. In a further case, a partnership allegedly part of a fraudulent conspiracy to close the Ukrainian wheat market was moved from the British Virgin Islands to the Seychelles.[1038] Lastly, 'Navimax ventures Ltd, a British company which allowed Yanukovych to own three places in Crimea and a coal producer in the Donetsk region was created by A1 Company Services, whose director was a Cypriot company ('Fynel Limited') and which in turn was managed by a Latvian nominee.[1039]

5.5.2.4.1. Facing the Misuse of Corporate Practices

As the latter examples show, one of the main challenges created by those kind of corrupt practices is the use of shell companies, trusts and foundations established in different countries in order to form layers and conceal the assets' identity as well as their movement across jurisdictions. In the previous Chapter[1040] I pointed out that the use of different kinds of

[1036] The company was then used in September 2009 when the director and owner became the above-mentioned Austrian lawyer Reinhard Proksch, who could conceal the company's true ownership behind attorney-client privilege. See Stack, G., 'Yanukovych Used Network of UK Shell Companies to Hide Private Empire' *Business New Europe* (24 February 2014).

[1037] LLPs are popular in this context because they are opaque and can easily avoid the control of the tax authorities.

[1038] V., M., 'Ukraine Stolen Assets. A Long, Hard Slog' (n. 1028).

[1039] See Bullough, O., 'Looting Ukraine: How East and West Teamed up to Steal a Country' (n. 1025), 11.

[1040] Cf. para 4.3.1.2.2.14.

corporate vehicles is one of the most common devices to launder the proceeds of cases of grand corruption because they allow to cover the real person in control of a company.[1041] Not surprisingly, then, the latter has been considered 'one of the greatest obstacles to recovering stolen assets'[1042]

In light of these considerations it comes as no surprise that the task of chasing the assets underlying those layered shell companies is a daunting one, as also illustrated by a specific StAR research on the issue.[1043] In order to overcome such challenge the latter study suggests that States should oblige service providers to hold beneficial ownership information or, more ambitiously, to request company registries to hold and make public beneficial ownership information for all companies.[1044] Another proposed strategy is to introduce a 'three layer test' according to which 'whenever more than three layers of legal entities or arrangements separate the end-user natural persons (substantive beneficial owners) from the immediate ownership or control of a bank account, this test should trigger a particularly steep burden of proof on the part of the potential client to show the legitimacy and necessity of such a complex organization before the bank will consider beginning a relationship.'[1045]

However, StAR also noticed that to address this problem 'is not a question of passing new laws but rather to better enforcing those we already have.'[1046] An alternative strategy proposed to make illicit assets more traceable is thus for the public sector to share critical information with the private sector in order to help the latter to identify politically exposed persons and beneficial owners of shell companies.[1047] On top of this, it is considered that

[1041] According to Bullough, O., 'Looting Ukraine: How East and West Teamed up to Steal a Country' (n. 1025), 11, in the case of Yanukovych these kind of companies layering have the following context-related advantages: 'First, the sheer number of jurisdictions— Ukraine, UK, Nevis, Austria, Cyprus, and Latvia, as well as others hidden behind secrecy jurisdictions and nominee directors—complicates any potential investigation. Second, the "British" ownership gives both a veneer of respectability and access to UK courts. Third, ownership via Nevis or a similar jurisdiction makes it impossible for any future investigator to find information on beneficial ownership since registers there do not ask for it, and therefore do not have it. Fourth, Cyprus and Latvia have long-standing experience of dealing with former Soviet clients, and their bankers and directors have a reputation of waving through Know-Your-Customer requests without serious checks.'

[1042] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 74.

[1043] van der Does de Willebois, E. and others, 'The Puppet Masters. How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It' (n. 742).

[1044] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 74.

[1045] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 56.

[1046] Sharman, J., 'Shell Companies and Asset Recovery: Piercing the Corporate Veil' (n. 704), 74.

[1047] Schulz, M. E., 'Beneficial Ownership: The Private Sector Perspective' (n. 673), 81.

investigators have more chance to trace those hidden assets if 'haven' States freeze promptly suspicious assets, as it was done following the Ukrainian political crisis of 2014.

5.5.2.4.1.1. The G-8 and G-20 Political Commitments on Beneficial Ownership

In this context one should welcome the fact that in November 2014 the members of the G-20 agreed on some principles on beneficial ownership transparency[1048] after the G-8 did the same in June 2013.[1049] The momentum is thus growing on such essential anti-corruption issue. It is positive, for instance, that reference is made to the adoption of central registries of beneficial ownership of legal persons or other appropriate mechanisms, and that emphasis is laid on timely and effective information exchange with international counterparts. On the other hand, one should bear in mind that such commitments are formulated in an often vague and ambiguous wording. Moreover, they are political in nature, and thus they do not hold any binding significance.

5.5.3. The 'Asset Freeze' Sanctions of the International Community

As for the upheavals in Tunisia, Egypt and Libya, States and organizations reacted swiftly to Yanukovych's remove from office and ordered the freezing of his (and his entourage) assets in order to avoid the risk that misappropriated assets would be transferred before they can be blocked through the ordinary channels of mutual legal assistance. Although they are not relevant in the present context, one should take note of the fact that next to the latter freezing measures, the EU and the U.S. responded to the Ukrainian political crisis by adopting another set of sanctions (diplomatic, restrictive and trade/cooperation measures) against decision

[1048] G-20, 'G20 High-Level Principles on Beneficial Ownership Transparency' (November 2014).
[1049] G-8, 'G8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements' (June 2013).

makers in Russia and individuals in the Crimea who are considered to be involved in threatening Ukrainian sovereignty.[1050]

5.5.3.1. Switzerland, Lichtenstein and Austria

Switzerland adopted a decision on 26 February 2014[1051] based on the emergency powers provided for by Article 184(3) of the Swiss Constitution which establishes that '[w]here safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.' Besides blocking all assets of Yanukovych and his entourage in Switzerland for three years, the Swiss Federal Council has prohibited the sale and any disposal of assets, namely property, of these persons.

Austria[1052] and Lichtenstein[1053] followed shortly after and on 28 February 2014 they released freezing order concerning the assets of former party officials in the Ukrainian administration.

5.5.3.2. Canada

Canada issued freezing regulations on 3 March 2014[1054] pursuant to the Freezing Assets of Corrupt Foreign Officials Act of 2011.[1055] In particular, any Canadian person was prohibited

[1050] For the European Union see European Union Newsroom, 'EU Sanctions Against Russia over Ukraine Crisis', available at http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm. As for the United States see U.S. Department of the Treasury, 'Ukraine-related Sanctions', available at http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx.

[1051] Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de l'Ukraine du 26 février 2014 (946.231.176.7), available at http://www.admin.ch/opc/fr/classified-compilation/20140488/index.html.

[1052] Verordnung der Oesterreichischen Nationalbank gemäß Devisengesetz 2004 im Zusammenhang mit der aktuellen Lage in der Ukraine (Verordnung DevG 1/2014), 28 February 2014, available at http://star.worldbank.org/star/sites/star/files/verordnung_devg_1-2014final_mit_unterschriften.pdf.

[1053] Verordnung vom 28. Februar 2014 über Massnahmen gegenüber bestimmten Personen aus der Ukraine (946.224.0), available at https://www.gesetze.li/get_pdf.jsp?PDF=2014058.pdf.

[1054] Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44, available at http://laws-lois.justice.gc.ca/eng/regulations/SOR-2014-44/FullText.html.

the following conducts with respect to Yanukovych and a group of politically exposed person listed in the freezing order:

(i) Dealing, directly or indirectly, in any property, wherever situated, of any politically exposed foreign person;
(ii) Entering into or facilitating, directly or indirectly, any financial transaction related to a dealing referred to in the previous paragraph; or
(iii) Providing financial services or other related services in respect of any property of any politically exposed foreign person.

5.5.3.3. The European Union

After that the European Union and the United States intervened with freezing measures on 5 and 6 March, respectively. With respect to the former, the EU – pursuant to pursuant to the its autonomous Common Foreign and Security Policy powers – decided that all Member States had to freeze 'all funds and economic resources belonging to, owned, held or controlled by persons having been identified as responsible for the misappropriation of Ukrainian State funds and persons responsible for human rights violations in Ukraine, and natural or legal persons, entities or bodies associated with them.'[1056]

[1055] Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10, available at http://laws-lois.justice.gc.ca/eng/acts/F-31.6/.

[1056] Article 1 of Council Decision 2014/119/CFSP (OJ L 66, 5 March 2014) implemented by Council Implementing Decision 2014/216/CFSP (OJ L 111, 14 April 2014) amendment to the list of persons and entities subject to restrictive measures. See also Council Regulation (EU) No 208/2014 (OJ L 66, 5 March 2014) implemented by Council Implementing Regulation (EU) No 381/2014 (OJ L 111, 14 April 2014).

5.5.3.4. The United States

As for the United States' President signed the Executive Order 13660 authorizing sanctions on individuals and entities responsible for violating the sovereignty and territorial integrity of Ukraine, or for stealing the assets of the Ukrainian people. Accordingly, the order blocked 'all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person.'[1057] Contrary to the Swiss, Canadian and EU decisions, the U.S. executive order did not list any specific person but it referred to 'any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) 'To be responsible for or complicit in, or to have engaged in, directly or indirectly, any of the following:
(…)

c. misappropriation of state assets of Ukraine or of an economically significant entity in Ukraine; (…).'

5.5.4. The Cooperating Efforts of the International Community to Recover Ukrainian Assets

Given that the recovery process of the assets looted by former Ukrainian President Yanukovych has only begun in February 2014, one cannot trace any further development with

[1057] Executive Order 13660, 'Blocking Property of Certain Persons Contributing to the Situation in Ukraine', 6 March 2014, available at http://www.whitehouse.gov/the-press-office/2014/03/06/executive-order-blocking-property-certain-persons-contributing-situation.

respect to the following steps, that is confiscation and repatriation.[1058] As it emerged from the previous examples and experiences, asset recovery takes in fact years – if not decades – to accomplish some tangible results.[1059] Furthermore, the situation with Ukrainian assets is complicated by the fact that part of the assets is believed to have moved to Russian and Central Asian banks,[1060] making it more difficult to recover assets because of the geopolitical issues underlying the Ukrainian political unrest of 2014.

Although it is thus early to assess whether the international asset recovery efforts have been fruitful in the case of Ukraine, one should turn to an initiative of the international community aimed at enhancing cooperation and dialogue among States committed to recover stolen assets to Ukraine.

5.5.4.1. Perspectives on the Recovery of Ukrainian Stolen Assets

5.5.4.1.1. The Ukraine Forum on Asset Recovery ('UFAR') [1061]

The proactive freezing measures adopted by many States towards allegedly corrupt assets is an important yet temporary step of the asset recovery process which is to be complemented by further actions to secure their confiscation and actual return. Since the latter phases necessitate a considerable amount of cooperation among States, a forum was organized jointly

[1058] It is only known that the Lichtenstein's Office of the Public Prosecutor has applied to the investigating judge to carry out preliminary investigations against four suspects on suspicion of the crime of money laundering as referred to in § 165 paragraphs 1, 2, and 3 of the Liechtenstein Criminal Code (StGB). See the press release at http://star.worldbank.org/star/sites/star/files/liechtenstein_-_ukraine_press_release_june_2014_0.pdf.

[1059] Cf. Gray, L. and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (n. 469).

[1060] V., M., 'Ukraine Stolen Assets. A Long, Hard Slog' (n. 1028), reporting the opinion of a high-level Swiss sources contending that 'this time [Swiss banks] don't hold much of the loot'.

[1061] A similar initiative was taken for the 'Arab Spring' cases with the 'Arab Forum on Asset Recovery', which has been meeting regularly every year since 2012, after the G-8 meeting of Deauville in May 2011 launched the 'Deauville Partnership with Arab Countries in Transition' in order to support the asset recovery efforts of transitional countries in the Arab World. On the latter see 'Arab Forum on Asset Recovery', available at http://star.worldbank.org/star/ArabForum/About.

by the United Kingdom and the United States at the end of April 2014[1062] in order to bring together a range of international partners from around the world and to aim at:

(i) Reaffirming political commitment in tracing and recovering stolen assets;
(ii) Facilitating international cooperation for the early tracing and freezing of such assets;
(iii) Enabling the sharing of best practices for the benefit of Ukrainian practitioners;
(iv) Addressing the challenges of tracing stolen assets hidden behind complex corporate structures;
(v) Developing mutual confidence and building trust among foreign practitioners;
(vi) Identifying specific capacity building needs.[1063]

According to the final statement released by the chairs (United Kingdom and United States) of the meeting, the forum has been fruitful in several ways.[1064] Among the points emerged from the first UFAR – where international cooperation was regarded as 'central and crucial to any successful asset recovery case'[1065] – a few cooperation-oriented points should be underlined here.

[1062] The (first) Ukraine Forum on Asset Recovery took place in London on 29-30 April 2014. It was attended by delegates from Australia, Austria, Belgium, Bermuda, British Virgin Islands, Canada, Cayman Islands, Cyprus, Estonia, France, Germany, Gibraltar, Guernsey, Isle of Man, Italy, Japan, Jersey, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, The Netherlands, Panama, Seychelles, Spain, and Switzerland, along with the European Union and with the Stolen Asset Recovery initiative. Representatives of the Camden Asset Recovery Interagency Network (CARIN), Council of Europe, EUROJUST, EBRD, EUROPOL, INTERPOL, Organisation for Economic Cooperation and Development (OECD) and representatives of civil society also participated.

[1063] See 'Ukraine Forum on Asset Recovery', available at http://star.worldbank.org/star/UFAR/ukraine-forum-asset-recovery-ufar.

[1064] See the U.K. Foreign & Commonwealth Office, U.K. Foreign and Commonwealth Office, 'Chairs' Statement by the United Kingdom and United States and the Ukraine on the Meeting of the Ukraine Forum on Asset Recovery' (30 April 2014).

[1065] U.K. Home Secretary, 'Speech at Ukraine Forum on Asset Recovery' (29 April 2014).

5.5.4.1.2. Pre-MLA Cooperation

Emphasis was stressed, in particular, on the effectiveness of informal cooperation and on the establishment of pre-MLA international cooperation through asset recovery networks or contacts between police agencies, prosecutorial offices, and Financial Intelligence Units. As I stressed earlier on in the present work, this kind of cooperation (which is to be complemented with formal mutual legal assistance requests) is particularly valuable because is informal, quicker and can be crucial in building the necessary basis to issue a formal request.[1066] Furthermore, I also noticed that informal means of assistance may be pursed both before and during the elaboration of a request of mutual legal assistance, and that close attention should be given to issues of confidentiality, eventually through specific agreements.

5.5.4.1.3. Asset Recovery Guides and Resources

The UNFAR also favoured the mutual understanding among foreign officials through the publication (in Ukrainian) of Asset Recovery Guides illustrating and explaining the asset recovery tools and procedures available in each participating country.[1067] Such tools could contribute greatly to build trust and confidence among States, especially when cooperative concerns are due to the lack of knowledge or to the difficulties in understanding each other legal system and procedures.

5.5.4.1.4. Assisting Less-Experienced Jurisdictions

The last set of relevant initiatives which were announced at the UFAR concern the direct engagement of foreign experts, which is one of the strategic recommendations emerged from

[1066] Cf. para 4.3.1.2.4.8.

[1067] See 'Ukraine Forum on Asset Recovery', available at http://star.worldbank.org/star/UFAR/ukraine-forum-asset-recovery-ufar.

the previous Chapter.[1068] In that context I underlined that the exchange of specialized personnel and experts or the use liaison officers is considered particularly important in large and complex cases which involve large amounts of money and/or potential political consequences. In this way less-experienced States have the possibility to learn from experts and thus minimize crucial mistakes in building up cooperation relationships with foreign authorities.

As stressed in the remarks of former U.S. Attorney General Holder at the UFAR,[1069] in the Ukrainian case the U.S. have been proactive in this context since a few days after the fall of Yanukovych's regime the U.S. Department of Justice sent a response team in Kiev in order to:

(i) Assess the investigative needs of Ukrainian authorities to trace and recover stolen assets;
(ii) Assist with documents review and preservation;
(iii) Help initiate and coordinate investigative efforts.

Furthermore the U.S. allocated further human and financial resources to aid the Ukrainian investigations which, among other things, will allow the Department of Justice to place a liaison Attorney on the ground in Kiev 'to work exclusively with Ukraine and its partners on asset recovery and mutual legal assistance issues.' According Holder the similar experience in the Arab Spring cases has in fact demonstrated that the latter move will produce significant results in so far as it will enhance 'vital' information-gathering and communications capabilities, as well as the overall asset recovery process.[1070]

[1068] Cf. para 4.3.1.2.4.9.
[1069] U.S. Department of Justice, 'Attorney General Holder Delivers Remarks at the Ukraine Forum on Asset Recovery' *Press Release* (29 April 2014).
[1070] U.S. Department of Justice, 'Attorney General Holder Delivers Remarks at the Ukraine Forum on Asset Recovery' (n. 1069).

5.6. Concluding Remarks

After having addressed issues and challenges of international cooperation in the previous parts of the work from the perspective of international instruments and bodies, in the present Chapter I took the point of view of real cases of corruption where multiple jurisdictions were involved and criminal law assistance sought or afforded.

Besides illustrating the factual background of often complex cases of transnational corruption, my aim was to assess the impact of international law norms and practice in their cooperative dimension. Furthermore, I was able to examine how the challenges and shortcomings emerged in the previous Chapter affected the actual investigation and prosecution of corruption cases by domestic authorities throughout the world. Lastly, I tested whether the strategies emerging from international instruments and bodies could actually improve the effectiveness of cooperation to tackle foreign bribery and grand corruption practices.

With regards to the first case of foreign bribery perpetrated by the TSKJ Consortium in favour of Nigerian high-officials, one can notice an effective level of enforcement in multiple jurisdictions and especially in the U.S., whose authorities obtained more than $1.7 billion in penalties and forfeiture orders from the prosecution of four companies, two third-party intermediaries, and other culpable individuals. More importantly in the present context, the U.S. Department of Justice benefitted from an effective level of cooperation among foreign judicial authorities, which undoubtedly contributed to the success of its action. More generally the similar degree of development and the long-standing level of trust among some of the involved jurisdictions (U.S., France, Italy, Switzerland and the United Kingdom) seem to have positively influenced the outcome of the cases. The reason for such high level of trust among might be in turn found in the OECD Anti-Bribery Convention, which has set few - yet effective - obligations against bribery of foreign officials and has created several possibilities for State Parties to meet, exchange their experience and eventually gain confidence in each other work. The notable absence of Japan and the Netherlands among the investigating/enforcing jurisdictions shed nevertheless some doubts over the political commitment of some ‘western’ States against transnational bribery, which has often emerged as one of the general obstacle to cooperation. Furthermore, the Nigerian authorities lamented

other problematic issues in the realm of cooperation which may be seen as deriving from a lack of trust and problems in communication, the latter being two of the fundamental barriers which hinder the establishment of international cooperation. Another controversial issue raised from the Nigerian perspective is the recovery of the asset to the victim State in relation to foreign bribery cases,[1071] which has not received particular attention by the media although it was recently stressed by the U.S. authorities[1072] and it does not seem to be excluded by the UNCAC.[1073] While some authors contend that States are bounded to permit the latter strategy also towards the fines imposed through foreign bribery settlements, the reading of the UNCAC is debated in this respect:[1074] in any case one should agree with the fact that States 'victim' of foreign bribery 'should be given both legal standing and the opportunity to present the harm they suffered in any proceedings',[1075] including summary proceedings and settlements. As a consequence, Nigeria should file, when possible, a compensation claim in the home States of the TSKJ' Consortium companies and of its agents, which may then lead to return some proceeds of the bribery scheme pursuant to Article 57(3)(b) of the UNCAC. Although this way to recover asset has not received particular attention by the general public, which rather regards asset recovery as only linked to gran corruption, one should take into consideration this potential tool to recover proceeds of foreign bribery. At the same time one should also consider the (ambiguous) political space opened by resolution 5/3 of the 5th Conference of the States Parties to the UNCAC, which 'urges States parties to consider the

[1071] Cf. Solorzano, O. and P. Gomes Pereira, 'The Swiss Plea-bargaining Practice and Asset Recovery' (n. 737), 288, who analyse the Swiss 'Summary punishment Order' against the company Alstom and notice that Swiss authorities appear to 'draw a clear line between foreign bribery against companies and other forms of corruption when it comes to the application of enforcement strategies.' In light of such disparity and the lack of any distinction in Article 57 of the UNCAC, the authors come to the conclusion that, although it may be hard to evaluate the harm, States victims of foreign bribery should have the chance to request 'their' assets back by having legal standing and presenting the damage suffered as in any other corruption-related proceeding.

[1072] U.S. Department of Justice, 'Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act' (19 November 2014), where emphasis is stressed, among other things, on the assistance of the Kleptocracy Asset Recovery Initiative in the FCPA Unit's efforts to eradicate foreign corruption.

[1073] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 204.

[1074] See Pedriel-Vaissier, M., 'Is There an Obligation Under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' (n. 837)*; contra*, Stephenson, M., 'UNCAC Does Not Require Sharing of Foreign Bribery Settlement Monies' (n. 837).

[1075] Solorzano, O. and P. Gomes Pereira, 'The Swiss Plea-bargaining Practice and Asset Recovery' (n. 737), 293.

use of the tools set out in Chapter V of the Convention when resolving cases involving offences outlined in the Convention, including transnational bribery.'[1076]

The second case addressed in the present Chapter, the so-called Kazakh-gate, has also dealt with foreign bribery and revealed once again the essential role played by international cooperation to investigate and prosecute transnational corrupt practices, as well as to recover the related assets. In this sense one should stress the proactive approach displayed by the Swiss authorities and the cooperation between the U.S. and Swiss authorities to detect the pattern of transactions between Kazakhstan and American/European oil companies where the middleman - Mr Giffen - was involved. Effective cooperation was also established in confiscation matters by fully complying with Article 54(2)(b) of the UNCAC, which require States Parties to implement a foreign confiscation order 'upon a request that provides a reasonable basis for the requested State Party to believe there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation'. Furthermore, from the latter case it also emerged the significant level of cooperation established by the U.S., Switzerland and Kazakhstan in the realm of asset recovery leading to the creation of an independent and monitored institution using the confiscated funds to the benefit of the population in the victim States. Although some controversial issues have emerged in relation to the administration costs and the lack of any political responsibility in the Memorandum of Understanding, the idea of establishing a charitable foundation with the confiscated can be regarded as 'a artfully and carefully expressed compromise agreement in the spirit of Article 57(5) of the Convention.'[1077]

The two remaining set of cases which I addressed were quite different, not only because they are mostly in the investigative phase, but also because they do not relate to episodes of foreign bribery but rather of 'grand corruption', that is 'acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.'[1078] Another common feature of those two cases (which I named

[1076] COSP, 'Report of the Conference of the States Parties to the United Nations Convention against Corruption on its fifth session, held in Panama City from 25 to 29 November 2013' (n. 383), 12.

[1077] COSP, 'Digest of Asset Recovery Cases' (n. 877), 86, whereas Article 57(5) provided that '[w]here appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.'

[1078] Transparency International, 'FAQs on Corruption', available at http://www.transparency.org/whoweare/organisation/faqs_on_corruption/.

'Arab Spring' and 'Yanukovych' cases) is that the States' cooperating efforts begun after major political events consisting of upheavals overthrowing the government of the respective countries. As for the substantial content of my analysis, it did not touch on issues of MLA and extradition but it centred on the tracing, freezing, confiscation and return of the proceeds of corrupt practices carried out by the country's political elites. Although the latter process is still ongoing in both set of cases, it was already possible to formulate some considerations in relation to the effectiveness of both the domestic and international legal frameworks.

In particular, with regards to the 'Arab Spring' cases of Tunisia, Egypt, and Libya, one should welcome the proactive approach of 'western' States and Institutions in freezing the assets of politically exposed persons linked to the old regimes in line with Article 31 of the UNCAC. Interestingly, one of the reason explaining such efficacy and which may be thus considered as an effective practice is the administrative nature of the measures adopted by Switzerland, but also by Canada,[1079] the European Union,[1080] and the United States[1081] to freeze the potentially corrupt assets.[1082]

On the other hand, requested States experienced significant problems in confiscating assets through the 'traditional' criminal way because the latter requires the conviction of the asset holder in the requesting/victim State and the proof that the assets are linked with the 'proceeds' of the crime. In light of these difficulties alternative strategies to confiscate corrupt assets more effectively may be put in place, namely administrative confiscation, non-

[1079] See Freezing Assets of Corrupt foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78, 23 March 2011, last amended on 28 February 2014.

[1080] With regards to Tunisia see Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, OJ L 28, 2.2.2011, 62, later amended by Council Decision 2012/724/CFSP (OJ L 327, 26 November 2012) and Council Decision 2014/49/CFSP (OJ L 28, 30 January 2014). As for Egypt see Council Decision 2011/172/CFSP (22 March 2011), OJ L 76, 22.3.2011, 63, later amended by Council Decision 2014/153/CFSP (20 March 2014), Council Decision 2013/144/CFSP (21 March 2013), Council Decision 2012/723/CFSP (27 November 2012), and Council Decision 2012/159/CFSP (20 March 2012); Council Regulation (EU) No 270/2011 (22 March 2011) OJ L 76, 22.3.2011, 4, later amended by Council Regulation (EC) No 517/2013, Council Regulation (EU) No 270/2011, and Council Regulation (EU) No 1099/2012 (27 November 2012). For the EU see.

[1081] See the U.S. President's Executive Order 13566 'Blocking Property and Prohibiting Certain Transactions Related to Libya' of 25 February 2011.

[1082] Contrary to the past experiences, States did not look for a judicial order by a Court nor waited for a request of mutual legal assistance from the victim State, but they ordered banks and other financial entities to freeze assets directly. This effective freezing method was justified by the particular (yet not exceptional) situation of the countries at stake, characterized by political upheaval or severe internal turmoil, and it was aimed at both preserving and preventing assets from being transferred and hidden somewhere else.

conviction based confiscation and private civil actions. While there is no obligation with respect to former, Switzerland introduced the former confiscation method through the RIAA to deal with 'fragile States'; as for non-conviction based confiscation[1083] and private civil actions, they are two tools provided for by the UNCAC and thus they should be taken particularly in consideration by all State parties to the Convention.[1084] Furthermore, the limited amount of assets which have been actually repatriated to Arab countries after more than four years of efforts led to question the overall willingness of the international community to tackle the proceeds of gran corruption as well as the efforts of the single States to cooperate in compliance with the international framework.

Lastly, as for the Yanukovych case, in spite of the fact that the cooperating efforts to recover assets have only started in February 2014 and, as for the 'Arab Spring' cases, prompt freezing measures were adopted by many 'western' States which also established the Ukraine Forum on Asset Recovery, the road to recover Yanukovych's assets appears to be a long one and there is little reason to believe that Ukraine's experience will be much different from the past one in terms of actual retuned assets.[1085] An outstanding issue which emerged from the analysis of Yanukovych's corrupt practices is the significant misuse of corporate structures to create layers and conceal the stolen asset holders. In spite the recent political commitment of the G-8[1086] and G-20[1087] in the realm of beneficial ownership, States should intensify their cooperative efforts and comply with the relevant UNCAC's obligations.[1088]

More generally, considering the process of recovery in latter two cases and keeping in mind that the UNCAC establishes the 'fundamental principle' of asset recovery,[1089] I concluded by questioning whether the international community should carry out a cost-benefit analysis of the global asset recovery policy, and I put forward an alternative strategy to increase its

[1083] According to de Kluiver, J., 'International Forfeiture Cooperation' (n. 505), 40 '[t]he number of nations that can assist in civil forfeiture matters is certainly rising and, given the new requirement of FATF Recommendation 38, civil forfeiture should one day be an option available in most countries.'

[1084] While State should ensure private civil actions pursuant to Article 53 of the UNCAC, according to its Article 54 non-conviction based confiscation is only an optional provision.

[1085] See V., M., 'Ukraine Stolen Assets. A Long, Hard Slog' (n. 1028).

[1086] G-20, 'G20 High-Level Principles on Beneficial Ownership Transparency' (November 2014).

[1087] G-8, 'G8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements' (June 2013).

[1088] See Articles 14 and 52 of the UNCAC.

[1089] Article 51 of the UNCAC.

effectiveness, that is to hold somehow States 'accountable for not repatriating illicit assets effectively within a reasonable period of time.'[1090]

[1090] Richter, D. and P. Uhrmeister, 'Returning "Politically Exposed Persons" Illicit Assets from Switzerland' (n. 979), 499.

VI. GENERAL CONCLUSION

The present research work has analysed the international legal framework establishing mechanisms of cooperation to tackle transnational corrupt practices, in particular mutual legal assistance, extradition and asset recovery. Although the impact and effect of the instruments I have considered is not uniform with respect to all the latter forms of cooperation, I will conclude by providing some general considerations touching upon horizontal outstanding issues which emerged throughout my analysis.

First of all, I stressed the fact that the process toward an 'ever closer' cooperation of States in criminal matters is hampered by two sets of issues: firstly, the lack of mutual trust in the underlying values of foreign legal system, which could be addressed by favouring the knowledge of 'other' legal systems and the exchange of the most relevant practices. Secondly, the fact that transnational criminal procedure is 'fundamentally relational',[1091] especially in relation to a politically-sensitive crime such as corruption.[1092] As a consequence I underlined the consideration that many of the strategies to overcome challenges related to mutual legal assistance and extradition should be 'primarily political, and secondarily legal.'[1093] Similarly, any issue of criminal law cooperation may be improved through a clear and constructive communication among States[1094] and, for this reason, treaty-based agreements may be particular effective because they provide legal certainty, favour dialogue and mutual understanding; plus, they limit arbitrary and discretionary behaviours.

[1091] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 252 (emphasis added), which adds that transnational criminal procedure 'tries to overcome the parochial nature of criminal procedure by nudging states towards the mutual recognition of authoritative decision-making of other states, with the minimum of added conditions.'

[1092] Cf. Neliken, D. and M. Levi, 'The Corruption of Politics and the Politics of Corruption' (1996) 23(1) Journal of Law and Society Vol 23, No 1, 1.

[1093] Cf. Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 234, who mainly refers to the 'politics' of extradition, whereas 'States are notoriously sceptical of extradition' and some of them 'are eager to request it, but loath to grant it.'

[1094] As stated by a French Liason Magistrate in the United Kingdom in respect of common legal issues that arise in mutual legal assistance, 'it is vital for practitioners (in both the requesting and requested states) to anticipate potential problems and to proactively address them. Communication between the two states is essential. Whenever there is doubt about an issue, making inquiries leads to better results than simply ignoring the problem'; Rabatel, B., 'The Role of Liaison Magistrates in International Judicial Cooperation and Comparative Law' (n. 385), 44.

In this context one should welcome the efforts made in recent years by States to reach a closer level of assistance in criminal matters and, in particular, against transnational corruption.[1095] However, States should consider to further commit in this field, for instance by negotiating additional instruments on inter-State cooperation between law enforcement agencies, multilateral cooperative task forces for outstanding cases of transnational corruption, and U.N.-led command for transnational corruption prevention.[1096] Such developments should not certainly proceeds without an appropriate degree of jurisdictional and procedural guarantees: for this this reason, States could begin by setting up closer forms of legal and law enforcement assistance within regional organizations, where the approximation of laws and procedures is more feasible from both a legal and a political perspective. In this sense, in spite of the enduring difficulties and challenges, the European continent could be taken as a reference[1097] in light of the fruitful work of the Council of Europe and the entry into force of the Lisbon Treaty in 2009, both of which have laid solid and promising premises for the harmonization and the common prosecution of transnational crimes, including corruption.

The second set of issues which I considered concerned asset recovery, which some regard as 'the most effective way to curb corruption because it denies criminals the benefits of their acts and effectively removes any motivation for such criminal action in the future.'[1098] The

[1095] In this sense, Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 250-1 notices that the current trend is rather effective insofar as it goes toward 'less formality, to greater speed, and to more forms of assistance at ever earlier stages in the investigation.' The author adds, however, that the process is 'still heavily dependent on authentication, adherence to the correct procedure, and, above all, only being able to exercise powers that a requested state can exercise in its own right.' A further weakness is identified in the fact that 'the system does not provide for the powers available in the party with the most extensive enforcement powers, but only the powers in the particular requested party.' As for extradition, the author remarks that reform is occurring in two main ways: firstly, the number of extraditable offences is expanding, and the focus is switching from 'enumerative' to 'evaluative' thresholds; secondly, efforts have been made to remove the barriers to extradition. In this context the 'goal of universally available extradition' is far from reality because some barriers, such as the refusal to extradite nationals, is still very much present.

[1096] Cf. Mueller, G., 'The Globalization of Life on Earth, of Crime and of Crime Prevention : An Essay on how to Deal with the Major Criminals who Threaten the Continued Existence of Humankind' in Eser, A. and O. Lagodny (eds), *Principles and Procedures for a New Transnational Criminal Law : Documentation of an International Workshop in Freiburg, May 1991* (Max Planck Institute, Freiburg 1992).

[1097] According to Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 252, signs that the European model is taken as a reference 'are clearly there' since the '*de facto* manifestations of sovereign control and reciprocity are slowly being eroded, while individuals struggle to erect human rights control of these processes in the hostile terrain of transnational procedural cooperation which treats them as objects, not subjects.'

[1098] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' (n. 429), xxiii.

discussion of the latter theme centred on the most innovative provisions related to international cooperation and, in particular, on Chapter V of the UNCAC – a 'treaty within a treaty'[1099] which broke 'entirely new ground in terms of multilateral treaty regimes.'[1100] Although the latter instrument does not establish asset recovery as a fundamental right of States, it has broken an 'entirely new ground in terms of multilateral treaty regimes'[1101] because it systematized the concept of asset recovery by putting together obligations in the realm of money-laundering, prevention, seizure and confiscation, and, crucially, international cooperation. As a prominent practitioner argued 'in the end, the UNCAC is and must be about actual recoveries.'[1102] Furthermore, it is also significant that the UNCAC considers asset recovery as a 'fundamental principle' of the Convention:[1103] in spite of the fact that the latter is a symbolic statement of intent, one should emphasize that it does imply 'that any doubt concerning the interpretation of provisions related to asset recovery should be resolved in favour of recovery as a core international cooperation objective of the Convention.'[1104] At the regional level important steps have also been taken by the EU also in relation to seizure and confiscation. As I already stressed, the results achieved by the EU are favoured by the fact that its Member States have built up an advanced level criminal cooperation; however, one should notice that no EU instrument addresses the obligation to return the proceeds of corruption to the victim State. As a consequence, the most stringent international obligation in this context remains Article 57 of the UNCAC.

On the other hand, concerns have been raised in relation to the rights of bona fide owners and third parties which have acquired assets already 'tainted' by corruption. As a consequence it is likely that the purchase of assets related to countries ruled by corrupt regimes will lead to an

[1099] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 19.

[1100] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 4.

[1101] Low, L. A., 'The United Nations Against Corruption: The Globalization of Anticorruption Standard' (n. 297), 4.

[1102] Claman, D., 'The Promise and Limitations of Asset Recovery under the UNCAC' in Pieth, M. (ed), *Recovering Stolen Assets* (n 780) 333, 350.

[1103] Article 51 of the UNCAC.

[1104] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (2009) 191, which refers to U.N. Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Ad Hoc Committee for the Negotiation of a Convention against Corruption on the Work of its First to Seventh Sessions. Addendum. Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Corruption' (7 October 2003), para 48, where it is pointed out that the expression 'fundamental principle' would not have legal consequences on the other provisions of Chapter V of the UNCAC.

increased need for companies to carry out due diligence and risk assessment. An additional problematic factor which seems to emerge from Chapter V of the UNCAC is the time needed to recover assets pursuant. However, what is considered to be the most significant threat to asset recovery is the reluctance of requested States to afford cooperation and to engage with the necessary political will. In this sense it is not surprising that UNCAC reviews reveal that developing States show a more intense degree of political motivation in asset recovery cooperation than developed states 'which place a premium on discretion when responding to a mutual assistance request in this regard.'[1105] Accordingly, asset recovery increasingly emerged as an issue of justice and development for the 'global South', which too often sees the proceeds of corruption of their élites laundered abroad and never returned to the population to whom they belong, taking away resources from infrastructures, heath care, education, homeland security, and, most importantly, democracy.[1106] Since a large amount of the proceeds of corruption do not remain in the country where the offence occurred, it is correctly contended that asset recovery cannot be effective without 'an underlying ethos of cooperation between the concerned authorities of all the States involved'.[1107] Asset recovery cases can be thus compared with intricate puzzles which can be solved only by collecting the right pieces from the right jurisdiction, and then by putting them together in the their proper place.[1108] In other words, recovering asset is a 'collective undertaking' between practitioners from different jurisdictions which need to work together within a complex process consisting of investigations, law enforcement activities and requests of mutual legal assistance dealing with different cultural, linguistic, legal and political environments.[1109]

After having analysed in detail the relevant international legal framework for the purpose of asset recovery I examined in depth the challenges and perspectives of the latter process both by looking at the outcome of the most recent meetings of the UNCAC's Working Group on

[1105] Boister, N., *An Introduction to Transnational Criminal Law* (n. 4), 245, referring to Vlassis, V., 'International Economic Crime and Combating Corruption. Challenges and Responses' (Globalization of Crime— Criminal Justice Responses Ottawa, Canada 7–11 August 2011).

[1106] According to International Centre for Asset Recovery, 'Development Assistance, Asset Recovery and Money Laundering: Making the Connection' (2011), 24, it is calculated that 30% of development disbursement disappears in bribes to corrupt individuals and organizations.

[1107] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' (n. 429), xxiii

[1108] Dornbierer, A. and G. Fenner Zinkernagel, 'Introduction' (n. 429), xxiii

[1109] Davies, M., 'Asset Recovery: An Ongoing Dialogue' (n. 696), 120.

Asset Recovery as well as by examining the rich research work of StAR, a joint initiative of the UNODC and World Bank focused on asset-recovery issues. In this context it was also extremely helpful to trace the policy discourse taking place within the Conference of the States Parties to the UNCAC, whose role is crucial for a number of reasons: firstly, because it favours the development of the States' institutional and legislative framework through non-binding, yet politically-significant, resolutions and recommendations; secondly, because it represents an occasion where States' Ministries and experts can discuss issues from different perspectives, and build networks of cooperation to be used in practical cases; thirdly, because the COSP identifies the most significant problematic issues faced by States in implementing the UNCAC, and it attempts to provide some common answers or best practices in order to overcome them.

In spite of the fact that I considered a broad range of challenges, the best-practices and strategies in the asset recovery process, the focus has been laid on those issues linked with international cooperation. At the general level I underlined the fact that States should enhance their political will, as well as the trust and communications among them: since the latter concepts were also mentioned with respect to MLA and extradition, one can infer that they represent very essential elements to boost international cooperation, also in asset recovery matters. From a legal perspective I noticed that States are often called to comply more strictly with the relevant anti-corruption and anti-money laundering framework, and to introduce innovative tools and practices such as non-conviction based confiscation and the offence of illicit enrichment. Other crucial issues to be addressed by States are the identification of beneficial ownership and an enhanced due diligence on public officials, especially the category of 'politically exposed persons'. Thirdly, at the operational level, States should be more proactive and swift in establishing dialogue (and trust) with other States by employing to the fullest extent – and with the due precautions – the international provisions establishing informal channels, intelligence exchanges and financial intelligence units. In spite of these challenges, one should notice that practitioners and experts are increasingly approaching asset recovery as a process based on mutual learning, expertise and constructive dialogue and 'are witnessing and orchestrating a shift towards ever more effective enforcement and cooperation'.[1110] Asset recovery is no longer as a novel issue but rather as something 'that has

[1110] Davies, M., 'Asset Recovery: An Ongoing Dialogue' (n. 696), 126.

come to be accepted and expected'.[1111] As a consequence one can also predict a growing trust and confidence as well as consensus on the operational mechanisms among practitioners once mutual legal assistance with respect to asset tracing, freezing and confiscation will assume the features of a standard procedure.[1112] Regrettably, it will possible to assess States' progress in implementing Chapter V of the UNCAC only after 2019, when the second cycle of the Mechanism for the Review of Implementation will come to a conclusion.[1113] However, the perspective is that such review 'will create an unprecedented momentum for asset recovery, which will complement and continue the positive developments of the last years.'[1114]

My research work concluded by considering real cases of corruption where multiple jurisdictions were involved and inter-State criminal law assistance was sought or afforded. Besides illustrating the factual background of four complex and multi-layered cases, the last part of my research aimed at providing some general final conclusions. For this purpose, I assessed the impact of international law norms and practice in their cooperative dimension; I examined how the challenges and shortcomings emerged in the previous parts of my work affected the actual investigation, prosecution and enforcement of corruption cases by domestic authorities; lastly, I tested whether the strategies emerging from international instruments and bodies could actually improve the effectiveness of cooperation to tackle foreign bribery and grand corruption practices.

With regards to the first case of foreign bribery perpetrated by the TSKJ Consortium in favour of Nigerian high-officials, I noticed that the similar degree of development and the long-standing level of trust among some of the involved jurisdictions (U.S., France, Italy, Switzerland and the United Kingdom) have positively influenced cooperation and the

[1111] Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 171 who sustain that countries around the world are setting up policy, legislation and institutions to facilitate the recovery and return of stolen assets. At the same time it is also observed an increased number of professionals who have worked on asset recovery cases and who are gaining experience 'in navigating the complex terrain of multijurisdictional recoveries.

[1112]Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 171.

[1113] From 2015 until 2019 every State Party will be reviewed by two other State Parties in relation to the implementation of Chapter V. Although the peer-reviewing Parties will elaborate a country report, only its executive summaries will be made public.

[1114] Vlassis, D., D. Gottwald and J. Won Park, 'Chapter V of UNCAC: Five Years on Experiences, Obstacles and Reforms on Asset Recovery' (n. 476), 172.

outcome of the prosecution. The reason for such a high level of trust might be in turn found in the OECD Anti-Bribery Convention, which has set few - yet effective - obligations against bribery of foreign officials and has created several possibilities for State Parties to meet, exchange their experience and eventually gain confidence in each other work and practices. The notable absence of Japan and the Netherlands among the investigating/enforcing jurisdictions shed nevertheless some doubts over the political commitment of some 'western' States against transnational bribery, which has often emerged as one of the general obstacle to cooperation. Furthermore, the Nigerian authorities lamented other problematic issues in the realm of cooperation which may be seen as stemming from a lack of trust and problems in communication, the latter being two of the fundamental barriers which hinder the establishment of international cooperation. Another concern raised from the Nigerian perspective is the recovery of the asset to the victim State in relation to foreign bribery cases:[1115] although the latter issue has not received particular attention by the media, one should notice that such possibility was recently mentioned by influential U.S. authorities[1116] and it does not seem to be excluded by the provisions of the UNCAC.[1117]

The second case which I presented – the so-called Kazakh-gate – has also dealt with foreign bribery and revealed once again the essential role played by international cooperation to investigate and prosecute transnational corrupt practices, as well as to recover the related assets. During the analysis of this case I underlined the proactive approach displayed by the Swiss authorities and the cooperation between the U.S. and Swiss authorities to detect the pattern of transactions between Kazakhstan and American/European oil companies. Effective cooperation was also established in confiscation matters by fully complying with Article 54(2)(b) of the UNCAC, which require States Parties to implement a foreign confiscation

[1115] Cf. Solorzano, O. and P. Gomes Pereira, 'The Swiss Plea-bargaining Practice and Asset Recovery' (n. 737), 288, who analyse the Swiss 'Summary punishment Order' against the company Alstom and notice that Swiss authorities appear to 'draw a clear line between foreign bribery against companies and other forms of corruption when it comes to the application of enforcement strategies.' In light of such disparity and the lack of any distinction in Article 57 of the UNCAC, the authors come to the conclusion that, although it may be hard to evaluate the harm, States victims of foreign bribery should have the chance to request 'their' assets back by having legal standing and presenting the damage suffered as in any other corruption-related proceeding.

[1116] U.S. Department of Justice, 'Attorney General Leslie R. Caldwell Speaks at American Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act' (19 November 2014), where emphasis is stressed, among other things, on the assistance of the Kleptocracy Asset Recovery Initiative in the FCPA Unit's efforts to eradicate foreign corruption.

[1117] UNODC, 'Technical Guide to the United Nations Convention against Corruption' (n. 328), 204.

order ‘upon a request that provides a reasonable basis for the requested State Party to believe there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation’. Furthermore, the U.S., Swiss and Kazakh authorities displayed a significant level of cooperation in the realm of asset recovery through the creation of an independent and monitored institution – the BOTA Foundation – which is funded with the confiscated funds and operates for the benefit of the population in the victim States. Although some controversial issues have emerged in relation to the administration costs and the lack of any political responsibility in the founding agreement (the Memorandum of Understanding), the idea of establishing a charitable foundation with the confiscated assets was regarded as ‘a artfully and carefully expressed compromise agreement in the spirit of Article 57(5) of the Convention.’[1118]

The two remaining set of cases which I took into consideration were quite different from the previous ones, not only because the domestic prosecutions are still at an early stage, but also because they do relate to episodes of ‘grand corruption’. As a consequence my analysis did not concern issues of MLA and extradition, but it rather centred on the tracing, freezing, confiscation and return of the proceeds of corrupt practices carried out by the countries’ political elites. Although the latter asset recovery process is still ongoing in both set of cases, it was already possible to formulate some considerations in relation to the effectiveness of both the domestic responses and the international legal framework.

On the one hand I considered the ‘Arab Spring’ cases of Tunisia, Egypt, and Libya, where one has witnessed the proactive approach of ‘western’ States and institutions in freezing the assets of politically exposed persons linked to the old regimes in line with Article 31 of the UNCAC. One of the reason explaining such efficacy is the administrative nature of the measures adopted by Switzerland, but also by Canada,[1119] the European Union,[1120] and the United

[1118] COSP, ‘Digest of Asset Recovery Cases’ (n. 877), 86, whereas Article 57(5) provided that ‘[w]here appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.’

[1119] See Freezing Assets of Corrupt foreign Officials (Tunisia and Egypt) Regulations, SOR/2011-78, 23 March 2011, last amended on 28 February 2014.

[1120] With regards to Tunisia see Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia, OJ L 28, 2.2.2011, 62, later amended by Council Decision 2012/724/CFSP (OJ L 327, 26 November 2012) and Council Decision 2014/49/CFSP (OJ L 28, 30 January 2014). As for Egypt see Council Decision 2011/172/CFSP (22 March 2011), OJ L 76, 22.3.2011, 63, later amended by Council Decision 2014/153/CFSP (20 March 2014), Council

States[1121] to freeze the potentially corrupt assets.[1122] At the same time, requested States experienced significant problems in confiscating assets through the 'traditional' criminal way and I thus inquired into alternative strategies to confiscate corrupt assets, namely administrative confiscation, non-conviction based confiscation and private civil actions. While there is no obligation with respect to administrative confiscation, Switzerland introduced such tool through the RIAA, but only in presence of 'fragile States'; as for non-conviction based confiscation[1123] and private civil actions, they are two tools provided for by the UNCAC and thus they should be taken particularly in consideration by all State parties to the Convention.[1124] More generally, the limited amount of assets which have been actually repatriated to Arab countries after more than four years of efforts led me to question the overall willingness of the international community to tackle the proceeds of gran corruption as well as the efforts of the single States to cooperate in compliance with the international framework.

As for the last 'Yanukovych' case, in spite of the fact that prompt freezing measures were adopted by many 'western' States (which also established the Ukraine Forum on Asset Recovery), the road to recover the corresponding assets appears to be a long one, and there is little reason to believe that Ukraine's experience will be much different from the past one in terms of actual retuned assets.[1125] An outstanding issue which emerged from the analysis of Yanukovych's corrupt practices is the significant misuse of corporate structures to create layers and conceal the stolen asset holders. In order to tackle the latter issue, States should put

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Decision 2013/144/CFSP (21 March 2013), Council Decision 2012/723/CFSP (27 November 2012), and Council Decision 2012/159/CFSP (20 March 2012); Council Regulation (EU) No 270/2011 (22 March 2011) OJ L 76, 22.3.2011, 4, later amended by Council Regulation (EC) No 517/2013, Council Regulation (EU) No 270/2011, and Council Regulation (EU) No 1099/2012 (27 November 2012). For the EU see.

[1121] See the U.S. President's Executive Order 13566 'Blocking Property and Prohibiting Certain Transactions Related to Libya' of 25 February 2011.

[1122] Contrary to the past experiences, States did not look for a judicial order by a Court nor waited for a request of mutual legal assistance from the victim State, but they ordered banks and other financial entities to freeze assets directly. This effective freezing method was justified by the particular (yet not exceptional) situation of the countries at stake, characterized by political upheaval or severe internal turmoil, and it was aimed at both preserving and preventing assets from being transferred and hidden somewhere else.

[1123] According to de Kluiver, J., 'International Forfeiture Cooperation' (n. 505), 40 '[t]he number of nations that can assist in civil forfeiture matters is certainly rising and, given the new requirement of FATF Recommendation 38, civil forfeiture should one day be an option available in most countries.'

[1124] While State should ensure private civil actions pursuant to Article 53 of the UNCAC, according to its Article 54 non-conviction based confiscation is only an optional provision.

[1125] See V., M., 'Ukraine Stolen Assets. A Long, Hard Slog' (n. 1028).

into practice the recent political commitment in the realm of beneficial ownership,[1126] intensify their cooperative efforts in this field, and comply with the relevant UNCAC's obligations.[1127]

Notwithstanding the shortcomings which I highlighted throughout the work, my research has generally found out that that the current international legal framework against corruption – in particular the UNCAC – offers a solid web of legal and policy tools to enhance international cooperation against transnational corrupt practices, especially in relation to the recovery of stolen assets. The latter issue remains the most complex and problematic one, and, considering the likelihood that many other cases of grand corruption will emerge in the coming future, one may expect a growing interest and engagement of the research community (academia, international organizations, non-governmental organizations) on this subject. At this point of history, taking into account the challenges and the lack of results which currently characterize the asset recovery processes, the international community should carefully consider to carry out a cost-benefit analysis of the global asset recovery policy in place. At the same time, any future reform or instrument in this field should entail more stringent overview on States, should be result oriented, and should introduce accountability mechanisms for those States which do not actively engage in asset recovery efforts.

[1126] See G-8, 'G8 Action Plan Principles to Prevent the Misuse of Companies and Legal Arrangements' (June 2013), and G-20, 'G20 High-Level Principles on Beneficial Ownership Transparency' (November 2014).
[1127] See Articles 14 and 52 of the UNCAC.

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