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The normative development of laws on asset preservation and confiscation: An examination of emerging best practices

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The practice of international asset recovery appears to be in the process of moving beyond the provisions contained in the United Nations Convention against Corruption (UNCAC). These provisions were negotiated twenty years ago, and are now insufficient given the serious contemporary challenges involved in tracing, preserving, confiscating, and returning assets. This article focuses on the limitations of UNCAC's provisions concerning the preservation and confiscation of foreign assets. These limitations, and the need for progressive development, appear to have been recognized by the UNCAC Review Mechanism, which monitors the implementation of UNCAC by states parties. The Review Mechanism has begun encouraging states parties to adopt "good practices" that go beyond UNCAC's minimum requirements. In doing so, however, the Review Mechanism has not offered guidance on how exactly states parties ought to go about implementing the best practices that they have identified. The asset recovery laws of Canada, Switzerland, and the United Kingdom demonstrate the need for further consideration of how domestic asset recovery laws ought to be developed. These laws highlight some of the difficult issues raised by more flexible, informal, and rapid forms of international cooperation in the asset recovery context. In particular, they underscore the challenges involved in balancing the general, public interest in combating corruption and recovering stolen assets with respect for and protection of human rights.

1. Introduction

The asset recovery chapter of the United Nations Convention against Corruption (UNCAC) was a major achievement at the time of the treaty's conclusion in 2003. UNCAC is the only anti-corruption treaty that deals with asset recovery at length, and

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it emphasizes that the return of assets represents a "fundamental principle" of the Convention. At the same time, UNCAC's asset recovery provisions were the subject of a great deal of controversy during the negotiations of UNCAC, and the result is a set of provisions that are, in many respects, insufficient given the significant challenges involved in tracing, preserving, confiscating, and returning assets. The practice of international asset recovery appears to be in the process of moving beyond the provisions contained in UNCAC, in part through legislative developments at the domestic level. These normative developments have, however, been taking place in the absence of any robust international consensus about how exactly such "best practices" ought to be implemented.

This article explores the progressive development of UNCAC's provisions covering the preservation and confiscation of foreign assets. In using the term "progressive," we are referring to incremental legal change, as opposed to liberal or desirable legal change. Preservation measures include freezing and seizure, which UNCAC defines together as "temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority."[1] UNCAC further defines "confiscation" as "the permanent deprivation of property by order of a court or other competent authority."[2] UNCAC's provisions on asset preservation and confiscation are set out in article 54, which may be characterized as taking a relatively conservative approach to these aspects of asset recovery. Article 54's mandatory provisions require states to be able to preserve and confiscate assets in certain limited circumstances in the context of international cooperation. These mandatory provisions do not go as far as they could have, as they do not require states parties to be able to take timely, proactive, and flexible measures to preserve and confiscate assets. Under article 54, states parties are only obliged to consider adopting more progressive measures.

Article 54 is arguably ripe for progressive development, in light of the experience that states parties have gained in asset recovery since the treaty's conclusion in 2003. In the twenty years since the treaty's adoption, practice has shown the importance of states enabling timely asset preservation and confiscation even in the absence of a criminal conviction for a corruption offence. The UNCAC Implementation Review Mechanism (Review Mechanism), which monitors the implementation of UNCAC by states parties, has seemingly recognized the need for progressive development and has begun gently prodding states parties to adopt "good practices" that go beyond UNCAC's minimum requirements. Both the UNCAC Review Mechanism, and the United Nations Office on Drugs and Crime (UNODC), which is the Secretariat of the Review Mechanism, can be seen as actively encouraging the further normative development of domestic asset recovery laws. In doing so, however, neither the Review Mechanism nor the United Nations Office on Drugs and Crime (UNODC) has offered

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1 United Nations Convention against Corruption, art. 2(f), Oct. 31, 2003, in force Dec 14, 2005, 2349 U.N.T.S. 41, 43 I.L.M. 37 [hereinafter UNCAC].

2 *Id.* art. 2(g).

guidance on how exactly states parties ought to go about implementing the best practices they have identified.

The asset recovery laws of Canada, Switzerland, and the United Kingdom demonstrate the need for further consideration of how domestic asset recovery laws ought to be developed. These laws illustrate some of the difficult issues raised by more flexible, informal, and rapid forms of international cooperation in this context. The progressive development of domestic asset recovery laws raises questions about how the general, public interest in combating corruption and recovering stolen assets ought to be balanced with respect for and protection of human rights. This article focuses on Canada, Switzerland, and the United Kingdom because their laws and practices concerning asset recovery exemplify the types of good practices that have been highlighted by the UNCAC Review Mechanism.[3] The existing secondary literature on asset recovery has not, however, scrutinized or questioned these legal and policy developments. This article seeks to fill this gap by examining how the laws and practices of Canada, Switzerland, and the United Kingdom achieve a balance between the public interest and individual rights.[4] In doing so, this piece aims to contribute to a body of literature on the legal challenges associated with asset recovery.[5]

Section 2 considers UNCAC's provisions on asset preservation and examines the implementation and enforcement of asset preservation laws in Switzerland and Canada. Section 3 addresses UNCAC's provisions on confiscation, and then focuses on the introduction of and practical application of unexplained wealth orders (UWOs) in the United Kingdom.

2. Asset preservation: Freezing and seizure of assets

Asset preservation, through freezing or seizure, helps to ensure that assets are still available for confiscation when investigations and proceedings have run their course.[6] Ideally, such "provisional measures" occur as early as possible, so as to reduce the amount of time that alleged perpetrators, or their associates, have to hide or dissipate the assets at issue.[7] Domestic laws on asset preservation must strike a balance between competing interests.[8] On the one hand, asset recovery laws serve the public interest

[3] Conference of the States Parties to the UN Convention against Corruption, Report, Implementation of chapter V (Asset recovery) of the United Nations Convention against Corruption, UN Doc. CAC/COSP/2021/6 (Oct. 11, 2021), https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=CAC/COSP/2021/6&Lang=E [hereinafter Chapter V Report].

[4] Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons, SR 196.1 (2015) [hereinafter FIAA] (Switz.); Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10 (Can.); Criminal Finances Act 2017, c. 22, § 362B (U.K.).

[5] *See, e.g.*, Chasing Criminal Money: Challenges and Perspectives and Asset Recovery in the EU (Katalin Ligeti & Michele Simonato eds., 2017); Johan Boucht, The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds (2017); Radha Ivory, Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys (2014).

[6] Jean-Pierre Brun, Anastasia Sotiropoulou, Larissa Gray, Clive Scott, & Kevin M. Stephenson, Asset Recovery Handbook: A Guide for Practitioners 135 (2d ed. 2021).

[7] *Id.*

[8] *Id.*

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by ensuring the preservation and maintenance of the proceeds and instrumentalities of crime until confiscation proceedings are complete.[9] In other words, asset recovery laws help to maintain the integrity of anti-corruption investigations and prosecutions by preserving the proceeds and instrumentalities of alleged acts of corruption. On the other hand, asset recovery laws must respect and protect the human rights of the alleged perpetrators and bona fide third parties. Especially pertinent human rights include the right to a fair trial, in particular the presumption of innocence, and the right to the protection of property.[10] The balance achieved by UNCAC's provisions on asset preservation arguably tips somewhat in favor of the protection of individual rights, as opposed to maximally advancing the public interest in the preservation and maintenance of the proceeds and instrumentalities of corruption offences.

UNCAC does not go as far as it could in advancing asset preservation, as it includes a provision requiring states parties to *consider* enabling early preservation measures; they are not required to actually do so.[11] On the basis of this provision, the UNCAC Review Mechanism has been gently encouraging states parties to adopt domestic laws that enable early as well as proactive preservation measures. The following introduces the relevant asset preservation provisions of UNCAC, before examining the laws in force in Switzerland and Canada.

2.1. The state of international law on asset preservation

UNCAC's mandatory provisions on asset preservation are not designed to ensure early or proactive measures by states parties. Article 54(2) of UNCAC requires states parties to freeze or seize foreign assets in only two circumstances, both of which involve a formal mutual legal assistance request from another state party (the "requesting state" or country of origin).[12] In the first scenario, which is addressed by article 54(2)(a), states parties must ensure that their domestic authorities are able to freeze or seize property when a freezing or seizure order has been issued by a court or competent authority in the requesting state party.[13] A requested state party could comply with this provision by recognizing and enforcing a foreign freezing or seizure order, or by using a foreign order as the basis for seeking the issuance of an equivalent order by its own authorities. A requesting state's freezing or seizure order must, however, meet a particular evidentiary standard in order for it to have these possible effects in the requested

9 Rita Adam & Valentin Zellweger, *The Proposed Swiss Comprehensive Act*, *in* Emerging Trends in Asset Recovery 173 (Gretta Fenner Zinkernagel et al. eds., 2013); *see also* Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, & Larissa Gray, Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture 30 (2009).

10 International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, in force Mar. 23, 1976, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, in force Sept. 3 1953, 213 U.N.T.S. 221; Protocol to the Convention for the Protection of Human Rights as Fundamental Freedoms as amended by Protocol No. 11, art. 1, Mar. 20, 1952, in force May 18, 1954, E.T.S. No. 9.

11 UNCAC, *supra* note 1, art. 54(2)(c).

12 *Id.* art. 54(2) (the chapeau clarifying that freezing and seizure is a form of mutual legal assistance under article 55(2), which covers international cooperation for purposes of confiscation).

13 *Id.* art. 54(2)(a).

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state. The requesting state's preservation order must provide a "reasonable basis" for the requested state party to believe that there are "sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation. . . ."[14] An interpretive note to article 54(2)(a) indicates that the term "sufficient grounds" should be understood as "a reference to a prima facie case in countries whose legal systems employ that term."[15] In other words, domestic authorities in the requested state are meant to apply a relatively low standard of proof, rather than the elevated standard that would apply in criminal proceedings (e.g., "beyond a reasonable doubt").[16]

In the second scenario, which is addressed by article 54(2)(b), states parties must ensure that their domestic authorities can freeze or seize property on the basis of a request by a state of origin, rather than an order issued by a court or competent authority of the state of origin. The same evidentiary standard applies, as the requesting state must make a request which itself provides a "reasonable basis" for the requested state to believe that there are "sufficient grounds" for taking provisional measures and that the property would eventually be subject to a confiscation order.[17] As a matter of treaty interpretation, it is reasonable to assume that the evidentiary standard set out in article 54(2)(b) should be understood as the same as the standard set out in article 54(2)(a), as the language is identical.[18]

The provisional measures required by these two provisions (article 54(2)(a) and 54(2)(b)) have an inherently reactive rather than proactive character. Article 54(2) of UNCAC only requires states parties to provide mutual legal assistance in the form of freezing or seizure when requested to do so by another state party. States parties are not required to freeze or seize foreign property on their own initiative, in the absence of a mutual legal assistance request by a requesting state. Such "reactive" freezing and seizure orders will therefore typically be issued well after asset recovery proceedings have begun in the requesting state. This means that by the time the requested state orders provisional measures, the alleged perpetrator may have had ample opportunity to hide or dissipate the assets that were located in the requested state.

Article 54 of UNCAC does, however, acknowledge the possibility of earlier, timelier action by destination states (i.e., jurisdictions where alleged proceeds of corruption are located), as it requires states parties to "consider" enabling early preservation

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[14] *Id.* art. 54(2)(a).

[15] UN Office on Drugs & Crime, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption 475 (2010) [hereinafter Travaux Préparatoires].

[16] The Stolen Asset Recovery (StAR) Initiative warns against a narrow interpretation of this clause, such as would permit or require competent authorities to review the merits of the case for confiscation or conviction. Kevin Stephenson, Larissa Gray, & Ric Power, Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action 76 (2011).

[17] UNCAC, *supra* note 1, art. 54(2)(b).

[18] Vienna Convention on the Law of Treaties, art. 31(1) May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Article 31(1) VCLT provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In the case of article 54(2)(b) of UNCAC, the terms "reasonable basis" and "sufficient grounds" must be interpreted in their context, which includes article 54(2)(a), where the same terms are used and are defined in an interpretive note.

measures. Specifically, article 54(2)(c) provides that states must "consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property."[19] The requirement "to consider" entails an obligation of conduct, rather than an obligation of result.[20] A state party could therefore fulfill this obligation through a debate in the legislature about the adoption of such a measure. But such a debate would not actually have to culminate in the passage of legislation enabling early preservation measures in order for a state party to comply with this provision. A legislative debate would itself be sufficient for this requirement of consideration to be fulfilled.

Article 54(2)(c) appears to contemplate relatively early preservation measures that are not necessarily based on a formal mutual legal assistance request.[21] But UNCAC leaves the details to the discretion of states parties. The preservation measures covered by this provision would take place at a relatively early stage in the asset recovery process because the competent authorities of a destination state would not need to wait for the state of origin to produce an order issued by a court or competent authority, or to make a formal request. Instead, the destination state could issue a preservation order on the basis of certain triggers such as an arrest or criminal charge in the state of origin. A destination state that issues preservation orders on the basis of such triggers is still "reacting" to ongoing criminal proceedings in the state of origin, but it is doing so at an earlier stage, and possibly before the alleged perpetrator has had an opportunity to transfer or dissipate the assets. Such an order by a destination state would be informal in the sense that its competent authorities would not be waiting for the other state party to make a sufficient mutual legal assistance request. Article 54(2)(c) of UNCAC notably does not specify whether an arrest or criminal charge in a state of origin would need to provide a "reasonable basis" for the destination state to believe that there are "sufficient grounds" for taking action. But domestic laws that abandon this prima facie evidentiary standard would likely fail to achieve an appropriate balance between the public interest and individual rights.

Article 54(2)(c) arguably contemplates further early, proactive preservation measures by destination states. This provision provides a non-exhaustive list of possible triggers ("such as on the basis of a foreign arrest or criminal charge"), and therefore seems to conceive of other possible bases for preservation measures in destination states. A destination state could, for example, enable the freezing or seizure of assets on the basis of its own assessment of the likely criminal origins of the assets, without waiting for either a request from the state of origin or the initiation of criminal proceedings in the state of origin. Such an assessment could potentially be based on domestic money laundering proceedings in the destination state, or on media reports,

[19] UNCAC, *supra* note 1, art. 54(2)(c).

[20] Cecily Rose, Michael Kubiciel, & Oliver Landwehr, *Introduction* to The United Nations Convention Against Corruption: A Commentary 1, 12 (Cecily Rose, Michael Kubiciel, & Oliver Landwehr eds., 2019).

[21] Radha Ivory, *Article 54: Mechanisms for Recovery of Property Through International Cooperation in Confiscation*, *in* The United Nations Convention Against Corruption: A Commentary, *supra* note 18, at 549, 556–7.

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such as those based on the work of the International Consortium of Investigative Journalists.[22]

The UNCAC Review Mechanism appears to be promoting the normative development of domestic laws on asset preservation by encouraging states parties to go beyond the mandatory provisions of article 54. Although article 54(2)(c) does not explicitly frame early and proactive preservation measures as "good practices," the UNCAC Review Mechanism has adopted this characterization.[23] The Review Mechanism's position is notable in light of the fact that the drafters of UNCAC chose to make article 54(2)(c) an obligation of consideration (i.e., an obligation of conduct), rather than an obligation of result. The drafting history of UNCAC suggests that a mandatory provision on early preservation measures did not garner enough support among the delegations and therefore became an obligation to consider as the negotiations progressed.[24] At the same time, the *travaux préparatoires* do not suggest that early, proactive preservation measures generated significant controversy, unlike other aspects of asset recovery, such as article 57 on the return and disposal of recovered assets.[25] The absence of a documentary record of heated debate about article 54 during the treaty negotiations has arguably given the UNCAC Review Mechanism some room to maneuver. The Mechanism has been able to reframe early, proactive provisional measures as desirable, "progressive" measures that states parties should be encouraged to adopt.

Though the second review cycle was still ongoing at the time of writing, available information about the implementation of article 54 indicates that the Review Mechanism is encouraging states parties to adopt progressive laws that enable early and proactive preservation measures. In a summary of the state of implementation as of 2021, the Review Mechanism noted that most of the reviewed states parties had complied with the mandatory provisions of article 54 (arts. 54(2)(a) and 54(2)(b)).[26] Most states "could execute freezing or seizure orders issued by a foreign court or sometimes even by another competent authority, could freeze assets upon request from another state or could do both."[27] The summary further indicates that "*several* states" could issue proactive preservation orders "on the basis of media reports or a foreign arrest, criminal investigation or charge."[28] The phrase "several states" suggests that for the most part, states have not gone beyond the minimum requirements of UNCAC. In the second cycle review of France, for example, the reviewers reportedly noted that French legislation does not provide for the issuance of a preservation order in the absence of a mutual legal assistance request, in circumstances where there is a foreign

[22] *Offshore Leaks Database*, Int'l Consortium of Investigative Journalists, https://offshoreleaks.icij.org/ (last visited Nov. 24, 2021).

[23] Chapter V Report, *supra* note 3, at 5 (identifying "proactive issuance of freezing orders" as one of the "prevalent good practices in the implementation of Chapter V of the Convention").

[24] Travaux Préparatoires, *supra* note 15, at 467–73.

[25] *Id.* at 499–514.

[26] Chapter V Report, *supra* note 3, ¶ 46 ("contain[ing] a compilation of the information available as of September 2021 on successes, good practices, challenges and observations" identified with respect to Chapter V of UNCAC during the second review cycle).

[27] *Id.*

[28] *Id.* ¶ 51 (emphasis added).

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arrest or criminal charge.[29] The reviewers specifically recommended that France consider taking measures to permit its competent authorities to preserve property in such circumstances.[30]

While the Review Mechanism encourages states parties to go beyond the minimum requirements of article 54, it has not provided guidance as to how states parties ought to do so. The Review Mechanism has not, for example, indicated under what circumstances it would be appropriate for a destination state to take asset preservation measures on the basis of media reports or an investigation, as opposed to an arrest or an indictment. The absence of official guidance from the Review Mechanism leaves important outstanding questions about how states parties should balance the public interest and individual rights. The asset preservation laws of Switzerland and Canada help to illustrate the challenges involved in ensuring that an appropriate balance is struck between these competing interests.

2.2. Progressive domestic laws on asset preservation

Asset freezing laws in Switzerland and Canada exemplify the more proactive approach that the UNCAC Review Mechanism has identified as good practice. These laws are designed to enable asset freezing in circumstances where formal mutual legal assistance cannot be carried out in a timely and/or successful manner. This section analyzes the relevant provisions of the Swiss and Canadian laws and their application in practice.

Switzerland's Foreign Illicit Assets Act (FIAA) was enacted in 2016 due to problems associated with its 2011 Restitution of Illicit Assets Act (RIAA), which had introduced the non-conviction-based forfeiture of funds illicitly obtained by politically exposed persons.[31] Under the 2011 RIAA, however, freezing and forfeiture were only possible where mutual legal assistance had already been unsuccessful due to the "failure of state structures" in the country of origin.[32] The 2016 FIAA, by contrast, provides that the Swiss Federal Council may order the freezing of assets "in order to support *future* cooperation within the framework of mutual legal assistance proceedings with the country of origin."[33] In other words, the state of origin does not need to have attempted mutual legal assistance proceedings in order for the Federal Council to be able to order an asset freeze. The law enables the freezing of assets that are associated with a foreign politically exposed person or their close associates or assets that belong to a legal entity associated with a politically exposed person.[34] The law specifies that a

29 Conference of the States Parties to the UN Convention against Corruption, Implementation Review Group, Executive Summary (France), U.N. Doc. CAC/COSP/IRG/II/2/1/Add.22, at 12 (Sept. 14, 2022), https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=CAC/COSP/IRG/II/2/1/Add.22&Lang=E.

30 *Id.*, p. 13.

31 FIAA, *supra* note 4, art. 3; Federal Act on the Restitution of Assets Illicitly Obtained by Politically Exposed Persons SR 196.1 (2011) [hereinafter RIAA] (Switz.); Frank Meyer, *Restitution of Dirty Assets: A Swiss Template for the International Community*, *in* Chasing Criminal Money: Challenges and Perspectives and Asset Recovery in the EU, *supra* note 5, at 211.

32 FIAA, *supra* note 4, art. 2(c).

33 FIAA, *supra* note 4, art. 3(1) (emphasis added).

34 The FIAA defines foreign politically exposed persons as "individuals who are or have been entrusted with prominent public funds by a foreign country, for example heads of State or of government, senior

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foreign politically exposed person (or a close associate) must have "power of disposal" over the assets or be the beneficial owner of the assets or the legal entity to which the assets belong.[35]

In order for an asset freeze to be admissible, four seemingly cumulative conditions must be met.[36] These four conditions may be understood as the triggers for freezing orders under the Swiss FIAA. First, the government of the country of origin (or certain members of the government) must have lost power, or a change in power must appear to be "inexorable." This condition seems to encompass all types of power changes, including changes following a democratic election, as well as non-democratic regime changes such as a *coup d'état*. Second, the level of corruption in the country of origin must be "notoriously high." This criterion raises questions about what qualifies as "notorious," how this ought to be measured, and why general levels of corruption should be taken into consideration in asset recovery proceedings, which are necessarily case-specific. Third, it must "appear likely" that the assets at issue were acquired through "acts of corruption, criminal mismanagement or other felonies." The term "likely" seems to introduce an evidentiary standard that is arguably equivalent to the prima facie standard of "reasonable basis" and "sufficient grounds." Finally, "the safeguarding of Switzerland's interests" must require the freezing of the assets. This final condition inserts political considerations into Swiss decision-making about freezing foreign assets.

Canada's Freezing Assets of Corrupt Foreign Officials Act (2011) similarly enables asset freezing in the absence of a formal mutual legal assistance request, provided that certain conditions are met. The Canadian Governor in Council may issue orders or regulations for the seizing, freezing, or sequestration of property where a "foreign state, in writing, asserts to the Government of Canada that a person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship. . . ."[37] Such a written request must ask the Government of Canada to freeze the property of the person at issue. By requiring a written assertion, as opposed to a formal mutual legal assistance request that meets a "reasonableness" standard, Canada's law allows for more flexible or informal international cooperation in the form of asset freezing. Canada's law does not explicitly require the country of origin to provide a "reasonable basis" for a such a request.

Canada's law further provides that the Governor in Council may make the order or regulation only if three conditions are met.[38] These conditions serve as triggers for preservation orders or regulations under this law. First, the person at issue must be a politically exposed foreign person in relation to the foreign state making the request.

politicians at the national level, senior government, judicial or military officials at the national level, important political party officials at the national level and senior executives of state-owned corporations of national importance." The term "close associates" refers to "natural persons who are known to be in close association" with foreign politically exposed persons "by reasons of a family, personal or business relationship." *Id.* art. 2(a)–(b).

35 *Id.* art. 3(1).

36 *Id.* art. 3(2).

37 Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c.10 s. 4(1) (Can.).

38 *Id.* art. 4(2).

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Like the Swiss FIAA, the scope of Canada's law is thereby limited to property associated with politically exposed persons. Second, there must be "internal turmoil or an uncertain political situation, in the foreign state." Canada's law does not explicitly require a link between governance failures in the country of origin and an inability to make a formal mutual legal assistance request, but such a link is arguably implied by the inclusion of this condition.[39] Third, the making of the order or regulation must be "in the interest of international relations." Like the Swiss FIAA, the Canadian law thereby inserts political considerations into the decision-making of the Governor in Council.

The laws adopted by Switzerland and Canada may be considered progressive insofar as they allow for more flexibility and timeliness than formal mutual legal assistance procedures could achieve. The Swiss law does not require that mutual legal assistance has been attempted, while the Canadian law merely requires a written assertion by the country of origin. Both laws thereby acknowledge that waiting for mutual legal assistance proceedings to run their course may be inconsistent with the need for swift orders or regulations to freeze or seize assets. The Swiss and Canadian laws are not, however, progressive in the ways explicitly envisaged by article 54(2)(c) of UNCAC. Neither law specifically enables domestic authorities to proactively order the freezing or seizure of assets on the basis of a foreign arrest or criminal charge, or media reports. Under the Swiss FIAA, one of the triggers is that the assets "appear likely" to have been acquired through illicit conduct, such as corruption, criminal mismanagement, or other felonies. But this provision does not indicate the basis on which such an assessment ought to be made by Swiss authorities (i.e., on the basis of domestic proceedings in the destination state or in the state of origin, or on the basis of media reports).

Although asset recovery cases necessarily center around the illicit origins of specific assets, the Swiss and Canadian laws both premise early preservation measures, in part, on political and other factors that necessarily go beyond the specifics of the case at hand. The Swiss law requires a loss of power in the country of origin (actual or inexorable), notoriously high levels of corruption in the country of origin, and an alignment between the safeguarding of Swiss interests and the freezing of the assets. Similarly, the Canadian law requires governance failures in the country of origin and an alignment between the freezing measure or order and the interests of international relations. Under both laws, the existence of an unstable governance situation acts as a trigger, thereby enabling asset preservation measures in situations in which mutual legal assistance is unlikely to be timely or successful. The laws impose high thresholds with respect to unstable governance situations and would seemingly exclude scenarios where a country of origin is unable to make a successful mutual legal assistance request solely because of a severe lack of resources and domestic capacity.

[39] *See similarly* FIAA, *supra* note 4, art. 4(2)(b) (enabling confiscation in the event that mutual legal assistance proceedings have failed. One of the conditions for the admissibility of an asset freeze in such circumstances is that "the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system (failure of state structures)." *Id.*).

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From a purely legal perspective, the inclusion of factors concerning Swiss and Canadian foreign policy interests is difficult to justify. These factors introduce highly discretionary, political considerations into assessments of whether preservation measures are warranted in specific cases. These political considerations do not necessarily assist states in achieving a balance between the public interest in ensuring that assets can ultimately be confiscated, and the interests of the affected individuals. Whether a given preservation measure is in keeping with Swiss or Canadian foreign policy interests may be quite divorced from the question of whether such a measure has a "reasonable basis." From a political perspective, however, the inclusion of these foreign policy triggers is rational and justifiable, as the triggers allow Swiss and Canadian authorities to carefully select the situations in which these laws will be applied.

One especially prominent application of the Canadian asset freezing law took place in the wake of the Ukrainian revolution of 2014 (Revolution of Dignity or Maidan Revolution). After the former Ukrainian President, Viktor Yanukovych, was removed from office in February 2014, Ukrainian authorities began investigating his alleged theft of up to USD 100 billion in public funds.[40] Documents uncovered after his overthrow showed that Yanukovych and his associates had apparently used a network of shell companies, trusts, and foundations in order to obscure the beneficial ownership of embezzled funds.[41] In response to these events and revelations, Canada and Switzerland, along with the United States and the European Union, froze the assets of Yanukovych and his associates in their jurisdictions. Because the Swiss FIAA did not come into force until July 1, 2016, the original Swiss freezing orders with respect to the assets of Yanukovych and his associates were not based on the FIAA, although the annual extensions of these orders have been.[42] The following analysis therefore focuses on the Canadian freezing regulations, which were issued under the Canadian Freezing Assets of Corrupt Foreign Officials Act of 2011.

The overthrow of the Ukrainian government in 2014 gave rise to a relatively clear-cut application of the Canadian law enabling the freezing of foreign assets. In March 2014, at Ukraine's request, the Canadian Governor General in Council ordered the freezing of the assets of eighteen designated persons who had allegedly "misappropriated the property of Ukraine" or "acquired property inappropriately by virtue of their office or

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[40] Brun et al., *supra* note 6, at 145.

[41] Guy Faulconbridge, Anna Dabrowska, & Stephen Grey, *Toppled "Mafia" President Cost Ukraine up to $100 Billion, Prosecutor Says*, Reuters (Apr. 30, 2014), reuters.com/article/us-ukraine-crisis-yanukovich-idUSBREA3T0K820140430; Yanukovychleaks Nat'l Project, www.occrp.org/en/yanukovychleaks-national-project/ (last visited Nov. 24, 2021) (making publicly available documents uncovered at the residence of Yanukovych after his ousting).

[42] Press Release, *Federal Council blocks all assets Viktor Yanukovych and his entourage might have in Switzerland*, Fed. Council (Feb. 28, 2014), www.admin.ch/gov/en/start/documentation/media-releases.msg-id-52177.html (Switz.) (last accessed Dec. 10, 2021). At its meeting on December 10, 2021, the Federal Council decided to extend the preventive asset freeze relating to Ukraine by one year, until February 27, 2023. *See* Press Release, *Extension of the Asset Freeze Of the Federal Council in the Context of Ukraine*, Fed. Council (Oct. 12, 2021), www.admin.ch/gov/en/start/documentation/media-releases.msg-id-86399.html (Switz.).

a personal or business relationship."[43] The purpose of the Canadian freezing orders was to preserve the assets at issue by preventing their concealment or dissipation and to thereby enable their eventual return to Ukraine. The Ukrainian crisis of 2014 gave rise to circumstances that ensured that the three conditions required for the application of Canada's freezing law were easily satisfied. First, the Ukrainian revolution gave rise to "internal turmoil" and an "uncertain political situation," as required by the Canadian law. This threshold criterion was more than fulfilled by the overthrow of Ukraine's government and the ousting of its President, all of which took place in the broader context of violent mass protests. Second, the issuance of freezing regulations was in the interest of Canada's international relations. The freezing regulations can be understood as an aspect of Canada's broader foreign policy interests in fostering good governance (including anti-corruption initiatives) and democracy—interests that Canada shares with its allies. An impact analysis that accompanied the regulations explains that the regulations aim to "signal Canada's support for accountability, rule of law, and democracy in Ukraine."[44] Finally, Yanukovych and his associates, including family members, met the definition of "politically exposed foreign person[s]" as prescribed in the legislation.[45]

The freezing regulations issued by Canada highlight the relatively extreme character of the circumstances that trigger the application of the Canadian law. Canada had presumably been acting as a destination state for the stolen assets of Yanukovych and his associates well before the events of 2014 unfolded. But because "internal turmoil" or an "uncertain political situation" is one of the conditions required for the application of Canada's law, the law was arguably not triggered until the revolution of 2014. From a practical perspective, the inclusion of this condition in the Canadian (as well as Swiss) legislation can be justified by the fact that freezing may not be strictly necessary until the concealment or dissipation of the assets becomes a real risk. Moreover, regime change (i.e., "internal turmoil") may be needed for the existence of political will on the part of the requesting state, and also for the development of a necessary evidence base for allegations of corruption. In the case of Ukraine, the overthrow and exile of Yanukovych gave rise to a heightened risk that the assets would be concealed or dissipated. These developments also resulted in regime change in Ukraine, without which the request for Canada's cooperation would have been politically untenable. Moreover, the overthrow and exile of Yanukovych resulted in the discovery of documents that helped to reveal the extent of the misappropriation by Yanukovych and his associates. Though the requirement of "internal turmoil" or "an uncertain political situation" is justifiable from a practical perspective, the inclusion of such conditions greatly limits the scope of application of domestic laws providing

[43] Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, SOR/2014-44 (Mar. 5, 2014, last amended June 17, 2021), https://laws-lois.justice.gc.ca/eng/regulations/SOR-2014-44/FullText.html (Can.).

[44] Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations, Regulatory Impact Analysis Statement, 148 Can. Gazette (Mar. 26, 2014), www.gazette.gc.ca/rp-pr/p2/2014/2014-03-26/html/sor-dors44-eng.html.

[45] Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10, art. 2 (Can.).

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for the freezing of assets of foreign officials. While the laws of Canada and Switzerland embrace a proactive approach to asset freezing, they do so in a very narrow manner that was perhaps not foreseen by the drafters of article 54 of UNCAC.

The Canadian and Swiss freezing measures with respect to Ukraine also, unfortunately, demonstrate the obstacles typically encountered in asset recovery proceedings. The assets of Yanukovych and his associates in Canada and Switzerland remain frozen and have not yet been confiscated because Ukrainian authorities have not yet obtained a court ruling with respect to the illicit origins of the assets, despite the cooperation provided by Switzerland and Canada.[46] With the outbreak of war between Ukraine and Russia in February 2022, these difficulties have been "severely compounded," according to Swiss authorities.[47] The Swiss government has therefore considered "possible and appropriate" the initiation of domestic Swiss proceedings for the purpose of eventually confiscating over CHF 100 million (USD 104 million) in assets from Yuriy Ivanyushchenko (an associate of Yanukovych) and his family, with a view towards eventually returning the assets to Ukraine.[48]

3. Confiscation

The preservation of assets, which was discussed in Section 2, is ultimately geared towards enabling confiscation at a later stage of the proceedings. One of the purposes of confiscation is to deter corrupt conduct by preventing perpetrators from enjoying the proceeds of their criminal behavior.[49] Another purpose of confiscation is to enable the use of the proceeds of crime for the compensation of victims.[50] As with laws governing asset preservation, laws on asset confiscation must balance the public interest in confiscating the proceeds of crime with the human rights of (alleged) perpetrators and bona fide third parties. The right to a fair trial, in particular the presumption of innocence, tends to take on special relevance in the context of laws that permit the confiscation of assets in the absence of a criminal conviction. Even when a defendant has not been found guilty of a specific crime, his or her assets can still be seized if there is evidence that they are proceeds of illegal activities or are otherwise connected to criminal conduct.

Laws providing for such non-conviction-based confiscation (NCBC) can be useful because they allow assets to be confiscated even where the alleged offender is absent, but also where investigators and prosecutors lack sufficient evidence (e.g., proof beyond a reasonable doubt) to obtain a conviction for a corruption offence. These laws may, for instance, allow assets to be confiscated after the accused person has been given an opportunity to prove the lawful origins of the property in his or her possession. Laws

[46] Press Release, *Extension of the Asset Freeze of the Federal Council in the Context of Ukraine*, Fed. Council (Dec. 10, 2021), www.admin.ch/gov/en/start/documentation/media-releases.msg-id-86399.html (Switz.).

[47] *Swiss Move to Confiscate Assets of Ally of Ex-Ukrainian Leader*, SwissInfo (May 25, 2022), www.swissinfo.ch/eng/swiss-begin-efforts-to-confiscate-assets-of-ex-ukrainian-leader/47623632.

[48] *Id.*

[49] Brun et al., *supra* note 6, at 181.

[50] *Id. See further* UN Office on Drugs and Crime, Model Law on in Rem Forfeiture (2011).

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on NCBC involve the drawing of inferences or the use of rebuttable presumptions about the illegal origins of particular assets. Such inferences or presumptions may be in keeping with the presumption of innocence, provided that the laws include certain safeguards.[51]

Much like UNCAC's provisions on asset preservation, the treaty's provisions on confiscation adopt a relatively conservative approach, as article 54 does not require states parties to go so far as to adopt laws providing for NCBC. The UNCAC Review Mechanism considers NCBC to be good practice, however, and has encouraged states parties to adopt such laws. While the UNCAC Review Mechanism has gently pushed for the normative development of domestic confiscation laws, it has again not offered guidance on how states parties ought to design NCBC laws. This section begins by summarizing UNCAC's provisions on confiscation before examining the United Kingdom's laws on NCBC, which take the form of UWOs. The United Kingdom's UWOs, which are a relatively recent innovation in the United Kingdom, allow for further consideration of how states parties may achieve a balance between confiscating the proceeds of crime and upholding human rights, such as the presumption of innocence.

3.1. The state of international law on confiscation

Paragraphs 1 and 2 of article 54, which respectively govern confiscation and preservation, follow the same basic structure: both contain two limited obligations to enable international cooperation, followed by an obligation to consider going further by enabling a more progressive or flexible form of international cooperation. Article 54(1) of UNCAC thereby begins by requiring states parties to enable the confiscation of assets in two limited circumstances involving the recognition of a foreign court order or the institution of new proceedings in the destination state. Where these circumstances do not apply, states parties are only obliged to "consider taking measures" to allow for confiscation in the absence of a criminal conviction.

In the two scenarios in which states parties must enable confiscation, the basis for confiscation would be a domestic confiscation order issued by the destination state or a foreign state in the context of criminal proceedings. In the first scenario, the destination state must enable the enforcement of a foreign court order, such as an order made by a court in the state of origin. Article 54(1)(a) specifically provides that states parties must "take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party." An order of confiscation by a state of origin would fall under the scope of this provision as long as it concerns the property or instrumentalities of corrupt conduct, as defined by UNCAC.[52] An interpretive note in the *travaux préparatoires* clarifies that this provision only requires the enforcement of an order issued by a court that has criminal jurisdiction (as opposed to a court with civil jurisdiction).[53]

[51] Phillips v. United Kingdom, App. No. 41087/98, 2001-VII Eur. Ct. H.R. ¶ 43 (July 5, 2001).

[52] *See* UNCAC, *supra* note 3, art. 54(1) (referring to "property acquired through or involved in the commission of an offence established in accordance with this Convention").

[53] *Travaux Préparatoires*, *supra* note 13, at 475.

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In the second scenario, the destination state must enable the issuance of a confiscation order by its own authorities, rather than the enforcement of a foreign court order. Article 54(1)(b) provides that states parties must "take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law." An interpretive note in the *travaux préparatoires* clarifies that this provision only refers to criminal proceedings that lead to confiscation orders (as opposed to civil proceedings or criminal proceedings that do not lead to confiscation orders).[54]

In the absence of a criminal conviction in either the destination state or the state where the corruption offences allegedly took place, UNCAC does not require states parties to confiscate property.[55] Article 54(1)(c) does, however, require states parties to "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." This provision of UNCAC covers what is commonly known as NCBC. Like the parallel provision covering early preservation of assets (art. 54(2)(c)), this provision entails an obligation of conduct, rather than an obligation of result. States parties can fully comply with article 54 without enabling confiscation in these circumstances, so long as they have considered doing so.

This provision of UNCAC is in keeping with other international and regional instruments dealing with confiscation in the context of international cooperation. The Financial Action Task Force (FATF) has, for instance, issued a recommendation providing that "countries should have measures… to enable the confiscation of criminal property without requiring a criminal conviction (non-conviction-based confiscation)…."[56] This provision is quite broad, in that it does not specify the circumstances in which it would be appropriate for states to enable NCBC. The EU Directive 2014/42 more specifically requires EU member states to enable NCBC in certain situations where confiscation is not possible, including at a minimum situations involving illness or flight of the suspected or accused person.[57] Taken together, the provisions contained in UNCAC and the EU Directive suggest that an international consensus on NCBC has emerged or is emerging in situations where a criminal conviction is impossible due to the absence of the suspect or accused person. Illness, death, or flight appear to be considered the "de minimis" circumstances in which states ought to or must enable NCBC.[58]

[54] *Id.*

[55] UN Office on Drugs and Crime, Technical Guide to the United Nations Convention Against Corruption 207 (2009).

[56] Fin. Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, interpretative note to recommendation 4, para. 11 (2023), www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf.

[57] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, art. 4(2), 2014 O.J. (L 127) 39.

[58] UN Office on Drugs & Crime, *supra* note 50, 208.

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Given this apparent international consensus on the role of NCBC in at least certain circumstances, it is perhaps unsurprising that the UNCAC Review Mechanism has described NCBC orders as "good practice."[59] As with UNCAC's provisions on preservation, this characterization is notable in light of the fact that the drafters of UNCAC opted to frame this provision as an obligation of conduct rather than an obligation of result. Even though this provision did not garner enough support during the negotiations to merit language requiring states parties to adopt measures enabling NCBC, the UNCAC Review Mechanism is nevertheless encouraging states parties to adopt this "good practice." According to available data from the second review cycle, domestic implementation of NCBC may not be an overly ambitious goal for the Review Mechanism: the majority of states parties reviewed as of 2021 had already established either NCBC or civil forfeiture.[60]

While UNCAC, the FATF Recommendations, and the EU Directive all suggest that NCBC could be used in a broader range of circumstances that go beyond the absence of the offender, these instruments do not indicate when this would be appropriate. Moreover, neither the UNCAC Review Mechanism nor the UNODC Secretariat has offered guidance on this matter. Practice shows that NCBC can also be an appropriate solution to the evidentiary challenges inherent in complex corruption investigations and prosecutions.[61] Investigators and prosecutors in many states parties may, for example, struggle to demonstrate a link between corrupt conduct and specific assets, especially in circumstances where a politically exposed person has gained and hidden wealth over the course of many years in office, and in a context of state capture. Such evidentiary challenges arguably give rise to situations in which the use of NCBC is most needed, whereas illness, death, and flight do not appear to represent the main challenges for asset recovery.[62]

In cases where demonstrating a link between assets and corruption offences is not feasible, confiscation may be based on an inference or presumption about the unlawful origins of the assets at issue. Among the various regional human rights courts, the European Court of Human Rights (ECtHR) has produced the most relevant jurisprudence on the use of presumptions in the context of confiscation. The ECtHR requires states to confine presumptions of fact or law "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."[63] In order to keep presumptions "within reasonable limits," states must adopt "safeguards," principally by allowing the accused person an opportunity to rebut the assumption by producing evidence concerning the legal origins of the assets at issue.[64]

[59] Chapter V Report, *supra* note 3, at 5.
[60] *Id.* ¶¶ 3, 41.
[61] *See also* John Petter Rui, *Introduction* to NON-CONVICTION-BASED CONFISCATION IN EUROPE POSSIBILITIES AND LIMITATIONS ON RULES ENABLING CONFISCATION WITHOUT A CRIMINAL CONVICTION 1 (Jon Petter Rui & Ulrich Sieber eds., 2015).
[62] Chapter V Report, *supra* note 3, ¶¶ 39–41.
[63] Salabiaku v. France, App. No. 10519/83, ¶ 28 (Oct. 7, 1988), https://hudoc.echr.coe.int/?i=001-57570; Phillips v. United Kingdom, App. No. 41087/98, ¶ 40 (July 5, 2001), https://hudoc.echr.coe.int/?i=001-59558.
[64] *Phillips*, App. No. 41087/98, ¶ 43 (July 5, 2001).

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In practice, this means that the prosecution must first present a prima facie case, following which the accused person must be given an opportunity to present evidence.

NCBC has, of course, also given rise to regional human rights cases concerning alleged violations of other rights, including the right to property. Under article 1 of Protocol 1 to the ECHR, for example, the ECtHR has recognized the right of states to confiscate the property of individuals or legal persons under specific conditions. First, according to the jurisprudence of the ECtHR, the interference with the enjoyment of property must have a clear basis in domestic law and must adhere to the principles of the rule of law.[65] When the ECtHR assessed an extended confiscation procedure adopted by a respondent state in a case concerning corruption in the public service, it specifically noted that the forfeiture proceedings were adversarial, and that the national courts had duly examined the prosecution authorities' forfeiture request, "in the light of the numerous supporting documents available in the case file."[66] Second, the state's interference must pursue a legitimate aim in the public or general interest.[67] In the context of asset recovery, the ECtHR has considered combatting corruption in the public service to be a legitimate aim.[68] Finally, the interference must be proportionate, meaning that a fair balance must be struck between the right to the peaceful enjoyment of property and the public interest in combating corruption. This assessment takes into account the margin of appreciation that states have in implementing policies to fight crime, including confiscating certain kinds of property.[69]

3.2. Progressive domestic laws on non-convention-based confiscation

The progressive development of domestic confiscation laws through the adoption of NCBC raises questions about how states parties should achieve a balance between the importance of combating corruption and the rights of individuals. This section focuses on the balance struck by the UK's Criminal Finances Act 2017, which introduced UWOs as a basis for confiscation in the United Kingdom, in the absence of a criminal conviction. These orders not only enable confiscation but also potentially serve as a means by which UK authorities can obtain more information about the origins of certain assets. UWOs have been highlighted by the UNCAC Review Mechanism as good practice, and therefore merit further examination in light of the relevant jurisprudence of the ECtHR.[70] After describing the United Kingdom's statutory provisions on UWOs, this section explores how they have been applied and evaluated by UK courts in practice.

[65] *See, e.g.*, Baklanov v. Russia, App. No. 68443/01, 2005-IX Eur. Ct. H.R. ¶ 39.
[66] Gogitidze & Ors. v. Georgia, App. No. 36862/05, 2015-V Eur. Ct. H.R. ¶ 112.
[67] Riela v. Italy, App. No. 52439/99, 2001-IX Eur. Ct. H.R.
[68] *Gogitidze*, App. No. 36862/05, 2015-V Eur. Ct. H.R., ¶ 101.
[69] *Id.* ¶ 97.
[70] UN Office on Drugs & Crime, Country Review Report of the United Kingdom of Great Britain and Northern Ireland: Review by Turkey and Israel of the implementation by the United Kingdom of Great Britain and Northern Ireland of Articles 5–14 and 51–59 of the United Nations Convention against Corruption for the Review Cycle 2015–2021, at 22, www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_11_16_UK_Final_Country_Report.pdf (last visited May 19, 2024).

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Under the Criminal Finances Act, a number of requirements must be fulfilled before the High Court will make a UWO with respect to property. First, the High Court must be satisfied "that there is reasonable cause to believe that (a) the respondent holds the property, and (b) the value of the property is greater than £50,000."[71] In addition, the High Court, must be satisfied "that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property".[72] Finally, the High Court must also be satisfied that the respondent is a politically exposed person and that there are "reasonable grounds" for suspecting that the respondent (or a person connected with the respondent) "is, or has been, involved in serious crime."[73] The standard of "reasonable grounds" sets a relatively low standard of proof that appears to require the prosecutor to make a prima facie showing with respect to the property and its origins. Where these requirements are met, the High Court can effectively shift the burden of proof onto the respondent by ordering the respondent to provide a statement that explains, among other things, how the respondent obtained the property at issue.[74] If a respondent fails to comply with such an order without a "reasonable excuse," then the property may be "recovered" or confiscated.[75]

According to available data, since the United Kingdom introduced UWOs in 2018, the UK National Crime Agency (NCA) has obtained nine orders relating to four cases, with an approximate total value of GBP 143.2 million.[76] The first UWO was issued by the High Court on February 27, 2018, less than a month after the introduction of UWOs in the United Kingdom. The High Court issued the order with respect to a London property valued at GBP 11.5 million. The ultimate owner of the property was Zamira Hajiyeva, an Azerbaijani citizen and the wife of the former chair of an Azerbaijani state-owned bank, who had been convicted in Azerbaijan of various criminal offences, including fraud and abuse of office.[77] Hajiyeva appealed on a number of grounds, including that the UWO infringed the "peaceful enjoyment" of her property, a right protected under European human rights law.[78] In a judgment handed down on October 3, 2018, the High Court rejected the challenges to the UWO, including the argument that the UWO violated Hajiyeva's human rights. According to the court, any interference with her peaceful enjoyment of the residential property was proportionate. In the view of the High Court, the order struck a "fair balance" because there were "grounds to believe that the property ha[d] been obtained through

[71] Criminal Finances Act 2017, s. 362B(2) (U.K.).
[72] *Id.* s. 362B(3).
[73] *Id.* s. 362B(4).
[74] *Id.* s. 362A(3).
[75] Proceeds of Crime Act 2002, s. 352C (U.K.).
[76] Ali Salchi, *Unexplained Wealth Orders*, Research Briefing CBP 9098, UK Parl., House of Commons Library 18 (Apr. 14, 2022), https://commonslibrary.parliament.uk/research-briefings/cbp-9098/.
[77] NCA v. Mrs. A [2018] EWHC 2534, ¶¶ 10–20, 120. Hajiyeva's case attracted a great deal of publicity when the UWO was imposed upon her in February 2018. Known for her lavish spending at Harrods, her case caught the interest of the press.
[78] *NCA*, [2018] EWHC 2534, ¶ 21(vi); Richard Messick, *Bad News for Bad People: Decision in U.K.'s First Unexplained Wealth Order Case*, Global Anticorruption Blog (Oct. 17, 2018), https://globalanticorruptionblog.com/2018/10/17/bad-news-for-bad-people-decision-in-u-k-s-first-unexplained-wealth-order-case/.

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illegal conduct."[79] In addition, the interference caused by the order was "modest" because it merely required her to provide information about her residential property, in circumstances where she claims to be the beneficial owner of the company that is the registered proprietor of the property.[80]

On March 29, 2019, Hajiyeva appealed the judgment of October 3, 2018.[81] Her appeal claimed, in part, that the lower court wrongly relied upon her husband's conviction in Azerbaijan to establish reasonable suspicions about the source of her wealth because his trial was unfair. The Court of Appeal dismissed this argument on the basis that her husband's conviction for fraud and embezzlement "was only one of the strands" relied upon by the NCA in support of grounds for reasonable suspicion.[82] The implication of this passage is that even if his trial was unfair, the NCA put forward other persuasive evidence that established reasonable suspicions about the source of his income, including information about his legitimate income.[83] The Court of Appeal did, however, note that if a foreign conviction were in breach of *jus cogens* norms, then it could not form a proper ground for reasonably suspecting that the respondent's lawful income is insufficient to enable the acquisition of the property at issue.[84] While the right to a fair trial is not widely regarded as a *jus cogens* norm, the prohibition of torture is. A conviction obtained through a confession induced by torture would, for example, violate not only the right to a fair trial but also the *jus cogens* prohibition against torture. It is therefore conceivable that a UK court could decline, in the future, to issue a UWO if allegations of torture were associated with foreign criminal proceedings.[85]

In December 2020, Hajiyeva's application to appeal to the UK Supreme Court was also dismissed.[86] The refusal by the Supreme Court to hear the appeal brought an end to this case, which has been considered a "significant victory" for the NCA,[87] as well as a "helpful precedent."[88] Because the NCA does not appear to have publicized the recovery of any assets, the case cannot yet be considered a success in terms of its law enforcement outcome.[89] As of this writing, only one UWO has led to the successful recovery of assets. In May 2019, the NCA obtained UWOs against eight properties owned by a businessman, Mansoor Hussain, who was suspected of being a money-launderer

[79] *Id.* ¶ 103.

[80] *Id.*

[81] Hajiyeva v. NCA, [2020] EWCA Civ 108 ¶ 8 (Feb. 5, 2020).

[82] *Id.* ¶ 39.

[83] *Id.* ¶ 42.

[84] *Id.* ¶ 38.

[85] *See, e.g.*, Richard Messick, *Will the Swiss Government Condone Gross Human Rights Violations in Returning Stolen Assets to Uzbekistan?* Global Anti-Corruption Blog (June 22, 2018), www.globalanticorruptionblog.com/2018/06/22/will-the-swiss-government-condone-gross-human-violations-in-returning-stolen-assets-to-uzbekistan/; Radha Ivory, *The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases*, 9 Utrecht L. Rev. 147 (2013).

[86] UK Supreme Court, *Permission to Appeal Results—December 2020*, www.supremecourt.uk/docs/permission-to-appeal-2020-12.pdf (last visited Nov. 24, 2021).

[87] Olga Bischof, *Supreme Court Refuses Appeal Against Unexplained Wealth Order*, BrownRudnick (August 1, 2021), www.brownrudnick.com/alert/supreme-court-refuses-appeal-against-unexplained-wealth-order.

[88] Salchi, *supra* note 76, at 18.

[89] Anton Moiseienko, *The Limitations of Unexplained Wealth Orders*, 3 Crim. L. Rev. 230, 236 (2022).

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in connection with the activities of criminal gangs.[90] The respondent agreed to an out-of-court settlement with the NCA, in which he handed over forty-five properties in London, Cheshire, and Leeds, four parcels of land, as well as other assets and GBP 583,950 in cash, with a combined value of almost GBP 10 million.[91]

Finally, on May 22, 2019, the NCA obtained three UWOs against five respondents: four offshore entities, which are the registered owners of properties in London, and a UK citizen, Mr Baker, who served as the professional trustee of two of the entities. The Agency adduced evidence that London properties worth GBP 80 million were purchased using laundered funds linked to Rakhat Aliyev, a Kazakh national who held several senior political roles in Kazakhstan before falling out with the regime in 2007 and finally dying in an Austrian prison in 2015. The respondents appealed the imposition of the UWOs by arguing that the confiscated properties were purchased with funds obtained by Dariga Nazarbayeva, Aliyev's ex-wife (the former Chair of the Senate of Kazakhstan and the daughter of the country's late president) and her son, Nurali Aliyev. According to the respondents, both Nazarbayeva and her son were wealthy enough to purchase the properties, and their income and assets did not depend on their family relationships with Aliyev.

The Court overturned all three UWOs, and described some of the NCA's reasoning as "artificial and flawed."[92] The Court observed that according to the UK Criminal Finances Act 2017, the requirements for granting a UWO must be satisfied in relation to the respondent(s), namely Baker, and not in relation to Nazarbayeva and her son, who were not respondents in this case. The NCA was unable to demonstrate on reasonable grounds that Baker, the president of the two Panamanian foundations that owned the properties in question, was either a politically exposed person or involved in serious crime—one of the requirements for the issuance of a UWO.[93] The Court also found that the Agency wrongly inferred that the money used to purchase the properties must have come from Aliyev. Instead, the Court accepted that the properties were purchased with funds obtained by Nazarbayeva's son, who was at the time the chair of a bank that had loaned him the funds needed to purchase the properties.[94] Finally, the Court observed that the use of complex offshore corporate structures or trusts does not *per se* demonstrate that they have been "set up, or are being misused, for wrongful purposes, such as money laundering."[95] Such structures may well be used for lawful reasons, including privacy, security, or tax mitigation.[96] On June 17, 2020, the Court of Appeal refused the NCA's permission to appeal, noting that an

[90] Nat'l Crime Agency v. Mansoor Mahmood Hussain [2020] EWHC 432 (Admin).

[91] Nat'l Crime Agency, *Businessman with Links to Serious Criminals Loses Property Empire after Settling £10m Unexplained Wealth Order Case*, WiredGov (Oct. 8, 2020), www.wired-gov.net/wg/news.nsf/articles/Businessman+with+links+to+serious+criminals+loses+property+empire+after+settling+10m+Unexplained+Wealth+Order+case+08102020111500.

[92] Baker [2020] EWHC 822 (Admin); [2020] All E.R. (D) 59 ¶ 130.

[93] *Id.* ¶ 172.

[94] *Id.* ¶¶ 177–9.

[95] *Id.* ¶ 97.

[96] *Id.*

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appeal had no “real prospect of success.”[97] The NCA also received substantial criticism from the Court and an adverse costs order of approximately GBP 1.5 million.

In spite of a promising start, the use of UWOs in the United Kingdom has so far yielded mixed results.[98] No other enforcement body, other than the NCA, has obtained UWOs, and no UWOs have been issued since 2019.[99] The underuse of UWOs may be explained by a cost-benefit problem faced by enforcement bodies. The costs of obtaining sufficient information to make a prima facie showing about a respondent’s sources of income may prove to be prohibitively high.[100] Moreover, the costs may be substantial even where assets are recovered, as in *Hussain*.[101] Furthermore, *Baker* shows that UWO cases may have significant adverse costs for the NCA where it errs in assessing the origins of the wealth of foreign politically exposed persons. The risk of adverse costs orders has, however, been reduced by recent legislation that provides that unless the enforcement authority has acted unreasonably, dishonestly, or improperly, a court cannot order the authority to pay the costs of the respondent.[102] Finally, *Baker* raises questions about the applicability of UWOs to trustees, in that the Court’s decision has potentially narrowed the scope of UWOs, which seemingly have to be brought against the ultimate beneficial owners.

From a human rights perspective, UWOs raise questions about the protection of the human rights of alleged perpetrators and bona fide third parties. Cases like *Hajiyeva* and *Baker* show the importance of achieving an appropriate balance between the protection of human rights and the public interest in the confiscation of the proceeds of corruption offences. The right to a fair trial, in particular the presumption of innocence, tends to take on special weight in the context of laws that permit confiscation of assets in the absence of a criminal conviction. In *Baker*, Justice Lang noted that a UWO is “potentially intrusive” as it requires the respondent “to make a statement, answer questions and disclose confidential records in respect of sensitive personal financial matters.”[103] This passage seems to imply that UWOs may infringe upon the presumption of innocence, and on another aspect of the right to a fair trial, namely the protection against self-incrimination (also known as the principle of *nemo tenetur se ipsum accusare*). The reasoning in *Baker* is, however, at odds with that of previous case law, including the reasoning in *Hajiyeva*, and is ultimately unpersuasive. The question is not whether UWOs

[97] Nat’l Crime Agency v. Baker et al., Court of Appeal, Civil Division, June 17, 2020, Ref. C1/2020/0723.

[98] For the other enforcement authorities that can obtain UWOs, see UK Criminal Finances Act 2017, s. 362A(7); Moiseienko, *supra* note 89, at 7. See also *UWOs Three Years On: Underused and Overpriced*, WilmerHale (Mar. 29, 2021), www.wilmerhale.com/en/insights/blogs/WilmerHale-W-I-R-E-UK/20210329-uwos-three-years-on-underused-and-overpriced.

[99] Details regarding the fourth case are scarce. A UWO has been issued against four properties bought by a Northern Irish woman resident in London accused of having links to criminals involved in paramilitary activity and cigarette smuggling. However, there is no available information about recovery.

[100] Salchi, *supra* note 76, at 20, stressing that the costs of obtaining relevant information are a particularly important variable to consider, where evidence is otherwise hard to come by because the recipient of the unexplained wealth order (UWO) is on good terms with the foreign regime that is the source of its wealth.

[101] Moiseienko, *supra* note 89, at 7 (arguing that the application of the measures at issue in practice demonstrates that even when a UWO does bring success, “this does not necessarily mean that comparable results could not be secured through the use of other tools, such as disclosure orders followed by the commencement of civil recovery proceedings”).

[102] Economic Crime (Transparency and Enforcement) Act 2022, ss. 52–3 (U.K.).

[103] Baker [2020] EWHC 822 (Admin); [2020] All E.R. (D) 59 (Apr), ¶ 63.

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infringe upon the presumption of innocence or the protection against self-incrimination. Instead, the question is whether such infringements can be justified.[104] When enforcement authorities are pursuing a legitimate public goal, such as advancing the public interest in the confiscation of the proceeds of corruption offences, the legal analysis centers on the questions of reasonableness and proportionality.

With regard to the presumption of innocence, presumptions to the detriment of the defendant may entail a shifting of the burden of proof, but not a full reversal of the burden of proof.[105] The UK Criminal Finances Act 2017 requires the public prosecutor to make a prima facie showing with respect to the property at issue and its origins. Only where these requirements are met, together with the other conditions established by law for the imposition of a UWO, may the Court effectively shift the burden of proof onto the respondent, by ordering the respondent to provide a statement that explains how he or she obtained the property at issue.

Like the presumption of innocence, the right to protection against self-incrimination is recognized in national law and international treaties and entails a right to remain silent.[106] UWOs infringe upon the right against self-incrimination because they require the respondent to provide a statement with information about the property at issue. UWOs may require respondents to provide evidence of income from sources like business, gifts, inheritance, or gambling, and may thereby expose respondents to criminal liability for various offences.[107] Such an infringement of the protection against self-incrimination can, however, be justified by reference to the goal of combating corruption, and the reasonable character of the disclosure requirement imposed on the respondent. Although the protection against self-incrimination differs slightly among countries, in the United Kingdom it is possible, under certain circumstances, to draw adverse inferences from a defendant's decision to remain silent.[108] In situations that call for an explanation from the accused, the right against self-incrimination does not prevent the accused's silence from being taken into account by a court assessing "the persuasiveness of the evidence adduced by the prosecution."[109] Therefore, the silence

[104] *Cf., e.g.*, European Convention on Human Rights, art. 52(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; Murray v. United Kingdom, App. No. 18731/91, ¶ 49 (Feb. 8, 1996), https://hudoc.echr.coe.int/?i=001-57980.

[105] Salabiaku v. France, App. No. 10519/83 ¶ 28 (Oct. 7, 1988), https://hudoc.echr.coe.int/?i=001-57570 (holding that "presumption of facts or of law operate in every legal system," but that states must confine presumptions "withing reasonable limits which take into account the importance of what is at stake and maintain the right of the defence").

[106] *Murray*, App. No. 18731/91, ¶ 45 (Feb. 8, 1996) (holding that "there cannot be doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards that lie at the heart of the notion of a fair procedure").

[107] For a similar thread of arguments with respect to the criminalization of illicit enrichment, see Oliver Landwehr, *Article 20: Illicit Enrichment*, *in* The United Nations Convention Against Corruption: A Commentary, *supra* note 18, at 219, 234.

[108] In *Murray*, the ECtHR accepted that situation and concluded that the "question whether the right [to silence] is absolute must be answered in the negative." *Murray*, App. No. 18731/91, ¶ 47 (Feb. 8, 1996). *But see id.* (Pettiti, Valticos, JJ., dissenting; Walsh, Makarczyk, Lohumus, JJ., dissenting).

[109] *Id.* ¶ 47. *See also id.* ¶ 51 (stressing that it is only if the evidence against the accused "calls" for an explanation, which the accused ought to be in a position to give, that a failure to give an explanation may as a matter of common sense allow the drawing of an inference that the accused is guilty).

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of a respondent, following a prosecutor's prima facie showing, may be taken into account by the court, which has statutory authority to draw an adverse inference on the basis of such silence.

Finally, an aspect of the "intrusiveness" of UWOs is that respondents are exposed to a great deal of negative media attention. Some commentators contend that courts have considered only to a limited extent the reputational implications of UWOs.[110] UWOs also arguably raise questions about the right to protection of reputation as an aspect of the right to respect for private life.[111] Again, the key issue is not infringement of the right, but whether it is reasonable and proportionate. The possible interference with a respondent's private life, that is the damage caused to his or her reputation by the investigation and reports about the imposition of a UWO, is justified by the interest of the public in being aware of anti-corruption proceedings and their outcome. Although UWOs reduce the enjoyment of the right to reputation, this is consistent with the rules found in many legal systems,[112] and is not, in principle, a disproportionate restriction on the right to respect for private life.[113]

4. Conclusion

Effective domestic laws on asset recovery should ideally be flexible enough to enable timely and proactive measures to preserve and confiscate assets. Domestic measures should be timely or "early" in order to prevent the dissipation of the assets at issue. Domestic authorities should also be able to act proactively, without necessarily having to wait for a mutual legal assistance request or a criminal conviction. Domestic laws that embrace these qualities are arguably best suited to meeting the challenges posed by the speed with which assets can be hidden or dissipated, and the time that mutual legal assistance proceedings, as well as domestic criminal proceedings, necessarily demand. Yet, domestic laws that enable faster, more proactive measures to freeze and confiscate assets also tend to raise human rights concerns, such as questions about the presumption of innocence, the right to property, and the protection against self-incrimination. While article 54 of UNCAC encourages states parties to consider progressive measures, the treaty itself does not provide guidance on such best practices,

[110] Áine Clancy, *Proving the Dough: National Crime Agency v. Baker & Ors*, 84 Mod. L. Rev. 168, 178 (2021).

[111] Whereas there is no express provision guaranteeing the right to reputation in the ECHR, in a long line of cases the ECtHR has devised the protection to the right to reputation both as a limitation to the freedom of expression and, more recently, as an aspect of the right to respect for private life, which is protected by Article 8 of the Convention. For an overview of this caselaw, see *Factsheet—Protection of Reputation*, Eur. Ct. Hum. Rts. (June 2022), www.echr.coe.int/Documents/FS_Reputation_ENG.pdf.

[112] This is the case, for example, of the contracting parties to the ECHR, and the members of the Council of Europe and the European Union.

[113] With regard to the more general case of criminal investigations and trials, see Hoon v. United Kingdom, App. No. 14832/11 (Dec. 4, 2014), https://hudoc.echr.coe.int/eng?i=001-148728. It can also be noted that, in any event, in cases such as *Hajiyeva* and *Baker*, the facts relative to the interference are normally already in the public domain as a result of newspaper articles and other media reports. Thus, the respondent in a UWO proceeding could challenge the factual allegations by bringing proceedings against the media.

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and the UNCAC Review Mechanism has not yet done so. This potentially creates a risk of fragmentation, meaning that states may engage in the development of asset recovery laws without sufficiently taking into account other international legal obligations, including those of human rights law.

The asset freezing laws implemented by Canada and Switzerland help to demonstrate the potential of more flexible measures, but they do not necessarily represent ideal or best practices. While the Canadian and Swiss laws enable more timely and proactive asset freezing, they also inject political considerations into decisions about asset freezing, and effectively limit the application of these laws to crisis situations. Due to their emphasis on national interests and unstable governance situations, these laws arguably deprioritize any balancing between the public interest in recovering stolen assets and respect for and protection of human rights. While the United Kingdom's law on UWOs appears to facilitate NCBC without unjustifiably infringing upon human rights, the *Baker* case suggests that a judicial consensus on the issue of self-incrimination may not yet have formed. Moreover, the relatively sparse use of UWOs thus far, and the unsuccessful outcome of the *Baker* case, raises open questions about the future prospects of this tool for advancing asset recovery. As the body of progressive domestic laws on freezing and confiscation grows, a valuable evidence base will hopefully develop with respect to which measures are sufficiently flexible, justifiable in human rights terms, and also functional in practice.

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