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Civil and Administrative Liability for Corruption: 
Domestic Practices and Ways to Enhance International Cooperation 
Under the United Nations Convention Against Corruption
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Executive summary

While criminal law has traditionally been regarded as the predominant instrument in the battle against corruption, there is a growing acknowledgement by States of the efficacy of civil and administrative law remedies. These alternative avenues offer an additional means to address corrupt practices, with civil remedies serving as a mechanism for mitigating the financial impact of corruption and disrupting the economic incentives driving such misconduct. Various civil actions, including those rooted in tort, contract nullity or voidability, and unjust enrichment, are initiated to secure compensation, annul or void contracts, and rectify improper enrichment. At the same time, administrative law plays a crucial role in disciplining public officials and private actors that misuse their public roles, prioritizing personal interests over the integrity and proper functioning of public administration. Both civil and administrative liability mechanisms serve as essential tools to hold legal entities accountable for corrupt acts, especially considering the limitations of criminal liability for such entities in some jurisdictions. It is noteworthy, however, that some participating States in the study lack a systematic and coordinated non-criminal response to acts of corruption, thereby underutilizing these remedial measures.

The United Nations Convention against Corruption (UNCAC) and other international anti-corruption instruments underscore the role of civil and administrative law for the prevention of and the fight against corruption. UNCAC explicitly affirms the application of sanctions through criminal, civil or administrative proceedings and establishes the legal basis for international cooperation. This cooperation includes mutual legal assistance in civil and administrative matters for successfully locating individuals residing abroad, serving documents, taking evidence and tracing, freezing and recovering assets acquired through corrupt practices. International cooperation is also facilitated by informal cooperation among counterparts, who may exchange information directly, quickly and spontaneously. While cooperation in the context of non-criminal matters against corruption is encouraged under UNCAC, it may prove quite challenging in practice, as States may not be familiar with rendering legal assistance in non-criminal proceedings. Legal asymmetries, lack of experience and limited resources are among additional challenges that may hinder international cooperation between States and cause delays that risk the outcome of proceedings. In line with the relevant resolutions of the Conference of the States Parties to UNCAC, this report underscores the need for increased consideration of civil and administrative remedies at both national and international levels in the ongoing fight against corruption.

Key observations

Based on the information provided by 31 States parties to UNCAC on trends, challenges, good practices and lessons learned in the use of civil and administrative liability regimes against corruption, several observations can be made:

❖ States increasingly realize the need to address corruption by imposing and combining various types of liability, namely criminal, civil and administrative and, in particular, to deprive perpetrators of the financial gains of corrupt acts.
❖ Criminal law remains the most common course of action against corruption. It is considered to have a strong deterrent effect, while criminal penalties are believed to represent society’s disapproval of the corrupt acts.

Civil and Administrative Liability Mechanisms:
❖ Civil actions based on tort allow victims who have suffered damage resulting from various corrupt acts to seek compensation and repair the damage caused by recovering punitive
damages, loss of consortium and pain and suffering, which are not available in criminal restitution.

❖ The scope of potential plaintiffs and defendants in tort actions is quite broad, including States and natural and legal persons, while compensation may include material damages, non-pecuniary damages and loss of profits.

❖ States generally recognize that contracts obtained through corruption may be considered void or voidable depending on the national legal framework.

❖ Proprietary claims seek the return of embezzled or misappropriated assets to their legitimate owners, while unjust enrichment actions aim to reverse defective transactions where a person obtained undue benefits.

❖ Civil law remedies have been used by States to recover stolen assets with actions brought either in domestic or foreign courts. UNCAC strengthens legal regimes for civil claims for the direct recovery of assets acquired through corruption abroad.

❖ Civil law remedies may be employed when it is difficult to obtain a conviction due to the death or flight of the defendant as well as in the case of an acquittal.

❖ Public officials are generally subject to three main types of liability, namely, criminal, civil and administrative, which often occur in conjunction with one another.

❖ Administrative liability of public officials is based on the employment relationship that the public official has with the public administration and the specific duties and obligations that he/she owes to it.

❖ The scope of misconduct for which administrative liability for corruption may arise is broad.

❖ National frameworks provide for administrative sanctions to hold suppliers accountable for breaches of public procurement legislation.

❖ Both civil and administrative liability may be employed to address corporate malfeasance and hold legal persons liable in circumstances where criminal liability is not available.

❖ When compared to criminal proceedings, both civil and administrative proceedings are considered to be less complex, more cost effective and subject to lower standards of proof.

**International Cooperation in Civil and Administrative Matters:**

❖ Although some States have experience with requesting and providing international assistance in non-criminal matters, the majority only have limited or no experience at all.

❖ Although some States seem to have established fruitful collaboration with others, they still encounter obstacles when it comes to clarifying the rules of their legal frameworks, leaving them vulnerable to the possibility of having their requests denied.

❖ There are some States that have applied UNCAC’s provisions to render or request mutual legal assistance in civil and administrative proceedings, while there are others that indicate that UNCAC could be used as the/a legal basis in the context of international cooperation.

❖ Apart from UNCAC, States rely on various bilateral and multilateral treaties, regional agreements and memoranda of understanding for cooperation in civil and administrative proceedings. Where a treaty is not in place, national legislation or the principle of reciprocity may also provide a sufficient basis for international cooperation.

❖ Informal cooperation, including through anti-corruption networks, may support States’ efforts to cooperate in non-criminal proceedings.

❖ Mutual legal assistance in non-criminal matters relating to corruption encompasses various actions, such as document service, information provision, evidence gathering, asset tracing and freezing, as well as the recognition and enforcement of foreign judgments.

❖ The most common grounds for refusing to provide assistance include: the risk that the execution of the request may pose a threat to the sovereignty and the security of the
requested country; incomplete or imprecise requests with insufficient information; and the
existence of a confidentiality clause or a leniency agreement that among its terms does not
allow the sharing of information with other authorities.

Key challenges

Based on States’ responses, the following challenges have been identified regarding the use of
civil and administrative remedies against corruption:

❖ A secondary role of civil and administrative law remedies against corruption with criminal law
having priority in fighting corruption: civil law may be employed when a criminal conviction
cannot be reached, while administrative remedies may be available only in minor cases that
do not rise to the level of crimes, or they may be imposed only if there is a criminal conviction.
❖ A limited awareness regarding the strengths and limitations of civil and administrative law
remedies against corruption.
❖ A limited experience in using civil and administrative law remedies against corruption and a
shortage of experts that could advise on such matters.
❖ A lack of systematic provisions for civil and administrative law remedies as well as a limited
availability of investigative tools used in non-criminal proceedings.
❖ Differences in legal regimes, such as lack of civil or administrative mechanisms, which may
pose serious difficulties for international cooperation.
❖ Coordination issues in circumstances when a multitude of authorities are involved;
❖ A lack of resources of competent authorities.
❖ Obstacles related to cost and delays, especially when civil or administrative proceedings need
to be suspended until the finalization of the criminal case.
❖ A limited or no experience of some States in international cooperation in the context of civil
and administrative proceedings against corruption.
❖ The reluctance of States to provide mutual legal assistance in non-criminal matters or
proceedings that are not initiated by judicial authorities in the requesting States.
❖ The existence of a confidentiality clause or a leniency agreement that does not allow for the
sharing of information with foreign authorities.

Overall recommendations

In order to strengthen the use of civil and administrative law remedies against corruption,
States should consider recommendations in the following areas:

Legal and policy frameworks:
❖ Adopt a systematic approach against corruption by embedding the use of civil and
administrative law remedies in the broader fight against corruption.
❖ Strengthen national legal frameworks by providing avenues for civil redress and administrative
mechanisms, including provisions on international cooperation in civil and administrative
matters, where such provisions are not available. Ensure that non-criminal measures are
compatible with fundamental rights and due process.
❖ Raise awareness on the advantages of civil and administrative remedies against corruption to
prompt practitioners and competent authorities to adopt and apply such remedies.
❖ Conduct evaluations to identify gaps or challenges and provide recommendations on the use
of civil and administrative remedies against corruption.
❖ Promote procedural and substantive uniformity in the use of non-criminal mechanisms.
Institutional capacity:
❖ Establish specialized bodies to develop capacity in civil and administrative liability for corruption.
❖ Address obstacles related to limited resources of competent authorities and procedural delays in relevant criminal civil, and administrative proceedings against corruption.
❖ Provide training on civil and administrative law remedies against corruption to domestic authorities and share good practices.
❖ Strengthen coordination of various authorities to avoid duplication of efforts.

International cooperation:
❖ Promote the use of mutual legal assistance regardless of the type of liability involved where consistent with domestic legal frameworks.
❖ Consider adopting bilateral or multilateral agreements or other arrangements, as encouraged by article 59 of UNCAC, aiming to promote international cooperation in civil and administrative matters or strengthening the implementation of existing instruments.
❖ Dedicate the necessary resources to competent authorities involved in international cooperation, including translation services and trained personnel.
❖ Encourage early and spontaneous communication with foreign counterparts.
❖ Support and actively engage in informal practitioner networks.
❖ Develop guides and manuals on international cooperation in the context of civil and administrative proceedings.
Introduction

1. Background

The global battle against corruption has gained paramount importance, as underscored by the almost universal adherence to the United Nations Convention against Corruption (UNCAC), the sole international legally binding anti-corruption instrument. Recognized as a major international policy priority, this effort aims to address the multifaceted ramifications of corruption, including its contribution to poverty, inequality, hindrance of investment and economic growth, erosion of public accountability, and the diversion of crucial resources earmarked for infrastructure, public health, and education. Moreover, corruption poses a direct threat to security and stability, while eroding citizens’ trust in public institutions. In addition, corruption undermines the achievement of the United Nations Sustainable Development Goals (SDGs) and especially Goal 16, which seeks to promote peaceful and inclusive societies for sustainable development, ensure access to justice for all and build effective, accountable and inclusive institutions at all levels.

Over the past two decades, substantial efforts have been directed toward deterring corruption and mitigating its impact on domestic, regional, and global scales. These endeavours have predominantly focused on the adoption and enforcement of criminal penalties to prosecute and penalize corrupt individuals. Regrettably, this emphasis on the criminal aspects of anti-corruption measures has led to the oversight of civil and administrative remedies. Reports from the Secretariat for the Conference of the States Parties to UNCAC and its subsidiary bodies, which document national practices and international cooperation efforts, highlight the limited experience of States parties in utilizing civil and administrative measures against corruption, coupled with challenges in international cooperation in these domains.

Concurrently, analysis of the existing State practices suggests that civil and administrative law remedies offer valuable contributions to addressing corruption more comprehensively. While criminal

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law measures express society’s disapproval of corrupt acts and primarily seeks to punish the perpetrator of the corrupt offense(s)\(^5\), civil law measures prioritize the interests of victims, aiming at compensation and restitution.\(^6\) Administrative law measures, on the other hand, target abuses of public powers to reduce maladministration and rebuild public trust in government.\(^7\) Civil law remedies empower natural and legal persons, as well as affected States, to seek damages, recover illicit profits, and remedy contractual obligations tainted by corruption.\(^8\) These remedies can be employed to obligate defendants to pay damages both for pecuniary or non-pecuniary loss and disgorge their profits.\(^9\) Proprietary claims to enforce ownership rights on particular and identifiable assets against illegitimate holders brought by victims of embezzlement or misappropriation may also be used to return assets to legitimate owners.\(^10\) Civil remedies prove particularly effective when meeting the stringent burden of proof required in criminal trials becomes challenging.\(^11\) Administrative law remedies encompass disciplinary sanctions against public officials, fines, confiscation and revocation of licenses or permits of corporations as well as debarment from public procurement.\(^12\) Both civil and administrative law remedies against corruption extend to legal persons, bridging the gap in situations where criminal liability of such entities may not be feasible.\(^13\)

While various anti-corruption instruments, including UNCAC, emphasize the use of criminal law as the primary tool against corruption, they also recognize the significance of non-criminal measures. UNCAC, the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention), the Council of Europe Criminal Law Convention on Corruption, the Inter-American Convention Against Corruption (IACAC), the African Union Convention on Preventing and Combating Corruption (CPCC) and the Arab Anti-Corruption Convention (AACC) all incorporate provisions for civil and administrative remedies. This recognition reflects a broader international consensus favouring a comprehensive approach to anti-corruption strategies.\(^14\)

The broader sanctioning process aligns with the international good practices that increasingly recommend using a combination of anti-corruption measures, while taking into consideration the specific aspects of each case and the goals that need to be achieved.\(^15\) In practice, however, many countries exhibit limited experience in using civil and administrative law remedies for corruption. This lack of familiarity can impede international cooperation, as States may hesitate to provide legal assistance or face restrictions in non-criminal proceedings. Despite these challenges, the resolutions adopted by the Conference of the States Parties to UNCAC underscore the importance of cooperation among States in civil and administrative matters related to corruption, urging mutual assistance in investigations and asset recovery through such mechanisms.

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\(^5\) Id. at 617.
\(^6\) Id. at 617-618; UNODC is currently in the final stages of preparing a publication entitled "Victims of corruption and the reparation of damages: The legal frameworks and practices of States," which provides an overview of the current state of law and practice with regard to the recovery of corruption damages, and the respective challenges that arise in the use of the different legal avenues.
\(^10\) Brun et al., supra note 8, at 49.
\(^11\) Id. at 5.
\(^12\) WGAR, CAC/COSP/WG.2/2015/CRP.1, supra note 4, at 2.
\(^13\) Id. at 1.
\(^14\) Makinwa, supra note 9, at 348.
These resolutions, including Resolution 5/1 on Enhancing the Effectiveness of Law Enforcement Cooperation in the Detection of Corruption Offenses in the Framework of UNCAC,16 Resolution 5/3 on Facilitating International Cooperation in Asset Recovery,17 Resolution 6/4 on Enhancing the Use of Civil and Administrative Proceedings Against Corruption, Including Through International Cooperation in the Framework of UNCAC18 and Resolution 7/1 on Strengthening Mutual Legal Assistance for International Cooperation and Asset Recovery,19 highlight the commitment to proportionate and dissuasive penalties across civil, administrative, and criminal realms. Furthermore, the international community, as reflected in the Special Session of the General Assembly’s political declaration, acknowledges the necessity of effectively addressing challenges and implementing measures to prevent and combat corruption through strengthened international cooperation in non-criminal proceedings, including civil and administrative actions.20

2. Objectives

This report aims to further investigate the potential contribution of civil and administrative law remedies in the ongoing battle against corruption. The primary objective is to analyse and compare the legal approaches adopted by various States, delving into diverse legal cultures, systems, and traditions. Through this examination, the report seeks to gain a nuanced understanding of how different States utilize civil and administrative law in combating corruption.

The comparative analysis of these legal practices serves a dual purpose: first, to provide States with insights into the application of civil and administrative law remedies for corruption, fostering knowledge acquisition; and second, to facilitate the exchange of experiences, thereby promoting international cooperation. The overarching goal is to underscore both the strengths and limitations inherent in different approaches, highlight good practices, identify existing gaps, and offer constructive suggestions for improvement. This analysis is geared towards fostering a more holistic and effective approach to addressing corruption.

By exploring the diverse array of civil and administrative law remedies for corruption, this report seeks to underscore the importance of their careful consideration. The analysis of these remedies not only aims to enhance their application at the national level but also strives to foster improved cooperation among States on the international stage. Drawing on existing practices, successes, and challenges, the report encourages countries to strategically leverage and select the most effective remedies tailored to bolster their anti-corruption efforts.

3. Methodology

In order to identify and compare States’ legal frameworks and practices regarding the use of civil and administrative law remedies against corruption, a note verbale and a questionnaire entitled “Civil and Administrative Liability for Corruption: Domestic Practices and Ways to Enhance International Cooperation under the United Nations Convention against Corruption” was sent to States parties to UNCAC in September 2022. The questionnaire sought information from States parties on the topic of

20 General Assembly, ‘Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation’, A/RES/S-32/1 (2021), paras. 13 and 40.
civil and administrative liability for corruption for the purposes of international cooperation. The Secretariat invited States parties to disseminate the questionnaire to their competent authorities, including anti-corruption units or agencies, ministries of justice, attorneys-general or financial regulators, in order to collect information on the use of civil and administrative measures against corruption and on their practical experience in the context of international cooperation. The questionnaire centred on two pillars, namely, the use of civil and administrative measures against corruption at the national level and international cooperation in the context of civil and administrative proceedings relating to corruption.

Under the first pillar, States parties were encouraged to present their legal provisions, mechanisms or procedures that apply to civil and administrative liability measures or penalties for corruption offenses at the national level, provide information on key legal and procedural matters, share their experience, discuss the strengths and the weaknesses of civil and administrative liability in comparison with the criminal liability, identify good practices and tools and recommend ways for improvement. Under the second pillar, States parties were invited to describe the legal provisions, mechanisms or procedures to seek or provide international cooperation through civil and administrative remedies, specify their experience in applying such mechanisms in international cooperation or asset recovery cases, explain the reasons for refusing requests, describe their experience in the application of articles 46 para. 1 and 53 of UNCAC, identify good practices and tools, provide information on their focal points, inform on the issuance of relevant guidelines, identify strengths, weaknesses and challenges, and provide recommendations for improvement.

Information collected through the questionnaire was used to map the existing domestic and international practices of States parties in using civil and administrative remedies for corruption. It should be noted that only 32 States parties responded to the questionnaire. The extent of their responses also varied. Some countries provided comprehensive responses with detailed references to their national practices and experience on the international level, while others provided very basic information or described their lack of experience regarding the topic.

The collected information was complemented with background research of relevant primary and secondary sources. In order to provide an overview of the international legal framework on civil and administrative remedies for corruption, the report analysed relevant international anti-corruption instruments, namely UNCAC, the OECD Bribery Convention, the CLCC and the AACC, as well as supporting documents such as the UNCAC Legislative Guide, the Commentaries on the OECD Bribery Convention and the Explanatory Report to the CLCC. Apart from these anti-corruption conventions, other multilateral instruments that provide for international cooperation in civil and administrative matters are also examined with a view to obtain an overall understanding of the existing framework that may promote or even compel mutual legal assistance where applicable.

The report also takes into consideration resolutions aiming at strengthening the use of civil and administrative remedies against corruption and promoting international cooperation in non-criminal matters adopted by the Conference of the States Parties to UNCAC and uses previous research published in notes by the UNODC Secretariat assessing States parties’ efforts to obtain a broader overview of national practices and international experience. Where necessary, country reviews within the context of the UNCAC Implementation Review Mechanism regarding States parties’ implementation of the Convention are also consulted. To provide a full analysis of the use of civil and administrative law remedies for corruption, the report draws on the existing work that reflects practitioners’ day-to-day experience, such as the publications of the UNODC-World Bank Stolen Asset

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21 The countries that responded to the questionnaire are the following: Australia, Azerbaijan, Bahrain, Belarus, Bolivia, Brazil, China, Cuba, Cyprus, El Salvador, France, Greece, Guatemala, Hungary, Iran, Japan, Kenya, Kuwait, Latvia, Lebanon, North Macedonia, Mauritius, Moldova, Nicaragua, Panama, Saudi Arabia, Serbia, Timor Leste, Russian Federation, Tajikistan, Ukraine. One jurisdiction also responded to the questionnaire, namely Zanzibar (Tanzania).
Recovery Initiative and reports by international organizations that are active in the fight against corruption. It also utilizes academic literature to examine various aspects of non-criminal remedies.

The report benefited from the thoughtful and helpful comments consolidated during the Expert Group Meeting on Civil and Administrative Liability for Corruption that took place from 2-3 May 2023 at the headquarters of the UNODC in Vienna. A first version of the report was presented before a group of practitioners, including prosecutors, law enforcement officials, asset managers and representatives of anti-corruption authorities, who shared their experiences and best practices from their respective jurisdictions regarding civil and administrative proceedings in corruption cases, including those involving mutual legal assistance components. The experts were nominated to attend the meeting by their respective regional groups or invited by the Secretariat.

4. Structure of the report

The report is divided into three chapters addressing the main areas for comparison, namely civil law remedies for corruption, administrative law remedies for corruption, and international cooperation in civil and administrative proceedings for corruption. Each chapter addresses both substantive and procedural issues by explaining their main aspects, providing the international legal context and comparing States’ approaches. It identifies strengths and weaknesses, highlights best practices and offers recommendations. The concluding remarks summarize the findings and provide suggestions for improving the use of civil and administrative law remedies and enhancing international cooperation with a view to strengthening anti-corruption efforts in the future.
Chapter I - Civil Law Remedies for Corruption

This chapter outlines practice-oriented information on the use of civil law remedies for corruption at the state level by examining the various grounds for bringing civil claims, the practical aspects of such actions and the challenges that they may involve. The chapter begins by exploring the broader international context that allows for civil law remedies for corruption, continues with a discussion on the advantages of such remedies, and presents the variety of legal actions that may be brought domestically, addressing specific aspects of civil proceedings. The Chapter identifies potential procedural and substantive limitations in the use of civil law remedies. It also highlights good practices to demonstrate how civil law remedies might serve as an effective tool in addressing corruption.

1.1. Overview of the international legal context

The following international anti-corruption instruments recognize that States may exercise their authority to address corruption through civil liability. For the most part, these conventions are not self-executing and establish only minimum standards that national legislations must meet. In other words, States parties are required to enact appropriate legislation to comply with their obligations under these conventions.

1.1.1. The United Nations Convention against Corruption

With 190 States parties, UNCAC is the only global instrument against corruption, encompassing 71 articles that provide a comprehensive framework for the prevention of and fight against corruption, international cooperation and asset recovery, as well as technical assistance and information exchange.\(^{22}\) The Convention contains norms on all three forms of legal liability to punish corruption including criminal, civil and administrative liability. It lays a strong framework for States parties to use their civil law to hold the perpetrators of corruption to account and to ensure compensation for victims of corruption,\(^{23}\) while also providing for remedial actions to address the contractual consequences of acts of corruption.\(^{24}\) Throughout UNCAC, references are made to the use of civil measures to preserve the integrity of accounting books, to provide penalties for non-compliance with measures to prevent corruption in the private sector, and to ensure the liability of legal persons.\(^{25}\)

1.1.2. The OECD Convention on Combating Bribery of Foreign Public Officials

With article 3 para. 4, the Convention calls on States parties to consider imposing civil sanctions, apart from criminal ones, on persons for bribery of foreign public officials.\(^{26}\) In accordance with article 8 para. 2, effective, proportionate and dissuasive civil sanctions may also be provided for accounting omissions and falsifications in respect of books, records, accounts and financial statements of companies.

1.1.3. The Council of Europe Civil Law Convention on Corruption

The first attempt to provide civil law remedies for corruption at the regional level was made with the Council of Europe Civil Law Convention on Corruption (CLCC) which is open for ratification by

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\(^{22}\) UNCAC was adopted by the UN General Assembly on 31 October 2003, entered into force on 14 December 2005 and has up to now 189 States Parties.

\(^{23}\) See UNCAC article 35.

\(^{24}\) See UNCAC article 34.

\(^{25}\) See UNCAC articles 9 para. 3, 12 para. 1, and 26 para. 2 respectively which also provide for administrative remedies.

\(^{26}\) The OECD Convention on Combating Bribery of Foreign Public Officials was adopted on 17 December 1997, entered into force on 15 February 1999 and currently has 44 State Parties.
both European and non-European countries. The Convention complements the Council’s Criminal Law Convention on Corruption which focuses on the criminalization of corruption in the public and private sector. The CLCC is the only international anti-corruption instrument which focuses exclusively on civil law issues resulting from corruption as it deals with compensation for damage, liability, validity of contracts and international cooperation, among others, and indicates the Council’s intent not only to address the criminal aspects of corruption, but also to repair the harm that is caused by corruption.

1.1.4. The Arab Anti-Corruption Convention

The AACC, the most recent regional instrument against corruption developed by the League of Arab States, includes provisions regarding civil remedies against corruption. Article 5 of the Convention addresses the liability of legal persons, stating that States should implement appropriate measures to establish the civil liability of legal entities for offenses outlined in the Convention. Civil liability can be imposed without prejudice to the criminal liability of natural persons. The Convention also emphasizes the compensation of corruption victims and the possibility of cancelling or revoking contracts that were obtained through corrupt practices.

1.2. Reasons for using civil law remedies for corruption

As was previously mentioned, civil remedies for corruption remain relatively underutilized in a number of jurisdictions. The reluctance of using civil law remedies for corrupt acts relates to various reasons, such as limitations in bringing civil claims, high costs of litigation, adverse publicity and difficulties in obtaining evidence and proving the causal link between corrupt acts and relevant assets or damages. Nonetheless, the use of civil law remedies for corruption seems to be on the rise.

1.2.1. Civil law remedies address the financial impact of corruption

States and public entities, private actors and civil society organizations who are harmed by corruption may choose the civil action to claim compensation. Civil lawsuits are considered effective in addressing the financial consequences of corrupt activities, as they target the economic foundation of corruption. Apart from the harm caused to the economy or the political system, corruption also causes tangible damages to particular persons or to society as a whole. As a result, in most jurisdictions, whoever has suffered damage as a result of corruption may bring a civil action to seek compensation. Although, a few States have indicated their lack of experience in using civil law remedies.
remedies,\textsuperscript{36} actions based on tort and breach of contract are generally available in a large number of jurisdictions, while proprietary claims seem less common. The use of civil law remedies for corruption is primarily justified by States as a means to provide compensation for the corrupt acts.\textsuperscript{37} Civil liability allows for repairing the damage caused by corruption and provides relief to the victim, while also offering the opportunity to the perpetrator to correct the misconduct.\textsuperscript{38}

1.2.2. The combination of civil law remedies with criminal ones has a stronger deterrent effect to corruption

Most States prioritize the use of criminal law in the fight against corruption.\textsuperscript{39} Criminal law is found at the centre of national efforts against corruption with authorities pursuing a criminal case as a means of redress. Countries seem to agree that criminal law measures have a deterrent effect, while criminal punishment through penalties, such as imprisonment, fines or confiscation, is considered to represent society’s disapproval of corrupt acts.\textsuperscript{40} Despite the prevalence of using criminal law as the main approach, which requires the initiation of a criminal action, it is increasingly recognized that it is challenging to effectively combat corruption by using the remedies of a single category of law and that the criminal law alone often may not address the financial damage caused by corruption and penalize all relevant perpetrators.\textsuperscript{41} Corruption is more than ever recognized as a multi-faceted problem demanding the use of a plurality of strategies to address its various aspects. Expanding the range of anti-corruption tools with the addition of civil law remedies promotes a holistic response to the problem and ensures flexibility in employing different mechanisms to achieve the desired result.

**Non-criminal measures against corruption as key priorities in Azerbaijan’s action plan against corruption**

States wishing to promote the use of non-criminal measures against corruption may consider incorporating them into their national anti-corruption plans or strategies. For instance, Azerbaijan has set the use of civil and administrative law measures, non-conviction-based (NCB) confiscation, as well as the fight against illicit enrichment as key priorities in its recently adopted National Action Plan (NAP) for 2022-2026 on the fight against corruption.

\textsuperscript{36} North Macedonia reported that the adoption of civil law measures for corruption has not been considered, while Serbia reported that such measures are not available. One jurisdiction, namely Zanzibar (Tanzania) explains that although it has no experience in applying civil mechanisms to corruption offences, its Anti-Corruption and Economic Crimes Authority has restructured its departments to strengthen the asset recovery division in order to effectively deal with asset recovery cases, including forfeiture of unexplained assets which is dealt under civil measures.

\textsuperscript{37} For instance, Belarus reported that the use of civil law measures is necessary to ensure compensation for the harm caused by corruption, while Hungary highlighted that victim compensation is currently more prioritized in comparison to asset forfeiture.

\textsuperscript{38} France, Greece and Hungary recognize the need to address harm caused by corruption, while one jurisdiction, namely Zanzibar (Tanzania) noted that civil law remedies give an opportunity to the offender to correct his/her misconduct. China and France report that civil remedies benefit the victims of corruption as they allow them to obtain relief.

\textsuperscript{39} For instance, France and El Salvador inform that corruption is primarily a matter of criminal law. Greece reported that criminal law has priority in the fight against corruption, while Hungary informed that criminal law remedies have a greater deterrent effect and thus a greater role in preventing corruption offences. In Pakistan, all corruption-related cases are based on criminal proceedings, while subsequent civil proceedings are treated as criminal ones. See COSP, CAC/COSP/2019/7/Add.1, supra note 4, para 25. At least until 2017, in Norway, civil proceedings relating to corruption were rare as most corruption cases were dealt with under the criminal law, while in Slovakia, corruption matters were dealt almost exclusively in criminal proceedings. See COSP, CAC/COSP/2017/2 paras. 64 and 91 respectively.

\textsuperscript{40} For instance, Australia expressed a view that criminal sanctions satisfy community’s expectation that those involved in corruption are appropriately brought to account, while Bahrain reported that criminal penalties have greater deterrence than civil ones.

\textsuperscript{41} C. Takoff, ‘Key Issues of Civil Law in Corruption Cases in Bulgaria’, in O. Meyer, ed., The Civil Law Consequences of Corruption (Nomos, 2009), 195. For instance, Azerbaijan noted that criminal law is not able to address corruption on its own.
Several States surveyed combine criminal law remedies with civil ones in order to achieve greater deterrence. The combination of various types of liability is recommended by a number of countries and is considered to be a good practice, aiming at combating the phenomenon of corruption from various angles.

**Combination of criminal and civil penalties under the United States’ Foreign Corrupt Practices Act (FCPA)**

Under the FCPA (1977), individuals and legal entities are subject to both criminal and civil penalties if they violate FCPA’s anti-bribery and accounting provisions. For criminal penalties, each violation of the anti-bribery provisions by corporations and other business entities is subject to a criminal fine of up to US$2 million while individuals are subject to a fine of up to US$250,000 as well as to imprisonment for up to five years. As to civil penalties, for violations of the anti-bribery provisions, corporations and other business entities as well as individuals are subject to a civil penalty of up to $21,410 per violation. For violations of the accounting provisions, a civil penalty not exceeding the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation based on the nature of the violation and potential risk to investors may be imposed. Apart from criminal and civil penalties, companies may also be required to forfeit the proceeds of crimes or disgorge their profits.

### 1.2.3. Civil liability of legal persons for corruption accounts for the lack of criminal liability

Although a number of countries have embraced the concept of corporate criminal liability, some jurisdictions still resist the idea that corporations can commit crimes. To address corporate malfeasance without employing criminal law, civil liability may be used to yield successful results. Legal persons may be found civilly liable for damages or may have to disgorge their illicit profits, thus removing the benefit associated with corporate offending. Disgorgement of profits may prove particularly helpful in cases where criminal fines can be lower than the profits acquired from corporate wrongdoing. National legislation can obligate individuals as well as companies to disgorge their ill-gotten gains and strengthen competent authorities’ mandates to enforce the abovementioned measures.

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42 For instance, Brazil submitted that its legal system provides for various types of sanctions to strengthen business integrity and reduce corruption in the private sector, which can be applied in civil, criminal or administrative proceedings. Australia reported that civil sanctions are used in addition to criminal and administrative sanctions. Bahrain reported that the combination of civil and administrative remedies apart from criminal ones may have a greater deterrent effect on potential criminals. Belarus noted that civil law remedies are applied along with criminal, administrative and disciplinary measures. France reported that civil remedies complement the criminal approach. Russian Federation reported about the possibility of applying all types of responsibility for corruption offenses.

43 China reported that it follows a three-dimensional approach, Greece highlighted the importance of using a holistic approach to fighting corruption, while Mauritius reported that its legal system encompasses all three types of remedies.


45 Id. at 71.

46 Id.


48 See Brazil’s Corporate Liability Law 12,846/2013 with civil sanctions for domestic corruption and foreign bribery.

49 Australia reported that depriving persons and legal entities of the proceeds of crime can have a greater deterrent effect as it undermines the profitability of criminal enterprises and prevents their re-investment into further criminal activity.

50 For example, the National Défense Authorization Act for the 2021 Fiscal Year amended the Securities Exchange Act, extending the SEC’s authority to pursue disgorgement of unjust enrichment for violations of federal securities laws by both natural persons and legal entities. The amendments introduced a ten-year statute of limitations, allowing the SEC to avoid previous limitations and strengthened its civil enforcement actions by doubling the period for bringing disgorgement claims, see N. Gorbacheva, ‘U.S.
The imposition of civil liability for corrupt acts on legal persons can incentivize the adoption of preventive measures inside companies. Further, the civil disgorgement of illegal proceeds may prove more effective than criminal sanctions in deterring corporations from engaging in corrupt acts.51

Risk of civil liability as an incentive for developing integrity programmes in Brazil

In Brazil, the Corporate Liability Law 12,846/2013 establishes a strict liability regime for legal entities that engage in acts of corruption or procurement fraud by prescribing robust civil and administrative sanctions. The law provides that both the Office of Public Advocacy and the Public Prosecutor’s Office may bring lawsuits against corporations for claims involving the loss of property rights, requests for partial suspension of corporate activities or the compulsory dissolution of legal entities involved in bribery.52 The law has incentivized companies to establish integrity programmes in order to prevent corruption but also to minimize the consequences of a potential legal action. It has, thus, strengthened integrity in the private sector as companies are strongly encouraged to implement integrity programmes not only to prevent the occurrence of unlawful acts but also to reduce the severity of sanctions in case of misconduct.

1.2.4. Civil proceedings in corruption cases have various procedural advantages

Civil proceedings have a number of advantages compared to often cumbersome, time-consuming and possibly inefficient criminal proceedings.53 Civil proceedings are often considered to be less complex and more cost effective.54 They enable the victim of corruption to seek recourse independently of State prosecution and allow the plaintiff to have more control over the progress of the case.55 Civil remedies may extend the scope of potential defendants by bringing claims against third parties with substantial financial assets who may have knowingly participated in the corrupt act, such as family members, associates, lawyers, or even banks.56 Another important advantage of civil proceedings is that they are generally subject to lower standards of proof compared to criminal proceedings which in common law jurisdictions require proof beyond reasonable doubt while in civil law ones it requires intime conviction.57 Thus, even if it is difficult to obtain a conviction, a lower standard of proof may permit the forfeiture of property and compensation for damages.58 An additional advantage is the less demanding requirement for linking assets to the corrupt wrongdoing resulting in higher chances of imposing appropriate remedies.59 Furthermore, as further discussed in section 1.5., civil law remedies may be a preferred legal avenue when obtaining a conviction is

54 One jurisdiction, Zanzibar (Tanzania), reported that the rationale of non-criminal remedies is to avoid long and complex criminal proceedings.
55 Makinwa, supra note 9, at 333; Brun et al., supra note 8, at 5.
56 Brun et al., supra note 8, at 5.
57 Makinwa, supra note 9, at 333; Brun, supra note 8, at 3. For instance, China reported that both civil and administrative remedies have relatively low standards of proof, which can effectively address long proceedings and the harsh standards of proof in criminal trials. In Moldova, in the context of civil proceedings in rem, the burden of proof of the lawful origin of goods is shifted to the defendant.
58 Cheh, supra note 53, at 47.
59 Brun et al., supra note 8, at xii, 5.
impossible, such as in cases of the defendant’s death, flight or acquittal or when public officials enjoy immunities in the context of criminal proceedings but not civil ones.

1.2.5. Civil actions offer additional avenues for asset recovery in corruption cases

Civil law remedies have been used by authorities to recover stolen assets both in domestic and foreign courts. The right of harmed States to seek direct recovery of assets through civil actions is recognized in article 53 of UNCAC. This provision introduces an important deviation from the established notion that proceeds of corruption should solely be recovered through confiscation. States parties are obligated to incorporate into their national legal frameworks measures that would allow other States affected by corruption to initiate civil actions seeking property recovery and compensation, such as claims in rem or based on tort. Such actions presuppose that the State acting as plaintiff enjoys locus standi in the courts of the other State. Hence, article 53 approaches States not only as subjects of international law but also as legal subjects in other jurisdictions. Bringing a civil action in a foreign jurisdiction may be advantageous when criminal prosecution is impossible, when the standard of proof is lower in civil proceedings, or when grounds for international legal cooperation are absent.

According to article 53(a) of UNCAC, States parties must take the necessary measures to allow other States parties to initiate civil actions in their courts to establish title to or ownership of property which was acquired through the commission of an offense established in UNCAC. Furthermore, under article 53(b), States parties must take the necessary measures to permit their courts to order offenders to provide compensation to other States parties which have been harmed by corruption offenses. This provision requires States parties to allow other States to stand before their courts and claim damages either in the context of civil litigation as plaintiffs or in criminal proceedings as third parties. Lastly, article 53(c) requires from States parties to take measures to permit their courts or competent authorities, in a confiscation procedure, to recognize other States parties’ claims as legitimate owners of property acquired through corruption.

Consequently, article 53 of UNCAC allows States to pursue civil claims abroad for direct recovery of assets acquired through corruption. The article becomes particularly relevant when domestic legislation does not automatically treat other States as any other foreign legal persons.

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60 See UNCAC art. 54(1)(c). Young, supra note 32, at 144. Australia reported that, in certain circumstances, it can be difficult to obtain a criminal conviction, for example when the suspect may have fled the jurisdiction, died or where there are legal or other barriers to extradition. China reported that non-conviction-based confiscation provides a legal basis for confiscating illegal proceeds in cases where defendants have fled or died.

61 Brun et al., supra note 8, at 6. Ukraine reported that among the advantages of civil forfeiture is the possibility of its application without a conviction including in relation to property of those persons who are granted immunity from criminal prosecution.

62 Brun et al., supra note 8, at 4.


64 Id. at para. 30, this however does not prevent States parties from subjecting civil actions to special rules on jurisdiction, such as assigning the adjudication of those actions to higher courts, see para. 36.

65 Id. at para. 34.

66 Id. at para. 32.

67 Id. at para. 33.

68 Id. at para. 37.

69 Id. at para. 38.

70 For instance, in Azerbaijan, no provision in the national legislation prohibits the possibility of initiating civil litigation by a foreign State.
States as plaintiffs seeking compensation for corruption in the United States

In the United States, under the Racketeering Influenced and Corrupt Organizations (RICO) statute, foreign governments or foreign nationals may bring civil claims for compensation for damages resulting from tortious corrupt practices. For example, in the civil claim filed by the Philippines against its former president and his wife under the RICO, alleging mail and wire fraud and the transportation of stolen property in the foreign or interstate commerce of the United States, the Court of Appeals held that the foreign nature of Philippines did not deprive it of its statutory personhood, recognizing that it had standing to assert RICO claims. In addition, under both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act, a foreign government harmed by FCPA violations may bring a claim for damages. To date there are cases where a foreign government has received compensation for a FCPA violation and most of these cases were resolved through the defendants’ guilty pleas.

Civil schemes for the recovery of corrupt proceeds are considered an effective route especially when assets are located abroad. Civil law is considered suitable in tracing changes in corporate ownership and piercing the corporate veil, permitting authorities to unravel offshore structures and discover proceeds of crime hidden in foreign jurisdictions.

Asset recovery through civil proceedings brought by Nigeria in the United Kingdom

Nigeria succeeded in recovering three residential properties in London as well as funds held in bank accounts by bringing civil claims against the former governor of Bayelsa state, Alamieyeseigha, who in 2005 was impeached for corruption. The civil proceedings in the United Kingdom were pursued simultaneously with the criminal proceedings in Nigeria. Nigeria claimed ownership of the stolen assets and proceeds of the defendant’s corrupt activities. The total amount of confiscated and repatriated assets in the United Kingdom, South Africa and the United States as a result of the civil lawsuits was more than US$17 million.

1.3. Civil actions for corruption

This section provides an overview of various civil remedies employed by national authorities to address corruption. The section examines national and international instruments related to civil actions based on tort, proprietary claims, contract nullity, and unjust enrichment.

1.3.1. Civil actions based on tort in corruption cases

The right to bring a civil claim for damages in corruption cases is recognized by UNCAC and other international instruments such as the CLCC and the AACC. More specifically, according to article

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72 R. Messick, ‘Legal Remedies for Victims of Bribery Under U.S. Law’, Open Society Foundations (Jun. 2016) 6. Messick provides a list with FCPA cases where a foreign government has received compensation namely: a) United States v. Kenny International Corp., No. Cr. 79-372 (D.D.C. 1979) where under a plea agreement $337,000 was paid to the government of the Cook Islands, b) United States v. Napco International, Inc., No. Cr. 3-89-47(1) (D. Minn. 1989) where under a plea agreement $140,000 was paid to the U.S. Defense Department to be credited to Niger’s Foreign Military Sales account, c) United States v. F.G. Mason Engineering, Inc., No. B-90-29 (D. Conn. 1990) where under a plea agreement a $160,000 payment plus discounts on future sales was provided to compensate German government, d) United States v. Diaz, No. 20346-CR-JEM (S.D. Fla. 2009) where under a plea agreement the defendant was ordered to pay $73,824 to the government of Haiti. A case that was adjudicated is United States v. Green, 722 F.3d 1146 (9th Cir. 2013) (9th Cir. 2011) in which Gerald and Patricia Green were convicted for the bribery of Thai public officials with the court finding that there was an identifiable victim or victims who suffered pecuniary loss.

73 For example, Australia and China reported that civil law remedies can be used to recover assets especially when they are located abroad.

74 Makinwa, supra note 9, at 334.


76 Id., at 16; Brun et al., supra note 15, at 27.
35 of UNCAC, States parties are required to ensure that entities or persons, including natural and legal persons, as well as States, who have suffered damage as a result of corruption, have the right to initiate legal proceedings to obtain compensation for damages from those responsible.77 Similarly, the CLCC establishes in article 1 that each State party shall adopt effective remedies for persons who have suffered damage as a result of acts of corruption, so as to defend their rights and interests and obtain compensation for damages. In particular, article 3, which outlines the Convention’s main goal requires States parties to provide in their internal laws the right to initiate an action in order to provide full compensation to persons who have suffered damage as a result of corruption.78 In accordance with article 4, civil liability is based on the fulfillment of three conditions: the existence of an unlawful and culpable behaviour on the part of the defendant, which involves the commission or authorization of an act of corruption or the failure of the defendant to take reasonable steps to prevent it; damages suffered by the plaintiff; and a causal link which must exist between the act of corruption and the damage for the latter to be compensated.79 Furthermore, according to article 8 of the AACC, each State Party shall provide for the right to bring an action for compensation for damage suffered as a result of an act of corruption.

As a general rule, identified by most States, any person that has suffered damage as a result of corruption is entitled to bring a claim to request compensation for damages. The basis for such liability is tort, which accounts for the harm that the defendant has caused to the plaintiff as a result of the corrupt conduct.80 Although it may be difficult to cover all types of acts that may qualify as torts or civil wrongs, civil fraud, tortious interference with contract or economic advantage, conspiracy to injure, conversion and breach of a fiduciary duty are all relevant in the context of corruption.81 In most jurisdictions, civil codes recognize that whoever commits an unlawful act that causes damage must provide compensation.82 Similar provisions giving rise to civil liability can also be found in criminal codes.83 The unlawful act may include corruption related offenses.84 Hence, bribery, embezzlement, misappropriation of property, abuse of functions, illicit enrichment and money laundering can serve as a basis for bringing a civil claim for compensation.

The scope of potential plaintiffs who may initiate civil claims for damages incurred by corruption is quite broad, encompassing all those who are victims of a corrupt act, including natural persons, as well as States, who have suffered damage as a result of acts of corruption, so as to defend their rights and interests and obtain compensation for damages. In particular, article 3, which outlines the Convention’s main goal requires States parties to provide in their internal laws the right to initiate an action in order to provide full compensation to persons who have suffered damage as a result of corruption.

77 UNODC, Legislative Guide for the Implementation of the UNCAC (United Nations, 2006), paras. 358 and 461; Another relevant avenue to reclaim assets lost due to corruption is compulsory insolvency proceedings, see generally J. P. Brun, M. Silver, Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases, (The World Bank, 2020).
78 CoE, supra note 27, at para. 35.
79 Id. paras. 41-45.
80 Brun et al., supra note 8, at 60.
81 Brun et al., supra note 8, at 62. In Korea Supply Co. v. Lockheed Martin Corp. 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003), the Supreme Court of California found that the losing bidder’s claim against a winning competitor who had won a military contract by offering bribes and sexual favours to key public officials, stated a cause of action for the tort was interference with prospective economic advantage.
82 For instance, in Azerbaijan, all acts of corruption can be defined as civil delicts under the Civil Code and can be compensated. In Bahrain, the general rule that every action, which causes injury to another, imposes an obligation for reparation, including the context of corruption offenses. Similarly, in Greece the general clause for tort liability creating an obligation to compensate for an unlawful act that causes harm to another can be applied to corruption offenses. A basic rule in common law is that a claimant is entitled to the sum of money, which will put the injured party in the same position as he/she would have been but for the wrong sustained for which compensation is requested, Livingstone v. Rawyards Coal Co [1880] 5 App. Cas. 25 at 39.
83 In Cuba, Law 151, the new Penal Code, provides in article 102.1 that civil liability for damages caused as a consequence of a crime is imposed on the perpetrators and participants and third parties can be declared as civilly responsible. In El Salvador, article 116 of the Criminal Code establishes that any person who is criminally liable for a crime or a misdemeanour is also civilly liable, if damage or harm, whether moral or material, results from the act. In Iran, the Code of Criminal Procedure addresses the private aspects of crimes and how damages caused can be claimed, as under the Code of Civil Procedure. In Lebanon, every criminal sentence includes remedies to affected persons. In Panama, article 128 of the Criminal Code provides that every offense gives rise to civil liability for those who are guilty as perpetrators, instigators or participants.
84 For instance, in Australia, natural and legal persons may seek compensation for wrongs against them, including harm caused by corruption offenses. Similarly, in Brazil, the Improbity Law 8,429/1992 establishes civil liability for several offenses committed by public agents and natural persons, including the ones that relate to corruption, such as illicit enrichment, payment and receipt of bribery, nepotism and public procurement fraud.
and legal persons who have a specific legal interest in the case. Civil claims may also be brought by States that are harmed by the acts of their public officials or others involved in corruption. A prosecutor or attorney general may file a civil complaint and participate as the plaintiff in court proceedings. By bringing a civil claim to court, the State can also request to be compensated for the social damage caused by the corrupt behaviour. In practice, ministries, anti-corruption agencies, central banks, local authorities, municipalities, provinces, cities, counties and state-owned enterprises may also initiate legal actions to pursue corruption claims.69

Shareholders of a company damaged by bribery may also be considered to be victims of corruption and claim damages before courts. Shareholders’ lawsuits may allege that directors of a company violated their fiduciary duties by failing to exercise proper oversight over the company and detect bribery or engaged into misrepresentations regarding bribery.91

Shareholder lawsuits in the United States

In the United States, FCPA civil suits have been brought by shareholders either as derivative actions against the board of directors or executive officers on behalf of the corporation, claiming that the latter was harmed by its managers who consciously disregarded their fiduciary duties by failing to detect or prevent FCPA violations, or as securities fraud class actions against the corporation, alleging misrepresentations or omissions of material facts that led to FCPA violations.92 Although the FCPA does not provide for a private right to sue, government enforcement of the FCPA has increased opportunities for private plaintiffs to bring collateral civil actions. A number of cases have been

85 Brun et al., supra note 8, at 11. For example, in Hungary both natural and legal persons can bring a civil claim under the same conditions. In the United States, the Mandatory Victims Restitution Act (1996) determines who is considered a victim in federal criminal cases and requires criminal defendants to compensate victims of their crimes. The Act has been used by public corruption victims to seek recovery. R. Messick, ‘Actions for Damages Caused by Corruption: American Law’, GAB/The Global Anticorruption Blog (10 March 2021), available at https://globalanticorruptionblog.com/2021/03/10/actions-for-damages-caused-by-corruption-american-law/ (accessed 15 Jun. 2023).

86 For instance, in Azerbaijan, compensation shall be provided to the benefit of the State in case property is unlawfully obtained by officials. In Bolivia, given that corruption offenses are always linked to the economic damage to the State, civil liability ensures reparation of civil damages to the State. In Nicaragua, public servants as well as natural or legal persons may be held civilly liable for acts or omissions that have caused damage to the State or public entities.

87 For instance, in Azerbaijan, the Prosecutor’s Office is entitled to file and defend a civil claim in court.

88 Social damage caused by corruption refers to the harm incurred by the members of a community as a whole, rather than any individual in particular. This damage includes harm to social trust, credibility of institutions, good governance, and collective fundamental rights such as health, peace, and security, among others. A civil claim to repair the social damage resulting from corruption was brought in November 2004 by the Costa Rican Attorney General resulting in US$10 million compensation agreement which was incorporated into the government budget. J. Olaya, K. Atitso, A. Roth, ‘Repairing the Social Damage out of Corruption Cases: Opportunities and Challenges as illustrated in the Alcatel Case in Costa Rica’ (2010), 10, 20, available at SSRN https://ssrn.com/abstract=1779834 or http://dx.doi.org/10.2139/ssrn.1779834 (accessed 15 Febr. 2023).

89 Brun et al., supra note 8, at 12, 14, 92. In Djbouti, associations and other public interest bodies have the right to bring a civil suit.

90 R. Messick, ‘A Breakthrough in Recognizing Who is a Corruption Victim’, GAB/The Global Anticorruption Blog (17 Dec. 2020), available at https://globalanticorruptionblog.com/2020/12/17/a-breakthrough-in-recognizing-who-is-a-corruption-victim/ (accessed 15 Jun. 2023), citing the ruling of the United States District Court for the Eastern District of New York according to which shareholders of a company were considered as victims damaged by bribery and were awarded $135 million in damages. The case was brought by some of the former shareholders of the Canadian mining company in the aftermath of the OZ Africa Mgmt LLC’s guilty plea, seeking restitution pursuant to the Mandatory Victims Restitution Act for losses they allegedly incurred as a result of OZ Africa Mgmt LLC’s bribery of officials in Congo. The court’s decision in United States v. OZ Africa Mgmt.GP (16-CR-515 (NGG)) (E.D.N.Y. Aug. 8, 2019) is a United States precedent whose reasoning regarding the showing of “direct” and “proximate” harm caused by corruption can be used by courts in other jurisdictions.


92 For instance, following revelations that Wal-Mart’s foreign subsidiary, Wal-mart de Mexico, had engaged in bribery, Wal-Mart shareholders filed a dozen lawsuits against the company, alleging that it had made misleading disclosures and that the company directors and officers had breached their fiduciary duties exposing the company to liability under the FCPA, Deen Westbrook, supra note 91, at 1218.

93 In Lamb v. Phillip Morris, Inc., 915 F.2d at 1025 (6th Cir. 1990), the Sixth Circuit affirmed the government’s exclusive right to enforce the FCPA and rejected that a private right of action exists under the FCPA. Deen Westbrook, supra note 91, at 1224.
settled without litigation on the merits for amounts often exceeding the penalties imposed for FCPA violations. For example, in January 2018, Petroleo Brasileiro SA (Petrobras), Brazil’s state-controlled oil company, agreed to pay $2.95 billion to settle a United States securities class action. Although Petrobras denied any wrongdoing, it agreed to pay more than six times what it had to pay under the bribery schemes.

Other potential plaintiffs requesting compensation for corruption may be competitors who have lost contracts because of corruption. In such cases, competitors may bring claims on the basis of unfair competition claiming that their rights and interests have been harmed.

**Compensation for commercial bribery in China**

The Chinese Anti-Unfair Competition Law expressly prohibits commercial bribery to obtain trading opportunities or competitive advantages and provides for civil liability for various acts of unfair competition, including commercial bribery. In addition, the Civil Code also applies to civil liability for torts of commercial bribery. The Company Law, the Bidding and Tendering Law, the Government Procurement Law and other legal norms also provide for civil liability for the commission of commercial bribery. Cases where companies sought to obtain market opportunities by engaging in bribery were found by courts to constitute unfair competition through commercial bribery, creating an obligation to compensate for the resulting economic loss.

Civil claims for corruption are generally brought against wrongdoers as well as affiliated persons and organizations. Claims are often brought by principals against their agents for breach of trust in order to recover the benefits gained or the loss suffered. For example, an employer may bring a claim against an employee for accepting a bribe thus breaching the duty of loyalty owed to the employer. In cases of public sector corruption, the most obvious defendants will be the corrupt public officials who abused their powers for private gain.

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94 Deen Westbrook, supra note 91, at 1218.
96 Id. The settlement was approved by the Court on 27 Jun. 2018 while on 24 September 2019, the Court issued the Order Granting Authorization to Distribute the Net Settlement Fund.
97 See China’s Anti-Unfair Competition Law article 7, which expressly prohibits commercial bribery, and article 17, which provides for uniform civil liability for various acts of unfair competition. In the United States., the Sherman Act, which protects competition at the federal level as well as state laws against unfair competition provide that any damages awarded for violation of the rules on unfair competition are to be trebled, Messick, supra note 85. In Newmarket v. Innospect (Civil Action No. 3:10CV503-HEH (E.D. Va. May. 20, 2011), Newmarket brought a civil lawsuit, after Innospec was charged with bribing Indonesian officials in return for obtaining an exclusive right to sell its products in Indonesia. The suit alleged that Innospec had monopolized or attempted to monopolize the market in violation of the Sherman Act. The case was settled with Innospec paying $45 million.
98 Young, supra note 32, at 146. See for example the Attorney General for Hong Kong v. Charles Warwick Reid [1994] 1 AC 324 case where the court ruled that a fiduciary acted dishonestly and criminally by accepting a bribe thus breaching the duty of loyalty owed to the employer.
99 Brun et al., supra note 8, at 19. For instance, in Greece, civil servants can be held civilly liable for any damage caused to the State as a result of intent or serious negligence in the performance of their duties. In Guatemala, various types of public officials who by election, appointment, contract or any other relationship render their services to the State, are subject to civil liability, apart from criminal and administrative liability. In the case of Continental Management v. United States 208 Ct. Cl. 501, 527 F.2d. 613, 617 (1975), the United States government brought a civil action against a public official for misusing his position for private gain, Brun et al., supra note 8, at 21.
In addition, corporate vehicles used by corrupt officials as well as their relatives and associates can be possible defendants.\(^{101}\) Intermediaries and those who have assisted in the commission of the corrupt act and the concealment of the assets such as banks, accountants, lawyers, art dealers and real estate agents may also be sued.\(^{102}\) Both natural and legal persons who bribed the corrupt official may also be found liable in civil court.\(^{103}\)

Defendants who are found liable are normally required to compensate for material damages, loss of profits and non-pecuniary damage.\(^{104}\) The material damage represents the actual deterioration of the economic situation of the person who has suffered damage, while the loss of profit accounts for the profit that could reasonably have been expected but was not gained as a result of a corrupt act. Non-pecuniary loss, such as loss of reputation, may also be compensated, although it cannot be immediately calculated.\(^{105}\)

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<tr>
<th>Compensation for reputational damage in the City of Cannes case</th>
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<td>The mayor of the city of Cannes was convicted of receiving a bribe in exchange for awarding a gambling license to a company. The Minister of Interior revoked the license and refused to proceed with any relicensing until the relevant legal proceedings were concluded. Consequently, the city of Cannes was not able to benefit from taxes, such as those imposed on gambling, for two years.(^{106}) As a result, the city filed a lawsuit against the bribers. Although the court held that the damage that the city had incurred was not directly linked to corruption but was the result of the Minister’s decision to revoke the license and refuse to award it before the finalization of the proceedings, it recognized the city’s loss of reputation and quantified the damages at 100,000 euros to be paid by the bribers.(^{107})</td>
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Determining the amount of compensation can be challenging; however, the basic rule for assessing damages is to restore the victim as closely as possible to the situation they would have been in if the corrupt act had not occurred.\(^{108}\) This means that all expenses or lost profits caused by the corrupt act must be compensated.\(^{109}\) For instance, in case of government contracts, damages caused by the corrupt act are often the same as increased profits gained by the contractor.\(^{110}\) In cases where an unsuccessful bidder has lost a contract due to a competitor who paid a bribe, the damage is linked to the loss of all profits that the bidder would have earned.\(^{111}\)

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\(^{101}\) For instance, in the civil action brought by the Nigerian government against Diepreye Alamieyeseigha, governor of the Bayelsa State, the London High Court found that two companies, Santolina and Solomon & Peters Ltd. (S&P), were controlled by him as they were used as corporate vehicles to hide assets deriving from corrupt activities including bribes and secrets commissions obtained as a result of abuse of power, Fed. Republic of Nigeria v. Santolina Inv. Corp., Solomon & Peters, and Diepreye Alamieyeseigha [2007] EWHC 437 (Ch) (UK) para. 50.

\(^{102}\) Brun, supra note 8, at 21, 22. Zambia v. Meer Care & Desai (a firm) & Ors, England and Wales High Court of Justice, Chancery Division [2007] EWHC 952 (Ch.), para. 589.

\(^{103}\) Makinwa, supra note 9, at 333. The Brazilian Corporate Liability Law 12,846/2013 establishes strict liability of legal entities for corruption acts. Hence, a legal person may face sanctions whenever an act of corruption has been committed on its behalf.

\(^{104}\) See article 3 para. 2 of the Civil Law Convention on Corruption. In Greece, a few actions have been brought before civil courts in order to request compensation for pecuniary and non-pecuniary loss suffered following convictions in corruption cases. In Hungary, the tortfeasor shall compensate the aggrieved party for all losses covering any depreciation in value of the property of the aggrieved party, any pecuniary advantage lost as well as the costs necessary for the mitigation or elimination of the financial losses sustained by the aggrieved party.

\(^{105}\) CoE, supra note 27, at para. 38.


\(^{107}\) Id.


\(^{109}\) Brun et al., supra note 8, at 62, 89-90.

\(^{110}\) OECD, StAR, supra note 108, at 33.

\(^{111}\) Id. at 34.
1.3.2. Civil actions for damages relating to corruption brought in civil or criminal proceedings

Criminal and civil liability for corruption may arise from the same set of facts. The evidence proving the criminal act may provide the injured party with grounds for a separately actionable civil claim.\textsuperscript{112} Civil actions for damages from corrupt acts are generally brought in civil proceedings that are separate from criminal ones.\textsuperscript{113} Certainly, criminal charges and convictions can be used to bring a case in a civil court and make it easier to establish civil liability.\textsuperscript{114}

Guilty pleas entered in criminal proceedings as a legal basis for civil proceedings

In the civil proceedings initiated by Nigeria before the United Kingdom High Court (Chancery Division), seeking summary judgment against two companies under the control of Alamieyeseigha, the former governor of Bayelsa state from 1999 to 2005, and utilized as corporate entities to conceal assets obtained through corrupt practices, the UK judge rendered a judgment in favour of Alamieyeseigha. The judgment was based on his claim that he had legitimate explanations for all the assets in question. However, a few months later, in separate criminal proceedings initiated in Nigeria, Alamieyeseigha pleaded guilty to six charges of making false declaration of assets and money laundering on behalf of the two companies. Based on the Nigerian proceedings, the United Kingdom High Court inferred that the assets held by the two companies were derived from bribes and had to be returned to Nigeria as their legitimate owner.\textsuperscript{115}

Nevertheless, even if the defendant is acquitted in a criminal court, a civil action for compensation based on the same facts may still be an option, especially in jurisdictions where the standard of proof in the civil trial is lower. For example, in common law jurisdictions, the standard of proof of a civil trial is preponderance of evidence which is less demanding than proof of guilt beyond reasonable doubt of a criminal trial.\textsuperscript{116} In civil law jurisdictions, although a criminal decision may have an effect on the civil case, civil judges are not necessarily obligated to follow it.\textsuperscript{117} There are, however, jurisdictions where the civil case is possible only when there is a criminal conviction.\textsuperscript{118}

Civil claims for damages may also be brought in criminal proceedings.\textsuperscript{119} In some jurisdictions, a civil action for damages may be jointly brought with a criminal action,\textsuperscript{120} while in others the initiation of the civil action may be requested within the criminal process.\textsuperscript{121} The criminal court may award

\textsuperscript{112} Brun et al., supra note 8, at 64.

\textsuperscript{113} For instance, in Belarus, civil liability measures are primarily implemented by bringing a civil action in court according to the rules of the Civil Code and the Code of Civil Procedure. In Hungary, a civil claim can be pursued in criminal proceedings but also separately before a civil court.

\textsuperscript{114} In Australia, charges and convictions for corruption offenses can be used as grounds for civil actions. In Israel, State Attorney’s Directive no. 14.8, allows for the use of evidence from criminal proceedings in civil and administrative enforcement.

\textsuperscript{115} Brun et al., supra note 8, at 52.

\textsuperscript{116} Id. at 66.

\textsuperscript{117} Id.

\textsuperscript{118} For instance, in Bolivia, the process for the reparation of damage is opened independently of the sentence imposed by specialized anti-corruption courts, and this occurs once the sentence is enforced. In Greece, a civil action based on tort will usually follow a criminal conviction. In Latvia, it is possible to initiate a civil case only when a decision in criminal proceedings has been made regarding the person’s guilt.

\textsuperscript{119} In Azerbaijan, a civil action may also be brought in criminal proceedings. In Cuba, civil liability derived from a corrupt act is addressed during criminal proceedings, applying the rules of civil nature. In Panama, the victim may bring a restorative action against the perpetrator or the civilly responsible party for the compensation or reparation of damages caused by the punishable act within criminal proceedings. In Ukraine, compensation for damage caused by corruption offenses takes place within the framework of civil proceedings or within the framework of consideration of a civil claim in criminal proceedings.

\textsuperscript{120} For instance, in El Salvador, the civil action for damages caused to the public administration may be brought jointly with the criminal action, so that the judge decides on both criminal and civil liability. In Guatemala, a civil action may be decided jointly with the criminal action.

\textsuperscript{121} For instance, in Moldova the victim may request the initiation of the civil action within the criminal process, otherwise the reparation of damage will take place in accordance with the provisions of the Civil Code.
pecuniary damages, while the prosecutor may request the sentencing judge to order compensation. In some jurisdictions, the payment of damages may be considered a mitigating circumstance in the criminal case. Some States may confer a civil party status to victims allowing their participation in criminal proceedings as persons being directly and personally harmed by the defendant’s conduct. The victim may participate in the criminal trial as a civil party simply to support the charges, but also to obtain reparation, if the defendant is convicted. National courts have granted civil party status to various States in the context of criminal proceedings initiated against their public officials. Furthermore, civil society organizations active in the fight against corruption have participated with a civil party status in criminal proceedings.

### The “Biens Mal Acquis” case

In December 2008, the French chapter of Transparency International (TI France) along with a Gabonese citizen, filed a criminal complaint with a civil party petition against the presidents of the Republic of Congo (Denis Sassou Nguesso), Gabon (Omar Bongo Ondimba, who died in 2009), and Equatorial Guinea (Teodoro Obiang), as well as against the members of their families and their close associates, in the hope of triggering a judicial inquiry into how their luxury assets were acquired in France. The Supreme Court of France found that TI France had sufficient legal interest in the case and had standing to participate in the criminal trial as civil party. This decision is considered a legal milestone as for the first time in France, the collective action of an anti-corruption association was deemed admissible before a criminal court.

### 1.3.3. Proprietary claim in corruption cases

A proprietary claim is brought when a person seeks the return of an asset or its equivalent value as the rightful owner. In such cases, the claim may extend to the property in question as well as to the profits deriving from it. In civil law systems, although proprietary claims for corruption are

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122 In Hungary, the criminal court will typically award pecuniary damages.
123 In Bolivia, the complainant or the prosecutor may request the sentencing judge to order the reparation of the damage caused or the corresponding compensation.
124 In Belarus, the reparation of damages, the payment of income obtained by criminal means, the rectification of damage caused by a crime and other actions aimed at remedying damage are considered mitigating circumstances under the Criminal Code.
125 Brun et al., supra note 8, at 68.
126 For instance, in Greece, the injured party can participate in the criminal trial only to support the indictment. Greek criminal courts have recognized the participation of the Greek State as civil party in the criminal trial, given that as a result of the illegal act of a public official the good functioning and the purity of the public service as well as citizens’ trust were harmed.
127 In France, a civil party may obtain civil compensation in criminal proceedings upon showing personal and direct damage resulting from the crime. The French legal system recognizes that States may bring a civil action before criminal courts in order to recognize loss suffered in the event of corruption and obtain compensation. For instance, Nigeria became a civil party in a money laundering case that was initiated against a former minister of energy and was awarded 150,000 euros for non-pecuniary damages, see Brun et al., supra note 8, at 69.
128 Id. For instance, Tunisia was granted civil party status in the criminal proceedings that were initiated against its former President Ben Ali in Switzerland as well as in other countries. Nigeria was also awarded damages as a civil party to a money laundering case initiated in French courts against a Nigerian official.
129 Brun et al., supra note 15, at 55.
130 Under article 85 of the French Code of Criminal Procedure, an injured civil party could join the case by filing a petition claiming harm suffered from a felony or a misdemeanour.
132 Brun et al., supra note 8 at 49. It is worth mentioning here that both the federal republic of Brazil and the municipality of Sao Paulo brought proprietary claims regarding the funds that were held in bank accounts in Jersey (Isle of Jersey) in the name of Sao Paulo’s former mayor, governor and his son. The Royal Court of Jersey accepted the claim brought by the federal republic as the “constitutionally necessary party to a claim” as well as the claim brought by the municipality of Sao Paulo as the “substantively aggrieved party”, see Brun et al., supra note 8, at 17.
133 Id. at 49
not that common, a person can claim back property as its owner against anyone holding it. Proprietary actions, however, may not be available, if the proceeds of corruption cannot be traced, as in cases where they have been laundered. Proprietary claim brought before a foreign court

In December 2011, the state of Libya brought a civil action in the High Court in London claiming ownership of a luxury mansion that was bought in 2009 through Capitana Seas, a company registered in the British Virgin Islands, ultimately under the control of Saadi Qadafi, son of Muammar Gaddafi, the former ruler of Libya. The judge of the court noted that the property was “wrongfully and unlawfully acquired with funds belonging to the claimant”, and thus awarded the property to the Libyan government.

1.3.4. Civil actions based on contract nullity or voidability for corruption

The United Nations Convention against Corruption, the CLCC on Corruption as well as the AACC address the contractual consequences of corruption. Under article 34 of UNCAC, States parties may consider corruption a relevant factor for annulling or rescinding a contract, withdrawing a concession or similar instrument, or taking other remedial action. Article 8 of the CLCC specifies in paragraph 1 that any contract or clause of a contract that provides for corruption shall be null and void. Paragraph 2 of the article strengthens the applicable remedies by providing that any party to a contract whose consent has been undermined by an act of corruption must be able to apply to the court for the contract to be declared void, in addition to their right to sue for compensation for damages. Furthermore, according to article 13 of the AACC, corruption may be taken into consideration as an important factor when taking steps to cancel or revoke a contract, withdraw a concession or other similar arrangements.

Despite some national variations, the nullity or unenforceability of contracts tainted by corruption is a transnational principle of law. Hence, promises of bribes or promises to arrange the payment of bribes are unenforceable in any court of law. The justification for rendering such agreements null and void is based on the illegality and the immorality of the corrupt transaction. Likewise, a contract or a clause of contract obtained through corruption may be cancelled or annulled and considered void or voidable depending on the jurisdiction. A void contract will have no legal effect while a voidable contract may be rescinded at the choice of the innocent party. However, a

134 Id. at 55.
135 Id. at 55.
137 Id.
138 UNODC, supra note 77, para 357.
139 CoE, supra note 27, at para. 64.
141 Id.
142 Id.
143 For instance, in Azerbaijan, agreements reached by abuse of power or fraud are invalid and all gains obtained in the course of a null agreement have to be returned to the victim. Colombia has issued judgements in which an act of corruption provided the ground for deciding to cancel or annul contracts to which the State was a party. In Moldova, decisions adopted, contracts concluded, other actions or any clause of an agreement whose object or cause constitutes an act of corruption or an act related to acts of corruption are voided by absolute nullity. In Paraguay, contracts obtained through corruption may be suspended or declared null and void.
144 For example, in Australia, in cases where the government has entered into a contract that was later found to involve corruption, the contract can be rescinded on grounds such as a fraudulent misrepresentation which occurs when one party makes a representation with intent to deceive and with the knowledge that it is false.
State may consider not to annul a contract, if that would bring damage to the public interest, such as when the execution of the contract is advanced. In such a case, compensation for damages may be requested on the grounds of entering the contract under less favourable terms and such damages consist of the excess sums paid.

**Voidability of a public contract obtained through bribe**

In the World Duty Free Company Limited v. the Republic of Kenya (2006) case, the International Centre for the Settlement of Investment Disputes (ICSID) stated that claims based on a contract obtained by corruption cannot be upheld as bribery is contrary to the international and transnational public policy. In particular, the case concerned a dispute over an agreement between the World Duty Free Company and the government of Kenya for the construction, maintenance and operation of duty free complexes at Kenyan international airports. The World Duty Free Company alleged that Kenya acted in breach of the contract, while Kenya argued that the contract was unenforceable because it was concluded through corruption. The tribunal found that the $US2 million bribe which was provided to Kenya’s then President, Daniel arap Moi, was contrary to international public policy, that the agreement was voidable at the discretion of Kenya and that the government of Kenya was lawfully entitled to avoid obligations arising from a contract.

Allegations of corruption have increasingly been submitted before international investment tribunals either by investors alleging corrupt conduct by public officials or by host States alleging corruption between investors and host State’s public officials with both sides aiming at avoiding their obligations under concluded contracts. Such allegations may arise at different stages of the arbitral proceedings and may be invoked either by the host States to deny the competence of the tribunal and prevent the admissibility of a claim or by investors who may allege a violation of the host state’s obligations under a relevant bilateral investment treaty.

### 1.3.5. Civil actions for unjust enrichment in corruption cases

Unjust enrichment can serve as a basis for bringing a civil action aiming to reverse a normatively defective transaction where the defendant obtained a benefit at the claimant’s expense. In corruption cases, a public official who has received undue advantages must return all profits. For example, in case of a regime change, the newly established government may aim to recover embezzled assets from corrupt public officials. With restitution, the defendant’s

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145 In Moldova, the contract may not be voided by absolute nullity in cases where the annulment would cause damage to the public interest. Brun et al., supra note 8, at 57.
146 Brun et al., supra note 8, at 57.
149 Id. at 252; Brun et al., supra note 8, at 57.
150 Devendra, supra note 148, at 248.
153 For instance, in El Salvador, forfeiture of assets acquired by the former public official or employee as well as his/her family without just cause is imposed under the Law on Illicit Enrichment of Public Officials or Employees. In Ukraine, the details of the procedure for recognizing assets as unfounded as well as their recovery into the State revenue are determined by the Civil Procedure Code.
154 Young, supra note 32, at 145. For example, a civil lawsuit brought following a regime change includes a case against the former Indonesian President Suharto and his son. In 2015, the Indonesian Supreme Court ordered the ex-president’s family to pay back $324 million of embezzled funds back to the State, Reuters Staff, ‘Ex-Indonesian Leader Suharto’s Family Ordered to Pay Back Millions’, Reuters (11 Aug. 2015), available at https://www.reuters.com/article/uk-indonesia-suharto-idUKKCN0QG0Y020150811 (accessed 15 Febr. 2023).
enrichment will be reversed not only by giving the enrichment back to the claimant but by providing the remedies that cancel or negate the enrichment received by the defendant. Unjust enrichment civil actions have been used to recover stolen assets in various jurisdictions.

**Kenya’s Civil Illicit Enrichment Legislation**

Kenya targets unexplained assets of public officials with illicit enrichment proceedings that may be brought in civil courts on the basis of the Anti-Corruption and Economic Crimes Act (ACECA, 2003). This is useful in cases where a criminal conviction cannot be achieved, but there is sufficient evidence that the public official has accumulated wealth that cannot be justified when taking into consideration his/her legal income. The law has been used in cases where there was clear evidence that public officials had accumulated large amounts of unexplained wealth that was disproportionate to their known sources of income.

1.4. Provisional measures to secure assets in civil actions for corruption

Once a civil claim is brought, the plaintiff may need to secure the defendant’s ability to compensate damages or return assets. Although in civil proceedings the range of available provisional measures may not be as broad as in criminal proceedings, some mechanisms may be employed to secure civil liability. Under article 2 para. (f) of UNCAC, “freezing” or “seizure” is defined as a provisional or temporary measure that prohibits the transfer, conversion, disposition or movement of property and/or allows public authorities to assume temporary custody or control of it on the basis of an order issued by a court or other competent authority.

Civil provisional measures such as seizure orders taking physical possession of assets as well as restraint orders preventing the dissipation of assets may be applicable. Temporary orders require a lower standard of proof. Freezing orders may be used to freeze accounts held by financial institutions, while restraining orders may be employed to restrain property to preserve it pending a final judicial order. Precautionary measures of civil nature may be applied from the beginning until the end of the criminal proceedings so as to ensure the payment in case of civil liability. Freezing or seizure measures may also be implemented to ensure the later enforceability of NCB confiscation measures. In fact, NCB measures are often preceded by a provisional restraining order.

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155 Id. at 7.
156 The case involved a former Chief Accountant at the Treasury relating to Kenya’s so-called Anglo Leasing case in which 18 high-value government security contracts were allegedly awarded to fictitious companies in the early 2000s. The sudden increase in the official’s wealth could not be justified with reference to his modest salary and the amounts declared on his asset declaration form. Basel Institute on Governance, *Case Study: Upholding an Unexplained Wealth Judgement in Kenya’s Anglo Leasing Affair* (12 Aug. 2021), available at https://baselgovernance.org/news/case-study-upholding-unexplained-wealth-judgement-kenyas-anglo-leasing-affair (accessed 15 Febr. 2023).
157 Brun et al., *supra* note 8, at 71.
158 Brun et al., *supra* note 8, at 77.
159 Freezing and restraining orders are available under Australia’s Proceeds of Crime Act (POCA, 2002). Freezing orders are a short-term mechanism allowing authorities to temporarily freeze accounts held with financial institutions for a period of three days. Restraining orders allow for the restraint of property for longer terms but are still interlocutory in nature. In the United Kingdom, a freezing order (formerly known as Mareva injunction) is an interim court order, which prohibits a defendant in a civil case from dissipating assets and is sought to preserve a defendant’s assets until a judgment can be obtained. Brun et al., *supra* note 8, at 78.
156 For instance, in El Salvador, the Code of Criminal Procedure provides that precautionary measures of civil nature may be granted at the request of a party to guarantee the fine or civil liability.
1.5. NCB confiscation or forfeiture\textsuperscript{162} in corruption cases

Confiscation or forfeiture, which may be referred to by different terms depending on the jurisdiction, generally relates to the permanent deprivation of property that was obtained through criminal activity. This penalty is normally imposed by a court or other competent authority as part of a criminal sentence on a convicted offender.\textsuperscript{163} Article 54 para. 1 (c) of UNCAC, refers to confiscation without a criminal conviction, covering thus, the possibility that confiscation may be imposed when a person is charged with a crime but criminal proceedings do not result in a conviction.\textsuperscript{164} States parties are required to consider the possibility of allowing NCB confiscation in the context of mutual legal assistance, that is, the confiscation of property without a criminal conviction, in cases when the defendant cannot be prosecuted by reason of death, flight or absence, among others.\textsuperscript{165} A number of States have introduced provisions in their legislation that allow confiscation without a conviction with some variations.\textsuperscript{166}

In some States, NCB confiscation is considered as an alternative to classic confiscation, when a conviction is not possible, for instance when the defendant has died or has escaped the jurisdiction, or even when the crime has become statute barred.\textsuperscript{167} In such States, NCB confiscation may be part of the criminal justice system or even be embedded in the same criminal proceedings concerning the predicate offense, while it may be governed by criminal codes and usually follow the rules of criminal proceedings.\textsuperscript{168} In these cases, proof of guilt is not necessary to confiscate assets without a criminal conviction. It is, thus, sufficient to prove the link between the crime and the assets in question.\textsuperscript{169}

In other States, NCB confiscation is explicitly considered as a civil law remedy and it is pursued in the context of civil proceedings and outside of the criminal sphere, with civil rules regarding evidence and standard of proof being applicable.\textsuperscript{170} Civil confiscation shares similar objectives with

\textsuperscript{162} For the purposes of this report, NCB confiscation or forfeiture is considered civil in the sense that it does not require a criminal conviction, is brought before civil courts and follows the rules of civil procedure, despite the fact that in some jurisdictions it is pursued by the state in its sovereign capacity and not as a mere private litigant, see Brun et al., \textit{supra} note 8, at 6.


\textsuperscript{164} In that way, NCB confiscation is distinguished from extended confiscation in which confiscation can extend beyond the proceeds of crime that is the object of the criminal proceedings and can be applied only if there is a conviction. WGAR, CAC/COSP/WG.2/2021/4, \textit{supra} note 4, at para. 9.

\textsuperscript{165} The importance and practical usefulness of procedures that allow for the confiscation of proceeds of corruption without requiring a conviction has been addressed within the meetings of the Conference of the States Parties to the United Nations Convention against Corruption Open-ended Intergovernmental Working Group on Asset Recovery, while NCB confiscation is considered as a good practice within the framework of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (see, e.g., CAC/COSP/IRG/2021/7).

\textsuperscript{166} COSP, CAC/COSP/2021/15, \textit{supra} note 161, at para. 14 Four different NCB confiscation models were identified in the European Commission’s report on NCB measures in the EU, namely: classic NCB confiscation where confiscation is not possible on the basis of a final conviction; extended confiscation which allows for the confiscation of assets which are not connected to the crime; in rem proceedings, which are initiated to confiscate assets obtained through unlawful conduct; and unexplained wealth model which compares the actual property a person has acquired against income declared. European Commission, ‘Commission Staff Working Document: Analysis of Non-conviction Based Confiscation Measures in the European Union’, SWD (2019) 1050 Final (12 Apr., 2019), 3, \url{https://data.consilium.europa.eu/doc/document/ST-8627-2019-NEXT/EN/pdf} (accessed 15 Jun. 2023).

\textsuperscript{167} It seems that article 54 para. 1(c) refers to this type of NCB confiscation as an alternative to classic confiscation, although it does not exclude cases where confiscation may be imposed as an autonomous measure, regardless of the outcome of the criminal process. WGAR CAC/COSP/2021/4, \textit{supra} note 4, at para. 22. J. Boucht, \textit{The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds} (Hart Publishing, 2019), 68. For instance, in China, the Criminal Procedure Law and Supervision Law have established an NCB confiscation procedure that allows the confiscation of illicit assets in cases of death or flight of the natural person.

\textsuperscript{168} This is the case of France and Czechia as well as of Canada (federal level). WGAR, CAC/COSP/WG.2/2021/4, \textit{supra} note 4, at paras. 23, 24. See also, COSP, CAC/COSP/2021/15 (13\textendash{}17 Dec. 2021), \textit{supra} note 161, at para. 20.

\textsuperscript{169} Id., at para. 81.

\textsuperscript{170} This is the case in common law countries, although this practice can also be encountered in civil law systems, WGAR, CAC/COSP/WG.2/2021/4, \textit{supra} note 4, at paras. 19, 20.
criminal confiscation, primarily aiming to seize the proceeds of crime and deter illegal activities.\footnote{T. S. Greenberg, L. M. Samuel, W. Grant, L. Gray, Stolen Asset Recovery, A Good Practices Guide for Non-Conviction Based Asset Forfeiture, (The World Bank, 2009), 13.} However, civil confiscation focuses on assessing the criminal origin of the property instead of the criminal liability of the offender. Hence, an action is brought against the property in question and not against the alleged offender.\footnote{Simonato, supra note 163, at 218. Ukraine reported that the indisputable advantage of civil forfeiture is the possibility of its application even in the absence of a conviction.} These proceedings are often called in rem proceedings because they target the illegal item.\footnote{WGAR, CAC/COSP/WG.2/2021/4, supra note 4, at para. 20.} In such cases, the authorities may give public information or notice about the seizure of the property, allowing relevant parties to initiate a procedure aimed at protecting their property rights.\footnote{Id. at para. 20.} In countries with civil confiscation systems in place, the standard of proof is balance of probabilities.\footnote{This is the case in Australia, Mauritius, New Zealand, United Kingdom, United States of America and Singapore. WGAR, CAC/COSP/WG.2/2021/4, supra note 4, at para. 81.} However, in some other countries, although NCB proceedings are considered to be civil in nature, the standard of proof is beyond a reasonable doubt.\footnote{This is the case of Germany, where the standard of proof is beyond a reasonable doubt, despite the fact that such proceedings follow the rules of civil procedure. Similarly, in Switzerland, although confiscation proceedings are autonomous and independent from criminal ones, the standard of proof is that of intimate conviction. WGAR, CAC/COSP/WG.2/2021/4, supra note 4, at paras. 82, 85, and 86.} The burden of proving that the assets represent criminal conduct usually rests on the public authority initiating the procedure, while in some countries it may shift to the suspects or the interested parties, requiring them to demonstrate the lawful origin of the property (also known as a rebuttable presumption).\footnote{Id., at paras. 87 and 88. For instance, in Australia, the onus of demonstrating the lawful origin of the property falls on the suspect or the interested party. G. France, ‘Non-Conviction-Based Confiscation as an Alternative Tool to Asset Recovery, Lessons and Concerns from the Developing World’, Transparency International Anti-Corruption Helpdesk Answer (26 Jan. 2022) 11 available at https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022.pdf (accessed 15 Jun. 2023). In the United States of America, prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000, the burden was on the claimant to prove that the property was not subject to forfeiture; however, the Act abolished the reverse burden of proof and placed the burden of establishing the forfeitability of the property on the Government. 18 U.S.C. § 983(c)(1).} Although civil confiscation or forfeiture is not available in all jurisdictions, some States have a long-standing tradition in the recovery of criminal assets through civil proceedings, with special bodies in place to handle such actions.\footnote{For instance, in Ireland, the Proceeds of Crime Act of 1996 as amended in 2005 and in 2016 governs the civil recovery process, while the Criminal Assets Bureau, a multi-disciplinary agency, is responsible for depriving assets deriving from criminal activity. In the United Kingdom, civil recovery provisions are provided in the Proceeds of Crime Act which was adopted in 2002. The National Crime Agency (NCA) is a non-ministerial government department representing the enforcement authority in civil recovery proceedings. Civil recovery powers have also been assigned to the Director of Public Prosecutions and to the Director of the Serious Fraud Office, Boucht, supra note 167, at 73, 74, 83, 84.} 

**Civil forfeiture in the United States**

In the United States, civil forfeiture is an action against the property itself and not against the property owner, and thus it does not require a conviction. It may be commenced before a criminal case is filed, while the criminal case is pending, after the criminal case is concluded, or even if there is no related criminal case at all.\footnote{S. Cassella, ‘Nature and Basic Problems of Non-Conviction-Based Confiscation in the United States’, Veredas do Direito, Belo Horizonte, 16/34 (2019), 53, 54.} The standard of proof needed to establish the commission of the crime for the purpose of civil forfeiture is balance of probabilities.\footnote{Id. at 55.} Civil forfeiture is chosen in cases where the forfeiture is uncontested, the wrongdoer has died or is a fugitive or is unknown, the property belongs to a third party, the interests of justice do not require a conviction or the criminal case is pursued in a foreign country.\footnote{Rider, supra note 163, at 500-502.}
The United States has successfully used civil forfeiture in recovering assets linked to corruption cases. For example, over $53 million were recovered through two civil cases seeking the forfeiture of luxury assets that were the proceeds of foreign corruption and were laundered in the United States. The scheme involved the payment of bribes to Diezani Alison-Madueke, Nigeria’s former Minister for Petroleum Resources, who oversaw the country’s state-owned oil company, in return for the award of lucrative oil contracts to companies owned by two Nigerian businessmen.\(^{182}\) The proceeds of those illicitly awarded contracts were then laundered in the United States and were used to purchase various assets that were subject to seizure and forfeiture, such as a condominium in Manhattan and a yacht.\(^{183}\) The United States also returned more than 1 billion to Malaysia from misappropriated 1MDB funds.\(^{184}\)

In some countries NCB confiscation is not linked at all to criminal, civil or other proceedings.

**Peru’s extinción de dominio**

In 2018, Peru adopted Legislative Decree 1,373 that allows for confiscation through an autonomous process not linked or subordinated to a criminal, civil or other procedure. Extinción de dominio aimed to strengthen Peru’s asset recovery laws dating back to 2008. Extinción de dominio has a civil basis and it facilitates the confiscation of assets that would not have been possible in criminal proceedings.\(^{185}\) Extinción de dominio has successfully been used in cases were the perpetrator’s assets were discovered after the conclusion of the criminal proceedings, without their status having been adjudicated during the trial.\(^{186}\) A specialized Prosecutor’s Office (‘Fiscalía Especializada de Extinción de Domínio’) is competent to handle this type of confiscation.\(^{187}\) The law was first used in 2019 in relation to a bank account held in Luxemburg by a Peruvian Navy General containing laundered money acquired through corruption. The Peruvian courts had declared that the said assets belong to Peru.\(^{188}\)

In other systems, property is confiscated not because it is linked with a criminal activity but because the owner cannot justify the origin of the wealth.\(^{189}\) Thus, unexplained assets may be confiscated, if there is no proof of their legitimate origin or acquisition.\(^{190}\) Depending on the jurisdiction, unexplained wealth confiscations can be embedded either within criminal proceedings or outside of them.\(^{191}\) A court can also order individuals who possess assets that are disproportionate to their income to provide an explanation for their origin and submit relevant documentation. These orders are of civil nature and may help relevant authorities to acquire the necessary information regarding the origins of the assets, especially when there is reasonable suspicion that the assets were

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\(^{183}\) Id.

\(^{184}\) Id.


\(^{187}\) Id. at 6.

\(^{188}\) France, *supra* note 177, at 20.


\(^{190}\) Id. at para. 25.

\(^{191}\) Id. at para. 26.
obtained through corruption. Such orders allow authorities to freeze and ultimately confiscate the assets of those defendants who cannot provide sufficient evidence regarding their lawful origin.

Unexplained Wealth Orders in the United Kingdom

Following an application made by an enforcement authority, such as the National Crime Agency or the Serious Fraud Office, the High Court can issue an unexplained wealth order (UWO) in respect of any property if the court is satisfied that: a) there is reasonable cause to believe that the respondent holds the property and the value of the property is greater than £50,000; b) there are reasonable grounds for suspecting that the known sources of the respondent’s lawfully obtained income would have been insufficient to obtain the property; and c) the respondent is a politically exposed person or there are reasonable grounds for suspecting that the respondent is or has been involved in serious crime. The UWO requires respondents to identify the nature and the extent of their asset ownership and explain how the asset was obtained within a specific period set by the court. An UWO is an investigation tool but not by itself a tool to recover assets. Failure to respond to an UWO may result in a presumption that the property is recoverable under any subsequent civil recovery action.

Taking into consideration the advantages of the various types of NCB confiscation, countries often have in place a variety of NCB confiscation tools.

Australia’s four types of NCB confiscation

Australia has several types of NCB confiscation orders which are available under its Proceeds of Crime Act (POCA, 2002). The POCA allows for the confiscation of proceeds and instruments of crime, including in situations where no conviction was obtained. This process is useful in cases where the perpetrator cannot be prosecuted due to death or abscondment or where his/her identity is unknown. Under section 47, a court may proceed with a forfeiture order, once it is satisfied on the balance of probabilities that the person has engaged in corrupt conduct and where a restraining order in relation to the property has been in place for at least six months. Under section 49, in rem forfeiture can apply where a court is satisfied that a relevant restraining order has been in place for at least six months and the property is the proceeds of an indictable offence or foreign indictable offence or the instrument of a serious offence. Value-based confiscation can be imposed with pecuniary penalty orders while unexplained wealth orders are also available. POCA provides an expansive asset recovery toolbox and has allowed the Australian authorities to successfully restrain and forfeit assets through the civil route without requiring a conviction. The confiscated assets are reinvested in the community for crime prevention, law enforcement and social purposes.

1.6. Strengthening the use of civil law remedies for corruption

The sections below identify challenges related to the use of civil law remedies for corruption and provide suggestions for strengthening their use.

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192 Brun et al., supra note 15 at 104.
193 Id. at 66.
196 Id.
1.6.1. Promoting a systematic and coordinated civil law approach to corruption

As highlighted in section 1.2, criminal law has traditionally taken priority in the fight against corruption, while civil law often has a complementary role. State responses to the questionnaire illustrate that some countries have limited awareness of the financial effects of corruption and some others are not familiar with the strengths of civil law remedies. Some countries acknowledge the absence of systematic provisions for civil law remedies for corruption and the presence of limited regulations, while they recognize that certain types of corruption may not constitute violations under the civil code. When dealing with corruption cases, a number of countries rely on general principles of either tort or contract law, which govern responsibility for a wide variety of financial and other harms. Due to a lack of awareness about these remedial mechanisms, an absence of precedents, as well as difficulties relating to proving causation, courts may award damages only to those whose injuries were the “direct” or “immediate” result of a defendant’s act.

To address these challenges, it is crucial to adopt a systematic approach to combating corruption using civil law remedies. This entails integrating civil law remedies into the broader fight against corruption and standardizing their use. The civil liability framework can be strengthened by providing avenues of civil redress for victims and by introducing civil proceedings that are independent of criminal ones. Several countries are already in the process of developing laws that will enrich the arsenal of civil law mechanisms against corruption. One example of this approach is the recognition of a private right of action in corruption cases. Another important strategy is the promotion of cooperation among national authorities with competence in the use of civil law remedies for corruption.

Collaboration of national authorities in the use of civil law remedies against corruption

To ensure an all-inclusive approach in the fight against corruption, it is pivotal to ensure the interaction and coordination of all competent national authorities. In Brazil, in the context of the National Strategy to Combat Corruption and Money Laundering (ENCLA), approximately 80 public institutions tasked with the fight against corruption and money laundering using either criminal or civil and administrative means are able to interact with much more comprehensive results, including the design and implementation of public policies on corruption and money laundering. In Nicaragua, the National Anti-Poverty Plan (2022-2026) also provides for coordination between various agencies to improve their effectiveness in imposing and enforcing civil and administrative sanctions for corruption.

Raising awareness about the advantages of civil law remedies is also important not only to enable practitioners and competent authorities to utilize such remedies but also to empower victims of corruption to bring civil actions on various grounds. Further, country evaluations can improve

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198 Panama reported that one of the main challenges in terms of anti-corruption enforcement is the lack of understanding of the effects of corruption on society as a whole and the dimension of the damage caused.
199 Azerbijan identified as challenges the absence of systematic legislation and the existence of imperfect and restricted legal regulations leading to divergent interpretation and vagueness in the outcome of the whole process.
201 For instance, Bolivia suggests that applicable civil rules regarding corruption should be systematized.
202 For instance, China highlighted the importance of improving civil anti-corruption legislation and the need for building a legal system for full participation in the fight against corruption.
203 Moldova reported that it is currently working on drafting a new law related to civil confiscation.
204 For instance, it has been argued that the recognition of a private right of action with regards to the FCPA, either judicially or legislatively through an amendment, could have various benefits such as the compensation of the victims of foreign bribery, enhanced deterrence, alignment of the United States foreign anti-bribery policy with international conventions and judicial review of FCPA’s provisions, G. Mark, ‘Private FCPA Enforcement’, American Business Law Journal, 49/3 (2012), 506.
205 For instance, China suggests the need to give victims of corruption the right to file civil lawsuits on various grounds.
domestic civil law frameworks by identifying gaps in existing legislation and providing suggestions for improving civil tools against corruption.\textsuperscript{206}

1.6.2. Avoiding practical impediments in civil litigation relating to corruption

Despite the various advantages of civil proceedings, such as the relative ease of bringing civil lawsuits and the ability of victims to maintain control over the process, there are still obstacles that relate to cost and delays, especially when the civil process has to be suspended until the finalization of the criminal one.\textsuperscript{207} Given that criminal proceedings are associated with the general interest of society to punish corrupt conduct, they may be given priority over civil proceedings, which, although based on the same facts, may be suspended until the criminal case is concluded.\textsuperscript{208} Potential difficulties in the calculation of damages may also considerably prolong civil proceedings.\textsuperscript{209} Additionally, countries are sometimes confronted with expensive and lengthy civil proceedings that may be barred by statutes of limitations. These obstacles give rise to a degree of uncertainty regarding civil litigation that may prevent plaintiffs from bringing civil actions because of the risk of losing time and money.\textsuperscript{210}

On the other hand, independence of civil proceedings from criminal ones may prevent delays in the civil process as the civil court will not need to wait for the finalization of the criminal case. Adjudicating civil cases in a timely manner without waiting for the disposition of the criminal court may remedy the potential length of civil proceedings and address excessive delays. Calculating the value of corruption proceeds and the amount to be recovered can be assigned to consultants who can estimate damages using appropriate methodologies in accordance with the legal framework where an action is brought.\textsuperscript{211} Litigation funding, especially in cases where States bring civil claims, has been suggested as a means to cover legal costs through the support of a third party, such as a for-profit commercial organization that may fund in whole or in part the process, or an international organization that may offer funding assistance.\textsuperscript{212}

1.6.3. Addressing lack of experience in the use of civil law remedies for corruption

While the use of civil law remedies is on the rise, a number of countries admit a lack of practical experience regarding the use of civil law mechanisms as well as a shortage of experts that could advise on bringing civil actions for corruption.\textsuperscript{213} States highlighted that training on civil law remedies for corruption, as well as sharing good practices, can play an important role in addressing the limited experience in the field.\textsuperscript{214} To develop capacity in this area, some States have established specialized bodies or departmental units particularly assigned with the competences of handling civil cases related to corruption. Having dedicated bodies in place to deal with the civil aspects of corruption can

\textsuperscript{206} For instance, Greece suggests dedicating country evaluations to examining the availability and effectiveness of civil law remedies for corruption in order to determine gaps, enable authorities to use such measures and provide suggestions for improvement.

\textsuperscript{207} Young, supra note 32, at 152.

\textsuperscript{208} Brun et al., supra note 8, at 67.

\textsuperscript{209} Brun et al., supra note 8, at 68-69.

\textsuperscript{210} Azerbaijan identified the length of civil proceedings as well as the high expenses related to the processing time and appeals among the challenges in bringing civil claims. High costs and delays in implementing civil procedures are also considered as challenges for Saudi Arabia.

\textsuperscript{211} For example, in its civil action for social harm against Alcatel-Lucent, the Costa-Rican Attorney General’s Office for Public Ethics hired an external consultant to estimate damages using a methodology combining the economic consequences of corruption which decreased investors’ trust in the government as well as the political consequences of corruption which reduced the credibility of politicians. Brun et al., supra note 8, at 97.

\textsuperscript{212} Brun et al., supra note 8, at 36, 37.

\textsuperscript{213} China noted the lack of experience as a challenge for countries. One jurisdiction, Zanzibar (Tanzania), identified the shortage of experts as a challenge when applying the civil law approach.

\textsuperscript{214} Capacity-building is recommended by various States such as Azerbaijan, Greece, Serbia as well as by one jurisdiction, Zanzibar (Tanzania).
enable States to expand their substantive and procedural frameworks for addressing non-criminal liability related to corruption.

Specialized bodies dealing with the civil consequences of corruption
In Israel, the Civil Enforcement Unit under the State Attorney’s Office has a civil enforcement competence using civil and administrative law tools to protect state assets and government property, enhance rule of law and assist ministries in the implementation of their policies and regulations. The Unit initiates civil claims on behalf of the State for restitution of damages resulting from criminal proceedings and supports revocation of license proceedings. It also brings claims in respect of damages to state assets as well as claims for the enforcement of contracts or compensation for their breaches. In Australia, the Criminal Assets Confiscation Taskforce (CACT) investigates and litigates cases under the Proceeds of Crime Act, which includes civil remedies for corruption. The CACT ensures the development of individual and institutional capacity in the recovery of criminal proceeds and maintains a comprehensive and regularly updated database of cases.

1.6.4. Striking a fair balance between NCB confiscation and fundamental rights in corruption cases
Certain jurisdictions may not be familiar with NCB confiscation, while others may be reluctant to use it given that such proceedings do not contain the same constitutional or other guarantees available in criminal proceedings. The abovementioned concerns often relate to the presumption of innocence, especially when NCB measures are qualified as penalties which are imposed on persons who are not convicted in criminal proceedings. Further, the overly broad application of NCB confiscation especially in cases where the link between the assets and the offense is not proven may create concerns regarding the protection of property rights. Despite numerous challenges, the constitutionality of such proceedings has generally been upheld by national courts. In order to strike a fair balance between NCB confiscations and the protection of fundamental rights, the principles of proportionality and fair judicial procedure should always apply to NCB confiscation proceedings. Furthermore, it is important to protect third parties with a legitimate interest in assets subject to confiscation, particularly those who were unaware of the conduct leading to confiscation. Legislative frameworks may protect the rights of those parties by allowing them to intervene in forfeiture proceedings asserting that the property belongs to them and that they qualify as legitimate owners.

216 Simonato, supra note 163, at 221, 223. See also UN, CAC/COSP/2021/4, supra note 4, at para. 125.
217 COSP, CAC/COSP/2021/15, supra note 161, at para. 120. In Butler v. United Kingdom, the European Court of Human Rights (ECHR) dealt with a civil NCB recovery of cash case and found that forfeiture was not a criminal sanction. As such, article 6 para. 2 of the European Convention on Human Rights safeguarding the presumption of innocence when charged with a criminal offense, did not apply. Council of Europe, ‘The Use of Non-Conviction Based Seizure and Confiscation’, European Union, Council of Europe, (2020) 21, available at https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3 (accessed 15 Jun. 2023), the ECHR has been tolerant in cases concerning NCB confiscation as it has not found that such measures are criminal in nature. Simonato, supra note 163, at 224.
218 For instance, in Moldova, the Constitutional Court found in 2022 (Decision no. 7) that confiscation is proportionate even in the absence of a conviction establishing the guilt of the accused persons. It also found that it is legitimate for the relevant authorities to issue confiscation orders based on a preponderance of evidence suggesting that the legal income of the persons concerned could not be sufficient to acquire the assets in question. Furthermore, in Kenya, no prejudice has been found regarding forfeiture proceedings being pursued at the same time with criminal proceedings as the standard of proof is different. ACEC MISC Appl. No. 46 of 2018, Assets Recovery, Agency vs Felix Obonsi Ongaga & Three Others. In addition, in the United States, the variety of due process protections and other safeguards that apply to NCB forfeiture proceedings are considered to a certain extent equal to those applicable in criminal proceedings and ensure that the rights of litigants will be protected. Cassella, supra note 179, at 61: Rider, supra note 163, at 505. Courts in Australia and Germany have also confirmed the constitutionality of NCB measures and their compliance with fundamental rights. See COSP, CAC/COSP/2021/4, supra note 4 at para 126.
219 Id. at para 122.
220 Cassella, supra note 179, at 62. For instance, in Australia, the rights of bona fide third parties claiming an interest in the property are preserved with Section 34C of the Mutual Assistance in Criminal Matters Act (1987) which sets out a process.
Chapter II - Administrative Law Remedies for Corruption

The use of administrative law in the fight against corruption is common in jurisdictions that aim to punish public officials who are abusing their public role and placing their interests above the integrity and the proper functioning of the public administration. In comparison with other areas of law, administrative law approaches corruption as a malfunction of the public administration and seeks to address it with mechanisms that are designed to ensure the smooth functioning of the civil service and the integrity of various public processes. Administrative law is also increasingly used to address the liability of legal persons, especially in States where criminal liability is not available. This chapter provides an overview of international anti-corruption instruments that recognize the use of administrative law in the prevention of and fight against corruption. It explains the rationale underlying the use of administrative law against corrupt conduct and explores the interrelationship of administrative law with criminal and civil law remedies. The chapter traces national experiences regarding disciplinary liability of public officials and addresses specific aspects of administrative proceedings and sanctions of an administrative nature that may be imposed on public officials as well as on legal entities and natural persons for corruption.221

2.1. Overview of the international legal context

The United Nations Convention against Corruption, the OECD Bribery Convention and the AACC refer to the use of administrative law measures for the prevention of and fight against corruption and affirm that sanctions for corruption can be applied through criminal, civil or administrative proceedings. This section provides an overview of the legal instruments that focus on administrative liability for corruption.

2.1.1. The United Nations Convention Against Corruption

Under article 5 para. 3 of UNCAC, States parties shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption. According to article 8 para. 6, States parties shall consider taking disciplinary or other measures against public officials who violate the codes or standards that aim to promote integrity, honesty and responsibility in the public sector in accordance with their domestic legal principles. The Convention clarifies in article 30 para. 8 that the prosecution, adjudication and sanctioning of corruption offenses will not prejudice the exercise of disciplinary powers of competent authorities against civil servants. In the context of public procurement and management of public finances, article 9 para. 1(d) prescribes that States parties shall establish an effective system of domestic review, including ensuring legal recourse and remedies in case of violations of relevant procurement rules and procedures. In accordance with article 9 para. 3, civil and administrative measures must be taken in accordance with domestic legal principles to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents. States parties must provide effective, proportionate and dissuasive civil, administrative or criminal penalties, as appropriate, under article allowing an application by an affected third party to a court to determine that person’s legitimate interest in the property that is the subject of a foreign forfeiture order. COSP, CAC/COSP/2021/15, supra note 161, at para. 111.

221 It is important to note that, depending on the jurisdiction, disciplinary and administrative liability can differ from one another in procedural and substantive aspects. In certain countries, disciplinary liability is applicable within the scope of employment relationships involving civil servants and relevant public administration, while administrative liability applies more broadly to both natural and legal persons, who may face non-criminal sanctions for breaches of various rules, including procurement regulations, recordkeeping obligations, and financial license rules. This chapter will explore both types of liability under the umbrella of administrative liability.
12 para. 1, to prevent corruption in the private sector. In order to establish the liability of legal persons for their participation in the offenses established in accordance with the Convention, as required under article 26, its para. 2 provides that States parties may impose criminal, civil or administrative liability on such persons in accordance with domestic legal principles.

2.1.2. The OECD Convention on Combating Bribery of Foreign Public Officials Foreign Bribery Convention

Article 3 para. 1 prioritizes the use of effective, proportionate and dissuasive criminal penalties for foreign bribery. However, the Convention also encourages States to consider imposing additional administrative sanctions, apart from criminal or civil ones, for foreign bribery under article 3 para. 4 and for omissions and falsification in respects of the books, records, accounts and financial statements under article 8 para. 2. According to the commentaries on the Convention, non-criminal sanctions that may be imposed on legal persons for an act of bribery of a foreign public official can include exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or disqualification from other commercial activities, judicial supervision with the goal to correct errors that have occurred and a judicial winding-up order. 222

2.1.3. The Arab Anti-Corruption Convention

Article 5 provides for the imposition of administrative liability on any legal person for the offenses stipulated in the Convention, without prejudice to the criminal liability of natural persons.

2.2. Reasons for using administrative law remedies for corruption

2.2.1. Disciplinary enforcement in corruption cases ensures the proper functioning of public administration

Typically, public officials are subject to three main types of liability, namely, criminal, civil and disciplinary. The rationale that specifically underlies disciplinary enforcement is based on the employment relationship that the public officials have with the public administration and specific duties and obligations that such officials owe to it. 223 Generally speaking, public integrity and accountability standards are promoted directly by public institutions and are enforced through disciplinary proceedings and sanctions to urge public officials to correctly perform their duties. 224 The reason for imposing disciplinary sanctions is that the conduct of public officials negatively affects the proper functioning of the public administration and undermines public trust in government institutions. 225 Hence, one of the primary goals of disciplinary mechanisms is to ensure an efficient and just administration, promote public good, prevent and punish any conduct that causes harm to the State. 226

224 For instance, China noted that among the advantages of non-criminal remedies, such as administrative ones, is their ability to compel public officials to perform their duties in accordance with the law.
225 F. Cardona, ‘Liabilities and Discipline of Civil Servants’, Support for Improvement in Governance and Management SIGMA (2003), 3; Hungary informed about the adoption in 2016 of the code governing administrative procedure with the intent to increase public trust in administrative authorities and ensure the integrity of public administration through the adoption of adequate statutory measures directed at eliminating or minimizing the risk of corruption.
226 According to Bolivia, the responsibility for the exercise of the public function arises from the mandate that society grants to the representatives of State power to administer on its behalf public resources in the pursuit of the common good and public interest. According to El Salvador, officials who incur financial detriment to the State shall be held administratively liable.
Strengthening integrity standards throughout the public sector

Guatemala’s National System of Internal Governmental Control (SINACIG) is a set of objectives and internal control standards of the Office of the Vice-President of the Republic. It aims to achieve institutional objectives such as efficient and effective use of public resources, compliance with applicable laws and regulations, prevention of misuse and damage, and to ensure compliance and accountability in public administration.²²⁷ Panama’s Inter-institutional Network of Public Ethics (RIEP) constitutes an alliance between various institutions whose main mission is to strengthen and promote an ethical culture in the public sector, including by promoting the creation of ethical committees, units, or departments within the institutions. The RIEP is coordinated by the Public Administration Ombudsman’s Office and is made up of representatives from forty-nine (49) institutions who attend ethics training programmes, workshops and activities in which ethical concerns are being shared.

2.2.2. Administrative liability is provided for a wide-range of corruption-related violations

The scope of misconduct for which administrative or disciplinary liability for corruption may arise is broad. In many countries, corruption-related offenses such as bribery, illicit enrichment and abuse of public function are subject to both criminal and administrative sanctions.²²⁸ Administrative sanctions are also applied for breaches of integrity principles and duties of public officials, including conflict of interest violations and violations of restrictions on receiving gifts.²²⁹

Administrative Improbity Act in Brazil

The Administrative Improbity Act establishes liability for public officials, private individuals, or enterprises engaged in conduct that causes damage to public property. Liability covers illicit enrichment, acts which harm the public treasury as well as acts that violate the principles that govern the public administration, such as duties of probity, impartiality, lawfulness and loyalty to public institutions.²³⁰ Penalties for breaches of the relevant rules can include confiscation of the unlawfully acquired assets, full restitution of the damages, loss of public office, fines, debarment from government contracts and exclusion from receiving tax or credit benefits or incentives.²³¹

Administrative sanctions may be imposed for violations of provisions regarding the submission of asset declarations by public officials or for the failure to submit annual financial statements.²³² Administrative liability may also arise in the field of public procurement as well as in the field of political financing and money laundering with penalties such as fines and debarment.²³³

²²⁸ Australia reported that administrative sanctions are available to address corrupt conduct. Bahrain reported that national legal provisions, mechanisms and procedures apply administrative liability measures or penalties to corrupt conduct. According to China, corrupt practices may give rise to administrative recourse. In Russia, corruption offenses may result in administrative responsibility.
²²⁹ In Brazil, acts that give rise to conflicts of interest by public agents are prohibited by Law 12,813/2013 on Conflicts of Interest and can be considered as acts of administrative improbity for civil and administrative purposes. In Ukraine’s Code on Administrative Offenses, administrative violations relating to corruption include among others failure to take measures to combat corruption, violation of the requirements for the prevention and settlement of conflicts of interests and violations of statutory restrictions on receiving gifts.
²³¹ Id.
²³² In Latvia, non-submission of the declaration of a public official, false information in the declaration, failure to comply with the procedures on assets, as well as the failure to submit an annual Statement to the State Revenue Service or the Corruption Prevention and Combating Bureau are considered administrative offenses.
²³³ In Latvia, unlawful conclusion of a contract, violations of the requirements for the selection of candidates and for technical specifications, violations of restrictions and prohibitions relevant to political financing as well as violations in the field of the
2.2.3. Administrative liability of legal persons in corruption cases could fill the gap for the lack of criminal liability

Although many national legal frameworks are moving towards introducing criminal liability for legal persons for various types of conduct, including corruption, there are still some countries that do not support the idea of imposing criminal sanctions on legal entities. Despite this diversity in corporate liability approaches, some of the countries that have decided against the criminal liability of legal persons, have opted for a system of administrative liability for legal persons. As such, this approach is not problematic, as long as it is compensated by an elaborate system of administrative liability for offenses, including corruption-related ones. Country responses demonstrate the existence of administrative regimes for corruption acts by legal persons where criminal liability is not available. Administrative liability of a legal person may arise where the corrupt conduct is committed on its behalf or for its benefit. When established, such liability may lead to administrative sanctions against the legal person that include among others, fines, prohibition of carrying out business activities, revocation of licenses and confiscation.

Administrative liability of legal persons in the Russian Federation

The legal basis for holding legal persons administratively liable for corruption offenses is provided in Article 19.28 of the Code of Administrative Offenses (CAO), which pertains to "illegal remuneration on behalf of a legal entity". Under the CAO, it is prohibited to transfer, offer or promise, on behalf of or in the interests of a legal entity or a legal entity associated with it, money, securities, or other property to a public official, a foreign public official, or an official of a public international organization, in exchange for benefits related to the duties of the said official. The property of the legal person may, in accordance with this provision, be seized. Various cases have been brought before the courts under article 19.28 in which legal persons had offered bribes to public officials directly or using intermediaries. Court decisions have imposed administrative fines on legal entities and both employees who acted for and on behalf of these entities as well as public officials who received bribes have been held criminally liable for bribe giving and bribe taking under articles 291 and 290 of the prevention of money laundering and terrorism financing, including violations in relation to customer due diligence, are also considered administrative offenses.


Belarus informed about the introduction in 2021 of administrative liability of legal entities for unlawful remuneration on their behalf or in their interests. In Brazil, the Corporate Liability Law 12,846/2013 establishes strict liability of legal entities for corruption acts and strong administrative and civil sanctions due to acts of domestic and foreign bribery. In Russia, legal persons are subject to administrative liability, if their officials have engaged into corrupt acts.

In Greece, legal persons are subject to administrative liability in case a money laundering offense or any of the predicate offenses, including bribery, are committed for the benefit or on behalf of the legal person. In Tajikistan, a legal entity may be held administratively liable for the actions or omissions of natural persons committed on their behalf and in their interest.

Azerbaijan reported that administrative sentences imposed on legal entities involve warning, administrative penalties, and confiscation. In Brazil, legal entities can be fined in the amount of 0.1 to 20 per cent of their gross revenue earned during the fiscal year prior to the filing of the administrative proceedings, while the condemnatory decision may be published. See also COSP, CAC/COSP/2015.CRP.1, supra note 4. In China, administrative sanctions for commercial bribery mainly include fines, confiscation of illegal income, revocation or suspension of the operating license and prohibition to carry out certain business activities. In Greece, administrative sanctions that may be imposed on legal entities for money laundering and predicate offenses include among others administrative fines, temporary or definitive revocation, suspension of the operating license, and prohibition to carry out business activities. Russia reported that in 2021, 335 legal persons were held administratively liable and were punished with fines totalling 873.8 million roubles.
Criminal Code. Deprivation of the right to hold public positions has also been imposed on public officials for corruption-related offences.

The enforcement of administrative penalties on legal persons can be conducted by various national authorities in accordance with their mandates.

**Colombia’s Superintendence of Companies**

In Colombia, legal entities cannot be subject to criminal liability but can be held liable for any damage caused by their employees and executives.\(^{239}\) Administrative penalties for legal entities may also be imposed and include fines, publication of violation reports, exclusion from receiving government subsidies and other disciplinary sanctions.\(^{240}\) Fines against legal entities are based on an enforceable final decision against the entity’s legal representative or administrator convicted of bribery. The Superintendence of Companies is an agency attached to the Ministry of Commerce, Industry and Tourism, responsible for the inspection, surveillance, and control of commercial companies, with specific focus on the enforcement of administrative anti-bribery measures.\(^{241}\) The Superintendence of Companies may impose fines of up to 200,000 times the legal minimum wage, if the legal entity benefited from the commission of offence.\(^{242}\) It may also impose a direct debarment of a legal entity from participating in public procurement for a period of up to 20 years. In a transnational corruption case related to Interamericana de Aguas y Servicios SA (Inassa) for corrupt practices in Ecuador, the Superintendence of Companies imposed a fine of approximately US$1.2 million.\(^{243}\)

In some jurisdictions, sanctions may be mitigated when a legal entity has adopted an effective compliance programme and cooperates with the authorities in the context of administrative liability proceedings.\(^{244}\)

**Cooperation among a multitude of competent authorities and leniency agreements in Brazil**

To improve coordination between institutions with overlapping jurisdiction to fight corruption, a Technical Cooperation Agreement was signed in 2020 between several organizations, such as the Office of the Comptroller General, the Ministry of Justice, the Federal Court of Accounts and the Attorney’s General Office, under the coordination of the Brazilian Supreme Court. The Agreement was designed to improve coordination among institutions with overlapping competences, which was considered to be a major challenge for Brazilian authorities. At the same time, the agreement has also managed to improve the framework for leniency agreements, creating a more effective system in which companies can cooperate with the government, while admitting wrongdoing, to solve corporate liability issues with public institutions.

### 2.3. Administrative-disciplinary liability of public officials in corruption

Disciplinary liability of public officials is normally governed by provisions that aim to ensure the smooth functioning of the civil service while also protecting the rights of public officials through proceedings conducted in accordance with due process. Public officials who violate their duties or fail


\(^{240}\) Id. at 99.


\(^{242}\) Pardo Cuéllar and Castell, *supra* note 239, at 99.

\(^{243}\) Id. at 105.

\(^{244}\) In Brazil, leniency agreements are used when legal persons effectively collaborate with investigations and administrative liability proceedings through which they may be exempted of some actions or have sanctions attenuated.
to comply with relevant laws will be held administratively liable in almost all States that responded to the questionnaire. Generally speaking, disciplinary liability is raised when a public official's actions or omissions, while performing their duties, show culpability in the form of intent or negligence. This culpability must affect the proper functioning of the service and be attributed to the official in question. Without these factors, disciplinary misconduct cannot be said to have occurred.\textsuperscript{245} Disciplinary liability normally applies to all public officials regardless of their seniority or position.\textsuperscript{246} Disciplinary proceedings are generally governed by civil service codes or relevant instruments and regulations, such as internal rules and regulations of public institutions.\textsuperscript{247} Disciplinary sanctions can include warning, demerit, demotion, dismissal, monetary sanctions, such as fines and disqualification from holding public office.\textsuperscript{248} In minor cases, the payment of the loss caused may terminate administrative proceedings.\textsuperscript{249} It is also worth noting that, in some countries, independent anti-corruption authorities or agencies are assigned with the competence to impose or request the imposition of administrative/disciplinary sanctions for acts of corruption.\textsuperscript{250}

2.4. Interrelationship of administrative-disciplinary liability and proceedings with criminal and civil law ones in corruption cases

Administrative liability of public officials often occurs in conjunction with criminal or civil liability. The same type of conduct may bear legal consequences concerning all three areas of law without violating the legal principle of “non bis in idem”.\textsuperscript{251} As seen in Chapter 1, several countries have adopted a comprehensive approach against corruption, combining various types of remedies from distinct categories of law. In this approach, various types of liability are independent from each other and are not mutually exclusive as they are often applied together.\textsuperscript{252} Hence, public officials may be

\begin{itemize}
\item Guatemala reported that public officials have administrative responsibility when the actions or omissions contravene rules that regulate their conduct. Latvia noted that the ground for applying administrative penalties is an administrative offense, that is, an unlawful culpable act or failure to act of a person for which administrative liability is provided in a law.\textsuperscript{248}
\item Bolivia reported that all public servants assume full responsibility for their actions, accounting not only for the objectives to which the public resources entrusted to them were allocated but also for the manner and the results of their application. Latvia noted that lower or higher rank officials as well as judges may be held liable for administrative offenses. In Ukraine, persons authorized to perform the functions of the State or local government, such as civil servants, members of the parliament, and judges, may be held administratively liable for corruption-related offenses.\textsuperscript{247}
\item Bahrain reported that disciplinary proceedings and relevant punishments are governed by the Civil Service Law and its Executive Regulation as well as by the disciplinary regulations of the entities subject to the audit of the National Audit Office. In Brazil, federal public agents are subject to the disciplinary regime imposed by Law 8,112/90 or the dictates of the Consolidation of Labor Laws and internal regulations of State-owned companies. El Salvador reported that some State institutions have their own Organic Law, which penalizes certain offenses. The Greek Code of Civil Servants provides for a wide range of disciplinary breaches, including acquisition of economic benefit or financial advantage by the public official in the course of carrying out duties. Kuwait reported that administrative and disciplinary penalties may be applied to public sector employees in accordance with a number of provisions of national regulatory legislation.\textsuperscript{248}
\item Brazil noted that the penalty of dismissal is an appropriate reprimand for public servants who are held administratively liable for corruption. China reported that in case of violation of integrity requirements, public officials may be subject to such sanctions. Latvia reported that in 2021, the Corruption Prevention and Combating Bureau held 222 public officials administratively liable, fining them a total of EUR 40,365. According to Nicaragua, sanctions range from a fine to removal from office, without prejudice to any civil or criminal liability that may be applicable.\textsuperscript{248}
\item In Azerbaijan, when a person who committed an administrative offense fully indemnifies the loss caused and reconciles with the victim, administrative proceedings shall be terminated.\textsuperscript{250}
\item In France, the Director of the French Anti-corruption Agency may request that the sanction committee's decision on violations deriving from the law on transparency and the fight against corruption combine various administrative sanctions, which may be imposed alternatively or cumulatively, such as orders to adjust internal compliance procedures and fines. In Greece, the Governor of the National Transparency Authority may appeal in favour of the public administration or the public official against all disciplinary decisions of single or collective disciplinary bodies and for any disciplinary sanction. In Moldova, the request by the integrity inspector of the National Integrity Authority to the court for ordering the confiscation of unjustified assets has an administrative nature but is solved in a civil procedure trial.\textsuperscript{251}
\item Cardona, supra note 225, at 5; El Salvador reported that different types of liability have different applications, and the strength of the combined liability measures lies in the clarity that double jeopardy is avoided.\textsuperscript{252}
\item Belarus reported that corruption offenses may raise criminal, civil, administrative and disciplinary liability. Bolivia noted that each type of liability has its own particularities, is completely independent from others without being mutually exclusive. In
held criminally, civilly and administratively liable in several jurisdictions.\(^{253}\) Compared to other types of proceedings, States consider administrative proceedings to be less complicated and more efficient, simple and fast, while such proceedings are also often interrelated with criminal and civil ones.\(^{254}\) In practice, an ongoing disciplinary procedure may be suspended, while criminal proceedings for the same fact are being conducted. This suspension also interrupts the statute of limitations.\(^{255}\) The facts proved in a criminal trial may be used as evidence in disciplinary proceedings.\(^{256}\) Hence, in case of a guilty verdict, the disciplinary sanction imposed on the public official may be dismissal from the civil service.\(^{257}\) Nevertheless, in case of acquittal, a disciplinary sanction may still be imposed depending on the circumstances of each case.\(^{258}\) Public officials may also be held liable for damages, if the damage occurs from actions or omissions during the performance of their duties.\(^{259}\) In some jurisdictions, illegal acts causing damage below a certain threshold may trigger administrative liability while staying below a threshold for criminal liability, while in others, the results of the act will determine the type of liability that may arise.\(^{260}\)

### 2.5. Administrative sanctions for corruption in public procurement

Public procurement is an essential public process that is particularly susceptible to corruption.\(^{261}\) National frameworks provide for administrative sanctions to hold suppliers and procurement officials accountable for breaches of public procurement legislation.

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**Holding legal entities administratively liable for public procurement violations in Brazil**

In Brazil, the Corporate Liability Law, which introduces civil and administrative sanctions for legal persons can be applied in conjunction with the Public Procurement Law in order to debar legal persons that have engaged in corruption from public tenders. Administrative fines have been imposed on companies that were involved in schemes to defraud public contracts. In addition to the fines, such companies were also debarred from taking part in future public procurements.

These breaches may include collusion between bidders or a bidder and a public official concerning the formulation of bidding documents, misconduct relating to the submission of bids (such

\(^{253}\) In Mauritius, a public official who has engaged in corrupt practices is subject to disciplinary action, in addition to criminal proceedings. In Nicaragua, public officials are personally liable for the violation of the Constitution, the lack of administrative probity and any other crime or fault committed in the performance of their duties, while they are also responsible to the State for the damages they cause through abuse, negligence and omission in the exercise of their office. In Russia, corruption offenses may result in criminal, civil and administrative responsibility.

\(^{254}\) Latvia noted that administrative proceedings are simpler, faster and more efficient from the point of view of the State. Ukraine noted that compared to the application of criminal sanctions, the application of administrative fines for corruption-related administrative offenses requires less time, while administrative proceedings are less complicated and require lower costs. Ukraine also reported that criminal prosecution and administrative prosecution are interrelated procedures.

\(^{255}\) OECD, *supra* note 223.

\(^{256}\) Australia reported that charges and convictions for corruption-type offenses can also be used to ground other types of action, including civil and administrative measures. Brazil reported that the same evidence may be used in both criminal and administrative proceedings.

\(^{257}\) OECD, *supra* note 223.

\(^{258}\) Id.

\(^{259}\) For instance, in Bolivia, the liability of public servants is civil when their actions or omissions in the exercise of their functions cause economic damage to the State. In Greece, according to the Code of Civil Servants, a public official shall be liable to the State for any damage caused as a result of intent or serious negligence on his/her part in the performance of his/her duties. In Hungary, liability for damages caused within the scope of administrative jurisdiction shall be established only if the damage results from actions or omissions in the exercise of public authority and if the damage cannot be abated by common remedies or by way of administrative actions.

\(^{260}\) In Azerbaijan criminal liability will arise, if the amount of damage exceeds the threshold provided in the Criminal Code, while administrative liability will arise, if it the damage is below that threshold.

\(^{261}\) OECD, *Preventing Corruption in Public Procurement* (OECD, 2016), 6.
as corruption, price fixing and breach of confidentiality), unlawful conclusion of a contract, failure to comply with the provisions for the exclusion of candidates and tenderers, among others.\textsuperscript{262} In case an entity is found to have bribed public officials, sanctions such as fines, suspension, disqualification of bidders and debarment from any future public procurement processes may be imposed.\textsuperscript{263}

Debarment lists are maintained by several countries and international organizations, such as the World Bank, and aim not only at punishing wrongdoing but also at deterring potential violations as well as restoring trust in government effectiveness and legitimacy.\textsuperscript{264} Debarment lists can assist other countries in the process of investigating corruption cases while they can also be used to cross-debar companies that have already been sanctioned abroad.\textsuperscript{265}

2.6. Administrative confiscation in corruption cases

Administrative confiscation, unlike criminal or NCB confiscation, does not require either a criminal conviction or court proceedings. It is a non-judicial mechanism employed to confiscate assets through a no-contest process.\textsuperscript{266} Administrative confiscation is often associated with the enforcement of laws regarding customs, prohibition of drug trafficking and cross-border transportation of currency.\textsuperscript{267} In some countries, the above-mentioned mechanism for asset confiscation has been used in corruption cases.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{Swiss Federal Act on the Restitution of Assets of Politically Exposed Persons Obtained by Unlawful Means (RIAA)} & \textsuperscript{268} \\
\hline
The Act governs the freezing, confiscation and restitution of assets held by foreign politically exposed persons or their close associates when there are grounds to believe that those assets were acquired through corruption, criminal mismanagement or by other unlawful acts.\textsuperscript{269} In accordance with article 14 of the Act, the Federal Council may instruct the Federal Department of Finance to take legal action before the Federal Administrative Court for the confiscation of frozen assets. The Federal Administrative Court shall order the confiscation of assets: (a) that are subject to the power of disposal of a foreign politically exposed person; (b) that are of illicit origin; and (c) which have been frozen by an order of the Federal Council in anticipation of their confiscation pursuant to article 4 of the Act. \\
\hline
\end{tabular}
\end{table}

\textsuperscript{262} Such conduct is prohibited in the Mauritius Public Procurement Act of 2006 section 53 as well as in Latvia’s framework.

\textsuperscript{263} Greece reported that contracting authorities must exclude economic operators from participation in a procurement procedure where it is proven that an economic operator has been convicted of certain offenses including bribery, fraud and money laundering. Kenya reported that in accordance with the Bribery Act of 2016, any person other than a natural person who is convicted of bribery shall be disqualified from transacting business with the national or county governments for a period of 10 years after conviction. Mauritius reported that the Public Procurement Act of 2006 is purely administrative and provides for penalties, such as suspension, debarment, disqualification of bidders and suppliers and fines.


\textsuperscript{265} Following a global survey launched in March 2020 on the exclusion systems of twenty-three different jurisdictions and institutions, the World Bank introduced the Global Suspension and Debarment Directory, providing information about how these jurisdictions apply in practice exclusion mechanisms in public procurement. The website that provides for an interactive table with information on each jurisdiction and links on its exclusion list is available at https://www.worldbank.org/en/about/unit/sanctions-system/osd/brief/exclusion-survey (accessed 15 Jun. 2023).

\textsuperscript{266} Brun et al., \textit{supra} note 8, at 6.


\textsuperscript{268} See article 1 of the Act “General provisions”.

\textsuperscript{269} See supra note 15, at 191.
providing for freezing for purposes of confiscation in the event mutual legal assistance proceedings fail.270

Tunisian Decree-Law No 20211-13 Regarding the Confiscation of Assets and Movable and Immovable Property271

Article 1 of the Decree-Law provides for the confiscation of all movable and immovable property acquired after 7 November 1987, belonging to the former President of the Tunisian Republic, Ben Ali, and his wife, as well as a list of other persons.272 The Decree-Law establishes a confiscation commission with the powers to request any information that enables it to carry out its duties, to obtain any documents it requires from administrative bodies, public or private entities of any kind and from all courts of any level, to request the administrative authorities or the competent court to order any enquiries or investigations as well as the appointment of experts in order to identify the movable and immovable property and to request the competent court to order all procedures enabling the preservation of property confiscated under the Decree-Law.273 The Decree-Law enabled the confiscation of assets worth billions of dollars following the end of the Ben-Ali regime.274

Some countries implement preventative confiscation measures when it is proven that an individual is habitually engaged in criminal activities or relies on the proceeds of crime for their livelihood. In such cases, evidence demonstrating that the person poses a danger to society is normally necessary.275

Preventive Confiscation in Italy

Confiscation in Italy is regarded as a preventive tool that stands apart from being a penalty for a criminal offense and is independent of criminal conviction.276 In practice, however, there is often a link between the preventive measures and criminal proceedings as the preventive measures are imposed when criminal proceedings are in progress.277 Preventive confiscation falls under the administrative law and thus remains outside of the criminal justice system. Nonetheless, it is imposed through judicial proceedings with a decision by which an individual is deprived of ownership rights regarding property of unexplained origin.278 In such a case, property is confiscated because of its link with an individual who is suspected, accused or guilty of an offense.279

2.7. Strengthening the use of administrative law remedies for corruption

The following sections address the challenges in the use of administrative law remedies for corruption and provide suggestions on how to strengthen their use at the national level.

270 See article 14 of the Act “Conditions and procedure” regarding the confiscation of assets.
272 See article 1 of the Decree-Law.
273 See articles 3 and 5 of the Decree-Law.
274 Brun et al., supra note 8, at 4.
275 Council of Europe, supra note 27, at 11.
277 Id. at 123.
278 Id. at 123-124.
2.7.1. Establishing a coherent administrative law framework against corruption

As already demonstrated, the control of corruption is not solely criminal. In most States, *ex-ante* administrative arrangements are established to promote integrity and accountability standards in the public sector, while *ex post* mechanisms are in place to punish public officials who have engaged in corrupt acts.\(^{280}\) Nevertheless, some countries still acknowledge the absence of coherent frameworks for corruption-related administrative offenses that could give rise to disciplinary liability of public officials, while they recognize the limited scope of administrative misconduct.\(^{281}\) In some jurisdictions, administrative remedies may not be prioritized and may be available only in minor cases that do not rise to the level of crimes, while in others certain administrative sanctions may only be imposed if there is a criminal conviction.\(^{282}\) In addition, administrative cases may be handled by lower-level courts or judges who may be less familiar with handling corruption cases.\(^{283}\) Administrative proceedings may also be suspended until a final decision is reached in criminal proceedings.\(^{284}\) States also reported on insufficient timeframes for statutes of limitations in administrative offenses and about the lack of a variety of investigative tools for detecting administrative violations.\(^{285}\) Furthermore, States noted that insufficient statistical data prevent a detailed understanding and analysis of identified administrative offenses.\(^{286}\)

Addressing corruption as a problem of public administration and institutions would require promoting integrity and accountability throughout the public sector. Where unavailable or insufficient, administrative sanctions could be established or broadened respectively while investigative tools could be strengthened to allow for the detection of corrupt acts.\(^{287}\) Those responsible for investigating and/or imposing administrative sanctions should be equipped with the necessary resources for carrying out their duties.\(^{288}\) The multitude of authorities involved may pose coordination issues. Hence, inter-institutional collaboration frameworks may help in coordinating national efforts.

2.7.2. Addressing lack of experience

The lack of experience in the use of non-criminal law remedies against corruption is a serious challenge. States admit that they have less practical experience with administrative remedies for corruption as they face a shortage of experts with relevant expertise.\(^{289}\) Lack of experience may prevent national authorities from using administrative remedies as a response to corruption, even


\(^{281}\) Azerbaijan reported that the absence of a list of corruption-related administrative offenses fixed at the normative level in national legislation causes difficulties in law enforcement practice.

\(^{282}\) In Azerbaijan, cases below a certain threshold will give rise only to administrative liability. In Bolivia, disqualification only applies in the case of a conviction. Panama reported that there is no social pressure to adopt more severe measures or stricter standards to prevent and/or punish acts of corruption in the public administration.

\(^{283}\) For example, in Russia corruption cases involving corporate liability are handled by magistrate courts.

\(^{284}\) For instance, under article 14 para. 4 of the Swiss Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA), should mutual legal assistance proceedings in criminal matters resume, confiscation proceedings are suspended until a final decision has been reached in those proceedings.

\(^{285}\) Azerbaijan informed about the insufficient length for statute of limitations periods and timeframes in administrative proceedings as well as about the absence of a variety of investigative tools and coercive measures.

\(^{286}\) Azerbaijan reported that the available statistical data do not make it possible to examine the entire array of corruption offenses, while due to the absence of a list of administrative offenses, it is impossible to carry out a statistical analysis of the identified offenses.

\(^{287}\) Azerbaijan suggests developing the unified classification of administrative offenses against corruption in the legislative frameworks of countries and developing a larger set of investigative tools. China suggests promoting the implementation of administrative means of recourse in anti-corruption cases.

\(^{288}\) Guatemala reported that it is necessary to provide institutions, especially those responsible for investigating and/or imposing administrative sanctions, with the necessary resources to carry out their duties efficiently, thus preventing the possible commission of crimes associated with the phenomenon of corruption.

\(^{289}\) China reported that among the challenges in this context is the lack of practical experience. One jurisdiction, Zanzibar (Tanzania), identified a shortage of experts who can effectively deal with corruption cases in civil and administrative manner.
when they have adequate legislation in place. Training and capacity-building activities have been suggested by various States to address limited experience in the use of administrative law mechanisms for corruption.290

Azerbaijan’s Department for Non-Criminal Prosecution
The Department for Non-Criminal Prosecution is an independent structural unit of the Prosecutor General’s Office of the Republic of Azerbaijan. Its main goal is to ensure the participation of the prosecution office in non-criminal prosecutions. Its primary responsibilities include ensuring the participation of the prosecution office in civil disputes, administrative offenses and enforcement of sentences and recognition of decisions of foreign courts.

Jurisdictions may thus consider prioritizing training of their competent authorities including training on relevant domestic legislation and international conventions. Capacity-building activities may promote the sharing of good practices and contribute to developing a network of experts in the field. Experience with administrative remedies for corruption may be promoted by integrating relevant training into technical assistance programmes. Lack of experience may stem from limited financial resources, which also need to be addressed by dedicating the necessary resources to train and staff competent authorities. The establishment of specialized bodies is an effective way to hold individuals and legal persons administratively liable for corruption-related violations.

290 Guatemala reported that it is necessary for institutions to strengthen the capacity of their personnel through continuous training in investigation, internal control and technical knowledge that contributes to the timely application of civil and administrative remedies. Mauritius recommends the training of personnel and professionals for a more effective and proactive approach.
Chapter III - International Cooperation in Civil and Administrative Proceedings Relating to Corruption

In civil and administrative proceedings with transnational aspects, cooperation between States is critical to successfully locate persons who reside abroad, serve documents, take evidence and trace, freeze and recover assets acquired through corrupt acts. International cooperation in non-criminal matters can be quite challenging given that States are more familiar with rendering legal assistance in criminal proceedings. This chapter aims to present the state of play in international cooperation in civil and administrative matters by focusing on various legal arrangements and States’ practical experience. For this purpose, the chapter begins with an overview of the provisions of international legal instruments that support cooperation in civil and administrative matters, continues with exploring potential grounds for collaboration or reasons for refusal and the various types of assistance provided. The chapter identifies a range of good practices, outlines specific challenges that States encounter in their cooperation efforts and suggests ways to address such challenges in order to improve international cooperation in the use of civil and administrative mechanisms against corruption.

3.1. Overview of the international legal context

Several anti-corruption conventions aim to promote cooperation in civil and administrative proceedings against corruption with international elements. Both the United Nations Convention against Corruption and the OECD Bribery Convention call for international cooperation in both criminal and non-criminal matters, while the CLCC focuses exclusively on rendering assistance in civil matters. Apart from these instruments, various conventions and regulations on international cooperation in the context of civil and administrative proceedings may also be used by States to permit or compel assistance where applicable.

3.1.1. The United Nations Convention against Corruption

The promotion, facilitation and support of international cooperation is one of the main objectives of UNCAC. Under article 43 para. 1, States parties are encouraged to consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption where this is appropriate and consistent with their domestic legal system. Although UNCAC obliges States parties to cooperate in criminal matters, in the civil and administrative context States are required to consider providing such assistance. Nevertheless, the Convention encourages States parties to use article 43 as a legal basis for providing legal assistance in civil and administrative matters.

3.1.2. The OECD Convention on Combating Bribery of Foreign Public Officials

Article 9 para. 1 requires States parties to provide to each other prompt and effective legal assistance in accordance with their laws and relevant treaties in the context of non-criminal proceedings falling under the scope of the Convention and brought against legal persons. Hence, upon request, States parties should facilitate or encourage assistance in non-criminal proceedings that are initiated against legal persons.

3.1.3. The Council of Europe Civil Law Convention

Article 13 of the Convention requires States parties to cooperate in matters relating to civil proceedings, in accordance with the provisions of relevant international instruments on international

291 UNCAC, article 1b.
cooperation in civil and commercial matters to which they are Parties, as well as in accordance with their national laws. According to the Explanatory Report, various international legal instruments in the field of cooperation in civil matters constitute a sufficient legal framework that could apply to corruption cases with international elements.\(^{292}\)

### 3.1.4. The Arab Anti-Corruption Convention

Under article 20 para. 2, States parties shall provide mutual judicial assistance among others in the context of judicial procedures pertaining to offenses for which a legal person may be held criminally, civilly or administratively liable.

### 3.1.5. Multi-lateral instruments that promote international cooperation in civil proceedings

The Hague Conventions on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) and on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) apply to all cases regarding civil and commercial matters where there is a request to transmit a judicial or extrajudicial document for service abroad or to obtain evidence and perform other judicial acts in a foreign country. Both conventions provide tools to facilitate cooperation among States parties through central authorities that undertake such competences.\(^{293}\) More specifically, the first convention lays down the rules regarding the transmission of judicial and extrajudicial documents from the requesting authority to the central authority of the State addressed in accordance with a model form that is annexed to the convention. The second convention specifies rules on the transmission of letters of request from a judicial authority of a contracting State to the central authority of another contracting State to execute the request to obtain evidence or to perform a judicial act.

At the regional level, Regulation (EU) 2020/1783 of the European Parliament and of the Council on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters as well as Regulation (EU) 2020/1784 of the European Parliament and of the Council on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters apply in civil and commercial matters and aim to improve the effectiveness of cooperation among EU Member States and reduce delays by simplifying and streamlining cooperation mechanisms in cross-border cases.\(^{294}\) Similarly for the Americas, the Inter-American Convention on the Taking of Evidence Abroad (1975) addresses the issuance of letters rogatory within proceedings in civil or commercial matters for the purpose of taking evidence or obtaining information abroad addressed by a judicial authority of one State party to the competent authority of another.\(^{295}\) Furthermore, the Mercosur Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters (1996), known as the Protocol of Las Leñas, facilitates assistance among Mercosur member States.\(^{296}\)

\(^{292}\) According to the CoE Civil Law Convention on Corruption Explanatory Report, the Convention requires Parties to cooperate whenever possible in accordance with existing and relevant international legal instruments in these fields, such as the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968 and 1988 respectively, the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters of 1965, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970, the Hague Conventions on Civil Procedures of 1954 and 1980. CoE, supra note 27, at para. 88.

\(^{293}\) The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters was adopted on 15 November 1965, entered into force on 10 February 1969 and has 79 Parties, and the Hague Convention on the Taking of Evidence Abroad (1975) addresses the issuance of letters rogatory within proceedings in civil or commercial matters for the purpose of taking evidence or obtaining information abroad addressed by a judicial authority of one State party to the competent authority of another.\(^{295}\) Furthermore, the Mercosur Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters (1996), known as the Protocol of Las Leñas, facilitates assistance among Mercosur member States.\(^{296}\)

\(^{294}\) Both Regulations were adopted on 25 November 2020; see Preamble para. 3 in both Regulations.

\(^{295}\) The Convention was signed on 30 January 1975, entered into force on 16 January 1976 and has 18 signatories. The Additional Protocol to the Convention was adopted on 24 March 1984, entered into force on 28 November 1992, has 13 signatories and requires from State Parties to designate a central authority to perform the functions required by the Convention.

\(^{296}\) The Protocol was adopted in 1992 by Argentina, Brazil, Paraguay and Uruguay.
Another relevant instrument is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing on Terrorism (Warsaw Convention-2005), which aims to promote international cooperation in the identification, tracing, freezing and confiscation of criminal assets. Article 23 of the Warsaw Convention stipulates that State parties shall cooperate in the execution of non-criminal measures equivalent to confiscation if such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offense, and if the property in question falls within the scope of Article 5 of the Convention.

Specific multilateral instruments deal with the recognition and the enforcement of foreign judgments in civil matters, such as the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (1971) and the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (2007). At the regional level, it is worth mentioning Regulation (EU) No 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards. Furthermore, the European Enforcement Order for Uncontested Claims, established by Regulation (EC) 804/2004, enables the automatic recognition and enforcement of judgments, court settlements and authentic instruments on uncontested claims in another EU country through the issuance of an enforcement order. Lastly, the Minsk (1993) and Chisinau (2002) Conventions on Legal Aid and Legal Relations in Civil, Family and Criminal Cases provide for cooperation between member States, while they set forth rules on the recognition and enforcement of foreign court judgments.

3.1.6. Multilateral instruments that promote international cooperation in administrative proceedings

Although administrative law is a category of law that has been traditionally confined to domestic legal systems, countries are gradually recognizing the need to address its transnational aspects. There are no multilateral instruments that provide for generally applicable rules on international cooperation in administrative matters. However, there are instruments that call for States’ administrative cooperation in specific areas. For instance, OECD’s Convention on Mutual Administrative Assistance in Tax Matters, jointly developed by the OECD and Council of Europe in

297 The Convention entered into force on 1 May 2008 and has been ratified by 39 states.
298 The Convention entered into force on 14 September 1993 and has been ratified by all EU Member States and in total by 49 states.
300 The Convention was adopted on 1 February 1971, entered into force on 20 August 1979, yet it has limited scope as it only has five contracting Parties. The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Judgments in Civil or Commercial Matters has not entered into force yet.
301 The Convention was signed on 30 October 2007 and governs issues of jurisdiction and enforcement of judgments between the EU member States and the European Free Trade Association countries other than Liechtenstein (namely Iceland, Switzerland and Norway).
302 The Convention was adopted on 8 March 1979 and entered into force on 14 Jun. 1980 and has 18 signatories.
304 The Minsk Convention was adopted on 22 January 1993 and has ten States Parties. The Chisinau Convention was adopted on 7 October 2002 and has seven States Parties.
1988, as amended by Protocol in 2010, covers administrative cooperation on matters such as tax evasion.\(^{307}\) At the regional level, it is worth mentioning the European Convention on the Service Abroad of Documents relating to Administrative Matters (1977) and the European Convention on Obtaining Abroad of Information and Evidence in Administrative Matters (1978).\(^{308}\) The first convention provides for mutual assistance with regard to the service of documents relating to administrative matters, while its application can be extended by a declaration to fiscal matters or to any proceedings in respect of offenses the punishment of which does not fall within the jurisdiction of a State’s judicial authorities.\(^{309}\) The second convention provides for cooperation in administrative proceedings whenever a request for information and evidence is received from foreign authorities.\(^{310}\) Under both conventions, each State party has the obligation to designate a central authority to receive and take action on relevant administrative assistance requests.\(^{311}\)

Although the absence of generally applicable administrative cooperation rules also applies to the recognition of foreign administrative decisions, there are no specific legal obstacles with respect to such recognition.\(^{312}\) In the context of regional organizations, States may cooperate with regards to the recognition of foreign decisions.\(^{313}\) For example, administrative decisions adopted by member States at the EU level can have legal effects in other EU member States.\(^{314}\) Article 4 para. 3 of the Treaty of the European Union establishes the principle of sincere cooperation among member States, providing a basis for mutual assistance regarding obligations that stem from the EU treaties. Notable here is the Council Framework Decision 2005/214/JHA (2005) on the Application of the Principle of Mutual Recognition to Financial Penalties,\(^{315}\) which extends the principle of mutual recognition to financial penalties imposed by judicial or administrative authorities, facilitating their enforcement in a member State other than the one in which they were originally imposed. These penalties may concern various offenses including corruption, money laundering and participation in a criminal organization.\(^{316}\)

### 3.2. Legal basis and State practices in collaborating in the context of civil and administrative proceedings relating to corruption

Taking into consideration States’ responses to the questionnaire and most recent efforts that map country experiences regarding international cooperation in civil and administrative matters, countries can generally be categorized into three main categories: countries that have experience in either providing or requesting international assistance in non-criminal matters, countries that have limited experience and countries that do not have any experience at all. In terms of more specific country experiences, there are countries that generally provide assistance when they receive a request, while there are others that have requested assistance in civil and administrative cases.\(^{317}\)

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\(^{307}\) The Convention entered into force on 1 Jun. 2011.

\(^{308}\) The first convention was adopted on 24 November 1977, entered into force on 1 November 1982 and has been ratified by nine States. The second convention was adopted on 15 March 1978, entered into force on 1 January 1983 and has been ratified by six States.

\(^{309}\) Article 1 paras. 1 and 2.

\(^{310}\) Article 1.

\(^{311}\) See article 2 in both conventions.

\(^{312}\) Wenander, supra note 305, at 757,764.

\(^{313}\) Id., at 764.


\(^{316}\) Article 5 of the Framework Decision.

\(^{317}\) For instance, Brazil reported that international cooperation may be provided in both civil and administrative proceedings. Mauritius reported that it has experience in applying civil and administrative mechanisms in the context of international
Some countries particularly reported that in the context of international cooperation, they support other States in recovering assets through civil and administrative proceedings, when the criminal process is not available.\textsuperscript{318}

**International cooperation in the context of asset recovery**

As a result of international cooperation between the United States and the United Kingdom, Nigeria, Jersey and France, approximately US$332,4 million was forfeited and returned by the United States to Nigeria. The repatriation was the result of a civil forfeiture order issued by the District of Columbia in 2014 regarding the forfeiture of approximately $500 million located in accounts around the world.\textsuperscript{319} The forfeited assets involved public money misappropriated and laundered by General Sani Abacha, the Head of Nigeria from 1993 to 1998, and his associates. The entire amount of the net forfeited assets was agreed to be transferred by the United States to Nigeria with the goal of supporting critical infrastructure projects.\textsuperscript{320}

There are, however, States that provide assistance in non-criminal matters only where it is impossible to institute criminal proceedings.\textsuperscript{321} Cooperation in non-criminal matters is also possible with regards to proceedings against legal persons.\textsuperscript{322} Some States have established an extensive collaboration with others, including through joint investigations that have helped them in resolving a number of cases.\textsuperscript{323} Nevertheless, there are still a significant number of States that limit international assistance to criminal matters without any experience in dealing with requests in the area of civil and administrative proceedings.\textsuperscript{324}
To seek international cooperation in non-criminal proceedings, States rely on specific legal grounds that permit or compel assistance. The legal basis is normally specified in the request made by the requesting State and may include multilateral conventions, bilateral mutual legal assistance agreements, domestic legislation providing for international cooperation in civil and administrative cases or a promise of reciprocity. A number of countries, including the ones that responded to the questionnaire, indicated that UNCAC could be used as a legal basis for mutual legal assistance in relation to civil and administrative proceedings and asset recovery. In particular, it seems that article 46 para. 1 of UNCAC is applied by some States in practice, while article 43 of UNCAC has specifically served as the legal basis for submitting requests to foreign jurisdictions regarding non-criminal matters. The existence of an international multilateral instrument, such as UNCAC, allows the requesting and requested State to use it as a legal basis for mutual legal assistance, as long as both States are parties to it, even if they have not concluded a bilateral treaty. Some States also indicated that UNCAC has increased the scope of the countries with which they can collaborate. There are, however, a few countries that reported having made or received only a limited number or even no requests in non-criminal matters based on UNCAC.

Apart from the United Nations Convention against Corruption, States reported that they have used the United Nations Convention against Transnational Organized Crime (UNTOC) and the OECD Bribery Convention to engage in international cooperation. In addition, States indicated that they rely on various multilateral treaties for cooperation in non-criminal matters such as the Hague Conventions, while EU Regulations are also frequently used by the EU member States. Regional agreements, such as the Mercosur Agreement on Legal Cooperation in Civil and Administrative Matters, have also been used as a basis for mutual assistance. Additionally, bilateral treaties can

325 Brun et al., supra note 8, at 81.
326 Algeria, Bahrain, Bolivia (Plurinational State of), China, Iraq, Italy, Kuwait, North Macedonia, Pakistan, Romania, Russian Federation, Saudi Arabia, Ukraine and the United States reported that the Convention could be used as a legal basis for mutual legal assistance. See EMIC, CAC/COSP/EG.1/2019/2, supra note 4, at para. 64.
327 For instance, Australia reported that it has received mutual legal assistance requests where the predicate offenses fall within the scope of those prescribed under UNCAC. Brazil reported that it has applied article 46 para. 1 of UNCAC in the context of civil and administrative proceedings. Kuwait reported that it relies in its requests for legal assistance on the provision of article 46 of UNCAC. The Russian Federation reported that in 2020-2021, the Prosecutor General’s Office sent more than fifty international requests outside the criminal sphere to competent authorities with reference to the provisions of UNCAC in order to obtain information.
328 Brazil informed about the use of article 43 of UNCAC as the legal basis for an assistance request involving the sharing of information regarding the identification of Brazilian public officials, as well as the front and intermediary Brazilian-based companies through which unlawful payments had allegedly been made, see WGAR, CAC/COSP/WG.2/2015/CRP.1, supra note 4, at 6. Ukraine reported that in the context of international cooperation in administrative matters, the National Agency for the Prevention of Corruption (NACP) actively uses the mechanisms provided for in article 43 of UNCAC.
330 Kenya reported that the Convention has increased the scope of countries for the exchange of information.
331 See for example Greece and Latvia.
332 Brazil reported that apart from UNCAC, the UNTOC and the OECD Foreign Bribery Conventions were used as a legal basis for international cooperation. COSP, CAC/COSP/2017/2, supra note 4, at para. 22.
333 See for example, China, France, Greece, and Hungary.
334 France, Greece, Hungary, and Latvia refer to the use of EU Regulations such as (EU) 1783/2020 and (EU) 1784/2020.
335 Brazil reported that apart from UNCAC, the Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor and Administrative Matters adopted by Mercosur is also applied.
offer a legal basis for international cooperation,\textsuperscript{336} while memoranda of understanding may be used to enhance active cooperation in the use of non-criminal mechanisms.\textsuperscript{337}

### Mutual legal assistance considerations regarding the choice of legal forum

The absence of a multilateral or bilateral treaty can hinder international cooperation efforts between States, necessitating alternative paths for the recovery of stolen assets. For example, the Attorney General of Zambia opted to initiate a civil suit against Frederick Chiluba, a former president of Zambia, and 19 of his associates in the United Kingdom to reclaim funds transferred to London between 1995 and 2001. This decision was driven by the fact that mutual legal assistance would have been difficult for Zambia due to the lack of bilateral and multilateral agreements that could have facilitated such cooperation.\textsuperscript{338}

National legislation may also provide sufficient basis for international assistance, where a multilateral or bilateral treaty is not in place. Various States have relevant provisions in their domestic laws that can be used in the context of international cooperation in non-criminal proceedings.\textsuperscript{339} Reciprocity may serve as a ground for rendering assistance on the condition that the requesting State will provide similar assistance when requested in the future.\textsuperscript{340} Some States also reported that international cooperation is provided on a case-by-case basis in cases where there is no multilateral or bilateral treaty in place, or there is no standardized cooperation procedure.\textsuperscript{341}

#### 3.3. Informal cooperation among States in civil and administrative proceedings relating to corruption

Prosecutors, judges, State attorneys and other national authorities may collaborate informally by reaching out to their counterparts abroad. In such cases, direct exchange of information is possible and has the advantage of being done quickly and spontaneously. Several States that responded to the

\textsuperscript{336} Bahrain reported that it has entered into several bilateral treaties and agreements on judicial and legal cooperation that can be used in the context of asset recovery. Belarus noted that the development of bilateral and multilateral treaties may help expand the use of civil and administrative remedies in corruption cases. Cyprus used bilateral agreements for the promotion of judicial cooperation in both civil and criminal matters. France noted that it has in place numerous bilateral treaties with various countries in the area of mutual legal assistance in non-criminal matters. Cyprus used bilateral agreements for the promotion of judicial cooperation. Kenya considered the adoption of bilateral treaties as an important way to pursue mutual legal assistance. Kuwait reported that the conclusion of bilateral agreements for exchanging information may improve cooperation in the use of non-criminal mechanisms. Cuba and Panama report that international assistance and cooperation can be implemented through bilateral treaties and agreements.

\textsuperscript{337} Azerbaijan noted that international collaboration can generally take place through relevant bilateral agreements, such as memoranda of understanding. Mauritius reported that it has entered into MOUs with other countries for the purpose of providing assistance in investigations and training.

\textsuperscript{338} Brun et al., \textit{supra} note 15, at 24.

\textsuperscript{339} For example, Australia’s MACMA may be used to restrain or confiscate property located in Australia that constitutes foreign proceeds of crime. Brazil may grant assistance based on the Civil Process Code, in addition to UNCAC and existing treaties. China’s Civil Procedure Law provides for a special chapter on Judicial Assistance in Civil Matters. Cuba’s Law 16/2020 on International Cooperation provides the legal framework for offering and receiving assistance in the civil sphere. Japan’s Act on Special Provisions Concerning Civil Procedure Attendant upon Implementation of the Convention on Civil Procedure and Another Convention and Act on Assistance by Foreign Courts contains provisions for rendering judicial assistance in the service of documents and taking of evidence respectively.

\textsuperscript{340} For instance, Brazilian authorities may grant international legal assistance in relation to corruption cases based on reciprocity. Cuba, Kenya and El Salvador also use reciprocity as a ground for rendering assistance. Kuwait has reported that it could reciprocate mutual legal assistance in accordance with the provisions of UNCAC. COSP, CAC/COSP/2019/7/Add.1, \textit{supra} note 4, at para. 22.

\textsuperscript{341} Korea reported that with regards to cooperation in administrative proceedings, there is no standardized procedure as requests are analysed on a case-by-case basis. G20, ‘Guide on Requesting International Cooperation in Civil and Administrative Proceedings Relating to Corruption’ (2017), 19. The United States note that they do not require a bilateral or a multilateral treaty to offer assistance in civil and administrative proceedings and that international cooperation may be provided by various United States agencies on a case-by-case basis. COSP, CAC/COSP/2017/2, \textit{supra} note 4, at para. 114.
questionnaire identified the use of informal networks supporting their efforts to cooperate at the international level in non-criminal proceedings.\textsuperscript{342}

\begin{center}
\textbf{Anti-corruption networks for international cooperation}
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Numerous practitioner networks have been established around the world to facilitate international cooperation in corruption cases. States specifically refer to the use of practitioner and multi-agency networks that aim to promote international cooperation against corruption in specific regions. Examples of some of those networks include:

- The Global Network of Anti-Corruption Law Enforcement Authorities (GlobE Network) offers a platform for information exchange among anti-corruption law enforcement practitioners in all countries around the globe.\textsuperscript{343}
- The OECD Global Law Enforcement Network against Transnational Bribery (GLEN) aims to strengthen global enforcement actions in cross border complex corruption cases.\textsuperscript{344}
- The Latin America and Caribbean Anti-Corruption Law Enforcement Network (LAC LEN) is a platform for informal exchange of information that facilitates the provision of legal assistance among its members.\textsuperscript{345}
- Asset recovery networks (ARINs) may also provide expertise and allow the sharing of best practices regarding asset recovery. The Camden Asset Recovery Network (CARIN) is an inter-agency informal network of law enforcement and judicial practitioners in the field of asset tracing, freezing, seizure and confiscation.\textsuperscript{346} The Asset Recovery Inter-Agency Network of Southern Africa (ARIN-SA) is an informal multi-agency network for participating Eastern and Southern African countries that enables its members to exchange information, model legislation and country laws on asset forfeiture, confiscation and money laundering.\textsuperscript{347} Other ARINs exist in various regions, including ARIN-AP, ARIN-WCA, ARIN-CARIB, ARIN-RRAG, and ARIN-EA.
- The International Anti-Corruption Coordination Centre (IACCC) of the National Crime Agency of the United Kingdom brings together specialist law enforcement officers from multiple agencies around the world to tackle cases of grand corruption.\textsuperscript{348}
- The Council of Europe Network of Corruption Prevention Authorities (NCPA) aims to promote the exchange of information among anti-corruption authorities including their respective experiences and good practices.\textsuperscript{349}
- The European Judicial Network in civil and commercial matters aims to, first, facilitate judicial cooperation between member States in civil and commercial matters, and second, to create a

\textsuperscript{342} For instance, Australia reported that the increasing utilization of informal networks can improve the efficiency and effectiveness of civil asset forfeiture across all transnational cases. Brazil argues that one important way to move forward is the active engagement with cooperation networks. Mauritius reported that there is no requirement for certain types of information to be exchanged solely through the formal mutual legal assistance process but may also be shared informally.


European area where freedom, security and justice are guaranteed for the benefit of persons involved in cross-border disputes. The Ibero-American Network of International Legal Cooperation (IberRed) is a network of practitioners (judges, prosecutors & central authorities) on MLA in criminal & civil matters designed to facilitate formal & informal cooperation through a secure communication platform (Iber@).

Furthermore, informal assistance between financial intelligence units (FIUs) is common among States and is considered a primary tool to gather information. An FIU plays a central role in a country’s AML/CFT operational network and serves as the national centre for the receipt and analysis of suspicious transaction reports and other information relevant to money laundering, predicate offenses, terrorism financing and for the dissemination of relevant information spontaneously and upon request. Most FIUs maintain a central database of all suspicious transactions, currency transaction reports, cross-border currency reports, intelligence reports and any queries for law enforcement agencies or foreign FIUs. States report that their FIUs exchange information with foreign counterparts, such as information on suspicious transactions regarding money laundering, terrorist financing and corruption-related offenses. The FIUs may also transmit the information to a foreign FIU through the Egmont Secure Web system.

The Egmont Group of financial intelligence units

The Egmont Group is a global organization comprised of 166 FIUs worldwide that facilitates the exchange of information and promotes cooperation among member FIUs by providing a platform to securely exchange expertise and financial intelligence to combat money laundering, terrorist financing and related predicate offenses. The Egmont Group supports FIUs’ work by improving their understanding of ML/TF risks and informs policy considerations regarding AML/CFT. It also provides support regarding the implementation of resolutions and Statements of the United Nations Security Council, FATF and G20 Finance Ministers.

3.4. Scope of assistance in civil and administrative proceedings relating to corruption

International cooperation among States is typically facilitated by designating a central authority as the primary institution to be contacted for submitting requests for mutual legal assistance. Most States have designated specific institutions to serve as focal points in the use of civil and administrative proceedings against corruption. Such institutions may assist with the provision of various types of assistance, including the communication of procedural documents, such as service of process, subpoenas, and legal notices, the provision of information regarding bank records, movable and immovable property abroad, citizenship and residence permits and participation in foreign legal proceedings.

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352 Brun et al., supra note 15, at 31.
353 Guatemala’s Intendencia de Verificación Especial is an administrative FIU with the legal authority to exchange intelligence information with counterpart entities for the analysis of cases related to money laundering and financing of terrorism. Japan’s Financial Intelligence Center (JAFIC) has a framework for the exchange of information with foreign FIUs. Based on this framework, JAFIC exchanges suspicious transaction information regarding money laundering, terrorist financing and related crimes, including corruption offenses, such as bribery and embezzlement.
354 Azerbaijan reported that in order to contact, communicate and exchange information with relevant foreign partners, law enforcement authorities actively collaborate with national FIUs through the Egmont Group.
entities, the taking of evidence and statements, the questioning of witnesses, and the provision of original or certified copies of documents. The primary purpose of the abovementioned requests is the collection of evidence, seizure and confiscation of illicit assets and removal of public officials involved in misconduct from office.

**Use of open-data sources**

In corruption cases with transnational elements, gathering evidence that link assets to corrupt activities or establish the amount of benefit derived from them can be challenging as assets may have been laundered with the use of offshore companies, corporate vehicles or intermediaries. In order to collect evidence, practitioners may consider obtaining information that is available through domestic and foreign open-data sources. Open-source information is publicly available information that can be collected through official public records and databases, including public procurement data, campaign contributions data, asset disclosures of public officials, conflict of interest forms, beneficial ownership data, lobbying disclosure forms, corporate registers, and media. Nevertheless, some of the public data must be used with caution, as it may not be sufficient in proving relevant facts and may need to be corroborated through traditional means of investigation.

Recognition and enforcement of foreign judgments is another important element of international cooperation. Recognition of a judgement by a foreign court involves a decision by a court without hearing any evidence or engaging in any substantive decision-making process, provided the court is satisfied that the legal elements and conditions for recognition and enforcement are satisfied. The court in the requested jurisdiction issues a judgment by relying on the conclusion reached by the court of origin. Enforcement involves the execution of the judgment, such as the payment of damages or disgorgement of profits. Apart from international instruments that provide for the recognition and enforcement of foreign judgments, as already presented in sections 3.1.5 and 3.1.6, national legislation may also have relevant provisions. Some States inform that their national courts’ judgements in non-criminal proceedings have been recognized by other jurisdictions.

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358 Brazil noted that assistance, both for civil and administrative purposes, may be provided for the location of persons, the serving of documents and the taking of evidence, among others. China reported that assistance may include the serving of documents, the provision of evidence, the performance of judicial acts, the recognition and enforcement of civil judgments. Japan provides judicial assistance in serving papers or taking evidence. Mexico noted that with regard to administrative proceedings, the scope of the assistance that may be provided includes evidence and statements, bank records, precautionary measures, location of persons and serving of documents. G20, supra note 341, at 21. Panama reported that it has received a request for international judicial assistance in order to locate assets and securities belonging to persons sanctioned for irregularities in the exercise of their duties, improper administration of public funds or acts of corruption. Russian Federation reported that in 2020-2021, twenty-three requests were carried out and the necessary information was provided on accounts and financial instruments in foreign banks, residence permits and movable and immovable property. Saudi Arabia reported that among the forms of legal assistance is the questioning of witnesses, the provision of information and evidence and the identification and tracing of proceeds of crime.

359 Russian Federation reported that information obtained was used not only to secure the seizure and confiscation of illicit proceeds and property but also to remove from office public officials who committed corruption offenses.

360 Brun et al., supra note 15, at 75.


362 Brun et al., supra note 15, at 87.


364 For example, according to article 458 of Azerbaijan’s Civil Procedure Code, decisions of foreign courts shall be recognized and enforced in the Republic of Azerbaijan.

365 For instance, China reported that in an embezzlement case where the suspect had fled to another country and criminal prosecution was not possible, the Chinese court confiscated his illegal proceeds found in China as well as those transferred to another country by applying the relevant procedure of confiscation and by having the confiscation ruling recognized and enforced in other countries.
3.5. Grounds for refusing a mutual legal assistance request in civil and administrative proceedings relating to corruption

Most countries that responded to the questionnaire are generally willing to assist each other in non-criminal matters. However, some noted that one of the most common grounds for refusing to provide such assistance is when the execution of the request would pose a threat to the sovereignty and the security of the requested country. This is a well-established principle in criminal matters, recognized in UNCAC art. 46 para. 21, as well as in both Hague Conventions of 1965 and 1970 and in the European Conventions of 1977 and 1978, that provide for limited grounds for refusal to cooperate, for instance when compliance with a request would infringe the State’s sovereignty or security. A lack of a legal instrument that would otherwise facilitate international cooperation may also be a reason for refusal. Hence, if the requesting and the requested country do not have in place any bilateral treaty for mutual legal assistance or are not Parties to the same multilateral convention under which the request is sought, assistance can also be refused. The absence of a memorandum of understanding among counterpart entities for the exchange of information in the area of non-criminal matters has also been cited as a reason for refusal.

Central and other competent authorities that transmit requests for international assistance to the designated central authority of another country must be aware of the conditions and requirements for assistance to avoid refusal. Such requirements may be provided in the national legislation or in international instruments and if they are not complied with, a request may be rejected. For example, an incomplete or imprecise request with insufficient information may not be executed by the requesting jurisdictions. Additionally, the existence of a leniency agreement with an offender that precludes the sharing of information with other authorities may be a reason for refusing a request. Similarly, a confidentiality clause protecting defendants may also result in the denial of a request. States note that their outgoing requests in non-criminal proceedings relating to corruption have been refused by other countries on the grounds that the proceedings in question were not criminal, the foreign countries’ framework did not provide for the sharing of the information requested, and the request was not issued by judges or prosecutors.

365 For example, Azerbaijan reported that it never refused international cooperation through civil or administrative channels. Mauritius reported that it has always been proactive and willing to assist in facilitating the sharing of information.
366 For instance, France reported that a request for international cooperation may be rejected, if it is likely to prejudice the sovereignty or security of the State.
368 Kenya reported that the lack of a legal instrument to allow for the exchange of information with the requesting jurisdiction can be a reason for refusing a request for international cooperation.
369 Guatemala noted that with regards to cooperation among counterpart entities, a memorandum of understanding must be in place as this is an indispensable legal requirement for the exchange of information.
370 For instance, according to France, if the request is not presented in accordance with the provisions of the French Code of Civil Procedure, and specifically article 688, it may be rejected.
371 France reported that incomplete or imprecise requests can be refused.
372 Brazil reported that the administrative proceedings against a company were stopped due to a leniency agreement with the Brazilian authorities which provided that the information obtained could not be used against the company by other authorities.
373 In Colombia, with respect to administrative proceedings, the National Directorate for Special Investigations of the Office of the Prosecutor General had made a request using UNCAC as a legal basis which was, however, temporarily denied by the requested State due to a confidentiality clause protecting defendants in the proceedings. Cosp CAC/COSP/2017/2, supra note 4, at para. 38.
374 Brazil noted that it has experienced difficulties in outgoing international cooperation requests under article 43 of UNCAC originating from administrative proceedings relating to corruption as they were refused by other countries’ central authorities on the grounds that the proceedings in question were not criminal. Wgar, CAC/COSP/WG.2/2015/CRP.1, supra note 4, at 8.
3.6. Strengthening international cooperation in civil and administrative proceedings relating to corruption

In general, States’ responses to the questionnaire, as well as recent notes prepared by the Secretariat, demonstrate that while some efforts are being made to cooperate at the international level in non-criminal matters, there is still room for improvement. Building on States’ experiences, the following challenges are identified and discussed with a view to highlighting possible suggestions to promote international cooperation in non-criminal proceedings.

3.6.1. Ensuring international cooperation in corruption cases regardless the type of liability

As was previously highlighted, international cooperation is often limited to the realm of criminal law with countries encountering difficulties in cooperating in the context of civil and administrative proceedings, especially when their counterparts are unwilling to provide mutual legal assistance in non-criminal matters. Countries recognize that UNCAC does not impose an obligation to cooperate in the context of non-criminal matters as article 43 requires States parties to only consider providing assistance. Although the CLCC exclusively addresses the civil aspects of corruption and provides for States parties mutual assistance in this context, there is no specialized treaty on addressing corruption with administrative mechanisms. At the national level, the lack of domestic legal provisions imposing an obligation to cooperate with other States in civil and administrative matters may also be an obstacle to international cooperation. Countries may consider criminal law mechanisms more efficient compared to civil and administrative ones, especially in cases that involve multiple jurisdictions where complex corporate structures need to be investigated. Furthermore, national laws may prevent the use of evidence obtained through mutual legal assistance in criminal proceedings in non-criminal matters. It may still be unclear to certain national authorities whether assets can be seized in the context of the civil asset recovery process when there is no sufficient nexus between the proceeds of crime and the predicate offenses.

Considering these challenges, countries should be encouraged to ensure that assistance can be provided regardless of the nature of the proceedings of the requesting jurisdiction, where consistent with domestic legal frameworks. This could involve the introduction of domestic provisions for international cooperation in civil and administrative matters against corruption where

369 COSP, CAC/COSP/2019/7/Add.1 and WGAR, CAC/COSP/WG.2/2015/CRP.1, supra note 4, at paras. 34 and 3 respectively.
367 Brazil noted that it has faced difficulties in explaining the Brazilian legal framework, resulting in challenges related to international cooperation. Additionally, it also reported that requests originating from non-criminal proceedings related to corruption cases are often refused by other national authorities on the grounds that the proceedings in question are not criminal. China suggests that States should further increase their willingness to provide judicial assistance avoiding double standards in non-conviction-based confiscation. It should be noted that Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the Mutual Recognition of Freezing Orders and Confiscation Orders does not apply to freezing and confiscation orders that are issued within the framework of proceedings in civil or administrative matters. Hence, forms of civil asset recovery that are completely detached from criminal proceedings do not fall under this Regulation. See also COSP, CAC/COSP/2021/4, supra note 4, at para. 113.
369 According to the United States, UNCAC does not impose a binding requirement on States parties to provide assistance in civil and administrative proceedings, see COSP, CAC/COSP/2019/7/Add.1, supra note 4, at para. 30.
368 Panama reported that the main challenge is the lack of a specific regulation regarding international cooperation in civil and administrative proceedings.
369 According to Australia, matters involving complex multinational corporate structures can involve challenges due to the need to coordinate investigations across multiple jurisdictions.
370 For instance, in Israel, under the International Legal Assistance Law (1998), section 48 on ‘Unique use of evidence’: “When the State of Israel submits a request for legal aid, in connection with a criminal matter, the evidence or information received may not be used, except in the criminal matter for which they were received...”.
371 One of the challenges identified by Australian authorities is whether in the context of the civil asset recovery process a national order could be registered in respect of property located in a foreign country where there is no nexus between the assets and the predicate offense.
369 Brazil suggests the need to provide international cooperation regardless of the nature of the liability provided in the legal framework of the requesting country.
such provisions are not available. Countries that responded to the questionnaire highlighted the importance of international instruments that could serve as the basis for States to collaborate in non-criminal proceedings. \textsuperscript{383} The adoption of specialized bilateral or multilateral agreements, as encouraged by article 59 of UNCAC, with focus on non-criminal remedies against corruption, has been suggested as a means to promote international cooperation.\textsuperscript{384} In addition, the need for a forum that could allow countries to share experiences on the use of national civil and administrative procedures in countering corruption and inform them of the need to provide international cooperation regardless the nature of the liability has also been proposed.\textsuperscript{385}

**International Treaty on the Exchange of Data for the Verification of Asset Declarations**

The development of the International Treaty on Exchange of Data for the Verification of Asset Declarations is a relevant initiative designed to strengthen the integrity of the public sector through international cooperation in the context of asset and interest disclosures of public officials.\textsuperscript{386} The Treaty was developed under the Southeast Europe Regional Programme on Strengthening the Capacity of Anti-corruption Authorities and Civil Society to Combat Corruption and Contribute to the UNCAC Review Process and with financial support by the Austrian Development Agency.\textsuperscript{387} According to article 1 para. 1, the purpose of the Treaty is to prevent corruption by facilitating direct exchange of information concerning asset declarations of public officials between the Parties to the Treaty. The information that can be exchanged among focal points includes information taken from databases maintained by public authorities or private entities on matters such as taxes, bank accounts, financial securities, business ownership, trusts, foundations, real estate, and vehicles.\textsuperscript{388} The treaty provides for the use of open data information available online in public or private registers.\textsuperscript{389}

3.6.2. Overcoming legal asymmetries in international cooperation in civil and administrative proceedings relating to corruption

Differences in legal regimes are considered a key challenge in international cooperation and a common reason why a number of requests may be sent back for additional information or even be refused.\textsuperscript{390} Differences in terminology, available legal tools, evidentiary or admissibility requirements and procedures to obtain assistance have generally been identified as barriers that could potentially

\textsuperscript{383} For instance, Belarus reported that the development of bilateral and multi-lateral treaty relations between States could help expand the use of civil and administrative remedies in corruption cases.

\textsuperscript{384} Article 59 of UNCAC encourages States Parties to conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to Chapter V on Asset Recovery. Colombia has suggested the conclusion of specialized international instruments in the field. COSP, CAC/COSP/2017/2, supra note 4, at para. 41. The development of a protocol to the Africa Union Convention on Prevention and Combating Corruption on private civil actions against corruption has been suggested at least in academic literature. The promotion of socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights, as one of the objectives of the Convention (article 2 para. 4), could serve as the legal basis for the protocol. A. F. Alowolodu, ‘First Working Draft of a Protocol to the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC) on Private Civil Actions Against Corruption with Comments and Background Footnotes’ Rule of Law and Anti-Corruption Center Journal, 1 (30 Jun. 2020), 7.

\textsuperscript{385} Brazil reported that it would be important to establish an international forum that could raise awareness regarding the need to provide international cooperation in civil or administrative procedures.

\textsuperscript{386} See Preamble.


\textsuperscript{388} See article 3 paras. 1 and 2.

\textsuperscript{389} See article 7 para. 1.

\textsuperscript{390} Australia identified differences in legal regimes as a major challenge, which can limit mutual legal assistance. Brazil noted that there is a very large asymmetry among national legislations on direct recovery of property and exchange of evidence as well as variations in the ways States could intervene in foreign jurisdictions to recover property and obtain evidence that was produced abroad. China mentioned that differences in laws pose major challenges to international cooperation. According to Ukraine, the determination of an act as an administrative violation or a criminal offense may differ among legal systems.
impede cooperation.\textsuperscript{391} The lack of civil or administrative liability mechanisms in some countries also poses serious difficulties for international cooperation.\textsuperscript{392} For example, as seen in chapter one, there are still jurisdictions that do not recognize NCB confiscation.\textsuperscript{393} Some countries have explicitly stated that they do not or cannot enforce NCB confiscation orders from foreign countries given that their national legal frameworks do not recognize the NCB measures.\textsuperscript{394} States also note that they face difficulties when dealing with foreign authorities in their efforts to explain their national legal framework and secure cooperation.\textsuperscript{395} This would be the case, for instance, when a country that enforces administrative liability of legal persons requests assistance from another country that only uses criminal liability procedures. Criminal authorities in the second jurisdiction may refuse to share information or evidence or to seize funds subject to forfeiture.\textsuperscript{396}

Many countries that responded to the questionnaire have not issued any guidelines on international cooperation in the context of civil and administrative proceedings that could provide information on their framework of non-criminal remedies.\textsuperscript{397} Practitioners, unfamiliar with the laws and procedures of a particular jurisdiction, will need additional time to submit or respond to an assistance request.\textsuperscript{398} Delays in responding to and executing mutual legal assistance requests may jeopardize the outcome of non-criminal proceedings and could lead to refusals when counterparts cannot fully understand the differences in legal systems.\textsuperscript{399}

To address these challenges and facilitate mutual legal assistance, practitioners should consider early and clear communication with their counterparts to provide and receive guidance on the specific legal requirements of the other jurisdictions concerning MLA requests. The use of informal practitioner networks to spontaneously ask questions, share information and improve efficiency prior to the transmission of a formal mutual legal assistance request has been recommended by various States.\textsuperscript{400}

\begin{footnotes}
\item[391] K. Stephenson, L. Gray, R. Power, J.P. Brun, G. Dunker, M. Panjer, \textit{Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action} (The World Bank, UNODC, 2011), 47-48. See also COSP, CAC/COSP/2021/15, \textit{supra} note 161, at para. 117 where it is stated that the ‘babel’ of terminology can lead in major misunderstandings in the area of NCB confiscation.
\item[392] Russian Federation reported that one of the weaknesses of international cooperation in civil and administrative matters is the lack of civil and administrative liability for corruption offenses in the legislation of a number of States.
\item[393] Azerbaijan noted that due to the fact that non-conviction-based confiscation is not recognized in the national legal framework and cannot be used in cases where the perpetrator is outside the national jurisdiction, there have been situations in which certain cases have not been pursued.
\item[394] COSP, CAC/COSP/2021/4, \textit{supra} note 4, at para. 109
\item[395] Brazil reported that when having to interact with foreign agencies, there are difficulties in explaining the Brazilian legal framework.
\item[396] Brazil reported that difficulties to cooperate with some criminal authorities may prevent the acquisition of information and evidence and the receipt of funds subjected to forfeiture.
\item[397] A number of States including Azerbaijan, China, El Salvador, Greece, Guatemala, Hungary, Iran, Latvia, Moldova, Nicaragua, Panama, Serbia, and Timor-Leste note that they have not issued any guidelines on international cooperation in civil proceedings.
\item[398] Stephenson et al., \textit{supra} note 391, at 47.
\item[399] Australia reported that a key challenge is that formal mutual legal assistance mechanisms are not capable of providing evidence and assistance in a sufficiently timely manner. Azerbaijan noted that the process of mutual legal assistance is time-consuming. France reported that delays in executing requests for mutual legal assistance can be quite long (between four to six months) which can present challenges for the judicial authorities. Mauritius reported that national authorities face delays by foreign States which slow the case at the domestic level. Serbia noted slow procedures as a major challenge. Russian Federation reported that a request for legal assistance under articles 43 and 51 of UNCAC was not processed for more than three years. A request for international cooperation based upon UNCAC, asking for a specific list of evidence, transmitted by the Brazilian central authority to the central authority of a foreign jurisdiction, was denied because it referred to an administrative proceeding, and there were no provisions in that country’s legislation for sharing of such information. See WGAR, CAC/COSP/WG.2/2015/CRP.1, \textit{supra} note 4.
\item[400] Australia recommends the use of practitioner-based networks such as the Camden Asset Recovery Interagency Network (CARIN) and the Asset Recovery Interagency Network – Asia Pacific (ARIN-AP) as a way of providing practical and early advice prior to the making of a formal request for assistance in asset recovery matters. Azerbaijan suggests the establishment of a mechanism of informal relations among focal points of relevant institutions in order to ensure efficiency. Brazil supports the active engagement with cooperation networks which provide important tools for direct contact among law enforcement authorities. Kenya recommends the sharing of information spontaneously.
\end{footnotes}
The development of guides and manuals on international cooperation in the context of civil and administrative proceedings should be considered in order to familiarize practitioners with various domestic and international cooperation requirements.\textsuperscript{401}

Another relevant practice is the establishment of law enforcement offices or focal points overseas to facilitate cooperation with other jurisdictions and address issues such as interpretation of relevant laws.\textsuperscript{402} Promoting greater uniformity and harmonization between legal regimes has also been suggested by States in areas such as NCB asset seizure and confiscation as well as in the context of administrative liability for corruption.\textsuperscript{403} In the context of cooperation in the NCB confiscation, another good practice is the initiation of domestic NCB proceedings based on the foreign order in addition to the direct enforcement of such order.\textsuperscript{404}

\begin{quote}
\textbf{Issuance of guidelines to facilitate international cooperation in non-criminal proceedings}

A limited number of countries developed guidelines on international cooperation regarding non-criminal matters, which are designed to inform other jurisdictions about relevant practices and procedures.\textsuperscript{405} For instance, the Private International and Commercial Law Section at Australia’s Attorney General Department published practical guidance on serving legal documents and taking evidence across international borders as well as on enforcing foreign judgements.\textsuperscript{406} Brazil hosts a website with information about international legal cooperation in civil matters addressing general and specific issues relating to corruption and bribery cases.\textsuperscript{407} Guatemala’s Intendencia de Verificación Special has issued administrative provisions on international cooperation specifically on the prevention and suppression of the crime of money laundering and the financing of terrorism under the United Nations Security Council resolutions. At the international level, the G20 Anti-Corruption Working Group (ACWG) developed a guide designed to help countries to request assistance in civil and administrative proceedings. The guide provides a comprehensive overview of the possibilities available for cooperation including the assistance that may be provided and the prerequisites needed to submit a cooperation request.\textsuperscript{408}
\end{quote}

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\textsuperscript{401} For instance, France suggested the development of practical guides or explanatory sheets for competent authorities on the operation of applicable international instruments. Kuwait recommended the preparation of an international procedural guide regarding civil and administrative procedures with the aim of facilitating international cooperation in this regard. Panama proposed the elaboration of a good practice guide or manual for the application of international cooperation in civil and administrative mechanisms that would enable various States to adopt internal regulations to strengthen cooperation mechanisms in these matters.\textsuperscript{402} Australia and Brazil suggested that the opening of such law enforcement offices could promote assistance in non-criminal cases.\textsuperscript{403} Australia noted that international cooperation among States in asset recovery cases could be improved by establishing greater uniformity across legal regimes. China has recommended the promotion of non-criminal means in anti-corruption cases, especially in the context of international cooperation in non-conviction-based confiscation and asset recovery. Iran noted that the use of harmonized instructions could promote coordination among countries. Russian Federation suggested the harmonization of national legislations regarding the application of civil and administrative liability for corruption offenses. The need for harmonization of legal approaches has also been raised in the context of NCB confiscation. See COSP, CAC/COSP/2021/4, supra note 4, at para. 149.\textsuperscript{404} COSP, CAC/COSP/2021/4, supra note 4, at para. 146.\textsuperscript{405} Lebanon informed the issuance of a guideline on international cooperation for asset recovery including civil and administrative proceedings. Saudi Arabia reported that it has issued guidelines regarding civil and administrative procedures in financial and administrative corruption cases.\textsuperscript{406} The information is available at https://www.ag.gov.au/international-relations/private-international-law (accessed 15 Febr. 2023).\textsuperscript{407} The website is available at https://www.gov.br/mj/pt-br/assuntos/sua-protecao/cooperacao-internacional/cooperacao-juridica-internacional-em-materia-civil (accessed 15 Febr. 2023).\textsuperscript{408} G20, supra note 341.
3.6.3. Addressing institutional barriers in international cooperation in civil and administrative proceedings relating to corruption

A lack of resources has been identified as a major obstacle that can hinder international cooperation. \(^{409}\) Insufficient commitment of resources by either the requesting or requested jurisdiction, along with inadequate staffing, training, or experience of competent officials in dealing with mutual legal assistance requests, can significantly impair international cooperation efforts. \(^{410}\) Coordination among competent institutions in civil and administrative matters may also pose a challenge, \(^{411}\) while language barriers and inadequate translation of requests may hinder their execution. \(^{412}\)

Countries should, therefore, address these obstacles by allocating the necessary resources to the authorities competent in dealing with international cooperation requests in non-criminal matters. Countries should also prioritize the training of competent officials on national and international norms concerning international cooperation. \(^{413}\) Specialized agencies must be equipped with personnel with knowledge in requesting and providing mutual assistance in administrative matters in order to be able to implement their mandate. \(^{414}\) To build up sufficient expertise, training programmes should be a priority in order to meet the demands of civil and administrative cases with international aspects. International and regional organizations can be instrumental in providing technical assistance and supporting the training of competent personnel to promote and facilitate international cooperation in non-criminal matters. Requesting jurisdictions should provide quality translations of their requests into the language of the requested jurisdiction or an internationally accepted language, in accordance with mutual legal assistance requirements, and bear the associated costs to avoid cooperation delays and potential refusals of assistance. Effective coordination among domestic agencies and high-level commitment to engage all competent stakeholders will prevent duplication of efforts and provide an essential framework for dealing with mutual legal assistance requests. \(^{415}\)

\(^{409}\) Australia identified the lack of dedicated resources in many countries as a challenge of the existing international cooperation mechanisms.

\(^{410}\) Stephenson et al., supra note 391, at 31-32.

\(^{411}\) Id. at 38. According to Guatemala, the main challenge in the context of international cooperation is the coordination of the competences of institutions involved in civil and administrative matters.

\(^{412}\) Mauritius noted that language can be a barrier to the process but explains that such problem can be overcome by having documents and information duly translated.

\(^{413}\) For example, Greece and Kenya suggest the need to organize trainings for practitioners in order to improve capacity in providing and requesting mutual legal assistance in the context of civil remedies.

\(^{414}\) Stephenson et al., supra note 391, at 31.

\(^{415}\) Id., at 39.
Conclusion

While criminal remedies have traditionally held a central role in both national and international endeavours to combat corruption, civil and administrative law offer significant contributions to a comprehensive approach in addressing this issue. Historically, remedies rooted in civil and administrative law have been somewhat overlooked or considered secondary to their criminal counterparts. Nonetheless, there is a discernible shift towards their increased utilization, either as viable alternatives when criminal law measures are not feasible or as the primary legal recourse to address the financial ramifications of corruption or to penalize misconduct within public administration.

The primary objective of this study was to scrutinize how States employ civil and administrative law remedies to tackle corruption by exploring various aspects of their national legal frameworks and by reviewing their experience in the context of international cooperation. The study also endeavoured to shed light on good practices and prevailing challenges. Responses received from States through the questionnaire, and previous work undertaken by the UNODC, confirm the evolving perspective that corruption necessitates a multifaceted response, extending beyond the confines of criminal law. However, a lack of experience in utilizing non-criminal remedies against corruption coupled with reluctance to cooperate at the international level in the context of non-criminal proceedings can substantially impede anti-corruption efforts.

The establishment and promotion of additional means of liability do not seek to diminish the significance of criminal law in the fight against corruption; rather, they aim to draw attention to remedies that may have been previously overlooked. These remedies introduce a new dimension to anti-corruption efforts and have the potential to be highly effective. The findings of the report indicate areas where the expertise and capabilities of competent authorities require enhancement. While there is room for improvement in the current utilization of non-criminal remedies against corruption, mounting interest in the subject is anticipated to foster further research and contribute to the development of robust domestic and international tools to combat corruption through non-criminal mechanisms.
References

International Anti-Corruption Instruments and Related Documents


United Nations Resolutions


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United Nations, Conference of the States parties to UNCAC, ‘Challenges, Good Practices and Lessons Learned, and Procedures Allowing the Confiscation of Proceeds of Corruption Without a Criminal Conviction from States parties that Have Implemented Such Measures in Accordance with Article 54

**Reports and Publications by International Organizations**


Reports and Publications by National Authorities


Books, Articles and Chapters


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**Webpages**


