10.14324/111.444.2052-1871.1846

UCL Journal of Law and Jurisprudence

ONE FOOT IN, ONE FOOT OUT – AN ACCOUNTABILITY ANALYSIS OF THE UNITED KINGDOM'S AND SWITZERLAND'S REGULATORY FRAMEWORKS IN THE UNCAC REGIME.

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Abstract: This comparative analysis of the UK and Switzerland's regulatory frameworks on asset return showcases how two former safe havens for corrupt funds pioneer a novel grid of accountability in discretionary asset returns. This step of the UK and Switzerland is crucial as it fills the gap left by the UN Convention against Corruption, which introduces asset return obligations without guiding the mechanisms and procedures for the process. The comparison highlights how both states have tailored their regulatory framework to the domestic peculiarities of their legal system, serving as a basis for others to follow suit in this uncharted territory. Besides the commitment to accountability, both regulatory frameworks also showcase the importance both states place on protecting their leeway by enshrining the policy to make case-by-case return decisions. Nevertheless, creating standards and boundaries to inform their case-by-case decision-making, enhancing transparency and consistency in the process, is a step in the right direction.

A. INTRODUCTION

The United Kingdom (UK) and Switzerland are two of Europe's most prominent financial centres. In the past, both states have acquired a reputation for hosting corrupt assets from around the world. In the last decade, however, both have publicly committed to ending their statuses as a "safe haven" for such assets.[1] They have developed sophisticated anti-corruption tools, including extensive confiscation and asset recovery regimes, along with frameworks for the return of such assets.[2] This is in line with their obligations under the United Nations Convention against Corruption 2005 (UNCAC), the first-ever global anti-corruption instrument, which introduced the return of corrupt assets as one of its fundamental principles.[3]

The UNCAC obligates both the UK and Switzerland to return corrupt assets, with this article being focused on the merely *preferential* return obligation within Article 57(3)(c) UNCAC.[4] Different from the mandatory asset return obligations established in the UNCAC,

[*] LLB (UCL). I would like to thank Professor David Ormerod for his valuable guidance and encouraging supervision in writing this article. I am also grateful to Dr. Megan Donaldson for taking the time to discuss my initial ideas and directing me to relevant materials. All errors remain my own.

[1] HM Government, 'United Kingdom Anti-Corruption Strategy (2017-2022)' (2017) <https://www.gov.uk/government/publications/uk-anti-corruption-strategy-2017-to-2022> accessed 10 March 2024; Federal Department of Foreign Affairs, 'No Dirty Money' (2016) <www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf> accessed 10 March 2024.

[2] eg in the United Kingdom the Proceeds of Crime Act 2002 and in Switzerland Art. 70 of the Swiss Criminal Code (SR 311.0).

[3] United Nations Convention Against Corruption (adopted 31 October 2003, entered into force 14 December 2005) UNGA Res 58/422.

[4] From here on all references made to Articles are to be understood to be from the UNCAC.

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which are routinely realised through mutual legal assistance (MLA),[5] the preferential return obligation is of a discretionary nature which factually exempts haven and recipient states[6] from conventional accountability structures. The UNCAC itself does not provide for specific mechanisms regarding the asset return, which could safeguard proper procedures, transparency, and consistency throughout the preferential return process. Thus, an 'accountability gap' arises in discretionary asset return, which falls to states to fill through domestic regulation.[7]

This article will explore how the UK and Switzerland have aimed to fill this gap by introducing mechanisms of accountability to the discretionary asset return process through creating distinct regulatory frameworks. By scrutinising their regulatory frameworks, it becomes clear that, while introducing mechanisms of accountability, both states are careful not to lose their ability to manoeuvre when exercising this discretionary return – in other words, they protect their leeway. As the two states are forerunners in developing such regulatory frameworks, and academic commentary on them is limited, the following evaluation can contribute to the understanding of best practices in asset returns and hint at possible shortfalls.

The central argument of this article, that both states aim to introduce accountability to the discretionary asset return process while protecting their leeway, will be tested through employing the legal comparative method of functionalism. Functionalism rests on the premise that different legal systems face similar problems but legitimately create different solutions to respond to these problems.[8] Comparing solutions that serve the same function can meaningfully shed light on the particularities of a legal system as well as provide lessons that can serve as an inspiration across borders. It is the most suitable method here, as the two jurisdictions face the same return obligations under the UNCAC and must master the same problem of walking the fine line between a commitment to return assets executing the UNCAC's promise, while at the same time preserving flexibility for handling assets if, for instance, a recipient state cannot guarantee absence of corruption. The method requires the regulatory frameworks to be first assessed separately, and then be compared under the lens of

[5] MLA is the "formal way in which states request and provide assistance (…) in criminal investigations or proceedings" Council of Europe, 'Mutual Legal Assistance Manual' (Council of Europe 2013) 9 <https://rm.coe.int/mutual-legal-assistance-manual-eng/1680782927> accessed 6 April 2024.

[6] There is no consensus on the terms used when describing the two states involved in the asset return. In this article "haven states" refers to the state in whose jurisdiction the corrupted assets are and "recipient state" refers to the state from which the assets originated.

[7] Cecily Rose, 'Human Rights Law and the Return of Stolen Assets', in Niels M Blokker and others (eds), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development* (Brill 2021) 300, 302.

[8] Mathias Siems, *Comparative Law* (3rd edn, CUP 2022) 17.

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the function assigned – accountability.[9] Due to the sparse literature on accountability in asset returns, this article adopts a bespoke assessment of accountability drawn from first principles.

On this basis, the article first scrutinises the UNCAC as the legal backdrop for both regulatory frameworks, and then examines both states' regulatory frameworks separately (Part B); thereafter, the regulatory frameworks are compared through an accountability-lens (Part C) leading to a concluding assessment of the 'one foot in, one foot out' accountability approach of both states (Part D).

B. REGULATORY FRAMEWORKS

The UNCAC, "the only legally binding universal anti-corruption instrument",[10] aims to address the problem of corruption at a global level. It calls for preventive measures and the criminalisation of different forms of corruption in the public and private sector. Member States to the UNCAC must ensure the introduction of legislation, if necessary, in their domestic legal system to meet their obligations under the UNCAC. One of these obligations is the return of corrupt assets, which is labelled as a "fundamental Principle" of the Convention in Article 51 UNCAC.[11] The UK through its Framework for transparent and accountable asset return (Framework)[12] and Switzerland's through its Foreign Illicit Assets Act (FIAA)[13] have created distinct regulatory frameworks to discharge their various return obligations under the UNCAC, with this article focusing on the regulatory frameworks' effect on the exercise of a discretionary asset return. These two jurisdictions lend themselves best for a comparative analysis, due to their shared, at first glance contradictory, reputation of both being safe havens for corrupt funds and pioneers for development of best practices in asset return. The OECD, for example, has singled out both jurisdictions for their commitment to overcome barriers in asset return processes by creating new laws or employing other "creative solutions",[14] which is exemplified through both states' novel regulatory frameworks.

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[9] ibid 20.

[10] UNODC, United Nations Convention against Corruption (unodc.org) <https://www.unodc.org/unodc/en/corruption/uncac.html> accessed 20 April 2024.

[11] ibid.

[12] Home Office, 'Framework for Transparent and Accountable Asset Return' (2022) <https://www.gov.uk/government/publications/framework-for-transparent-and-accountable-asset-return/framework-for-transparent-and-accountable-asset-return> accessed 9 October 2023.

[13] Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act) (Law Nr. 196.1).

[14] Larissa Gray and others, 'Few and Far: The Hard Facts on Stolen Asset Recovery' (World Bank and OECD 2014) 2 <https://www.oecd.org/dac/accountable-effective-institutions/Hard%20Facts%20Stolen%20Asset%20Recovery.pdf> accessed 11 June 2024.

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1. *Article 57 United Nations Convention Against Corruption*

Article 57, which is the general source of return obligations, was subject to controversial debates during the UNCAC drafting.[15] Unsurprisingly, states that are more likely to be recipient states, due to their political reality, argued for mandatory return obligations throughout, restricting the haven states' discretion in the process.[16] Conversely, states who are more likely to be haven states felt they should have a right to control the asset return, citing concerns surrounding their potential re-corruption.[17] Article 57, as it stands, demonstrates a compromise between both positions. It constrains the haven state's discretion over the confiscated assets through mandatory and preferential return obligations[18] reflecting the different strengths of claims to ownership of the recipient state, depending on "the type of corruption offence involved, the strength of evidence and claims presented and the right of prior legitimate owners of property and victims other than the State parties."[19] This contextual approach manifests itself through different tiers of return obligations.

a) *Multi-tier Approach*

Firstly, Article 57(3)(a) and (b) set out the conditions for a mandatory return of assets from the haven state, referred to as "requested State Party" in the UNCAC, to the recipient state, referred to as "requesting State Party" in the UNCAC. Article 57(3)(a) is restricted to cases where the assets are embezzled public funds and Article 57(3)(b) extending to assets derived from other offences set out in the UNCAC. Both provisions further require that the confiscation was based on a final judgement in the recipient state, a requirement which the haven state, however, can waive, and that the asset confiscation was executed in accordance with Article 55, for which the recipient states will typically have had to request MLA from the haven state.[20] Therefore, the asset returns under one of the mandatory provisions will usually be channelled through MLA, and coupled with the mandatory phrasing of the provision and the default condition of a final judgement having been made in relation to the assets, the return process takes place within traditional accountability structures.[21]

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[15] Anton Moiseienko, 'The Ownership of Confiscated Proceeds of Corruption under the UN Convention Against Corruption' (2018) 67 ICLQ 669, 681.
[16] ibid.
[17] ibid.
[18] Pinar Ölçer, 'Ch.V Asset Recovery, Art.57: Return and Disposal of Assets', *The United Nations Convention Against Corruption: A Commentary* (OUP 2019) 570.
[19] UNODC, *Legislative Guide for the Implementation of the United Nations convention against Corruption* (UNODC 2007) para 782 <http://www.un-ilibrary.org/content/books/9789211559828> accessed 19 October 2023.
[20] Ölçer (n 18) 572.
[21] Moiseienko (n 15) 683.

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Secondly, Article 57(3)(c) provides that the haven state shall: "In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime." As the wording does not mandate a return, but mere priority consideration, indicating a moral rather than legal bond, the haven state has wide discretion in the exercise of the return obligation.[22] It is thus best conceptualised as a preferential return obligation.[23] This obligation will often capture returns in which haven states have self-initiated the asset confiscation pursuant to Article 31. Therefore, returns made under it will rarely be channelled through MLA. This highlights the conundrum of the UNCAC not providing for mechanisms for the return of assets, which risks the discretionary asset return taking place in detachment from any traditional legal structures. The regulatory lacunae could undermine both the UNCAC's fundamental principle of return, as well as its aim, set out in Article 1(c), to promote "accountability and proper management of public affairs and public property."

Lastly, the United Nations Office on Drugs and Crimes (UNODC), the custodian of the UNCAC, proposed a fourth preferential return obligation, obliging the haven state to consider returning "the confiscated assets to another State or to a prior legitimate owner or crime victim," based on Article 51, the fundamental principle of return, and the principles of equity.[24] This preferential obligation is to apply in the same manner as Article 57(3)(c) but cover the scenarios in which no request is made for the asset return by the recipient state. Thereby, it prevents the risk of the UNCAC's fundamental principle of return being undermined due to a narrow interpretation of the terminology of the reference in Article 57 to requested and requesting state. This terminology can be read as requiring that a request for the return of the assets must be made by the recipient state for the obligations contained within Article 57 to arise, to the effect that a haven state would be under no type of return obligation if no request was made.[25] This is hard to align with the reality that certain, arguably the most vulnerable,

[22] Michael J Biondi, 'Building Trust(s): Rethinking Asset Return in Kleptocracy Forfeitures' 72 Duke LJ 1080, 1091.
[23] Ölçer (n 18) 571.
[24] Michael Burke, 'Confiscated Asset Returns and UNCAC: A Net for All Fish' (UNODC 2023) 8 <https://www.unodc.org/documents/corruption/Publications/2023/UNODC_Confiscated_Asset_Returns_and_UNCAC_-_A_Net_for_All_Fish_2023.pdf> accessed 17 October 2023.
[25] Ölçer (n 18) 577; Kolawole Olaniyan, 'International Legal Rules on Proceeds Deriving from Corruption and Main Legal Challenges' in Kolawole Olaniyan, *Ownership of Proceeds of Corruption in International Law* (OUP 2023) 143.

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recipient states will struggle to make a request for return.[26] For this reason, this article will proceed to accept the existence of this fourth asset return obligation, despite it not being included in Article 57 itself. In practice, the acceptance of this fourth obligation simply means that the preferential return obligation contained within Article 57(3)(c) will extend to cover scenarios in which the recipient state has not made a request. Thus, for conciseness, any reference henceforth to Article 57(3)(c) is understood to include this fourth preferential return obligation.

b) *Preferential return obligation*

The terminology used in Article 57(3)(c), as the source of the preferential return obligation, requires further evaluation. The provision stipulates that assets can be returned to the recipient state, prior legitimate owners, or victims. "Prior legitimate owners" is defined in the Legislative Guide as those persons who can establish ownership at the time of the offence.[27] Identifying the "victims", in the sense of Article 57(3)(c), is more complex, as there is no agreed-upon definition of who the victims of corruption are.[28] This provides space for the different definitions of who may qualify as a victim under domestic laws to apply.[29]

The language of Article 57(3)(c) is similarly unclear in other respects: the meaning of "all other cases", which defines the scope of this preferential asset return obligation, is open to interpretation. The most recent UNODC report on asset return describes this wording as an "open-ended scope",[30] which is sensible as it allows the UNCAC to keep pace with the development of both new corrupt methods and advanced asset recovery tactics. Concurrently, it must be recognised that a sweeping interpretation could eventually damage the predictability of legal obligations when signing a convention. What falls quite organically under the scope of this provision are all cases in which the assets have been confiscated through domestic decisions of the haven states, either by request of the recipient state or self-initiated.[31]

[26] Dimitris Ziouvas, 'International Asset Recovery and the United Nations Convention Against Corruption' in Colin King and others (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Springer International Publishing 2018) 607.
[27] UNODC, *Travaux Préparatoires on the Negotiations for the Elaboration of the United Nations Convention against Corruption* (UNODC 2010) 516. <https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf> accessed 8 April 2024.
[28] Moiseienko (n 15) 691.
[29] ibid.
[30] Burke (n 24) 13.
[31] ibid 38, 39.

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The open phrasing of Article 57(3)(c) leaves ample room for reasonable interpretation. This flexibility allows haven states to prevent situations in which a continuously corrupt recipient state would "reap the benefits of" their "investigatory and prosecutorial efforts"[32] by returning their assets on their own terms. However, the haven states' leeway in doing so should not result in the undermining of the UNCAC's fundamental principle of return. Simultaneously, Articles 57(3)(c)'s open phrasing and its discretionary character, coupled with the fact that returns under the preferential return obligation do not take place within the confines of traditional legal mechanisms like MLA and that the UNCAC does not provide mechanisms for the returns either, give rise to an accountability gap.[33] To prevent this accountability gap, states must take the lead themselves and create regulatory frameworks that introduce mechanisms and procedures for the return, thereby enhancing accountability in the discretionary asset return process.

c) *Boundaries and Directions provided within Article 57*

As emphasised, the UNCAC does not provide for procedures for the return of assets. However, it does provide some boundaries and directions, through Article 57(4) and Article 57(5), for the return process, relating, respectively, to the deducting of reasonable expenses and the explicit permission for states to conclude return agreements. If states create a regulatory framework governing the return process, these boundaries and directions created by the UNCAC will undoubtably have to be reflected within their domestic regulatory frameworks.

Article 57(4) ensures that haven states do not inappropriately benefit by providing that they can only "deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article." The Travaux Préparatoires state specifically that reasonable expenses are costs and expenses incurred and not "finders' fees or other unspecified charges".[34] Further, the Legislative Guide provides explicitly that "the obligation to return assets is distinct from arrangements for asset sharing."[35] Asset sharing usually refers to agreements between two states to share confiscated assets, often in two equal parts, which is standard practice in scenarios where assets stem from criminal activity, for example illicit trade.[36] States must carefully separate this practice of asset

[32] Moiseienko (n 15) 680.
[33] Rose (n 7).
[34] Travaux Préparatoires (n 27) 516.
[35] Legislative Guide (n 19) para 790.
[36] Star Asset Recovery Initiative, 'Obtaining Assistance from the UK in Asset Recovery - a Guide for International Partners' (worldbank.org, 1 December 2022) 23 <https://star.worldbank.org/publications/asset-recovery-guide-united-kingdom-update-2022> accessed 9 October 2023.

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sharing from the UNCAC obligation, as the UNCAC language is one of full return. This seems imperative because the haven states are only in the possession of the assets due to their failure to keep their financial centres clean, in line with the UNCAC and other international obligations, in the first place.[37]

Article 57(5) provides direction by stating that haven states may conclude "agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property." The distinction between classic *asset sharing* agreements[38] and the established practice of releasing confiscated assets under return agreements defining the particulars of the *final disposition* of the assets must be recognised.[39] While the former is not allowed under Article 57, the latter is crucial in mitigating haven states' concerns about the assets being easily re-corrupted upon release to the recipient state.[40] Therefore, agreements under Article 57(5) are an important tool for haven states through which they can introduce mechanisms of accountability to the recipient state.

2. *United Kingdom: Framework for Transparent and Accountable Asset Return*

The UK released its Framework in 2022, in recognition of their obligations arising under the UNCAC, to "increase consistency in how the proceeds of corruption are returned as well as enshrining the requirement for transparency in the use of returned funds."[41] Prior to the introduction of the Framework, the UK had already developed "General Principles to compensate overseas victims in bribery, corruption and economic crime cases"[42] and had co-hosted the Global Forum for Asset Recovery and adopted the resulting "GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases", which established good practices on asset return for the international community by addressing "approaches and mechanisms for enhancing coordination and cooperation, and for strengthening transparency and accountability of the processes involved."[43] With the Framework, however, the UK went a

[37] Frank Meyer, 'Non-Conviction-Based Confiscations – Wundermittel Gegen Grand Corruption?' in Till Zimmermann (ed), *Korruptionsstrafrecht* (Nomos Verlagsgesellschaft mbH & Co KG 2023) 175.
[38] Ölçer (n 18) 585.
[39] Dagmar Richter and Patrick Uhrmeister, 'Returning "Politically Exposed Persons" Illicit Assets from Switzerland - International Law in the Force Field of Complexity and Conditionality' 56 GYIL 457, 468.
[40] Ölçer (n 18) 585.
[41] Framework (n 12).
[42] Serious Fraud Office, 'General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases' (2018) <https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/> accessed 10 March 2024.
[43] Global Forum on Asset Recovery, 'GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases' (2017) <https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf> accessed 20 October 2023.

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step further in its commitment to accountability by publishing the concrete steps it will take when facilitating the asset return process.

The features of the Framework illustrate the basic commitment to return assets while at the same time preserving some flexibility through its soft law character. The resort to a non-legally binding instrument, instead of enhancing the UK's sophisticated asset confiscation regime legislatively, was deliberate.[44] The Government rejected the opportunity to include provisions regarding asset return in relevant laws.[45] Ben Wallace MP, at the time Minister for Security and Economic Crime, argued that "strict requirements in an Act could restrict our flexibility and make it harder to obtain effective asset-return agreements tailored to the peculiarities of individual cases."[46] Whilst it is a valid concern to maintain the necessary flexibility to best accommodate each individual asset return, the balance between that concern and the aim to introduce accountability in the return process through commitment to certain rules, thereby advancing transparency and consistency, is a fine line to walk. Using soft law to pave the way into new territory, however, has the benefit of allowing for many detailed principles and procedures to be provided, while avoiding strict obligations that could not be so easily eluded if in a specific case a discretionary asset return seems inappropriate – be it for suspicion that the assets could fall into the wrong hands or for another reason.

a) *Framework's Scope*

From the outset, the Framework has been designed with a wide scope: it relates to mandatory and discretionary asset returns under the UNCAC, stretching from acting on formal MLA requests to situations where "another country has not requested the funds, but there might nevertheless be reasons to return the funds"[47] in line with Article 57(3)(c),[48] which demonstrates the wider conceptualisation of the preferential return obligation in line with the previously identified fourth asset return obligation.

The discretionary phrasing utilised in the Framework mirrors Article 57(3)(c). If the Framework were to utilise mandatory language, the UK would bind itself to an uncertain obligation, as it is not clear what falls under "all other cases" as referenced in Article 57(3)(c) and would lose its leeway – which could result in the UK being obliged to return funds directly to a corrupt recipient state. Furthermore, providing for a guaranteed return, that is discretionary

[44] eg the Proceeds of Crime Act 2002 and the Bribery Act 2010.
[45] Criminal Finances Bill HC Committee Deb 22 November 2016, cols 189-194.
[46] ibid 193.
[47] Framework (n 12) para 3.
[48] ibid para 7.

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under the UNCAC, would hamper the UK's position during negotiations for the return agreements. This would be problematic as the negotiations, and the concluding return agreements, are crucial to give effect to the procedures and mechanisms specified in the Framework. The discretionary phrasing, that secures the UK's leeway in the discretionary return process, thus does not undermine the Framework's accountability aim.

b) *Framework's Content*

In a detailed fashion (forty-six provisions, presented under different headings), the Framework "sets out the process for return, the deduction of reasonable expenses, the stakeholders to be engaged throughout the return process and the mechanisms for return."[49] The Framework aligns with Article 57(3)(c) UNCAC when referring to the possible beneficiaries of an asset return: recipient state, prior legitimate owners and victims.[50] It specifies that "in many cases the appropriate mechanism for return of funds will be to another country's central government, who may be best placed to enhance the position of victims and/or identify and provide restitution to prior legitimate owners."[51] This is sensible in the context of the Framework's approach, as it relies on concluding agreements with the recipient state over the return of the assets, a path laid out in Article 57(5), to implement accountability mechanisms for the disposition of the assets.

The Framework explicitly states that "funds cannot be returned to another government without a case-specific agreement."[52] As to the form of the return agreement, the Framework suggests the conclusion of a Memorandum of Understanding (MoU), while acknowledging that those do not create legal obligations.[53] It does also provide the possibility to accommodate a recipient state request for the return agreement to take the form of a treaty[54] – which would then bring the discretionary return into a more traditional legal structure.

Return agreements generally will have to "detail the steps that the recipient government will take to ensure the funds are put to their intended use"[55] and if possible "should detail the reporting mechanisms to ensure accountability and transparency."[56] If reaching an agreement proves difficult, the Framework suggests consulting civil society organisations (CSOs) and the

[49] ibid introduction.
[50] ibid para 21.
[51] ibid.
[52] ibid para 26.
[53] ibid.
[54] ibid.
[55] ibid.
[56] ibid para 30.

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UK embassy-in-country.[57] Once concluded, these "agreements which oversee the return of funds abroad must be published" to further enhance transparency.[58] All these elements can be used to channel the asset return into a certain direction while endorsing the different interests in the return process. Whilst in the spirit of the UNCAC, it was the initiative of the UK itself to create such parameters for the return agreements and to reference the inclusion of CSOs in the return process.

The Framework details the decision-making process regarding the mechanism of return, even highlighting the role each department will play.[59] It emphasises that funds can be returned via different mechanisms, including asset return funds and through CSOs. As key considerations it names ensuring transparency and "the preclusion of the funds benefitting any alleged perpetrators."[60] It states that effective monitoring, involving CSOs holding the recipient state to account, will be required to deliver on ensuring transparency, with the exact mechanisms to be decided on a case-by-case basis.[61] The setting of standards to guide case-by-case decision making is what best conceptualises the method advanced through the Framework overall.

Referencing Article 57(4) UNCAC, the Framework states that fair and reasonable costs attributed to the investigation can be recovered from the confiscated assets.[62] However, it provides that, if there is an intention to do so, this should be flagged to the recipient state.[63] The Framework further specifies that, under certain circumstances, it may not be "desirable or appropriate" to deduct reasonable expenses, for example, if the recipient state is a developing state.[64] This demonstrates acknowledgement of the potential power imbalances in the asset return process.

3. *Switzerland: Foreign Illicit Assets Act*

The Swiss Foreign Illicit Assets Act (FIAA) is the result of a dynamic and constantly evolving legislative effort to tackle problems connected to the confiscation and recovery of corrupt assets in Switzerland, starting in the late 1980s.[65] As per Article 1 FIAA, the law aims to govern "the

[57] ibid para 32.
[58] ibid para 45.
[59] ibid para 23-24.
[60] ibid para 22.
[61] ibid para 38-44.
[62] ibid para 13.
[63] ibid para 14.
[64] ibid para 20(d).
[65] François Membrez and Matthieu Hösli, 'How to Return Stolen Assets: The Swiss Policy Pathway' (Centre for Civil and Political Rights Anti-Corruption and Human Rights Initiative, 2020) 9,10 <https://ccprcentre.org/files/media/SwissReport_Asset_Recovery_25_Feb_20201.pdf> accessed 10 March 2024.

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freezing, confiscation and restitution of assets held by foreign politically exposed persons or their close associates, where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or by other felonies." By doing so, it is meant to protect the reputation of Switzerland's financial institutions, as well as preventing the impunity of perpetrators of corruption.[66] Whilst the text of the FIAA does not specifically refer to aiming to introduce accountability to discretionary asset returns, the Federal Council Dispatch accompanying the legislation makes this commitment clear when describing the legislation's goals.[67] The specific term "accountability" itself is not used, likely due to the fact that it does not have an exact translation in the Swiss national languages,[68] but concepts integral to accountability, like transparency and responsibility, are cited.

The FIAA also does not explicitly reference the UNCAC, but the Dispatch makes clear the FIAA was drafted with the responsibilities arising under the UNCAC in mind.[69] The lack of a reference to the UNCAC may well be due to Switzerland's cautious position of bypassing the sovereign domestic law maker, resorting to an autonomous approach.[70] Clearly aligning the FIAA to the UNCAC would be preferable to help stakeholders involved in the return to identify the relevant Swiss regulatory framework.

a) *FIAA's Scope*

FIAA's scope of application can only be understood in the background of Switzerland's other asset recovery routes, which include MLA and domestic criminal procedures. The FIAA aims to channel discretionary asset returns on the MLA track by proactively helping the recipient state to log a formal request.[71] If successfully executed, the assets would be returned in full to the recipient state.[72] This illustrates the Swiss preference for a tried and tested mechanism. Utilising MLA, however, also means Section 5 FIAA is circumvented, including the restrictions provided on how returned assets can be put to use in Article 17 FIAA.

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[66] Botschaft zum Bundesgesetz über die Sperrung und die Rückerstattung unrechtmässig erworbener Vermögenswerte ausländischer politisch exponierter Personen vom 21.5.2014, BBI 2014, 5266 <https://www.fedlex.admin.ch/filestore/fedlex.data.admin.ch/eli/fga/2014/1134/de/pdf-a/fedlex-data-admin-ch-eli-fga-2014-1134-de-pdf-a.pdf> accessed 30 December 2023.

[67] ibid 5267.

[68] Many European languages do not have a word that translates to "accountability", see Melvin Dubnick, 'Clarifying Accountability: An ethical Theory Framework' in Charles Sampford, Noel Preston and C-A Bois (ed.), *Public Sector Ethics*: *Finding and Implementing Value*s (Routeledge Press 1998) 69-70.

[69] Botschaft BBI (n 66) 5333.

[70] Bernhard Rütsche, 'Neuordnung des schweizerischen Humanforschungsrechts: Normgenese als kritische Rezeption internationaler Vorgaben' Zeitschrift für Schweizer Recht (2010), 391, 392.

[71] FIAA (n 13) s 3.

[72] Art. 74a Federal Act on International Mutual Assistance in Criminal Matters (IMAC, SR 351.1).

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If such a transmission to the MLA channels fails, Swiss authorities could launch domestic criminal proceedings aiming for a confiscation; yet, there will be potential difficulties in accessing the necessary evidence, and if the recipient state initially fails to log a successful request for MLA, it will likely also be unable to cooperate with Switzerland to the extent needed for a criminal conviction.[73] However, if Switzerland succeeds in confiscating corrupt funds in a domestic criminal proceeding, then – subject to the assertion of the victims' claims – Switzerland could keep the totality of the assets.[74] Alternatively, Switzerland could also choose to pursue a sharing agreement with a foreign state, with the usual objective of keeping at least half the assets, with a departure from this key in favour of the recipient state on reasoned ground.[75] In either case, the discrepancy between this mode of return and a process under Section 5 FIAA, where under Article 19 the deduction of reasonable expenses is restricted, is hard to justify.[76] This divide has attracted political attention, with a proposal to bridge the divide by extending the application of Section 5 FIAA to corrupt assets that were not confiscated under the FIAA having been submitted to the Federal Council.[77]

The regulations set out in Section 5 FIAA only apply if MLA and domestic criminal confiscation fail. Importantly, Section 5 FIAA only applies if the assets were confiscated under the FIAA itself, with Article 14 and Article 15 FIAA allowing for an administrative confiscation of assets presumed "to be of illicit origin". Only after such a confiscation do the regulations contained in Section 5 FIAA regarding the "restitution of assets" take effect or if, during the duration of such a freeze, an "amicable settlement is reached" as per Article 10 FIAA. Thus, the scope for the regulations in Section 5 FIAA to govern the return process is currently very narrow, putting its practical impact in perspective.

b) *FIAA's Content*

Whilst in accordance with the UNCAC, the FIAAs content mostly represents Switzerland's own initiatives and ideas of best practice in asset returns. Section 5 FIAA governs the return of assets confiscated. Article 17 FIAA provides that returns[78] are "made in pursuit of the following

[73] Richter and Uhrmeister (n 39) 483.
[74] Art. 70 of the Swiss Criminal Code (SR 311.0).
[75] Art. 11 and Art. 12 Bundesgesetz über die Teilung eingezogener Vermögenswerte (SR 312.4). This contrasts with the UNCAC not foreseeing asset share agreements to be made to return assets falling under its scope. Investigating this further, however, would distract from the main topic of this article.
[76] Membrez and Hösli (n 65) 23.
[77] Postulat Aussenpolitische Kommission Ständerat 19.3414 'Neue Bestimmungen zur Betreuung der Rückerstattung unrechtmässig erworbener Vermögenswerte', 4. April 2019 <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20193414>, accessed on 3 March 2024.
[78] The FIAA refers to restitution, which, for the sake of this article, means the same thing as return.

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objectives: (a) to improve the living conditions of the inhabitants of the country of origin; or (b) to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity." To achieve these self-imposed goals, Article 18(2) and (3) FIAA provides that the Federal Council may conclude agreements governing the return of assets and that such agreements "may cover, in particular: (a) the type of programmes of public interest to be funded by the returned assets; (b) the way in which the returned assets are to be used; (c) the parties to be included in the restitution process; (d) control and monitoring in the use made of the returned assets." The reference to this type of return agreements aligns with Article 57(5) UNCAC. In the absence of a return agreement, Article 18(4) FIAA stipulates that it falls to the Federal Council to determine how the assets are returned, explicitly suggesting a return of the assets "via international or national organisations." Article 18(5) FIAA provides that "to the extent possible" CSOs [79] should be "included in the return process", without giving further specifications.

Article 19(1) FIAA, in line with the boundary set by Article 57(4), addresses the deduction of reasonable expenses. Concretely, Article 19(1) FIAA provides that the amount to be deducted "to cover costs incurred in proceedings for the freezing, confiscation and restitution of assets, and in implementation of support measures" must not exceed "2.5% of the value of the confiscated assets", with Article 19(2) FIAA specifying that the exact amount is to be determined on a case-by-case basis. Overall, the content of the FIAA seems not primarily designed to provide detailed procedures, but more to guide and set boundaries on the Federal Council's discretion in making case-by-case decisions.

C. Accountability Analysis

The term *accountability* has become a buzzword, a "chameleon-like" term,[80] during the last two decades and is now used as a concept in many different contexts, from constitutional law to corporate governance.[81] Nevertheless, or maybe because of its popular use, there is no consensus on what the word really stands for.[82] Looking specifically at accountability in an international legal setting, however, it is possible to identify an academic consensus on the substance of accountability. Röben convincingly observes that, at its core, accountability means

[79] The FIAA refers to NGOs, which are a subset of CSOs, the distinction for which, however, is irrelevant for this article and thus the term CSOs is used throughout.
[80] Richard Mulgan, '"Accountability": An Ever-Expanding Concept?' (2000) 78 Public Adm 555.
[81] Mark Bovens and others, 'Accountability as a Cultural Keyword' in Mark Boven and others (eds), *The Oxford Handbook of Public Accountability* (OUP 2014) 24.
[82] ibid 26.

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setting parameters in situations in which actors can exercise their competence to make certain choices that will effect another.[83] This aligns with Brunée's definition that "accountability involves the justification of an actor's performance vis-à-vis others, the assessment or judgement of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to applicable standards."[84]

In recent years, such accountability elements emerged where international actors operated in a world "in which the exercise of power has transcended the boundaries of nation-state."[85] This has been recognised to be especially important in scenarios where a globally shared public objective exists, like the fight against corruption.[86] Introducing measures of accountability in this fight seems essential, as corruption is enabled specifically through a lack of accountability mechanisms.[87]

Article 1(c) UNCAC enshrines promoting accountability as one of the UNCAC's purposes. In mandatory asset return processes, as per Article 57(3)(a) and (b), accountability is introduced in the process through the reliance on more traditional legal mechanisms, for example through MLA, which defines obligations and entitlements of the state parties and certain individual rights and remedies.[88] However, the mandatory provisions are narrow in scope. In many cases, where asset returns will be of discretionary nature, under Article 57(3)(c) neither traditional legal mechanisms nor the UNCAC itself provide procedures and mechanisms that support accountability, to the effect of Article 57 will leave an 'accountability gap.'[89]

Both the UK and Switzerland have aimed to fill the accountability gap left open by the UNCAC through their regulatory frameworks and have explicitly committed themselves to a certain degree of accountability in this area.[90] Yet, crucially, both have aimed to protect their leeway, meaning the discretion granted to them by the UNCAC through Article 57(3)(c)'s phrasing, by retaining a case-by-case approach. This allows the UK and Switzerland to be able to manage the risk of re-corruption of assets – as putting themselves in a situation that leads to handing over assets to an untrustworthy regime would undermine their UNCAC obligations,

[83] Volker Röben, 'Accountability', *Max Planck Encyclopedias of International Law* (2020) para 2.
[84] Jutta Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility' (2005) 36 Netherlands Yearbook of International Law 3, 4.
[85] Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24 OJLS, 495.
[86] Röben (n 83) para 12.
[87] Isabel Brusca and others, 'Accountability and Transparency to Fight against Corruption: An International Comparative Analysis' (2018) 20 JCPA 486, 488.
[88] eg Mutual Legal Assistance (n 5).
[89] Rose (n 7), see also B.(1)(b).
[90] for the UK see B.(2), for Switzerland see B.(3).

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which centre on prevention of corruption, as well. The reality of corruption continuing to plague certain states to which assets could be returned stands in direct competition with the UK's and Switzerland's concurrent more idealistic desire for accountability in asset recovery regimes.

The following analysis will explore the content of the regulatory frameworks through the lens of the function they serve, introducing accountability to the discretionary asset return process. The accountability analysis leans on Brunée's definition,[91] by analysing whether the two regulatory frameworks bring clarity in terms of the relevant parties in between of which an accountability relationship arises, namely if they introduce standards to the discretionary asset return process and if – in case these are not respected – consequences arise or can be imposed. The goal of the comparison is not to identify a "winner", which many comparatists rightly argue one should not strive for,[92] but it is the vehicle through which the article's argument can be developed. The aim is to carve out how the UK and Switzerland aim to fill the accountability gap left by the UNCAC through distinct regulatory schemes, while concurrently ensuring their continuing control of the return process, and thus arriving at a similar result taking different paths.

1. *Relevant Parties*

Accountability is a relational concept; as Röben rightly observes it "necessarily implies someone else, the accountability to whom."[93] Accountability mechanisms are specifically designed to restrain the freedom of the obligated party from purely pursuing their own interest, but to respect their duties owed towards others. The haven state owes duties towards the parties listed in Article 57(3)(c), but as both regulatory frameworks specify the inclusion of CSOs in the process, this relationship will also be analysed. Ultimately, the analysis will show that both regulatory frameworks share a very similar understanding of the relevant parties throughout the discretionary asset return and with that the relationships that call for accountability.

a) *Recipient State*

The UK and Switzerland choose the recipient state as their default negotiating partner for a return agreement.[94] This undoubtably is informed by states being more used to operating in a state-to-state structure, as well as the lack of other viable options: prior legitimate owners and

[91] Brunnée (n 84) 4.
[92] Siems (n 8) 27; Pierre Legrand, 'Jameses at Play: A Tractation on the Comparison of Laws' (2017) 65 American Journal of Comparative Law 1.
[93] Röben (n 83) para 5.
[94] Framework (n 12) para 21, FIAA (n 13) s 18(4).

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victims can be hard to identify for the haven states, and CSOs are not mentioned in Article 57(3)(c) as a potential recipient of the assets. The obvious risk being that the recipient state re-corrupts, or fails to prevent the re-corruption of, the returned assets.[95] However, the return agreements foreseen in both the Framework and the FIAA aim specifically to minimise this risk by formulating the process of return.[96] Simultaneously, they show recognition of their own failure to prevent the hiding of corrupt assets in their jurisdiction as a haven state.

The Framework and the FIAA aim to encourage negotiations with the recipient state on an equal footing. When entering into a return agreement, the UK and Switzerland commit to performing certain functions that will be subject to accountability mechanisms, restricting their own freedom, in favour of returning the assets. Concurrently, the regulatory frameworks foresee that return agreements also implement measures to restrict the recipient state's freedom to handle the asset.[97] Therefore, a grid of accountability is created, as the haven state and the recipient state must both perform certain duties, whilst holding the other to account in doing so. Yet, the relationship between the two states is inevitably impacted by a power-imbalance, as only the haven state has the power to dispose of the assets. This dynamic is likely to affect negotiations concerning the return agreement.[98] Yet ultimately, by creating the regulatory frameworks for discretionary asset return, the UK and Switzerland have sought to level the playing field by restricting their own discretion.

These efforts are demonstrated clearly in the Framework, which aims to inform and include the recipient state as much as possible throughout the return, for example by specifying that timelines concerning the return should be shared with the recipient state and that, to manage expectations, "an intention to recover reasonable expenses"[99] should be flagged early on to the recipient state.

The FIAA does not showcase quite the same commitment, likely due to its scope: its initial freezing provision, which activates the latter application of Section 5 regarding the asset return, requires that a government has lost power or in which a "change in power appears inexorable."[100] In such a scenario binding obligations to engage with the government in a very prescribed manner might be difficult to fulfil, and therefore would result in a risk of stalling

[95] Moiseienko (n 15) 669.
[96] Framework (n 12) para 30; FIAA (n 13) art 18.
[97] ibid.
[98] for insights into difficulties during negotiations between economically unequal states see eg, Hartmut Lenz, 'Negotiating among Equals? The Effects of the World Economic Crisis on Negotiations between Developed and Developing States' (2012) 40 Politics & Policy 827.
[99] Framework (n 12) para 25, 14.
[100] FIAA (n 13) art 3(2)(a).

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the asset return process. Overall, both regulatory frameworks show that Switzerland and the UK conceive the recipient state as the most important party to be engaged in the return process, which fits the traditional understanding of state cooperation for asset return but holds the risk of playing into the hands of profiteering governments.

b) *Prior Legitimate Owners*

The status of prior legitimate owners is rarely mentioned in the domestic regulations. The Framework only mentions prior legitimate owners briefly to explain that recipient states are in a better place to "provide restitution"[101] to them, which indicates that they conceive the recipient states as responsible for the prior legitimate owner's claims. This is in line with the Framework mentioning the individual prior legitimate owner's right to bring a civil claim to recover funds.[102]

The FIAA does not refer to prior legitimate owners, but to individuals affected by measures taken under the FIAA and specifies their right of appeal "in accordance with the general provisions on the administration of federal justice" in Article 21 FIAA, which gives them a chance to make their case for legitimate ownership of the assets. Both regulatory frameworks therefore, whilst careful to not undermine the rights of prior legitimate owners, by referencing their broader legal structures in protecting individuals' rights, do not foresee initiating a return to the prior legitimate owner in the absence of a request.

c) *Victims*

The Framework, similarly, to how it deals with prior legitimate owners, emphasises that the recipient state is "best placed to enhance the position of victims."[103] It does not explicitly mention other avenues for victims to claim compensation. Only its introduction refers to the General Principles that aim to ensure that "overseas victims of bribery, corruption and economic crime are able to benefit from asset recovery proceedings."[104] Similarly, the FIAA does not mention victims explicitly. However, it arguably conceptualises them as a party whose interests should be furthered – if one accepts the widely held notion that the public, as a whole, of a corrupt state can be considered the victims,[105] due to their suffering under untrustworthy

[101] Framework (n 12) para 21.
[102] ibid para 34.
[103] Framework (n 12) para 21.
[104] General Principles (n 42).
[105] Moiseienko (n 15) 691.

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institutions and loss of socio-economic opportunities, as it obliges the return to be for the benefit of the public.[106]

Yet, in practice the FIAA also foresees the return taking place through the recipient state, which is sensible as it would be practically unviable to distribute the returned assets in the population directly. Thus, both regulatory frameworks display a similar perception that the recipient state is best placed to redistribute the returned assets in its population, with the FIAA, however, demonstrating a stronger commitment to victims by explicitly restricting the returns to be for the benefit of the public.

d) *Civil Society Organisations*

Both regulatory frameworks foresee the involvement of CSOs in the return process as a trusted third party, hoping to use their expertise in guiding return agreement negotiations as well as the final disposition. The Framework gives CSOs a central role in the return process, stating they should be engaged "promptly" after "it is agreed in principle" that a return should be made, and having them advise the return process, as well as potentially monitoring the projects funded with the returned assets.[107] It explicitly states that CSOs can help hold the "government to account" to dispose of the funds as agreed to.[108]

The FIAA likewise stipulates that CSOs should be included in the return process "to the extent possible".[109] Whilst less explicit than the Framework, the FIAA's also conceptualises CSOs as important facilitators in successful returns,[110] for instance when it states that if no agreement is reached with the recipient state, assets should be returned via international and national organisations.[111] Involving CSOs is a sensible strategy both regulatory frameworks employ, as it brings in actors who are well placed to observe recipient states' actions closely. However, an overreliance on CSOs in the asset return process could actually hinder the return process, as the CSOs have no obligation to be involved, and their decision to step in will depend on their own capacities and goals.

[106] FIAA (n 13) art 18(1).
[107] Framework (n 12) para 39-43.
[108] ibid. 44.
[109] FIAA (n 13) art 18(5)
[110] ibid.
[111] ibid. art 18(4).

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2. *Standards: Proper Procedures and Mechanisms, Transparency, Consistency*

Accountability is not only sustained by relationships, but also by standards in the form of objective criteria constraining the exercise of discretion by the obligation bearers.[112] To promote accountability, the standard-setting process must address "proper procedures and mechanisms", as an "absence of those mechanisms means an absence of accountability."[113] As seen, the Framework and the FIAA each introduce such procedures and mechanisms through their provisions.

Furthermore, for the standards to promote accountability, they must aim to introduce transparency, which is a "necessary component of any functioning accountability scheme."[114] Next to transparency, standards that help produce consistency in the obligation bearers' actions are central to accountability schemes – as consistency strengthens the legitimacy of the asset return process.[115] Here, the procedures and mechanisms in both regulatory frameworks initially seem to fall short as they focus on case-by-case decisions, which places an inherent restriction on the extent to which consistency can be achieved.

Yet, it must be recognised that providing guidance for case-by-case decision-making enhances consistency more than if each case is decided upon without a common framework. The case-by-case approach taken by both states illustrates their focus on protecting their leeway in the discretionary asset return process. This shows their 'one foot in, one foot out' approach, which poses risk to the accountability grid but, at the same time, might be the crucial element of flexibility for its functioning. This would explain why the UK deliberately creates a non-binding, albeit detailed, framework, and Switzerland introduces a formal law, but with a very narrow scope and frequent use of discretionary terms. At the nascent stage, the crucial point is that the standard-setting enables the above listed requirements of promoting proper procedures and mechanisms, transparency and consistency.

As has already been emphasised above, one could argue that the effect of the standards referred to in the preceding paragraphs is further limited by the fact that the regulatory frameworks are only addressed to the respective haven state, as Switzerland and the UK cannot bind recipient states through their own domestic frameworks. Ultimately, however, standards

[112] Brunnée (n 84) 4.
[113] Röben (n 83) para 6.
[114] Anne Peters, 'Towards Transparency as a Global Norm' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 566, 567.
[115] Biondi (n 22) 1106.

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for the recipient state will be contained within the return agreements that are going to be made under the standards set out in the Framework or the FIAA respectively.[116]

a) *Concluding Return Agreements*

Standards around the conclusion of return agreements, as provided for by Article 57(5), are present in both States' domestic regulations. The Framework generally requires assets to be returned to the recipient state only under a return agreement, which ensures transparency as well as consistency; if such an agreement cannot be concluded, it foresees that CSOs should be consulted, and a return of the funds through other programs should be considered.[117] The Framework foresees the default return agreements to be in the form of MoUs, which signifies political, not legal, commitments.[118] This allows for a relatively quick return process, which can be important for recipient states if they are, for example, in the process of rebuilding their state structures after suffering under a corrupt government. However, MoUs only guarantee a lower accountability level than if a treaty were concluded between the states, as the latter would create binding legal obligations.[119]

The FIAA only stipulates that return agreements "may" be concluded.[120] This is considerably more vague than the Framework's standard and does not ensure consistency. However, since Switzerland only handles cases under the FIAA where a government that has lost power or in which a "change in power appears inexorable,"[121] there is a heightened chance that the recipient state will not be capable of entering return agreement negotiations productively. Similarly to the Framework, the FIAA also foresees involving international and national organisations in the return process if no agreement with the recipient state can be reached.[122] The FIAA does not provide details on the nature of such return agreements. It is, however, very likely that Switzerland will also pursue an MoU as a default.[123] Determining what type of return agreement should be pursued in the FIAA as part of the statutory

[116] Framework (n 12) para 30; FIAA (n 13) art 18.
[117] Framework (n 12) para 32.
[118] ibid para 26.
[119] Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013) 28.
[120] FIAA (n 13) art 18(2).
[121] ibid art 3(2)(a).
[122] ibid art 18(4).
[123] Past asset return agreements that have been published have taken the form of an MoU, like the MoU between the Government of the Federal Republic of Nigeria, the Swiss Federal Council and the International Development Association (2017) <https://www.newsd.admin.ch/newsd/message/attachments/50734.pdf> accessed 10 March 2024, and the MoU between the Swiss Federal Council and the Government of the Republic of Uzbekistan (2020) <https://www.newsd.admin.ch/newsd/message/attachments/65473.pdf> accessed 10 March 2024.

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requirements would enhance both transparency and consistency in Switzerland's return process.

Both regulatory frameworks similarly set out what they expect the return agreements to regulate for the intended use of the assets and specifications in the reporting mechanism.[124] The Framework provides that all return agreements will be published.[125] The publication of the return agreements advances transparency, as it enables stakeholders in the process, like CSOs, or the intended beneficiaries of the return, like the public, to hold the haven state and the recipient state to account to comply with the agreement. The FIAA does not contain any regulation regarding the publishing of return agreements. This was a deliberate decision on the part of the Swiss authorities,[126] which is not only regrettable due to the transparency achieved through publication, but also curious as Switzerland has published return agreements in practice.[127] Not committing to this in the FIAA, signifies that Switzerland did not want to be obliged to publish all return agreements, which goes against creating transparency and consistency – and thus impairs accountability.

Overall, the Framework's standards regarding the conclusion of return agreements show commitment to transparency and consistency, introducing a harder standard, but remaining a soft law – whilst the FIAA is "hard law", yet setting soft standards. Notably, both regulatory frameworks are silent on setting standards regarding the process of negotiating return agreements between the haven and the recipient state. This is regrettable in terms of achieving accountability, as return agreements are central to both regulatory frameworks. It would further transparency if the recipient state, as well as other stakeholders, like CSOs, would understand the process of the negotiation beforehand. It would also further consistency as return agreements would be less dependent on the specific negotiating team.

b) *Deducting Expenses*

Both regulatory frameworks provide for standards regarding the deduction of reasonable expenses, which is not surprising considering the UNCAC explicitly mentions this right of the haven state, while setting a reasonable boundary to it, in Article 57(4). The Framework recites the UNCAC, concluding that, as a default position, reasonable expenses are recovered and that the recipient state ought to be made aware of this.[128] It, furthermore, discloses the information

[124] Framework (n 12) para 30, FIAA art 18(3).
[125] Framework (n 12) para 45.
[126] Botschaft BBI (n 66) 5317.
[127] see eg past asset return agreements (n 128).
[128] Framework (n 12) para 12-14.

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taken into account when deciding reasonable expenses, including the circumstances in which this right should not be exercised.[129] These guiding principles promote transparency by giving insight into the process of decision-making and ensure consistency in the deduction of reasonable expenses during the return process.

In contrast, the FIAA provides that the deduction of reasonable expenses should be decided on a case-by-case basis but should not exceed 2.5% of the value of the returned assets.[130] Through a hard limit, consistency and transparency is protected, as the recipient state is aware of the maximum amount of reasonable expenses that could be deducted from the outset. However proper procedures in arriving at the exact sum could be strengthened by specifying the factors taken into account when making case-by-case decisions.

c) *Involvement of CSOs*

The involvement of third parties is not stipulated by the UNCAC. Yet, both the Framework and FIAA set standards for the involvement of CSOs in the asset return process. The Framework highlights the important role CSOs play in ensuring transparency throughout the return process or as a resource for information on the recipient state.[131] The FIAA also states that CSOs should be included in the return process but does not provide further insights as to why and how.[132] The lack of details on procedures and mechanisms of involving CSOs in both regulatory frameworks could be seen as hesitance, but their initiative to include CSOs in the first place illustrates their wish for options to "harden" accountability, by introducing a third party that can watch over the process. Nevertheless, for the sake of guarding proper procedures during the return, more specification on the inclusion of the CSOs in the return process would be beneficial in both regulatory frameworks.

d) *Purpose of the Return*

Interestingly, the FIAA prominently sets out the purpose of asset returns: it either must improve the living conditions of the public or strengthen the rule of law in the recipient state.[133] This statutory requirement sets a standard that rigorously restricts Switzerland's discretion, by making them choose between two options, while leaving room to tailor the exact mechanism given the flexibility in interpreting what actually improves the living conditions or strengthens the rule of law in a specific case. At first glance it might seem inappropriate for a haven state

[129] Ibid para 18-20.
[130] FIAA (n 13) art 19(1).
[131] Framework (n 12) para 38-41.
[132] FIAA (n 13) art 18(5).
[133] ibid art 17.

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to determine the purpose of the to be returned assets. Yet in the absence of prescribing such a purpose, as Moiseinko points out, "one need not be a cynic to recognize the possibility that the recovered funds will be misspent again and the fruits of resource-intensive and time-consuming asset recovery efforts will not reach their intended beneficiaries."[134] Having set guidelines for purposes that can be pursued with the returned assets enhances transparency and consistency.

In contrast to the FIAA, the Framework does not restrict the asset return to have to go towards certain purposes. It does, however, set out to explain how the decisions are made regarding the return agreements, in which the final disposition of the assets is specified.[135] Whilst this is a first step towards consistency and transparency, unfortunately, the information contained in the relevant sections is often rather technical, and reveals little of the policy behind asset returns.

3. *Consequences*

To give standards force, and thereby entrench accountability, there must be consequences for the obligated party if they fail to meet them.[136] 'Consequences' is a term as broad as accountability itself – one could understand it as legal consequences, or as other forms of sanctions that the parties to whom certain duties are owed can initiate.[137] Or they could be understood as something that can be self-imposed, as a response by the obligated party to draw consequences themselves and repair a situation,[138] which could help prevent the risk of external consequences acting as a deterrent against recognising the applicability of the regulatory frameworks through incidentally "creating incentives to deny responsibility."[139] The UNCAC itself does not set out consequences for the failure to meet any of the return obligations specified within it and its own implementation review mechanism is based solely on a peer-review system.[140] Therefore it more closely reflects a conceptualisation of 'consequences' focused not on a traditional sanctioning scheme but on obligated parties being responsible for drawing consequences themselves. Concurrently this means the UNCAC does not offer a

[134] Moiseienko (n 15) 680.
[135] Framework (n 12) para 23, 24.
[136] Brunnée (n 84) 6.
[137] Röben (n 83) para 6.
[138] Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press 1994) 21.
[139] Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 Eur Law J 542, 545.
[140] UNODC, *Mechanisms for the Review of Implementation of the United Nations Convention against Corruption _ Basic Document'* (UNODC, 2011) <https://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf> accessed 5 April 2024.

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foundation for a sanction system, with externally imposed consequences, for the regulatory frameworks to build on. For this accountability analysis, it seems sensible to not confine consequences to any particular meaning but to evaluate if reference to any consequences for an obligated parties' failure to meet the set-out standards can be found in the regulatory frameworks.

a) *Judicial Review*

The Framework does not explicitly provide if consequences can arise or be imposed upon non-compliance with the set-out standards. Yet, whilst the focus of this article is on the content of the regulatory frameworks themselves, it would be short-sighted not to briefly highlight the wider legal and political context through which consequences might arise. Despite its soft law character, judicial review might be a possible path through which consequences could be imposed: Sorabji and Vaughan have convincingly showcased that the case law in the UK indicates that "soft laws are open to judicial review" and that that it has "binding-like effects on those who made them, and may give rise to legitimate expectations in favour of those whom they are addressed."[141] However, given that the return would in practice concern a question of foreign affairs, the courts are likely to practice a high degree of self-restraint, or might even conceptualise the matter as non-justiciable.[142] Thus, the accountability grid created through the Framework remains quite firmly within the political sphere.

The FIAA, in contrast, explicitly provides in Article 21 FIAA that all decisions made under it are subject to appeal "in accordance with the general provision on the administration of federal justice." On paper this appears a more robust avenue for imposing consequences on the obligation bearers due to its legal character. Yet, because of the discretionary phrasing utilised in Section 5 FIAA, it is likely that the courts would also practice a high degree of self-restraint in reviewing the decisions made under the FIAA, especially considering the political nature as the legally required balancing of interests takes place at the highest political level and Swiss courts traditionally refrain from reviewing such decision-making.[143] This showcases that despite Switzerland's efforts to legalise their commitment to accountability in asset returns, the

[141] John Sorabji and Steven Vaughan, '"This Is Not A Rule": COVID-19 in England & Wales and Criminal Justice Governance via Guidance' (2021) 12 Eur Journal of Risk Regulation 143, 148.
[142] Judicial review being initiated by another state seems to be uncharted territory; but for general insights into the treatment of foreign affairs in English Courts see e.g.: Lord Sumption, 'Foreign Affairs in the English Courts since 9/11' (Lecture at the Department of Government, London School of Economics, 14 May 2012) <https://www.supremecourt.uk/docs/speech_120514.pdf> accessed 8 April 2024.
[143] Bundesgericht (Swiss Federal Supreme Court), Urteil vom 11.3.2020, BGer 2C_572/2019.

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specific manner of return of the assets includes aspects that are more appropriately dealt with in the political sphere than within courts due to their diplomatic implications, for example.

b) *Return Agreements*

Neither regulatory framework includes consequences for failure to comply with the return agreements as recommended content. This aligns with the state's preference for returning assets under MoUs, a breach of which normally does not attract legal sanctions. For the sake of creating a robust accountability grid, it would be preferable if assets were returned under treaties, as then the international legal rules on treaties would apply and the regulatory frameworks would not have to create a new formal sanction scheme from scratch. However, even under MoUs, if either the UK or Switzerland as a haven state or the recipient state would fail to hold up their end of the return agreement, political consequences undoubtably would arise, even if not specified in advance.[144] These must not be underestimated as consequences: to not harm their reputation on the world stage and prevent diplomatic disasters both the UK and Switzerland have a strong incentive to comply with the agreed-on return agreements.

c) *Self-responsive Approach*

As can be inferred from the findings above specifying consequences for a failure to meet established standards within the regulatory frameworks was not a priority for either state. On one hand, this might seem to counteract the laborious exercise of construing an accountability grid and could be taken to showcase the states paying mere lip service to accountability. On the other, only acknowledging the accountability grid created by the UK and Switzerland if it were to be coupled with a legal sanction regime risk overlooking the headway the states' have made in filling the UNCAC's accountability. The lack of specified consequences, whether imposed externally or by the obligation bearer itself, for a failure to meet the set-out standards does not mean such a breach will not attract consequences. The very creation of the regulatory frameworks shows a self-responsive approach to repair a situation where corrupt assets are in their position and a readiness to go above and beyond international obligations, as the regulatory framework specifically oblige the UK and Switzerland to return assets when such a return would be discretionary under the UNCAC.

[144] Aust (n 119) 50.

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Further, through the self-imposed standards in the regulatory frameworks both states have opened the door for others, like CSOs,145 to hold them account to the set-out standards. Nevertheless, relying mostly on an unspecified self-responsive approach, meaning that neither regulatory framework specifies external parties who can impose consequences if set-out standards are not met, besides the courts in their regulatory judicial review function, nor what consequences internally should arise upon a failure to comply with the regulatory frameworks, showcases both states' 'one foot in, one foot out' approach. This is an understandable approach in this nascent stage in which both states are still testing the waters in filling the UNCAC's accountability gap, yet to fully deliver on their accountability promises, the 'consequences' aspect of the regulatory framework must be strengthened.

D. Conclusion

Two former safe havens for corrupt assets, the UK and Switzerland, have set out to restrict their discretion when returning assets for the benefit of bearing accountability to those who have been harmed by corruption – be it states, prior legitimate owners or victims at large. Despite the UNCAC's lack of specified mechanisms governing discretionary asset returns, the two domestic approaches show many similarities: both regulatory frameworks aim for states as the default negotiation partner for return agreements; and both set standards for or boundaries to their discretion through the provisions of the frameworks, while retaining their case-by-case approach to asset returns. However, the distinct domestic regulatory frameworks analysed in this article differ in their nature as the UK chose to create a soft law with detailed guidance, while Switzerland opted for a formal law with less specification for the process.

Nevertheless, they pursue the same function: to close the accountability gap left open by Article 57(3)(c) in discretionary asset return processes. Yet, both states have currently only restricted one foot for the benefit of accountability in discretionary asset return but have deliberately left the other free should they need to sidestep in a particular case, which is particularly visible in the lack of specified consequences for a failure to comply with either regulatory framework. Still, at this nascent stage of addressing the gaps left by the UNCAC in the discretionary asset return process, the two domestic frameworks are encouraging steps towards an emerging era of accountability.

[145] eg Maria Fernada Cruz Chaves, 'New confiscation case will test UK's commitment to transparent asset return' (Transparency International, 11 August 2023) <https://www.transparency.org.uk/new-confiscation-case-will-test-uk-s-commitment-transparent-asset-return> accessed 16 April 2024.

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Optimally, future developments in the regulatory frameworks in regard to standards setting would include the FIAA enshrining an obligation to publish return agreements and specifying the factors taken into account when deducing expenses, whilst the Framework would benefit from specifying the projects that can be pursued with the returned assets. Both regulatory frameworks could gain from setting standards for the process of negotiating return agreements and having those take the form of treaties, as well as providing more guidance for the inclusion of CSOs in the return process. Moreover, more thought must be given to creating the possibility for consequences to be imposed on the obligation bearer for a failure to comply with the regulatory frameworks or the return agreements made under it. Yet, overall, 'one foot in, one foot out' gives hope for forward motion in the early stage of the self-imposed accountability grid.

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