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THE OWNERSHIP OF CONFISCATED PROCEEDS OF CORRUPTION UNDER THE UN CONVENTION AGAINST CORRUPTION

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Abstract Article 51 of the United Nations Convention against Corruption sets forth the return of assets diverted through corruption as a fundamental principle of the Convention. This raises the question of whether the State where the stolen assets are located is entitled to refuse their repatriation or subject it to certain conditions. This article analyses the Convention and the policy considerations behind it and argues that such a State has a wider discretion over the return of stolen assets than is often thought. Furthermore, the article argues that the rule of law may be better served if States take vigorous action to confiscate the proceeds of corruption regardless of whether they are ultimately repatriated.

Keywords: Public international law, asset recovery, confiscation, corruption, economic crime, transnational crime, United Nations Convention against Corruption.

I. INTRODUCTION

Article 51 of the United Nations Convention against Corruption (UNCAC)[1] proclaims the return of assets diverted through corruption to be a 'fundamental principle' of the Convention. There is a paradox at the core of this provision. Return of stolen assets means their repatriation to a State where they have once been misappropriated (the Victim State). 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.[2]

A possible solution is for the State where the assets are located (the Holding State)[3] to establish a monitoring mechanism that will enable it to control how the Victim State uses the recovered funds. An example of such an arrangement is the BOTA Foundation established by the US, Switzerland and Kazakhstan to

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[1] 2349 UNTS 141.

[2] B Bertossa, 'What Makes Asset Recovery So Difficult in Practice?' in M Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 22.

[3] There are likely to be a number of Holding States in cases of large-scale corruption.

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disburse US$84 million to less well-off citizens of Kazakhstan under the supervision of a US-based non-profit organization IREX.[4] However, the Victim State might insist on an unconditional return of the funds that it deems its rightful property.[5]

At the time of writing, there are at least three pending asset recovery cases—all in the US—in which civil society organizations are advocating the creation of a BOTA-style foundation to ensure that the confiscated funds are well spent. One of these cases involves US$550 million in bribes paid by three US-listed telecommunications corporations to an unnamed senior official of the Uzbek government.[6] It has been widely reported that the official in question is Gulnara Karimova, the daughter of Uzbekistan's late President Islam Karimov.[7] Karimova, who is currently believed to be in detention in Uzbekistan and has also been recently sanctioned by the US government under the Global Magnitsky Act 2016,[8] denies any wrongdoing.[9]

[4] BOTA Foundation, 'The BOTA Foundation: Final Summative Report' (12 February 2015). The establishment of BOTA Foundation results from the prosecution of an American businessman James Giffen for alleged bribery in Kazakhstan under the Foreign Corrupt Practices Act 1977. See *US v Giffen*, 473 F3d 30 (2nd Cir 8 December 2006); JA Oduor *et al.*, *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Stolen Asset Recovery Initiative 2014) 125–8; A Cooley and J Heathershaw, *Dictators without Borders: Power and Money in Central Asia* (Yale University Press 2017) 75–6. After Switzerland froze the US$84 million that Giffen had allegedly paid as a bribe into a Kazakh official's Swiss bank account, the money was used to establish the BOTA Foundation. See *US v Approximately $84 Million on Deposit in Account No T-94025 in the Name of the Treasury of the Ministry of Finance of the Republic of Kazakhstan*, Case No 2:07-cv-03559 (SDNY 3 May 2007) Verified Complaint.

[5] The UNCAC speaks interchangeably of assets and property, eg art 51 refers to the 'return of assets' while art 53(a) speaks of 'title to or ownership of property acquired through the commission of an offence'. The present article uses these terms interchangeably. It also occasionally speaks of 'money' or 'funds' in recognition of the fact that the return of illiquid forms of wealth, such as real estate, is normally effected by selling it and repatriating the proceeds. The terms 'return' and 'repatriation' are also used interchangeably.

[6] *US v All Funds Held in Account Number CH1408760000050335300 at Lombard Odier Darier Hentsch & Cie Bank, Switzerland, et al*, Case No 1:16-cv-01257 (SDNY 17 February 2017) Verified Complaint. Regarding the use of the funds that may be forfeited, see Cooley and Heathershaw (n 4) 128–31. Before the DOJ brought the forfeiture complaint against the alleged proceeds of bribery, VimpelCom had entered a deferred prosecution agreement (DPA) in which it admitted to conspiracy to violate various provisions of the Foreign Corrupt Practices Act 1977. See DOJ, 'VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme' (18 February 2016).

[7] K Scannell, 'VimpelCom fined $795m in corruption case' *Financial Times* (18 February 2016); E Lazareva, 'DOJ Moves to Seize $1 billion Linked to Uzbek Telecoms Scandal' *FCPA Blog* (17 August 2015) <http://www.fcpablog.com/blog/2015/8/17/doj-moves-to-seize-1-billion-linked-to-uzbek-telecoms-scanda.html>.

[8] I Nechepurenko, 'Uzbekistan Reveals That Ex-Leader's Daughter Is in Custody' *New York Times* (28 July 2017). See also the *Executive Order 13818: Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption*, 82 Federal Register 60839 (26 December 2017) adopted on the basis of the Global Magnitsky Human Rights Accountability Act, Public Law 114-328, Subtitle F, 130 Stat 2000 (2016).

[9] 'Gulnara Karimova's Spokesman Denies Corruption Charges' *AKIPress* (16 July 2014).

The second case involves the alleged embezzlement of US$1 billion from the Malaysian State-owned investment fund, 1MDB, and is currently the subject of forfeiture proceedings brought by the US Department of Justice (DOJ).[10] Finally, the longest-running one of these three cases concerns US$250 million allegedly misappropriated by Ukraine's former prime minister Pavlo Lazarenko, whom a US court convicted of money laundering and conspiracy to commit money laundering in 2004.[11] Although the conviction led to the forfeiture of US$22 million, the DOJ seeks the forfeiture of an additional US $250 million in a separate civil forfeiture case that is still ongoing due to competing claims of third parties to the funds.[12]

In recent years, the issue of whether the UNCAC allows attaching conditions to the return of confiscated assets has made the rounds in the English-speaking anti-corruption blogosphere. The prevailing opinion seems to be that the UNCAC requires the unconditional surrender of stolen assets to the Victim State,[13] although the argument was also made that in light of its objectives the Convention should be taken to permit conditionality in asset recovery as long as it is proportionate and pursues a legitimate purpose.[14]

At first sight, the question is purely that of conditionality, ie whether the UNCAC allows the Holding State to impose any conditions as a prerequisite to the repatriation of confiscated funds. In reality, this is but a facet of a larger issue, namely who decides on the use of such assets, and within what legal limits? This article explores this by analysing contextually the

[10] *US v 'The Wolf Of Wall Street' Motion Picture*, Case No CV 16-16-5362 (CD Cal 20 July 2016) Verified Complaint; *US v Certain Rights to and Interests in the Viceroy Hotel Group*, Case No CV 17-4438 (CD Cal 15 June 2017) Verified Complaint.

[11] *US v Lazarenko*, Case No 00-cr-0284-01 CRB (ND Cal 4 February 2010) Amended Judgment.

[12] *US v All Assets Held in Julius Baer, et al*, Case No 1:04-cv-00798-PLF (DDC 30 June 2005) First Amended Verified Claim for Forfeiture In Rem. For a proposal of several NGOs on the disbursement of forfeited moneys for charitable purposes, see Open Society Justice Initiative, 'Repatriating Stolen Assets: Potential Funding for Sustainable Development' (15 July 2015).

[13] See, eg, M Stephenson, 'What's Left Out of "Left Out of the Bargain"' *Global Anticorruption Blog* (18 March 2014) <https://globalanticorruptionblog.com/2014/03/18/whats-left-out-of-left-out-of-the-bargain/>; M Stephenson, 'UNCAC, Asset Recovery, and the Perils of Careless Legal Analysis' *Global Anticorruption Blog* (8 May 2014) <https://globalanticorruptionblog.com/2014/05/08/uncac-asset-recovery-and-the-perils-of-careless-legal-analysis/>; M Perdriel-Vaissiere, 'Is There an Obligation under the UNCAC to Share Foreign Bribery Settlement Monies with Host Countries?' *UNCAC Coalition* (5 September 2014) <http://uncaccoalition.org/en_US/is-there-an-obligation-under-the-uncac-to-share-foreign-bribery-settlement-monies-with-host-countries/>; M Stephenson, 'A Different Kind of Quid Pro Quo: Conditional Asset Return and Sharing Anti-Bribery Settlement Proceeds' *Global Anticorruption Blog* (28 June 2016) <https://globalanticorruptionblog.com/2016/06/28/a-different-kind-of-quid-pro-quo-conditional-asset-return-and-sharing-anti-bribery-settlement-proceeds/>; R Messick, 'When Should Governments Keep Stolen Assets?' *Global Anticorruption Blog* (30 March 2016) <https://globalanticorruptionblog.com/2016/03/30/when-should-governments-keep-stolen-assets/>.

[14] R Packer, 'Is It Lawful Under UNCAC to Attach Conditions to Asset Returns?' *Global Anticorruption Blog* (25 February 2016) <https://globalanticorruptionblog.com/2016/02/25/guest-post-is-it-lawful-under-uncac-to-attach-conditions-to-asset-returns/>.

UNCAC's provisions on asset recovery and examining in detail the policy thinking behind them, as well as the Convention's *travaux préparatoires*.

It is not uncommon to see statements to the effect that the UNCAC requires the return of stolen assets with no strings attached if confiscated property represents the proceeds of the embezzlement of State funds, or if the Victim State can otherwise establish its prior ownership over the confiscated property.[15] This is generally correct but incomplete. What is often overlooked is that the obligation to repatriate confiscated proceeds of corruption only arises if confiscation takes place on the basis of a final judgment delivered in the Victim State and enforced in the Holding State. In all other cases, the latter is obliged to give priority consideration to (1) returning the confiscated property to the Victim State; (2) returning it to its prior legitimate owners; or (3) compensating the victims. However, it is under no legal obligation to actually do so.[16]

Those commentators who recognize this distinction tend to emphasize the importance of ultimate repatriation. An illuminating exchange took place in the Canadian Parliament during its December 2016 hearings on the Freezing Assets of Corrupt Foreign Officials Act between Hélène Laverdière MP and Swiss asset recovery expert Gretta Fenner. Ms Laverdière's question concerned a case where Canada had confiscated real estate belonging to a Tunisian public official but only returned 25 per cent of the proceeds to Tunisia,[17] to which Ms Fenner responded as follows:

> [I]f the case was solved or closed in a domestic Canadian investigation for money laundering, (…) Canada, legally, under the treaty, has the possibility of only giving back 25%, but politically, I can assure you, it is definitely not considered good practice.[18]

She went on to note that good practice is for the Holding State to keep no more than 5 per cent of the value of the repatriated assets, and that efforts are underway, led by the UN Office on Drugs and Crime (UNODC), to develop a set of common principles on the establishment of 'monitoring systems for spending of assets on specific earmarked projects'.[19] This raises the question of why there is a disconnect between what the Convention allows and what experts consider good practice.

[15] See, eg, B Zagaris, *International White Collar Crime: Cases and Materials* (2nd edn, Cambridge University Press 2015) 152–3; D Chaikin and JC Sharman, *Corruption and Money Laundering: A Symbiotic Relationship* (Palgrave Macmillan 2009) 140–1; JP Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (Stolen Asset Recovery Initiative 2011) 8.

[16] Art 57(3) UNCAC.

[17] As noted by Ms Fenner, the case referred to is apparently that of Belhassen Trabelsi, the son-in-law of Tunisian ex-President Ben Ali. See Stolen Asset Recovery Initiative, 'Zine El Abidine Ben Ali / Belhassen Trabelsi (Canada)' <http://star.worldbank.org/corruption-cases/node/18601>.

[18] G Fenner's remarks at Parliament of Canada, Standing Committee on Foreign Affairs and International Development, Evidence on Monday, 5 December 2016 at 16:15 <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8674987&File=0>.

[19] ibid.

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The primary contention of this article is that the UNCAC largely affirms the power of the Holding State to decide on how to use the proceeds of foreign corruption that it confiscates. Moreover, there are good reasons behind this policy choice and the UNCAC's provisions are an optimal end-product of a negotiating process that sought to reconcile competing viewpoints on asset recovery. In essence, the Convention allocates the decision-making powers over confiscated assets to the State that was the driving force behind the confiscation. In particular, there is no obligation to repatriate the proceeds of corruption in cases when the Holding State secures their confiscation in the legal proceedings that it itself brings under its own foreign bribery laws or anti-money laundering (AML) laws.

Furthermore, this article argues that an excessive focus on the repatriation of stolen assets, as opposed to their confiscation, may be counterproductive and hinder anti-corruption efforts. By its nature, the enforcement of laws that target foreign corruption is bound to be relatively low on the scale of prosecutorial priorities. As long as a time-consuming and high-risk investigation into foreign corruption and/or money laundering can only result in a surrender of confiscated assets to an overseas jurisdiction, asset recovery will be a hard sell.

In contrast, one of the best-known anti-corruption success stories—the vigorous enforcement by the US of the Foreign Corrupt Practices Act 1977 (FCPA)—is characterized by substantial pay-offs to the US treasury, with over US$6 billion in monetary sanctions paid in 10 largest-ever FCPA enforcement actions as of December 2017.[20] Drawing on the recent work of Jason Sharman, who proposes to harness the profit motive in the fight against corruption, this article suggests that States should be encouraged to divest the perpetrators of their ill-gotten gains even if the confiscated proceeds of corruption are never returned to the Victim State.[21]

II. FUNDAMENTALS OF ASSET RECOVERY

For present purposes, it is convenient to divide the process of asset recovery into two distinct phases. The first one is confiscation, whereby the perpetrator is deprived of the proceeds. The second stage is the actual recovery of property to the Victim State or to prior legitimate owners.[22] As will be seen, the UNCAC makes recovery dependent on the way in which the property was confiscated.

[20] R Cassin, 'Keppel Offshore Lands Seventh on Our Top Ten List' *FCPA Blog* (26 December 2017) <http://www.fcpablog.com/blog/2017/12/26/keppel-offshore-lands-seventh-on-our-top-ten-list.html>.

[21] JC Sharman, *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press 2017) 196.

[22] For a more detailed overview of the process of asset recovery, see Brun *et al.* (n 15) 5–8.

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Depending on the jurisdiction, recovery of the proceeds of corruption may take a variety of legal forms. Apart from confiscation as such, other types of payments than can be ordered by court include compensation, restitution, disgorgement and fines.[23] The types of proceedings that can lead to recovery also vary. Self-evidently, confiscation may be a consequence of criminal conviction. Furthermore, some States allow for civil forfeiture, whereby the State forfeits (confiscates) the proceeds of crime in a nominally civil process where the presumption of innocence does not apply.[24] Finally, recovery may be achieved through civil litigation whereby compensation is ordered, or the ownership over disputed assets restored, to the Victim State or another party in whose favour the judgment is made (eg, private victims).

The Victim State is the obvious forum for criminal and/or civil cases arising out of corruption that allegedly took place there. However, for strategic reasons the Victim State may choose to bring civil claims elsewhere, eg in the Holding State(s) or jurisdictions with well-regarded legal systems whose judgments might be easier to enforce across the world. Hence, Article 53(1)(a) UNCAC requires Holding States to allow the Victim State to bring civil proceedings against the alleged wrongdoer(s) in their courts, although the Victim State may have to worry about waiving its immunity and facing potential counterclaims.[25] If confiscation or recovery is ordered by another State's court, it may nonetheless be enforced in the Holding State pursuant to its rules on the recognition and enforcement of foreign judgments.[26]

Although the Victim State has a direct interest in recovering the proceeds of corruption, other States too may take action against the perpetrators and/or their assets. This is typically made possible by the interaction of the law on confiscation of the proceeds and instrumentalities of crime with foreign bribery laws and AML laws. It is widely accepted that the property resulting from crime or used to commit crime should be liable to confiscation.[27] Rules on confiscation are found in the UNCAC, the UN Convention against Transnational Organized Crime (UNCTOC)[28] and the (non-binding) Recommendations of the Financial Action Task Force (FATF), an

[23] Oduor *et al.* (n 4) 141–4.

[24] The use of terms 'confiscation' and 'forfeiture' differs across jurisdictions and is not always entirely consistent even within one legal system: see J Boucht, The Limits of Asset Confiscation: *On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing 2017) 16–18; P Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing 2003) 45–59. Under art 2(1)(g) UNCAC, 'confiscation' means the permanent deprivation of property by order of a court or other competent authority and includes forfeiture.

[25] D Claman, 'The Promise and Limitations of Asset Recovery under UNCAC' in M Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 341–2. [26] ibid. [27] Boucht (n 24) 1–16.

[28] 2225 UNTS 209.

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intergovernmental group that is universally recognized as the global AML standard-setter.[29] Article 31(1) UNCAC provides:

> Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
> (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.[30]

Foreign bribery laws and AML laws expand the scope of confiscation by criminalizing certain conduct that relates to overseas corruption. Foreign bribery laws originate with the enactment of the US FCPA in 1977, which prohibits the giving of bribes to foreign public officials by US residents, as well as US-incorporated companies and companies listed on US stock exchanges.[31] As the US sought to expand the prohibition multilaterally to create a level playing field in international business, the OECD Anti-Bribery Convention was signed in 1997 and OECD members thereby undertook to impose analogous prohibitions on their citizens and companies.[32] Article 15 UNCAC also proscribes foreign bribery. Foreign bribery laws are normally addressed to persons within the legislating State's jurisdiction, such as its citizens, residents or companies incorporated in that State, and do not criminalize bribe-taking by foreign public officials outside the legislating State's territory.[33] In one instance, a US court rejected the DOJ's attempt to prosecute a foreign public official for conspiracy to violate the FCPA.[34] However, whereas the bribe-taker is shielded from prosecution, the bribe can be confiscated, making foreign bribery laws a potent tool of asset recovery.[35]

[29] FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (October 2002, updated June 2017). See also Chaikin and Sharman (n 15) 18.

[30] See also art 12(1) UNCTOC (couched in almost identical language) and Recommendation 4 of the *FATF Recommendations* (n 29). In the EU, the law on confiscation has been harmonized by Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

[31] FCPA 15 USC section 78dd-1(b) ff. On the history of the FCPA, see M Koehler, 'The Story of the Foreign Corrupt Practices Act' (2012) 73 OhioStLJ 929.

[32] See, in general, M Pieth, L Low and N Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014). On the history of the Convention, see KW Abbott and D Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' [2002] JLS 141; G Stessens, 'The International Fight Against Corruption' (2001) 72 RIDP 891.

[33] G Marshall, 'Increasing Accountability for Demand-Side Bribery in International Business Transaction' (2014) 46 NYUJIntlLaw&Pol 1283; B Puckett, 'Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption' (2010) 41 GeoJIntlL 815.

[34] *US v Castle*, 925 F2d 831 (5th Cir 1991).

[35] Examples include the confiscation by the US of the bribes paid by James Giffen in Kazakhstan (n 4) and the ongoing civil proceedings arising out of VimpelCom's and TeliaSonera's bribery in Uzbekistan (n 6).

Of no lesser importance are the laws that criminalize money laundering. Essentially, the term covers 'the process of transforming the proceeds of illegal activities into legitimate capital'.[36] A criminal offence of money laundering was first introduced in the US and the UK in 1986 and was limited to the proceeds of drug dealing.[37] Today, money laundering offences capture a wide variety of conduct related to the use of the proceeds of various forms of crime. Article 23(1) UNCAC requires States Parties to criminalize the conversion or transfer, concealment or disguise, acquisition, possession or use of the proceeds of crime.[38] Under Article 23(2)(a), the widest range of predicate offences must be captured. Moreover, in accordance with Article 23(2)(c), it matters not where the predicate offence took place.[39] As a consequence, the investment or other use in one State of the proceeds of a crime committed elsewhere is a criminal offence. In this manner, international AML rules effectively require States to take action against wrongdoing which would otherwise be outside their jurisdiction.[40]

All the cases mentioned at the beginning of this article involve the US seeking to confiscate the proceeds and/or instrumentalities of corruption offences that took place beyond its borders but for various reasons fell within its jurisdiction.[41] Although the US has been more active in addressing foreign corruption than most other States, the legal principles involved are by no means an American idiosyncrasy. For instance, the Nigerian governor James Ibori was convicted in the UK for laundering the proceeds of corruption and fraud in Nigeria,[42] although confiscating the proceeds proved to be a major challenge.[43] The 10th edition of the non-binding Lausanne Guidelines for Efficient Recovery of Stolen Assets, which were endorsed by the Conference of UNCAC State Parties in November 2017,[44] encourages parallel

[36] Alldridge (n 24) 2.

[37] M Pieth, 'The Wolfsberg Process' in WH Muller *et al.* (eds), *Anti-Money Laundering: International Law and Practice* (John Wiley & Sons 2007) 95.

[38] See also art 6(1) UNCTOC.

[39] See also art 6(2)(c) UNCTOC and *FATF Recommendations* (n 29), Interpretive Notes to Recommendation 3, para 5.

[40] H Shams, 'The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control' (2001) 7 Law and Business Review of the Americas 85, 129–32; G Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press 2000) 216–17.

[41] See *US v Approximately $84 Million on Deposit in Account No T-94025* (n 4) paras 45–54; *US v All Funds Held in Account Number CH1408760000050335300 at Lombard Odier Darier Hentsch & Cie Bank* (n 6) paras 6–9; *US v 'The Wolf Of Wall Street'* (n 10) paras 103–108; *US v Lazarenko*, 564 F3d 1026 (9th Cir 2009).

[42] *R v Ibori* [2013] EWCA Crim 815, [2014] 1 Cr App Rep (S) 73.

[43] House of Commons, Public Accounts Committee, 'Written Evidence from the Crown Prosecution Service, Home Office and the National Crime Agency' (27 January 2014).

[44] *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its seventh session, held in Vienna from 6 to 10 November 2017* UN Doc CAC/COSP/2017/14 (23 November 2017) 4–5.

investigations by Victim States and Holding States, acknowledging that very often more than one State will have jurisdiction.[45]

The French money laundering conviction of Teodoro Nguema Obiang Mangue, the First Vice President of Equatorial Guinea who also happens to be a son of the country's president, is a fitting example of action taken by the Holding State. Obiang was put on trial in Paris for laundering the proceeds of corruption offences that he allegedly committed in Equatorial Guinea after Transparency International France, a non-governmental organization (NGO), submitted a criminal complaint against him together with a *partie civile* application.[46]

Equatorial Guinea attempted to halt the French prosecution by bringing claims against France in the International Court of Justice (ICJ).[47] It succeeded in securing an order on provisional measures whereby France was enjoined from seizing a hotel once purchased by Obiang and supposedly used by the Equatoguinean embassy in France.[48] However, the Court ruled that it had no jurisdiction, on the basis of the UNCTOC's compromissory clause, to rule on the alleged interference by France with Equatorial Guinea's domestic affairs or a violation by France of Obiang's immunities.[49] This case highlights the hitherto unresolved issue of whether casting the jurisdictional net over foreign corruption too wide may impinge on the rights of other States, but the question need not detain us now.

As the trial in Paris proceeded, on 27 October 2017 the *tribunal correctionnel* found Obiang guilty of the charges and gave him a 3-year suspended prison sentence as well as a suspended €30 million fine.[50] The court also ordered the confiscation of the defendant's property in France, reportedly worth over €100 million, but the confiscation order was stayed in relation to the hotel whose seizure remained the subject of the ICJ dispute.[51] Perhaps unsurprisingly, some commentators brought up the issue of what should be done with the confiscated assets,[52] while William Bourdon, the lawyer representing Transparency International France, noted that confiscated funds

[45] Guidelines for Efficient Recovery of Stolen Assets <https://guidelines.assetrecovery.org/guidelines>.

[46] For a first-hand overview, see M Perdriel-Vaissière, 'France's Biens Mal Acquis Affair: Lessons from a Decade of Legal Struggle' (Open Society Foundations: Legal Remedies for Grand Corruption, May 2017). See also T Daniel and J Maton, 'Is the UNCAC an Effective Deterrent to Grand Corruption?' in J Horder and P Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press 2013) 323–6.

[47] *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Request for the Indication of Provisional Measures, Order of 7 December 2016, ICJ.

[48] ibid, paras 88–96.

[49] ibid, paras 47–50.

[50] 'Equatorial Guinea: President's Son Convicted of Laundering Millions' *Human Rights Watch* (29 October 2017).

[51] S Pouget and K Hurwitz, 'French Court Convicts Equatorial Guinean Vice President Teodorin Obiang for Laundering Grand Corruption Proceeds' *Global Anticorruption Blog* (30 October 2017) <https://globalanticorruptionblog.com/2017/10/30/french-court-convicts-equatorial-guinean-vice-president-teodorin-obiang-for-laundering-grand-corruption-proceeds/>.

[52] ibid; 'Equatorial Guinea: President's Son Convicted of Laundering Millions' (n 50).

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must *not* be returned to Equatorial Guinea because doing so would 'return to the Obiang family what they are accused of embezzling'.[53]

Even before the French proceedings, critics of the Obiang family had long accused him and his father of exploiting the Equatoguinean natural wealth with devastating impact on the well-being of the population.[54] In 2014, Obiang surrendered US$30 million-worth of property in the US under the terms of a settlement with the DOJ. When the property was forfeited, the DOJ vowed to transfer the proceeds to a charity that was to distribute them for the benefit of the people of Equatorial Guinea subject to a deduction in favour of the US intended to cover case-related costs and expenses.[55] As of July 2016, the US government was still preparing to sell the property whose proceeds would subsequently be transferred to a nominated charity.[56]

III. INTERNATIONAL LAW AND ASSET RECOVERY

A. Article 57 UNCAC

Article 57 UNCAC lays out detailed rules on the return of assets. Its first clause provides that confiscated property 'shall be disposed of, *including by return to its prior legitimate owners*, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law' (emphasis added). It is notable that Article 57(1) implicitly admits of ways to dispose of the confiscated property other than by its return to the Victim State. Moreover, the property should be returned to 'prior legitimate owners'—no mention of any State here—whereas the following provisions of Article 57 speak of the 'requesting State Party'. The notion of 'prior legitimate owners' is elaborated on later in this article when the concept of the victims of corruption is explored.

Article 57(2) stipulates that each party to the UNCAC shall take such legislative and other measures as may be necessary to ensure the return of property in compliance with the Convention. Thereafter, Article 57(3) clarifies the Holding State's obligation to return stolen assets:

[53] T Donangmaye, 'Equatorial Guinean Vice President Convicted of Embezzlement in France' *Voice of America* (28 October 2017).

[54] United States Senate, Permanent Subcommittee on Investigations, *Keeping Foreign Corruption out of the United States: Four Case Histories* (Washington 2010) 18–25; K Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014) 96–100; M Vlasic and J Noell, 'Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems' (2010) 5 YaleJIntlAffairs 106, 117.

[55] *US v One Michael Jackson Signed Thriller Jacket et al*, Case No 2:11-cv-03582-GW-SS (CD Cal 10 October 2014), Stipulation and Settlement Agreement, sections 26–34. Section 27(B) provides for a deduction of US$10.3 million in favour of the US but the US represents in section 34 that this money will be used for the benefit of the people of Equatorial Guinea 'where practicable and consistent with law, and after deducting its actual case-related costs and expenses'.

[56] K Scannell, 'Corruption: Moving Money out of Purgatory' *Financial Times* (5 July 2016).

> 3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:
> (a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, *when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party*, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;
> (b) In the case of proceeds of any other offence covered by this Convention, *when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party*, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;
> (c) 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. (Emphasis added.)

These provisions show that the scope of the Holding State's obligation to return assets depends on the degree of the Victim State's involvement in the recovery process. Namely, the obligation of unconditional return is triggered if the following three conditions are cumulatively met: (1) the imputed crime is the embezzlement of public funds or the laundering of such funds; (2) the confiscation of the assets was executed in accordance with Article 55 UNCAC, which deals with how the Holding State must respond to a request for confiscation received from the Victim State; and (3) the confiscation took place on the basis of a final judgement in the Victim State. The Interpretative Notes to the Convention, which have been agreed to by the negotiating States Parties and must be taken to reflect their intentions, slightly mollify the requirement for a final judgment by providing that it should be waived if the offender is dead or absconded.[57]

Article 57(3)(b) covers the proceeds of offences under the UNCAC other than the embezzlement of public funds or the laundering of the proceeds of such a crime. It introduces an additional requirement that the Victim State must be able to establish its prior ownership over the confiscated property or achieve recognition of the damage it suffered from the crime.

Finally, Article 57(3)(c) includes within its ambit all other cases and requires no more than 'giv[ing] priority consideration' to the return of stolen assets. This is the requirement identical to that contained in Article 14(2) of the UNCTOC. It

[57] Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention against Corruption' UN Doc A/58/422/Add.1 (7 October 2003) para 69.

is this provision that applies to all cases in which the perpetrator's assets have been confiscated in legal proceedings launched by the Holding State.

It is worth emphasizing that Article 57 has direct bearing on the fate of monetary penalties collected in out-of-court settlements, which are particularly common in foreign bribery cases. In its report *Left out of the Bargain* published in 2014, the Stolen Asset Recovery Initiative (StAR), which was established jointly by the UNODC and World Bank, wrote that States where alleged bribery took place typically played a very limited role in settlement proceedings and only received 3.3 per cent of the total monetary sanctions levied.[58] Accordingly, StAR recommended bolstering information sharing on foreign settlements with a view to allowing Victim States to participate in the respective proceedings and lay their claims to the monetary penalties that result from settlements.[59] The proceeds of such settlements fall within the scope of Article 57(3)(c) UNCAC and do not *have* to be shared with the Victim State. However, consideration should be given to doing so.

The thinking behind Article 57(3) is easy to fathom. It would be inappropriate for a State to reap the benefits of investigatory and prosecutorial efforts that were entirely those of another State. Indeed, the listlessness of the Victim State can be viewed as an indirect indication that it is not serious about fighting corruption. In an extreme scenario, an all-encompassing obligation to return confiscated corruption proceeds would force the Holding State to hand them over to a kleptocratic regime that continues to exercise its grip on the Victim State.

Article 57(4) authorizes the Holding State to withhold its reasonable expenses from the repatriated amount. According to the Interpretative Notes, these only include 'costs and expenses incurred and not (…) finders' fees or other unspecified charges'.[60] This provision has to be read in conjunction with other prescriptions of Article 57. It is true that the Holding State must not deplete the assets that are subject to return by deducting from them anything above its reasonable expenses. However, an unconditional obligation of return in the first place only arises in certain predefined circumstances under Article 57(3)(a)–(b), as just described. Lastly, Article 57(5) suggests mutually acceptable arrangements as something that States may resort to. As discussed later, this is the path that several States have taken.

B. Drafting History of Article 57 UNCAC

The UNCAC's drafting history provides some insight into the thinking behind Chapter V of the Convention. Asset recovery sat high on the UN's agenda from the outset of the negotiations.[61] According to Thomas Stelzer, one of the Vice-

[58] Oduor *et al.* (n 4) 73.
[59] ibid 97–9.
[60] Ad Hoc Committee, 'Interpretative Notes' (n 57), para 70.
[61] P Webb, 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?' (2005) 8 JIEL 191, 206–12.

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Chairmen of the Ad Hoc Committee for Negotiation of the Convention, it was also one of the most controversial issues.[62] Who should get to decide what to do with the confiscated assets was the major bone of contention. As early as during the second session of the Ad Hoc Committee, one of the issues discussed was 'whether requested countries should have a role in distributing proceeds or simply transfer them back en masse, leaving distribution to the requesting countries'.[63]

In the ensuing negotiations, conflicting views were presented. The draft texts that had initially been tabled were ambiguous and oscillated between the two positions. Draft Article 61[64] (Disposal of confiscated proceeds of crime or property) was jointly submitted by Austria and the Netherlands and modelled on the rather non-committal provisions of Article 14 UNCTOC.[65] Under Article 14(2) UNCTOC, States Parties shall 'give priority consideration' to returning confiscated crime proceeds, while Article 14(3)(b) provides that special consideration shall also be given to arrangements for sharing such proceeds.

Latin American and Caribbean States were keen to see 'the prompt return of assets … without any conditionalities or sharing'.[66] A competing version of Article 61 was proposed by Mexico. It required States Parties to 'enable' their competent authorities to share the proceeds of crime with the Victim States 'in cases when this would not entail damage to the property of those States'. The meaning of this provision is elucidated by Mexico's preferred draft of another article, namely Article 62 (Return of property to the country of origin in cases of damage to State property). It established an obligation on the part of the Holding State to 'return to the country of origin property constituting proceeds of crime that has been obtained to the detriment of that country'. For the avoidance of doubt, Mexico's draft stipulated that '[i]n such cases, the property shall not be subject to the system of sharing between the requesting State and the requested State'.[67]

A different sentiment altogether was conveyed by an unnumbered article on the disposition of assets submitted by the US. It studiously avoided any reference to the Victim State whatsoever. States Parties would 'to the extent permitted by domestic law … [g]ive priority consideration to transferring the recovered assets in such a manner as to compensate the victims of the crime or to return the assets to their legitimate owners', as well as 'consider sharing

[62] Thomas Stelzer, Statement (11 December 2003) <http://www.un.org/webcast/merida/statements3/aust031211eng.htm>.

[63] *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Second Session, Held in Vienna from 17 to 28 June 2002* UN Doc A/AC.261/7 (5 July 2002) 8.

[64] The numbering changed in the course of the negotiations as some of the articles were deleted.

[65] UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (2010) 499–501, A/AC.261/IPM/4.

[66] *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Sixth Session, Held in Vienna from 21 July to 8 August 2003* UN Doc A/AC.261/22 (22 August 2003) 6.

[67] ibid 500–1, A/AC.261/IPM/13.

confiscated assets with foreign authorities that assisted in the investigation, prosecution or judicial proceeding leading to the confiscation'.[68]

Several delegations were unhappy with the US proposal because they felt that assets should be returned to the Victim State and the power of disposal over them should lie with it.[69] An alternative suggestion was made by Pakistan, which envisaged an unambiguous obligation to return the assets to the Victim State. In its turn, the Victim State would be 'responsible for making payments to the victims, potential claimants or rightful owners or other rightful recipients within the State'.[70]

By the fourth session of the Ad Hoc Committee, the differences of opinion among the delegations had crystallized. To resolve them, the Committee's Vice-Chairman responsible for asset recovery established an informal working group under the leadership of Switzerland.[71] Although the Committee's next session failed to forge a consensus, the working group produced a text that resembled in its structure what was to become the final version of Article 57. Building on it, India proposed at the Committee's sixth session a revised version which States Parties ultimately adopted as Article 57.[72]

The first paragraph of the Swiss draft had provided that the confiscated assets shall be 'disposed of' by the Holding State. Some delegations insisted that the wording should be changed to 'returned to the country of origin'.[73] India's proposal merged both formulations and gave the provision its final shape: 'disposed of, including by return to its prior legitimate owners'. It left intact the Swiss suggestion that the assets must be repatriated if confiscated upon request of the Victim State and on the basis of a final court judgment from the Victim State. The provision that did not survive the Committee's sixth session was the stipulation in the Swiss draft that the purpose of asset recovery is to 'make restitution to the victims of the crime or return such proceeds of crime or property to their legitimate owners'. The omission of this phrase must be taken to mean that its opponents gained the upper hand in arguing that the Victim State should remain unconstrained in how it uses the recovered assets.[74]

Eventually, the drafters of UNCAC managed to come up with a finely crafted compromise. In doing so, they strove to reconcile two opposing visions of asset recovery. One may be termed 'return-focussed'. Represented by the South American States, it stood for the notion that the Victim State is entitled to recuperate its losses. The other approach may be called 'discretionary', and is best represented in the US draft. On that conception, the return of assets was a matter of the Holding State's generosity rather than of legal obligation. The US

[68] ibid 501–2, A/AC.261/IPM/19. [69] ibid 505, fn 10. [70] ibid 506–7, A/AC.261/11.
[71] ibid 507. [72] ibid 512–13, A/AC.261/L.229. [73] ibid 508, fn 12.
[74] ibid 508, fn 17.

draft was strewn with qualifications such as 'when appropriate' and 'to the extent permitted by domestic laws'.

Attempts to find the middle ground led to the discovery of a third path, which can be dubbed 'desert-focussed'. It allowed the Victim State to demand the return of assets, but only as long as it was the driving force behind the confiscation. That way the Victim State would not freeride on the efforts of other governments; nor would the Holding State be placed in the impossible position of having to return stolen assets to the regime that has stolen them in the first place.

C. Implications of Article 57 UNCAC

Although the UNCAC has avoided the pitfalls associated with extreme positions, a cynic might question whether as a result it failed to make a significant contribution to the law. The obligation of unconditional return is effectively confined to situations when a foreign judgment is recognized and enforced. But assuming that a foreign judgment is successfully enforced, assets will be returned in conformity with such a judgment quite irrespectively of any international agreement. In other words, Article 57 UNCAC is, essentially, merely saying that confiscated assets must be returned to the Victim State in cases when the Holding State has enforced a judgment which orders that the assets be returned to the Victim State.

According to Dimitri Vlassis and Dorothee Gottwald, the practical import of Article 57 is to ensure that the Holding State can impose no conditions on the return of assets in situations that are covered by Article 57(3)(a). They rightly emphasize that what Article 57 does is allocate the decision-making power to either the Holding State or the Victim State depending on how the confiscation of corruption proceeds was secured. If the Holding State must return the assets, it cannot say that it will return them subject to conditions on their use:

> [C]onditions for the return of assets beyond those that related strictly to the requirements for procedural propriety and compliance with fundamental principles of legal systems, were detrimental to principles such as respect for sovereignty and non-interference in the internal affairs of States. Furthermore, such conditions would be based inevitably on value judgments about the integrity of national authorities and institutions and their ability to manage public finances properly.[75]

As recognized in the statement just cited, the Victim State will nonetheless have to withstand some scrutiny in the courts of the Holding State as the former seeks to enforce a final judgment issued by its court. For instance, Switzerland will refuse enforcement if the proceedings that led to the judgment did not meet

[75] D Vlassis and D Gottwald, 'Implementing the Asset Recovery Provisions of the UNCAC' in M Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 367.

the standards of the European Convention on Human Rights or the International Covenant on Civil and Political Rights.[76] It has also been argued that the Holding State may be in breach of its international human rights obligations if it enforces a foreign confiscation order that was issued in a proceeding marked by severe irregularities.[77] Although this issue is distinct from that of how well the Victim State is governed, these matters are related and a perception that the Victim State is incorrigibly corrupt may in practice hinder the enforcement of a judgment issued by its court.

The impact of Article 57 may come across as surprisingly modest when considering that Article 51 elevates asset recovery to a 'fundamental principle' of the Convention:

> The return of assets pursuant to this chapter [Chapter V UNCAC] is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

However, the Interpretative Notes clarify that '[t]he expression "fundamental principle" will not have legal consequences on the other provisions of [Chapter V UNCAC]'.[78] It is arguable that Chapter V of the Convention should be viewed as a valuable means of drawing political attention to asset recovery and raising the profile of the issue. It also contains other important provisions that deal with asset recovery, although this is not the place to examine them in detail. One should perhaps only note Article 53, which lays down three modalities of 'direct recovery of property' and thus enables the Victim State to seek judgment in its favour directly in the courts of the Holding State.

D. Swiss Experience: Lex Duvalier

It may happen that the Victim State takes some steps towards asset recovery at first but stalls thereafter, eg because of a lack of resources or political turmoil. From a legal standpoint, even if the Holding State freezes the assets pursuant to a mutual legal assistance (MLA) request from the Victim State, the Convention does not oblige the Holding State to repatriate these assets unless they are ultimately confiscated on the basis of a final judgment from the Victim State. But politically speaking, it may be particularly appropriate to seek a bilateral solution as to how the confiscated funds should be disbursed in such cases.

Haiti's initially energetic but then half-hearted attempts to recover the money stolen by former President Jean-Claude 'Baby Doc' Duvalier are an apt example of asset recovery efforts gone off the rails. Almost immediately after Duvalier

[76] *Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on its Second Session* (n 63) 7.

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

[78] Ad Hoc Committee, 'Interpretative Notes' (n 57) para 48.

fled the country, Haiti launched legal proceedings against him in France seeking a return of US$120 million. It also obtained a worldwide freezing injunction in support of these proceedings in an English court.[79] But the Tribunal de Grande Instance de Grasse refused jurisdiction to rule over the claims that it held to be based in Haiti's public law.[80] The Cour d'Appel d'Aix-en-Provence reversed the judgment in 1988 on the basis that the claims were of a private law nature; by that time, however, the assets had already been dissipated.[81] Moreover, two years later, the Cour de Cassation overruled the appeal ruling and reinstated the Tribunal's judgment. This outcome would now be incompatible with Article 53 UNCAC, which requires that Victim States be able to initiate civil claims and obtain compensation in foreign courts. More importantly, by 1988 Haiti had evidently lost its resolve to pursue Duvalier's assets in other jurisdictions and the recovery efforts ground to a halt. Haiti's lawyers were reportedly receiving no cooperation from the government and their bills were left unpaid.[82]

In response to the Haitian debacle, Switzerland, where part of Duvalier's funds had been frozen, enacted a law colloquially known as the Lex Duvalier that entered into force on 1 October 2010.[83] The law enables forfeiture and repatriation of the assets frozen based on the Victim State's MLA request whenever further proceedings are impossible due to a complete or partial collapse of the Victim State's legal system. The freezing of the assets must also be in the Swiss national interest.[84] Assets seized under the Act must be used 'to improve living conditions for the people in the country of origin' or 'reinforce the rule of law in the country of origin' pursuant to an agreement to be concluded with the Victim State.[85] In December 2015, Switzerland amended the Act by adopting what some called the Lex Ben Ali, in a nod to ex-President of Tunisia.[86] Under the Lex Ben Ali, the Swiss Federal Council can freeze the assets before receiving an MLA request and can provide information on frozen assets to the country concerned of its own initiative.[87]

[79] *Republic of Haiti v Duvalier* [1989] 2 WLR 261.

[80] F Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours de l'Académie de Droit International 9, 186–7; L Collins, 'Provisional and Protective Measures in International Litigation' (234) Recueil des Cours de l'Académie de Droit International 9, 155–6.

[81] K Hinterseer, *Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context* (Kluwer Law International 2002) 66.

[82] M Vlasic and G Cooper, 'Beyond the Duvalier Legacy: What New "Arab Spring" Governments Can Learn from Haiti and the Benefits of Stolen Asset Recovery' (2011) 10(1) Northwestern Journal of International Human Rights 19, 22.

[83] Federal Act on the Restitution of Assets illicitly obtained by Politically Exposed Persons of 1 October 2010. An unofficial English translation is at <https://www.admin.ch/opc/en/classified-compilation/20100418/201102010000/196.1.pdf>. The original text is available at <https://www.admin.ch/opc/de/classified-compilation/20100418/index.html>.

[84] Art 2.

[85] Arts 8–9.

[86] Sharman (n 21) 109; Neue Zürcher Zeitung, 'Nationalrat schwächt «Lex Ben Ali» ab' (10 June 2015).

[87] The original text is available at <https://www.admin.ch/opc/de/classified-compilation/20131214/index.html>.

While the Lex Duvalier is a trailblazing achievement in the field of asset recovery, it must be recognized that its enactment was possible thanks to the architecture of Article 57 UNCAC. Importantly, the Lex Duvalier sets conditions on how the returned assets must be used, namely to improve living conditions and the rule of the law in the Victim State. Moreover, the operation of the law is subject to the Swiss national interest proviso. None of this would be possible if the confiscated assets were always treated as the Victim State's property.

E. Bilateral Treaties

The UNCAC is the only multilateral anti-corruption treaty with detailed provisions on asset recovery. The Inter-American Convention against Corruption (1996) and the African Union Convention on Preventing and Combating Corruption (2003) contain generic provisions on the seizure of the proceeds of corruption and international cooperation.[88] However, they do not clarify how assets are to be shared between the States involved. The Council of Europe's Civil Law Convention on Corruption (1999) demands that '[e]ach Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage'.[89] There is no clarification as to whether 'persons who have suffered damage' can include foreign States. If they can, then the effect of the Convention is similar to that of Article 53 UNCAC.

If States wish to agree on a legal framework for asset recovery that is more detailed than the UNCAC's provisions or otherwise differs from them, they should conclude bilateral agreements, as recommended by the FATF and at the 7th Conference of UNCAC States Parties.[90] In early 2005, the UNODC convened an expert group to design a draft model bilateral agreement on disposal of the proceeds of crime covered by the UNCTOC and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The US proposed a draft model treaty whereby confiscated assets could only be shared 'where cooperation has been given by a Party (Cooperating Party) to a Party in possession of forfeited or confiscated assets (Holding Party) which facilitates the forfeiture or confiscation of assets'.[91] The version of the model agreement endorsed by the UN Economic and

[88] Arts XV and XIV and arts 16, 18 and 19 respectively.

[89] Art 3(1).

[90] FATF, *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for Ongoing Work on Asset Recovery* (October 2012) para 5; *Report of the 7th Conference of the UNCAC States Parties* (n 44) 5.

[91] Art 2 of the Draft Model Bilateral Agreement on Disposal of Confiscated Proceeds of Crime (Proposal submitted by the US, 26–28 January 2005) <http://www.unodc.org/pdf/crime/ieg_crime_2005-01-26_draft_model_agr_01.pdf>.

Social Council (ECOSOC) went along the same lines.[92] However, while the US draft made no mention of the UNCAC, the preamble to the ECOSOC's agreement made clear that 'this Agreement should not prejudice the principles set forth in the United Nations Convention against Corruption or the development, at a later stage, of any appropriate mechanism to facilitate the implementation of that Convention'. This caveat evinces a perception that the UNCAC's asset recovery provisions are more detailed and therefore require a different approach to the sharing of assets than treaties dealing with other types of crime. However, it appears that no comparable model agreement has ever been designed under the UNCAC.

In September 2016, China and Canada signed an Agreement regarding the Sharing of Forfeited Assets and the Return of Property, but its text has not been made public.[93] The treaty was reportedly still awaiting ratification as of June 2017.[94] The conclusion of this treaty is apparently part of China's ongoing effort, dubbed Skynet, to repatriate the proceeds of corruption stashed away by absconded Chinese officials and secure their extradition.[95] It is worth noting that, at the time of the writing, the US database of treaties in force contains no mention of an agreement with China on the sharing of confiscated assets.[96]

IV. THE POLICY OF ASSET RECOVERY

A. Objectives of Asset Recovery

As mentioned earlier, asset recovery serves two distinct objectives. The first is confiscatory in the sense that it is solely concerned with depriving the criminal of what is not lawfully his. This broadly framed objective could be further unpacked: for some, ensuring that the criminal does not profit from crime is an end in itself;[97] others point to a variety of utilitarian purposes served by confiscation, such as reducing the economic appeal of crime or preventing the reinvestment of ill-gotten wealth in criminal enterprise.[98] The end result

[92] ECOSOC Resolution 2005/14: *Model bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property Covered by the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (22 July 2005).

[93] Global Affairs Canada, *Agreement between the Government of Canada and the Government of the People's Republic of China Regarding Sharing and Return of Forfeited Assets* <http://www.treaty-accord.gc.ca/details.aspx?id=105505>.

[94] Z Dongmiao, 'Full Text: Joint Communiqué of the 2nd Canada-China High-level National Security and Rule of Law Dialogue' *XinhuaNe*t (23 June 2017).

[95] B Lang, 'Engaging China in the Fight against Transnational Bribery: "Operation Skynet" as a New Opportunity for OECD countries' (OECD Global Anti-Corruption and Integrity Forum 2017) <https://www.oecd.org/cleangovbiz/Integrity-Forum-2017-Lang-China-transnational-bribery.pdf>.

[96] US Department of State, 'Treaties in Force' (1 January 2017) <https://www.state.gov/documents/organization/273494.pdf> 82.

[97] For an overview of the pronouncements of English courts to that effect, see Alldridge (n 24) 45–8.

[98] Ivory (n 77) 221; Chaikin and Sharman (n 15) 18.

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is the same and the precept that crime should not pay is as uncontroversial as a criminal justice principle can be. The second objective of asset recovery is restorative in that it focuses on restoring the property to the victims. Ideally, both of these objectives will be achieved. However, they can also be in conflict.

If the primary objective of asset recovery is the actual recovery qua repatriation, then confiscation without repatriation is worth little. Conversely, if divesting the criminals of their ill-gotten gains outweighs other considerations, it is imperative to ensure that disagreements over the fate of the assets do not prevent their confiscation in the first place. Taking this reasoning one step further, it may even be permissible to put the Holding State's self-interest in the service of asset recovery by encouraging it to keep the recovered proceeds.

In his 2017 book *The Despot's Guide to Wealth Management*, Jason Sharman suggests that there is value to depriving the corrupt of their loot even if none of it ends up returned to the Victim State. Guided by this principle, Sharman proposes to harness the profit motive in asset recovery by engaging private actors in the capacity of litigation funders. Under such an arrangement, a private company would shoulder the costs of litigation, including legal fees, in return for a substantial proportion of the recovery:

> For the purposes of deterrence and accountability, it is better to have more cases taken by private actors, even if less money is returned to the victim governments, rather than fewer cases taken overall but a higher proportion of funds repatriated.[99]

A major attraction of this proposal is its potential to relieve the financial burdens on countries that may lack the wherewithal to aggressively pursue their claims. It would also shift the financial risks of a defeat unto the private funder/litigant. If this logic is taken to its limits, writes Sharman, it is appropriate for those States who feel unable to obtain recovery on their own to sell claims at a discount to private parties. This approach could open up a new market to vulture funds that are now in the business of purchasing distressed securities. The effect of this 'Baptist and bootlegger coalition' of States with vulture funds, Sharman argues, will be to harness the profit motive 'in the effort to pursue and confiscate (if not return) kleptocrats' ill-gotten gains'.[100]

While innovative, Sharman's proposal is a perfectly logical corollary of the principle that confiscating the proceeds of corruption is worthwhile even if they never make their way to the Victim State. This principle applies with at least equal force to the involvement of the Holding State as it does to vulture funds. Although the UNCAC says nothing about the role of private sector in asset recovery, it outlines the roles of the Holding State and the Victim State

[99] Sharman (n 21) 196.
[100] ibid 194–9; D Batty, 'Make Profit Motive an Ally in Corruption Fight, Says Offshore Expert' *The Guardian* (2 June 2016).

with a result that the former is entitled to keep the confiscated assets in a variety of scenarios. As mentioned earlier, this is subject to the stipulation that 'priority consideration' be given to retuning the property to the Victim State or its prior legitimate owners or, alternatively, compensating the victims.[101]

If allowing States to keep the proceeds of corruption that they confiscate can galvanize anti-corruption enforcement, one should be careful not to deify the return of the assets to the exclusion of other legitimate considerations. The simplest and most natural way of heeding Sharman's call to harness the profit motive is by allowing the Holding State, and not vulture funds or private parties, to keep the confiscated property.

Objections against this proposal are likely to be based on the impropriety of a State benefitting, albeit in an indirect way, from a crime that took place elsewhere—in a sense, 'stealing from the thief'. Besides, one could argue that the mere fact of the proceeds of corruption having been invested in the Holding State means it had failed in its AML controls, thereby acting as a quasi-enabler of the crime. Finally, if the Victim State is a poor developing country, the moral imperative of returning the proceeds of corruption is all the more pressing.

Although these are valid points, what they prove is that foreign States should do their best to provide maximum cooperation to the Victim State pursuant to Article 55 UNCAC when requested to do so. This does not mean that other States should take over the recovery of stolen assets in the interests of the Victim State when it is unable or unwilling to do so itself. One should keep in mind that the State where the crime took place is the most natural forum for any criminal or civil proceedings, not least because the evidence and witnesses are likely to be located there. As a consequence, a failure by the Victim State to take action against the alleged perpetrators can signal either a lack of political will or the incapacity of its law enforcement system. In either case, the repatriation of assets back to this country is arguably inadvisable. In those circumstances, the choice is essentially not between confiscation by the Holding State and a return to the Victim State but between confiscation by the Holding State and impunity.

This line of reasoning raises the question of whether the profit motive is an effective driver of anti-corruption enforcement by States. The obvious source of analogies is the FCPA enforcement in the US. Initially, the US government's decision to step up the enforcement of the Act was undoubtedly dictated by policy considerations. However, in a world of scarce resources and conflicting prosecutorial priorities, there are reasons to believe that its continued vigorous enforcement is at least partly due to the pay-offs that the Act generates for the US treasury.

At first, the FCPA had lain dormant for decades since its enactment in 1977.[102] A surge in enforcement took place in 2005 after the Bush

[101] Art 57(3)(c) UNCAC.

[102] See Koehler, 'The FCPA Story' (n 31) 934–5.

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administration expanded the numbers of staff responsible for FCPA investigations in the Securities and Exchange Commission.[103] That was part of a concerted campaign against foreign corruption led by George W Bush, which included the promulgation of the National Strategy to Internationalize Efforts against Kleptocracy in 2006. This campaign responded to a perceived connection between corruption, organized crime and terrorism in rogue States such as Saddam Hussein's Iraq or Bashar al-Assad's Syria.[104]

Today, the prominence of the FCPA among the US anti-corruption tools is hard to overestimate. As mentioned earlier, 10 largest-ever FCPA enforcement actions as of December 2017 had netted US$6 billion in monetary sanctions, with eight out of 10 actions relating to the conduct of corporations headquartered outside the US.[105] Mike Koehler has criticized the US DOJ for supposedly using the FCPA enforcement as a 'cash cow' by levying hefty fines.[106] Matthew Stephenson argues that the FCPA enforcement is driven by policy values but its financial component is an added bonus:

> If only a modest proportion of settlement recoveries went to the U.S., senior DOJ decision-makers might begin to wonder whether it's really worth putting as much money and time into FCPA actions, as compared with the whole range of other white collar fraud enforcement actions the Department might pursue – and it might strengthen the hand of FCPA critics who think that the U.S. shouldn't be taking upon itself the burden of cleaning up corruption in other countries.[107]

It is worth noting that the US experience has not been replicated in other countries, with the exception perhaps of the UK, where in January 2017 the Serious Fraud Office entered into a deferred prosecution agreement with Rolls Royce whereby the latter agreed to pay £497.25 million plus interest.[108] As of June 2014, the OECD's analysis demonstrated that only 17 out of 41 States Parties to the OECD Anti-Bribery Convention had sanctioned foreign bribery, the US being the leader with 128 enforcement actions and Germany coming second with 26 actions.[109] It is telling that the

[103] M Bixby, 'The Lion Awakens: The Foreign Corrupt Practices Act – 1977 to 2010' (2010) 12 SanDiegoIntlLJ 89, 104–5.

[104] J Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (Public Affairs 2013) 198–9. For an exposition of the corruption–terrorism nexus, see S Chayes, *Thieves of State: Why Corruption Threatens Global Security* (WW Norton & Co 2015).

[105] Cassin (n 20).

[106] M Koehler, '"Totally" Milking the FCPA Cash Cow?' *FCPA Professor* (3 June 2013) <http://fcpaprofessor.com/totally-milking-the-fcpa-cash-cow/>; M Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar Publishing 2014) 238.

[107] Stephenson, 'What's Left Out of "Left Out of the Bargain"' (n 13).

[108] *SFO v Rolls Royce Plc* QB (17 January 2017). This is the third UK DPA after they were introduced by Schedule 17 to the Crime and Courts Act 2013. The first one was *SFO v Standard Bank Plc* HC (30 November 2015). The identity of the company involved in the second DPA is currently undisclosed.

[109] OECD, *Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (2004) 31.

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State which levies largest fines is also the most active enforcer of foreign bribery laws.

Another insight of the FCPA enforcement is the alarming asymmetry in prosecutions, namely that many developing countries fail to take action against bribe-taking public officials after the bribe-givers have been prosecuted in the US.[110] The issue is neither limited to bribery alone, nor to the US prosecutions. When the convicted Nigerian governor James Ibori returned to Nigeria after serving his term in a UK prison, he was cheered by supporters and is reportedly contemplating a political comeback.[111] This experience casts further doubt on the advisability of asset-sharing in situations when the Victim State has failed to take any meaningful anti-corruption action in the past, since the culture of corruption may persist in that country.

B. Victims of Corruption and Who Represents Them

Article 57(3)(c) UNCAC provides that in cases not covered by the preceding provisions of the same article States shall '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'. This mention of prior legitimate owners and victims points to the possibility of treating someone other than the Victim State as a proper recipient of the confiscated assets. This is in line with Article 35 UNCAC, which reads as follows:

> Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Whether a person can bring a claim as a result of suffering damage due to an act of corruption will depend on the legislation of the State where the claim is brought. In principle, corruption hurts the State as a whole and all of its citizens can be seen as victims—in a similar way to the shareholders that are harmed by self-dealing of a company's directors.[112] In acknowledgment of the corrosive impact of corruption, UN bodies have increasingly addressed

[110] Oduor *et al.* (n 4) 53–5.

[111] E Shirbon, '"In It until You Die": Convicted Nigerian Politician Signals Comeback' *Reuters* (31 January 2017).

[112] A comparison between corruption-related asset recovery and the liquidator's efforts to recoup the property of a bankrupt company is made in T Daniel and J Maton, 'Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials' in M Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 253.

corruption and asset recovery from the standpoint of human rights,[113] which is an approach that resonates with some academic commentators.[114]

However, in many countries the doctrine of standing, or equivalent legal rules, requires that the claimant demonstrate a direct and specific interest in the matter before he or she is allowed to bring claims based on the conduct that harms a broad and potentially indeterminate range of individuals.[115] Such doctrines impede potential claims by individuals or NGOs who wish to take on a direct role in asset recovery.

On a conceptual level, there is some appeal in the prospect of actors other than the Victim State taking the lead in asset recovery. As then-President of the US Barack Obama said in his address to the Arab Forum on Asset Recovery, '[the stolen] money–potentially billions of dollars–does not belong to those who wielded power, it belongs to the people'.[116] Although this is in tension with a view of the government as the authorized representative of its nation, State authorities do not always fulfil that function in societies that find themselves in the grip of endemic high-level corruption. A natural solution is to look for legal ways in which the State's government can by bypassed so that the benefits of asset recovery accrue directly to the population.

Unfortunately, it is difficult to conceive of practical solutions. Since the State acts in the interests of all of its citizens, at least notionally, it would be inappropriate for any person, group of persons, or organization to seek recovery of the proceeds of corruption for its own benefit. One of the few feasible alternatives is an arrangement along the lines of the BOTA Foundation whereby an international charity or NGO disburses the confiscated funds for the benefit of the population of the Victim State. In like

[113] UN High Commissioner for Human Rights, *Comprehensive Study on the Negative Impact of the Non-Repatriation of Funds of Illicit Origin to the Countries of Origin on the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights* UN Doc A/HRC/19/42 (14 December 2011); Working Paper of the Special Rapporteur, Ms Christy Mbonu, E/CN.4/Sub.2/2003/18 (14 May 2003); Preliminary Report of the Special Rapporteur, Ms Christy Mbonu, E/CN.4/Sub.2/2004/23 (7 July 2004); Progress Report of the Special Rapporteur, Ms Christy Mbonu, E/CN.4/Sub.2/2005/18 (22 June 2005); and Second Progress Report of the Special Rapporteur, Ms Christy Mbonu, A/HRC/11/CRP.1 (18 May 2009).

[114] C Rose, 'The Application of Human Rights Law to Private Sector Complicity in Governmental Corruption' (2011) 24 LJIL 715; G De Beco, 'Monitoring Corruption from a Human Rights Perspective' (2011) 15(7) IJHR 1107; M Boersma and H Nelen (eds), *Corruption & Human Rights: Interdisciplinary Perspectives* (Intersentia 2010); J Gathii, 'Defining the Relationship between Human Rights and Corruption' (2009) 31 UPaJIntlL 125; Z Pearson, 'An International Human Rights Approach to Corruption' in P Larmour and N Wolanin (eds), *Corruption and Anti-Corruption* (Asia Pacific Press 2001). For a critical perspective, see C Rose, 'The Limitations of a Human Rights Approach to Corruption' (2016) 65(2) ICLQ 405.

[115] M Stephenson, 'Standing Doctrine and Anticorruption Litigation: A Survey' (Open Society Foundations: Legal Remedies for Grand Corruption, January 2016). A paper prepared by the UNODC in October 2017 discussed compensation to victims of corruption in principle but did not examine how victims are or should be defined. See UNODC, *Effective Management and Disposal of Seized and Confiscated Assets* (October 2017) 38–41.

[116] M Vlasic, 'A President's Legal Legacy: Stolen Asset Recovery and the Rule of Law for All' *Diplomatic Courier* (30 January 2013).

vein, the Holding State may commit the confiscated funds to its overseas development budget, especially if the money will be spent for the benefit of the Victim State.

To say that a charity should be entrusted by the Holding State with disbursing the funds does not mean that such a charity should be able to assert ownership in the assets and seek their recovery in the first place, or 'represent' the victim population who can assert its ownership. Allowing such claims would open up a significant potential for abuse, and the difficulty of fashioning appropriate legal rules would likely prove insurmountable. In contrast, NGOs such as Transparency International have demonstrated the capacity of non-State actors to initiate criminal investigations in some countries with favourable legal frameworks. That role too does not involve claiming any rights to the confiscated assets.[117]

The issue of identifying the victims of corruption took centre stage during the 7th Conference of UNCAC States Parties, but the paper on this subject presented by the Conference Secretariat stopped short of making any notable recommendations. In fact, it noted that most States Parties do not even 'explicitly address the right, set out in the Convention, of foreign States to stand before courts and receive compensation'.[118] The participants therefore encouraged the Open-Ended Intergovernmental Working Group on Asset Recovery, which was established at the 2006 Conference of States Parties, to continue its examination of the matter.[119]

At the end of the day, one returns to the dilemma that dominated the UNCAC negotiations, namely whether it is the Holding State or the Victim State that has the say over the use of the confiscated funds. The role of third parties, such as anti-corruption NGOs, is in advocating that they be used in a transparent manner for the benefit of the victims. However, even the Holding State keeping the money for its own benefit is preferable to a situation where the criminal preserves his or her ill-gotten gains.

V. CONCLUSION

The holy grail of asset recovery is ensuring that the proceeds of public corruption are confiscated and used for the benefit of the population of the Victim State. The purpose of this article is to stimulate conversation about how these objectives are best achieved in view of the UNCAC and its underlying policy values. In particular, it seeks to dispel any

[117] That being said, a note prepared in 2017 by the Secretariat of the Conference of UNCAC States Parties mentions criminal complaints by NGOs in the context of a discussion of the concept of victims of corruption. See Conference of the States Parties to the United Nations Convention against Corruption, 'Good Practices in Identifying the Victims of Corruption and Parameters for Their Compensation: Note by the Secretariat' UN Doc CAC/COSP/2017/11 (31 August 2017) 7.

[118] ibid 5.

[119] *Report of the 7th Conference of the UNCAC States Parties* (n 44) 8.

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misapprehensions that the UNCAC always requires the proceeds of corruption to be returned to the Victim State. This is only the case if confiscation takes place on the basis of a final judgment issued in the Victim State—which, as we have seen, is often not the case.

This is not to say that States should not strive to repatriate the proceeds of corruption or otherwise utilize them for the benefit of the aggrieved population. Quite to the contrary, increased use should be made of transparent arrangements for disbursing the proceeds of corruption along the line of the BOTA Foundation, as the UNCAC Coalition's Civil Society Working Group on Accountable Asset Return recommended in February 2017.[120] What is crucial is that policymakers recognize that the Victim State's legal claims to the confiscated proceeds of corruption are very weak indeed in those cases when confiscation has been secured through another State's efforts.

In contrast, the Holding State has wide discretion over the use of such assets although it is obliged to consider utilizing them for the benefit of those who have been harmed through corruption. Ensuring that confiscated assets are used in such a manner is what anti-corruption advocacy efforts should focus on—rather than handing the confiscated property over to the Victim State. This is in line with the Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases adopted at the Global Asset Recovery Forum in December 2017.[121]

Finally, this article puts forth a somewhat provocative claim that it is better to confiscate the proceeds of corruption and never use them for the benefit of the victims than not to confiscate them at all. This argument has its roots in a 'confiscatory' conception of asset recovery. On this view, the objective of depriving the perpetrator of his or her ill-gotten gains looms large while recovery as such is an important but secondary aim. This approach is bound to be unpalatable to some because it involves a departure from what the UNCAC recognizes as its fundamental principle, namely the return of stolen assets. On the other hand, it has the potential to incentivize developed States with state-of-the-art law enforcement capabilities to go after the proceeds of corruption that have been laundered in their territory and that would have otherwise remained untouched. While falling short of the UNCAC's high aspirations, that outcome too would buttress the international rule of law and go a long way towards reducing impunity.

[120] R Messick, 'Civil Society on Returning Stolen Assets to Highly Corrupt Governments' *Global Anticorruption Blog* (15 February 2017) <https://globalanticorruptionblog.com/2017/02/15/to-experts-attending-february-14-16-meeting-on-managing-disposing-of-stolen-assets/>. The UNCAC Coalition further made several statements on the subject during the 2017 Conference of UNCAC States Parties. See 'Recovery of Damages and Compensation for Victims of Corruption: UNCAC Coalition statement to the 7th Conference of States Parties in Vienna' UN Doc CAC/COSP/2017/NGO/7 (20 October 2017); 'Towards a Comprehensive, Effective, Transparent and Accountable Implementation of UNCAC Chapter V: UNCAC Coalition statement to the 7th Conference of States Parties in Vienna' UN Doc CAC/COSP/2017/NGO/2 (20 October 2017).

[121] Global Forum on Asset Recovery Communiqué (4–6 December 2017).