Notes

# BUILDING TRUST(S): RETHINKING ASSET RETURN IN KLEPTOCRACY FORFEITURES

MICHAEL J. BIONDI†

ABSTRACT

*Kleptocracy, literally meaning "rule by thieves," is a major destabilizing force in an already unstable world. Every year, corrupt government officials plunder billions of dollars rightfully belonging to their citizens and export them overseas. When these funds—often parked in luxury assets—reach the United States, federal prosecutors can seize them using a procedure known as nonconviction-based forfeiture. But after every such seizure, a question arises: How does the United States give stolen assets back to whom they belong? The United Nations Convention Against Corruption strongly encourages (or, in some circumstances, requires) forfeited assets to be returned to their state of origin or prior legitimate owners. Accordingly, the United States Department of Justice often executes sharing agreements with cooperating states. But asset return proves a more formidable challenge when the forfeiture was executed at the behest of a victim state whose government would likely misappropriate the assets again. This Note proposes a new type of fund, modeled on the charitable trust, that could provide an alternative mechanism to return assets in those cases. Depositing the assets in an independently managed trust would relieve the Justice Department of the administrative burden of managing a complex return and would bypass sovereigns to ensure benefits from the stolen assets accrue to the citizens to whom they belong.*

---



† Duke University School of Law, J.D. expected 2023; University of Maryland, B.A. 2018. Thank you to my former colleagues at the U.S. Department of State, who sparked my fascination with the fight against global corruption. Thank you to Professors Rachel Brewster and Doriane Coleman, whose generous counsel helped to refine that fascination into the subject of this Note. This writing benefitted from the editorial contributions and moral support of mentors, family, and friends. Thank you, especially, to the editors of the *Duke Law Journal*, my parents Marisa and Steven Biondi, and Gray Ingram.

## INTRODUCTION

December 13, 2013, held great promise for the people of Equatorial Guinea. On that date, the United States Department of Justice filed a civil action in federal court to forfeit millions of dollars' worth of the personal property of Teodoro Nguema Obiang Mangue ("Nguema"), their vice president.[1] The property was allegedly proceeds of Nguema's corruption.[2] The spoils could have made Imelda Marcos blush.[3] Among the items catalogued in the complaint was a horseshoe-shaped hacienda mansion perched on a bluff over the ocean in Malibu.[4] The government also sought Nguema's collection of rare Michael Jackson memorabilia, including an autographed jacket the popstar wore on the *Thriller* tour,[5] and—of course—Nguema's 2011 Ferrari 599 GTO.[6]

According to the complaint, Nguema purchased these assets using public funds belonging to Equatorial Guinea.[7] The nation has extensive publicly owned hydrocarbon reserves in the Gulf of Guinea, which generate billions of dollars for the country.[8] But little wealth reaches the Equatoguinean people.[9] Instead, much of it remains in the hands

1. Verified Complaint for Forfeiture *in rem* at 2, United States v. One Michael Jackson Signed Thriller Jacket, No. 2:13-cv-09169 (C.D. Cal. Dec. 12, 2013), ECF No. 1 [hereinafter Nguema Forfeiture Complaint].

2. *Id.*

3. Marcos, the former first lady of the Philippines, lived an opulent lifestyle widely seen as epitomizing public corruption and graft. She and her late husband, Ferdinand Marcos, are believed to have stolen $10 billion of public money from the Philippines during his two-decade rule. *See* Jason Gutierrez, *Imelda Marcos Is Sentenced to Decades in Prison for Corruption*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/world/asia/imelda-marcos-sentenced-philippines.html [https://perma.cc/25G6-GCZ5] (outlining the allegations of corruption against Marcos).

4. Nguema Forfeiture Complaint, *supra* note 1, at 4; James Rufus Koren & Neal J. Leitereg, *Did an L.A. Real Estate Broker Shortchange the Citizens of an African Nation out of Millions?*, L.A. TIMES (Oct. 1, 2018, 12:00 PM), https://www.latimes.com/business/la-fi-umansky-sweet water-20180930-story.html [https://perma.cc/5K5Z-EECU].

5. Nguema Forfeiture Complaint, *supra* note 1, at 4.

6. *Id.*

7. *See id.* at 22 (contending that "Nguema obtained extortion payments and misappropriated, embezzled and stole public funds and resources in violation of [Equatorial Guinea] law").

8. *Equatorial Guinea Facts and Figures*, ORG. OF THE PETROLEUM EXPORTING COUNTRIES (2022), https://www.opec.org/opec_web/en/about_us/4319.htm [https://perma.cc/S5LF-NL5Y].

9. *See* Sarah Saadoun, *"Manna from Heaven"?: How Health and Education Pay the Price for Self-Dealing in Equatorial Guinea*, HUM. RTS. WATCH (June 15, 2017), https://www.hrw.org/

of Nguema's family and others in their "Inner Circle," who "exercise[] plenary control over . . . [n]early all positions of political and economic power."[10] The Justice Department's civil complaint catalogued a prolific variety of corruption schemes undertaken by Nguema beginning in the 1990s.[11] For example, it estimated Nguema embezzled tens of millions of dollars through inflated government contracts awarded for public works projects[12] while serving as cabinet minister overseeing forestry, agriculture, and infrastructure.[13]

Because Nguema amassed wealth by misappropriating funds from the Equatoguinean public, the assets he purchased are the proceeds of "kleptocracy," meaning "rule by thieves."[14] That term describes the type of government where "state leaders, generally from poorer countries, . . . loot . . . from their national treasuries" through mechanisms such as embezzlement, bribery, and misappropriation.[15] What distinguishes kleptocracy from other forms of autocratic government is that kleptocratic leaders are simultaneously engaged in governing and illicit self-enrichment.[16] Kleptocracy thus functions like a theft against the public of the kleptocrat's state.[17] The result is

---

report/2017/06/15/manna-heaven/how-health-and-education-pay-price-self-dealing-equatorial-guinea [https://perma.cc/H6PT-TR23] (explaining that Equatorial Guinea's level of social and economic development is similar to that of Zambia and Ghana, despite "boasting a per capita income that is more than five times as high").

10. Nguema Forfeiture Complaint, *supra* note 1, at 9–10.

11. *See id.* at 14–36 (cataloguing various self-enrichment schemes).

12. *Id.* at 22. Nguema demanded bidders submit bids for infrastructure projects with built-in markups of 50 to 1,000 percent (or more) of their actual cost. *Id.* at 22–23. After awarding the contract and paying out government funds, Nguema had the company transfer, in the form of kickbacks, monies tendered for overstated line items to his shell companies or accounts he controlled. *Id.* at 23–24. Hundreds of these transfers occurred around the time Nguema acquired the property named in the Justice Department's complaint. *Id.* at 24–27.

13. *Id.* at 8.

14. JASON SHARMAN, THE DESPOT'S GUIDE TO WEALTH MANAGEMENT: ON THE INTERNATIONAL CAMPAIGN AGAINST GRAND CORRUPTION (2017), *as reprinted in* CAMBRIDGE ALUMNI MAG., Lent 2019, at 31, https://magazine.alumni.cam.ac.uk/wp-content/uploads/2020/01/86-05_cam_86_full_interactive_singles_150.pdf [https://perma.cc/E5MU-MMBA].

15. *Id.*

16. INT'L REPUBLICAN INST., THE KLEPTOCRAT'S PLAYBOOK: A TAXONOMY OF LOCALIZED AND TRANSNATIONAL TACTICS 3 (2021), https://www.iri.org/wpcontent/uploads/2021/11/the_kleptocrats_playbook_final.pdf [https://perma.cc/V72M-9ZFW] (describing kleptocracy as "specific types of criminal activity involving high-level corruption; an authoritarian governance system; and a systemic transnational threat" (emphasis omitted)).

17. *See* Naomi Roht-Arriaza, *Empowering Victims of Grand Corruption: An Emerging Trend?*, 36 CONN. J. INT'L L. (forthcoming 2022) (manuscript at 2), https://papers.ssrn.com/

destabilization: widespread corruption erodes trust in public institutions, undermines the rule of law, and can fuel radicalization.[18]

Systematic theft of state funds by public officials is a vexing problem to address because stolen public monies are exported from the kleptocrat's state for safekeeping and are often parked in luxury assets overseas.[19] States whose financial systems serve as destinations of kleptocracy assets, including the United States, do not sit on the sidelines. Dismantling the flow of kleptocracy assets is integral to preventing global destabilization that roils markets and degrades national security.[20] The plight of kleptocratic states—including Equatorial Guinea—cannot, then, be viewed as an internal concern of far-flung countries. It demands all states respond to kleptocracy and, ultimately, return stolen public assets to their rightful owners.[21]

---

abstract_id=3923652 [https://perma.cc/7SAC-GS9G] (noting that kleptocracy steals from and thus harms "individuals and collectivities as well as society as a whole").

18. *Combating Money Laundering and Other Forms of Illicit Finance: Regulator and Law Enforcement Perspectives on Reform: Hearing Before the S. Banking, Hous., and Urb. Affs. Comm.*, 115th Cong. 47 (2018) (prepared statement of Steven M. D'Antuono, Section Chief, Crim. Investigative Div., Fed. Bureau of Investigation, U.S. Dep't of Just.); *Corruption, Violent Extremism, Kleptocracy, and the Dangers of Failing Governance: Hearing Before the S. Comm. on Foreign Rels.*, 114th Cong. 5–6 (2016) (statement of Gayle Smith, Adm'x, U.S. Agency of Int'l Dev.).

19. Michael Chong & Tom Tugendhat, *The West Must Widen the War on Kleptocracy*, FOREIGN POL'Y (Apr. 14, 2022, 3:37 PM), https://foreignpolicy.com/2022/04/14/democracies-war-on-kleptocracy-russia [https://perma.cc?6MM6-URZD] (describing "core structural flaws"—from regulatory asymmetries across states to lacking enforcement—that allow kleptocrats to take advantage of existing law and "park their ill-gotten gains . . . in the West").

20. *See Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest*, WHITE HOUSE (June 3, 2021) [hereinafter *Memorandum*, WHITE HOUSE], https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest [https//perma.cc/MS2Y-JX97] (establishing countering corruption as "a core United States national security interest").

21. The rightful owners, of course, are the citizens of victim states. Equatorial Guinea's story is sadly not unique. The World Bank estimates that over $1 trillion is lost to criminal activities, corruption, and tax evasion each year. *Fact Sheet on Stolen Asset Recovery*, WORLD BANK & U.N. OFF. ON DRUGS & CRIME (UNODC), https://www.unodc.org/pdf/Star_FactSheet.pdf [https://perma.cc/S5DQ-E44B]. Of that figure, corrupt foreign leaders loot $20 to $40 billion each year from their countries through bribes and misappropriation of public funds. *Id.* This corruption exacts catastrophic costs on development. *See generally* Marie Chêne, *The Impact of Corruption on Growth and Inequality*, TRANSPARENCY INT'L (2014), https://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf [https://perma.cc/X6T5-RPHA] (noting the effects of corruption across a spectrum of development indicators, including economic efficiency, growth, income inequality, and human development).

The shared goal among political and law enforcement leaders has been to deprive corrupt actors like Nguema of the benefits of their corruption by "taking the profit out of the crime."[22] A chorus of intergovernmental bodies has pushed states to enact measures to trace the origins of assets stolen through kleptocracy, seize them, and eventually return them.[23] For example, the United Nations Convention Against Corruption ("UNCAC") recommends its parties adopt a procedure to recover stolen assets known as nonconviction-based ("NCB") forfeiture.[24] The convention encourages countries to implement legal processes to "allow confiscation of [kleptocratic] property without a criminal conviction in cases in which the offender cannot be prosecuted."[25]

In the United States, the Department of Justice's Kleptocracy Asset Recovery Initiative takes on this task, conducting what this Note terms "kleptocracy forfeitures."[26] The department's Money Laundering and Asset Recovery Section "investigate[s] and prosecute[s] cases to seize and forfeit the ill-gotten gains of corrupt foreign leaders and their cronies."[27] The process begins once prosecutors become aware of activity by foreign government officials resulting in a theft of public funds.[28] Then, prosecutors identify and

22. Mat Tromme, *Waging War Against Corruption in Developing Countries: How Asset Recovery Can Be Compliant with the Rule of Law*, 29 DUKE J. COMPAR. & INT'L L. 165, 170 (2019).

23. *See, e.g.*, *id.* at 171 (describing recommendations issued by the Financial Action Task Force ("FATF") in its 2018 international anti-money laundering and terrorism financing standards); KEVIN M. STEPHENSON, LARISSA GRAY, RIC POWER, JEAN-PIERRE BRUN, GABRIELE DUNKER & MELISSA PANJER, WORLD BANK, BARRIERS TO ASSET RECOVERY 7 (2011) (encouraging jurisdictions to "introduce and employ legislative reforms that . . . permit confiscation [of kleptocratic assets] without a conviction"); UN CONVENTION AGAINST CORRUPTION, MUTUAL RECOGNITION OF NON-CONVICTION-BASED FREEZING ORDERS AND CONFISCATION JUDGMENTS 6 (2019) (noting that states without domestic forfeiture mechanisms were "issued . . . recommendations to consider introducing them").

24. *See* U.N. Convention Against Corruption art. 54(1)(c), Dec. 9, 2003, 2349 U.N.T.S. 41 [hereinafter UNCAC] (recommending countries "[c]onsider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction").

25. *Id.*

26. U.S. DEP'T OF JUST. & U.S. DEP'T OF STATE, U.S. ASSET RECOVERY TOOLS AND PROCEDURE: A PRACTICAL GUIDE FOR INTERNATIONAL COOPERATION 1 (2017) [hereinafter U.S. ASSET RECOVERY], https://star.worldbank.org/sites/star/files/booklet_-_english_final_ ed ited.pdf [https://perma.cc/7DNS-89KC].

27. *Id.*

28. The acts that give rise to a kleptocracy forfeiture vary but all involve the misappropriation of public funds by foreign government officials. For example, the Justice

locate proceeds and instrumentalities of that corrupt activity within the United States.[29] Once a case is built, the Justice Department brings an action *in rem* to recover the assets in a kleptocracy forfeiture.[30]

It is through a kleptocracy forfeiture action that the Justice Department could remedy (or attempt to remedy) Nguema's theft. Taking the items away from Nguema was the first step toward returning them to those they belonged to—that is, the Equatoguinean people. But the prescribed U.S. legal mechanisms for kleptocracy forfeitures end with confiscation. Under existing law, forfeited assets become property of the U.S. government.[31] The Kleptocracy Asset Recovery Initiative aims to "recover assets for the benefit of the people of the country harmed."[32] But there is no statutory prescription for doing so. The attorney general has full discretion over assets in government possession.[33] The operative law provides only that the attorney general "may transfer the forfeited personal property . . . to any foreign country which participated directly or indirectly in the seizure or forfeiture."[34] UNCAC, to which the United States is a party,

Department seized $480 million from Nigerian dictator Sani Abacha, who "embezzled billions of dollars . . . from the Central Bank of Nigeria on the false pretense that the funds were necessary for national security." Press Release, U.S. Dep't of Just., U.S. Forfeits over $480 Million Stolen by Former Nigerian Dictator in Largest Forfeiture Ever Obtained Through a Kleptocracy Action (Aug. 7, 2014), https://www.justice.gov/opa/pr/us-forfeits-over-480-million-stolen-former-nigerian-dictator-largest-forfeiture-ever-obtained [https://perma.cc/S5A3-NEUN]. The Justice Department relies on federal law enforcement agencies, especially agents stationed at embassies abroad, to initiate investigations. U.S. ASSET RECOVERY, *supra* note 26, at 2. Evidence provided by foreign governments seeking assistance is crucial, as is interagency cooperation. *Id.* at 3. Since fiscal year 2021, members of the public can even provide information that could be used to initiate kleptocracy forfeitures via the U.S. Department of the Treasury's Office of Terrorism and Financial Intelligence. *See infra* notes 120–122 (discussing the Kleptocracy Asset Recovery Rewards Program).

29. U.S. ASSET RECOVERY, *supra* note 26, at 3–4.

30. *Id.* at 12. For a thorough explanation of *in rem* actions in the kleptocracy forfeiture context, see JEAN-PIERRE BRUN, ANASTASIA SOTIROPOULOU, LARISSA GRAY, CLIVE SCOTT & KEVIN M. STEPHENSON, WORLD BANK & U.N. OFF. ON DRUGS & CRIME, ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS 191–94 (2011), https://openknowledge.worldbank.org/bitstream/handle/10986/34843/9781464816161.pdf [https://perma.cc/D9M3-AG9E].

31. 18 U.S.C. § 981(f).

32. U.S. ASSET RECOVERY, *supra* note 26, at 14.

33. U.S. DEP'T OF JUST., CRIM. DIV., ASSET FORFEITURE POLICY MANUAL 129 (2021) [hereinafter ASSET FORFEITURE POLICY MANUAL], https://www.justice.gov/criminal-afmls/file/839521/download [https://perma.cc/P9GW-2DKH].

34. 18 U.S.C. § 981(i)(1).

provides similar guidance. It directs countries to return confiscated assets to victim states but gives states some discretion in doing so.[35]

And so, as it happened, the Equatoguinean people would not see any return for nearly a decade.[36] Even though the United States reached a settlement with Nguema in 2014, taking title to assets worth over $30 million, attempts to return those assets became mired in the diplomatic reality of dealings with kleptocratic states.[37] The Justice Department could not simply transfer the funds to the Equatoguinean government and trust it would spend them wisely.[38] Doing so would effectively transfer them back into the hands of Nguema, who continues to serve in government with impunity.[39] The Justice Department also struggled to give the forfeited funds to a charity: owing to the "authoritarian nature" of Equatorial Guinea, "there are no independent charities," which "complicat[es] efforts to establish independent execution or oversight of the funds."[40]

In many forfeitures, the Justice Department can share recovered assets directly with victim state partners.[41] But when dealing with states

35. *See generally* UNCAC, *supra* note 24, at ch. V (providing states broad latitude to adopt measures for asset return in accordance with their domestic laws). UNCAC's provisions on asset return will be examined in depth *infra* Part I.

36. *See* Press Release, U.S. Dep't of Just., $26.6 Million in Allegedly Illicit Proceeds To Be Used To Fight Covid-19 and Address Medical Needs in Equatorial Guinea (Sept. 20, 2021) [hereinafter DOJ Press Release], https://www.justice.gov/opa/pr/266-million-allegedly-illicit-proceeds-be-used-fight-covid-19-and-address-medical-needs [https://perma.cc/YJ6L-EVC6] (outlining how the proceeds from the 2014 settlement would be used to launch a COVID-19 vaccination campaign in Equatorial Guinea in 2021).

37. Part III.A further examines the quagmire of returning the Nguema assets. *See infra* Part III.A.

38. *See* Leslie Wayne, *Shielding Seized Assets from Corruption's Clutches*, N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/business/justice-department-tries-to-shield-repatriations-from-kleptocrats.html [https://perma.cc/9V7Y-ZBSS] (interviewing a Justice Department lawyer concerned that returned funds could "disappear and go back to those who caused the harm").

39. *See* Patrick Jackson, *Teodoro Nguema Obiang Mangue and His Love of Bugattis and Michael Jackson*, BBC (July 28, 2021), https://www.bbc.com/news/world-africa-58001750 [https://perma.cc/LKM4-MEDD] (noting that despite corruption-related sanctions in the United States and United Kingdom and a criminal conviction in France, Nguema "remains vice-president, in pole position to succeed his father" as president).

40. MICHAEL J. CAMILLERI, INTER-AM. DIALOGUE, CORRUPTION AND CRISIS IN VENEZUELA: ASSET REPATRIATION FOR HUMANITARIAN RELIEF 19 (2020), https://www.thedialogue.org/wp-content/uploads/2020/09/Corruption-and-Crisis-in-Venezuela-Asset-Repatriation-for-Humanitarian-Relief.pdf [https://perma.cc/J335-2DPF].

41. *See* U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 22 (2014), https://2009-2017.state.gov/documents/organization/222880.pdf [https://perma.cc/6S

who refuse to hold corrupt actors accountable, the United States' "basically voluntary and discretionary" legal framework for postforfeiture return has allowed for unpredictable results.[42] In those cases, the United States lacks a standard protocol to fulfill the UNCAC's goal of returning stolen corruption proceeds. As a result, it risks returning forfeited assets in ways that at best fail to achieve compensatory goals, or, at worst fuel more corrupt activity.[43]

This Note argues that clearer statutory guidelines would improve the Justice Department's procedure for returning forfeited assets to entrenched kleptocracies. A new framework, borrowed from the law of charitable trusts, could achieve that goal. In forfeitures where direct sharing of assets is not possible, this Note proposes that the Justice Department transfer away both legal and equitable title to forfeited assets. Legal title would vest in an independent trustee who stewards the assets and is endowed to disburse them for predetermined purposes. Equitable title would belong to the assets' rightful owners—victim state populations—who would benefit from the charitable returns. This arrangement would improve the Justice Department's existing method of asset return in those cases by providing predictability, accountability, and reducing the department's administrative burden.

Part I examines UNCAC's key provisions in the realm of asset return and explains the requirements and aspirations of the convention. Part II takes stock of existing U.S. law and policy, including the Justice Department's Kleptocracy Asset Recovery Initiative, observing that it affords broad agency discretion to dispose of forfeited assets in kleptocracy cases. Part III returns to the Nguema forfeiture as a case study. After examining repatriation of those assets and others, it identifies weaknesses of the current framework (or lack thereof). Part IV looks to the principles of trusts as a means to return forfeited assets in kleptocracy forfeitures. It picks apart elements from analogous funds and sketches how such a system might function.

---

WR-EP8H] ("From Fiscal Year (FY) 1989 through FY 2013, the international asset sharing program administered by the Justice Department shared $248,869,984 with 43 countries.").

42. Pablo J. Davis, *"To Return the Funds at All": Global Anticorruption, Forfeiture, and Legal Frameworks for Asset Return*, 47 U. MEM. L. REV. 291, 296 (2016).

43. For examples of the inefficiencies and risks of the Justice Department's current asset return process, see *infra* Part III.

## I. UNCAC, KLEPTOCRACY FORFEITURES, AND ASSET RETURN

This Part examines UNCAC, the United Nations' anticorruption treaty. As a party to UNCAC, the United States must ensure that any revised framework for asset return complies with the terms of the convention and the obligations it establishes under international law.[44] UNCAC includes provisions on both asset confiscation and return, reflecting a strong commitment to remunerating victims of kleptocracy. As Section A explains, UNCAC provisions not only encourage states parties to forfeit assets found to be kleptocracy proceeds but also require them to return assets to victims. Section B explores these instructions for asset return, and Section C examines who UNCAC considers a viable returnee. UNCAC's novel conception of corruption victims and treatment of asset return is a critical reason why the United States' existing framework for asset return can—and should—be reformed.

### *A. UNCAC and Kleptocracy Forfeitures*

UNCAC is a legally binding anticorruption treaty adopted by the UN General Assembly in 2003.[45] It is the apex of efforts to internationalize domestic criminal laws to combat and prevent corruption.[46] One of its central functions is to prescribe standards for states to deploy against corrupt activity.[47] In a "major breakthrough,"

---

44. *See* UNODC, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 261 (2006) [hereinafter UNCAC LEGISLATIVE GUIDE], https://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf [https://perma.cc/UCA7-BMHB] ("States parties are required to implement [UNCAC's asset return] provisions and introduce legislation or amend their law as necessary."). *But see* UNODC, MECHANISM FOR THE REVIEW OF IMPLEMENTATION OF THE U.N. CONVENTION AGAINST CORRUPTION, RESPONSE OF THE UNITED STATES OF AMERICA TO THE COMPREHENSIVE SELF-ASSESSMENT CHECKLIST 2 (2010), https://www.unodc.org/documents/treaties/UNCAC/SA-Report/Self-Assessment_Report_-_UNCAC_-_USA.zip [https://perma.cc/C7F7-PTPG] (noting that no federal or state legislation was passed to implement UNCAC).

45. UNODC, SIGNATURE AND RATIFICATION STATUS [hereinafter UNODC, SIGNATURE AND RATIFICATION], https://www.unodc.org/unodc/en/corruption/ratification-status.html [https://perma.cc/6WXD-NSTM], (last updated Nov. 18, 2021).

46. *See* Cecily Rose, Michael Kubiciel & Oliver Landwehr, *Introduction* to THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, A COMMENTARY 1, 4–5 (Cecily Rose, Michael Kubiciel & Oliver Landwehr eds., 2019) (UNCAC "represents the world in its social, economic, and political diversity. . . . It is . . . the basis . . . for the international political and scientific discourse on corruption").

47. *See id.* at 7 (noting that Chapter III, on Criminalization and Law Enforcement, "forms the centrepiece of the Convention").

confiscatory measures are central to that enforcement framework.[48] UNCAC encourages parties to "identif[y], trac[e], freez[e, and] seiz[e]" proceeds of official corruption through tools such as kleptocracy forfeiture.[49] It does so with good reason. Confiscating the spoils of corruption deters and punishes corruption by interrupting illicit asset flows and depriving individual actors of any benefit.[50] Confiscation also serves a reparative function by restoring economic integrity and—if assets are returned—contributing to development.[51]

If UNCAC's treatment of asset confiscation was a breakthrough, its treatment of asset return was a revolution.[52] The convention, designed to attract a variety of ratifiers,[53] often ducked specific prescriptions relating to enforcement.[54] UNCAC instead frequently uses precatory language, such as "[e]ach State Party shall *consider* adopting"[55] or "to the greatest extent possible *within its domestic legal system*."[56] But insofar as UNCAC dodged mandating states implement

48. *See id.* at 10 (describing Chapter V's asset recovery provisions, which "set[] forth procedures for international cooperation on confiscation matters"). The importance of these provisions is reflected in Article 51, which declares asset recovery a "fundamental principle" of the convention. UNCAC, *supra* note 24, at art. 51.

49. UNCAC, *supra* note 24, at art. 31(2); *see also* THEODORE S. GREENBERG, LINDA M. SAMUEL, WINGATE GRANT & LARISSA GRAY, WORLD BANK, STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE 18–19 (2009), https://star.worldbank.org/sites/default/files/Non%20Conviction%20Based%20Asset%20Forfeiture.pdf [https://perma.cc/2VYD-DQSP] (noting UNCAC provides "ground-breaking obligations" for cooperation in the realm of NCB forfeiture).

50. *See* GUILHERME FRANCE, TRANSPARENCY INT'L, NON-CONVICTION-BASED CONFISCATION AS AN ALTERNATIVE TOOL TO ASSET RECOVERY: LESSONS AND CONCERNS FROM THE DEVELOPING WORLD 4 (Sara Brimbeuf & Matthew Jenkins eds., 2022), https://knowledgehub.transparency.org/assets/uploads/helpdesk/Non-Conviction-Based-Forfeiture_2022.pdf [https://perma.cc/82J8-Z6ED] (summarizing the deterrence and economic integrity rationales for depriving corrupt actors of pecuniary windfalls from corruption).

51. *Id.*

52. *See* UNCAC LEGISLATIVE GUIDE, *supra* note 44, at 261 (declaring the UNCAC's primary provision on asset return a "clear departure" from "earlier initiatives" and calling it "one of the most crucial and innovative parts" of the convention).

53. *See* Rose et al., *supra* note 46, at 5 ("[T]he Convention does not apply only to a group of homogenous states of a continent . . . but has global aspirations.").

54. *See id.* at 4 ("[H]alf of [UNCAC's] provisions, including several important provisions in chapter III, are not (fully) mandatory.").

55. *E.g.*, UNCAC, *supra* note 24, at art. 21 (suggesting states adopt legislation criminalizing private sector bribery) (emphasis added).

56. *E.g.*, UNCAC, *supra* note 24, at art. 31 (requiring parties to adopt methods of confiscating proceeds of corruption, but only "to the greatest extent possible within [their] domestic legal system") (emphasis added).

many of its enforcement provisions, it took an unusually concrete and novel stance in its treatment of victims of kleptocracy.[57] In a first among treaties, it contains provisions addressing compensation and reparation for victims of official corruption and defined "victims" to include people and entities in addition to sovereign states.[58] UNCAC thus firmly establishes the principle that those harmed by corruption—states, individuals, or entities—should have compensatory rights.[59]

These novel ideas[60] about victimhood appear in UNCAC's treatment of "asset recovery," which "refers to the [combined] process" of "recover[ing]" stolen assets in a forfeiture and "repatriat[ing]" them "to their rightful owners."[61] Article 51 declares asset recovery "a fundamental principle" of the convention.[62] UNCAC's Legislative Guide goes further, declaring that none of UNCAC's societal aspirations, such as good governance and the rule of law, can be achieved "unless the fruits of the crimes are taken away from the perpetrators and returned to the rightful parties."[63] In respect

57. *Compare* Rose et al., *supra* note 46 ("Because many of its articles are not fully mandatory . . . [the] UNCAC lagged behind the expectations of some scholars and non-government organisations."), *with* Roht-Arriaza, *supra* note 17, at 5 (noting that UNCAC provisions dealing with victims are framed as mandatory obligations, unlike much of the rest of the Convention). For additional context, see, for example, UNCAC, *supra* note 24, at art. 35 ("Each State Party shall take such measures . . . 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 . . . .").

58. Roht-Arriaza, *supra* note 17, at 5–6.

59. Abiola Makinwa, *Article 35: Compensation for Damage*, *in* THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, A COMMENTARY, *supra* note 46, at 357, 358 ("Article 35 gives the victim of corruption a distinct position in the anti-corruption framework by emphasising the role of the private litigant . . . ."). The idea that corruption victims have compensatory rights is novel because only recently have policymakers begun to understand kleptocracy as an issue affecting individuals. Until late in the twentieth century, many considered victims of kleptocracy to be sovereign states alone. Roht-Arriaza, *supra* note 17, at 4. Only recently have policymakers recognized that kleptocracy's corrosive impacts on economic, social, and cultural development ultimately reach citizens and implicate human rights. *Id.*

60. Roht-Arriaza, *supra* note 17, at 5 ("The development of [UNCAC] . . . changed the perception of who was a victim, who had the right to participate in proceedings, and who was the subject of reparations.").

61. *Asset Recovery*, UNCAC COALITION, https://uncaccoalition.org/learn-more/asset-recovery [https://perma.cc/M2TW-QLN8]; *see also* Richard Messick, *Asset Repatriation Under UNCAC*, GLOB. ANTICORRUPTION BLOG (Mar. 27, 2019), https://globalanticorruptionblog.com/2019/03/27/asset-repatriation-under-uncac [https://perma.cc/BWL5-AY27] (describing the requirement that states cooperate to return stolen assets as "[o]ne of the most far-reaching changes [UNCAC] made to international law").

62. UNCAC, *supra* note 24, at art. 51.

63. UNCAC LEGISLATIVE GUIDE, *supra* note 44.

of that notion, UNCAC actually *requires*, at least in some circumstances—and in accordance with domestic law—the state where the relevant assets were found (the "holding state") to return them to the state where the corruption offense was committed (the "victim state").[64] With this understanding of UNCAC's novel focus on making victims of kleptocracy whole, Section B sketches UNCAC's primary provision for asset return after a kleptocracy forfeiture. That provision, Article 57, provides both specific instructions and broad principles that must play a role in the U.S. legal framework for asset recovery.

### *B. Asset Return Under UNCAC: Article 57*

The simple objective of asset recovery—to return assets to prior legitimate owners—proves difficult to translate into a legal procedure that accounts for the variety of legal regimes across states parties.[65] In states that have implemented an NCB forfeiture mechanism, the holding state that executes a forfeiture takes full title to forfeited assets.[66] Article 57 of UNCAC picks up there, telling states parties what to do with the assets they have forfeited. That provision—though it contains three prongs—is better conceived as placing assets into one of two "buckets." In the first bucket, a victim state has a right to unconditional return. In the second, the victim state is entitled only to "priority consideration" by the holding state of where and whether to return forfeited assets. Which bucket the assets fall into depends on the involvement of the victim state in the forfeiture.[67] This Section will examine each in turn.

Article 57(3)(a)–(b) forms the first bucket. It requires the holding state to return certain assets to the victim state unconditionally. But

64. UNCAC, *supra* note 24, at art. 57. And despite the novelty of these ideas, UNCAC is a ratification success: 189 countries, including the United States, are parties. UNODC, SIGNATURE AND RATIFICATION, *supra* note 45.

65. Messick, *supra* note 61 ("The overarching principle is straightforward, but translating it into exacting, legally binding language is anything but. The drafters had to account for cases where the state requesting return and the requested state have quite different laws . . . .").

66. *See* BRUN ET AL., *supra* note 30, at 181 (In NCB forfeitures, "[l]egal title is acquired by the state or government without compensation to the asset holder."). The U.S. civil forfeiture statute, which will be analyzed in Part II, is emblematic in that it vests "[a]ll right, title, and interest" in forfeited property in the United States. 18 U.S.C. § 981(f).

67. Anton Moiseienko, *The Ownership of Confiscated Proceeds of Corruption Under the UN Convention Against Corruption*, 67 INT'L & COMPAR. L.Q. 669, 679 (2018) ("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.").

UNCAC's drafters placed some stringent requirements on unconditional return. First, the property must clearly be *public* funds: victim states have no right to recover private funds lost to private corruption.[68] Article 57(3)(a) lists embezzlement and laundering of public funds as eligible offenses.[69] Article 57(3)(b) opens the door to others if the victim state can establish prior public ownership of the confiscated property.[70] Second, the victim state must have actually requested the holding state execute the forfeiture, pursuant to the procedure prescribed by Article 55.[71] And third, the forfeiture must have been premised on a valid final judgment in the victim state's own courts.[72]

In sum, the victim state must be deeply involved in the forfeiture to secure a right to unconditional return. This paradigm, and the requirements of Article 57(3)(a)–(b), make intuitive sense. A forfeiture requires a significant level of prosecutorial and investigatory effort from the holding state. It would be unjust for a victim state to free ride and reap benefits without itself contributing to enforcement.[73] And further, a victim state's ambivalence—or, in more extreme circumstances, its kleptocracy—could indicate that the regime is an inappropriate steward of the forfeited assets.[74] Take, for example, Equatorial Guinea: Article 57 smartly avoids any requirement that assets be returned to its government, which refuses to hold corrupt actors like Nguema accountable.

Because the first bucket requires victim state involvement, many kleptocracy forfeitures will fall into the second bucket. Article 57(3)(c) addresses these cases: if the three conditions (public funds, request by the victim state, and final judgment in the victim state) are not met, the holding state need only give "priority consideration" to returning forfeited assets to the victim state.[75] "Priority consideration" means more morally than it does legally. The holding state has full discretion,

68. The Legislative Guide takes care, for instance, to differentiate offenses like bribery and extortion, in which the state is criminally damaged but was never entitled to the proceeds of the corruption. UNCAC LEGISLATIVE GUIDE, *supra* note 44, at 264.

69. UNCAC, *supra* note 24, at art. 57(3)(a).

70. *Id.* at art. 57(3)(b).

71. *Id.* at art. 57(3)(a).

72. *Id.* (this requirement "can be waived by the requested State Party").

73. Moiseienko, *supra* note 67, at 680.

74. *Id.*

75. UNCAC, *supra* note 24, at art. 57(3)(c).

despite a request from a victim state, to decide how to return assets in the second bucket.[76] The standard applies in all cases in which the perpetrator's assets have been confiscated in legal proceedings launched by the holding state and all cases in which forfeitures are resolved in settlements.[77]

Article 57(3)(a)–(c) forms the skeleton of UNCAC's framework for asset return in kleptocracy forfeitures, but two later provisions add caveats that often affect asset return. The first, Article 57(4), authorizes the holding state to withhold reasonable expenses from the amount repatriated,[78] intended to account for costs incurred by the holding state in investigations and judicial proceedings.[79] The second, Article 57(5), allows for mutually acceptable agreements by states in lieu of the statutorily prescribed avenues.[80] Victim states may find this option preferable to the ambiguous "priority consideration" they are otherwise entitled to under Article 57(3)(c).[81]

### *C. Nonstates as Returnees*

Because kleptocracy depletes publicly owned assets, sovereign states—representing the victim citizenry—make a natural vessel for return.[82] During UNCAC's drafting, this view was endorsed by many delegations who were wary of references to nonsovereign victims in asset return provisions.[83] They preferred that the convention leave to victim states to receive recovered assets and process any further claims

76. Pinar Ölçer, *Article 57: Return and Disposal of Assets*, *in* THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, A COMMENTARY, *supra* note 46, at 569, 578.

77. Moiseienko, *supra* note 67, at 680 ("The proceeds of [monetary penalties collected in out-of-court settlements] fall within the scope of Article 57(3)(c) UNCAC and do not *have* to be shared with the Victim State."). Settlements may result because kleptocracy forfeiture cases are difficult to prosecute. *See infra* note 99 (discussing Justice Department guidelines that encourage settlements in certain forfeitures).

78. UNCAC, *supra* note 24, at art. 57(4).

79. UNCAC LEGISLATIVE GUIDE, *supra* note 44, at 265.

80. *Id.* at art. 57(5).

81. An example of this is the settlement reached in the Nguema forfeiture, detailed *infra* Part III.

82. *See* Nadja Capus & Kei Hannah Brodersen, *Negotiating Without the Victim State: The Exclusiveness of Anticorruption Settlements*, J. FIN. CRIME (forthcoming 2022) (manuscript at 2) (on file with author) (noting the state is the default legal representative of the people).

83. UNODC, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, at 504 n.8, U.N. Sales No. E.10.V.13 (2010) [hereinafter UNCAC TRAVAUX].

to them.[84] Others, by contrast, envisioned nonstates as possible avenues of return and spoke broadly of "transferring the recovered assets in such a manner as to compensate victims of the crime" or using them to "support anti-corruption initiatives."[85]

The provision that was ultimately enacted can be viewed as a compromise between the two. Article 57(3)(a)–(b) establishes that where victim states meet the requirement of unconditional return, assets must be returned "to the requesting [s]tate [p]arty."[86] But when it comes to return of assets in the Article 57(3)(c) discretionary bucket, there is interpretive room for holding states to return assets to nonsovereign entities. Recall that Article 57(3)(c) requires holding states to give priority consideration to returning property to "prior legitimate owners" or "victims of the crime."[87] At least in some circumstances, returning assets to nonsovereign entities fulfills that requirement. Sovereigns are supposed to represent the interests of all their citizens.[88] But often in kleptocratic states, self-dealing leaders fail to fulfill that representative function.[89] Article 57(3)(c) thus recognizes that holding states may need to bypass sovereigns to remunerate "legitimate owners" and "victims."[90]

Two key insights emerge from the UNCAC's prescriptions relating to kleptocracy forfeitures and asset return. First, the convention maintains a novel focus on the remuneration of victims, including in its provisions on asset recovery. Second, the structure of Article 57 means that the holding state will often have authority to decide how, and to whom, kleptocracy assets are returned. The next Part moves from the international to the domestic to examine the Justice Department's existing framework for the return of assets in kleptocracy forfeitures.

---

84. *Id.* at 505 n.10, 508 n.17; *see also id.* at 510–11 (reviewing drafts submitted by Pakistan and Russia, which conferred authority on requesting states to "give compensation to the victims of the crime, return them to their legitimate owners, contribute their value towards fulfilling other objectives of [the c]onvention . . . or use them to finance specific development projects").

85. *See id.* at 505 (reviewing draft text submitted by the United States).

86. UNCAC, *supra* note 24, at art. 57(3)(a)–(b).

87. *Id.* at art. 57(3)(c).

88. Moiseienko, *supra* note 67, at 692.

89. *Id.*

90. UNCAC, *supra* note 24, at art. 57(3)(c). The authorization to return assets to nonsovereigns is key to many instances of asset return in practice and the trust-based framework this Note proposes *infra* Part IV.

## II. KLEPTOCRACY FORFEITURES AND ASSET RETURN UNDER U.S. LAW

Combating corruption through mechanisms like kleptocracy forfeiture seems to be at the tip of every U.S. lawmaker's tongue in conversations about foreign policy.[91] But the history of confiscatory laws is short. The Justice Department launched the Kleptocracy Asset Recovery Initiative in July 2010,[92] seeking to "forfeit the proceeds of foreign official corruption and, where appropriate, return those proceeds to benefit the people harmed by these acts of corruption and abuse of office."[93] This Part explores the two phases of kleptocracy asset recovery under U.S. law: confiscation and return. While having a clear legal and procedural mechanism to execute asset *forfeiture*, the United States has a less developed legal framework to address asset *return*.

### *A. Confiscation*

It is worth noting why—aside from obligations under UNCAC—the United States invests resources into confiscating kleptocracy assets. In kleptocracy cases, the perpetrator of the corrupt activity is a non-U.S. national, generally outside the reach of U.S. jurisdiction.[94] Law enforcement within the victim state may be unlikely to pursue kleptocrats, who can steal assets in the first place by virtue of their positions of authority.[95] It is left, then, to countries such as the United States—which are often the destination of the proceeds of

91. *See, e.g.*, Press Release, Sean Patrick Maloney, Rep. Maloney Questions Intelligence Agency Leaders (Mar. 8, 2022), https://seanmaloney.house.gov/media-center/press-releases/video-release-rep-maloney-questions-intelligence-agency-leaders-on [https://perma.cc/W6H2-7JG6] ("I'm very interested in Russian oligarchs . . . what are we doing to get after the oligarchs in the United States? Can we seize some yachts . . . ?"); President Joseph R. Biden, State of the Union Address as Prepared for Delivery (Mar. 1, 2022) ("We are joining with our European allies to find and seize your yachts[,] your luxury apartments[,] your private jets. We are coming for your ill-begotten gains.").

92. H.R. REP. NO. 116-60, at 2 (2019).

93. *Id.*

94. Note that these scenarios mirror closely UNCAC's suggestions for when NCB forfeiture should apply. *See* UNCAC, *supra* note 24, at art. 54(1)(c) ("Consider taking such measures . . . to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, or absence or in other appropriate cases.").

95. *See* Daron Acemoglu, James A. Robinson & Thierry Verdier, *Kleptocracy and Divide-and-Rule*: *A Model of Personal Rule*, 2 J. EUR. ECON. ASS'N 162, 163 (2004) ("Kleptocracy emerges in weakly institutionalized polities, where formal institutions neither place significant restrictions on politicians' actions nor make them accountable to citizens.").

kleptocracy—to disrupt flows of corrupt activity by confiscating the *assets* involved. Ensuring the United States is not a harbor of corrupt proceeds is not only altruistic but is recognized by the White House as a national security priority.[96]

Once prosecutors identify proceeds of kleptocracy within the United States, the Justice Department brings an *in rem* action to confiscate the assets under 18 U.S.C. § 981, the federal forfeiture statute.[97] Though § 981 creates a civil remedy, it applies to predicate criminal offenses (and their proceeds), including acts under the umbrella of kleptocracy, such as embezzlement of public funds.[98] U.S. courts have found that assets touching the U.S. financial system are within jurisdictional reach, opening the door to forfeiture proceedings even when the assets involved have minimal contact with the United States.[99] Since the introduction of the Justice Department's Kleptocracy Asset Recovery Initiative, kleptocracy forfeitures have

96. *Memorandum*, WHITE HOUSE, *supra* note 20. The White House cites corrosive effects on global GDP, democracy, and domestic rule-of-law among the reasons for its recognition. *Id.*

97. Davis, *supra* note 42, at 312 (citing 18 U.S.C. § 981(a)(1)).

98. For example, 18 U.S.C. § 981(a)(1)(C) provides a forfeiture remedy for "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title) or a conspiracy to commit such an offense." Section 1956(c)(7) includes in its definition of "specified unlawful activity" the "bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official." 18 U.S.C. § 1956(c)(7)(B)(iv).

99. *See* United States v. All Assets Held in Acct. No. XXXXXXXX, 83 F. Supp. 3d 360, 368 (D.D.C. 2015) ("Use of the United States banking system . . . provides sufficient contact between property and the United States for a civil forfeiture action in rem."). Even with the requisite legal footing of section 981, executing NCB forfeitures through the Kleptocracy Asset Recovery Initiative is a cumbersome process. Matthew Goldstein, *Seizing an Oligarch's Assets Is One Thing. Giving Them to Ukraine Is Another.*, N.Y. TIMES (May 8, 2022), https://www.nytimes.com/2022/05/08/business/russia-oligarch-yacht-assets.html [https://perma.cc/D6WE-938H]. Justice Department guidelines make clear that a "direct link between the illicit asset and criminal conduct" is required. U.S. ASSET RECOVERY, *supra* note 26, at 12. A successful case may require a substantial evidentiary record, including financial records and witness interviews. *Id.* And kleptocrats are by nature well-heeled and often highly litigious. *See* Robert Frank, *Here's What Happens to Russian Oligarch Yachts After They're Seized*, CNBC (Mar. 9, 2022, 11:09 AM), https://www.cnbc.com/2022/03/09/russian-oligarch-yachts-this-is-what-happens-after-theyre-seized-.html [https://perma.cc/4NZT-UPRP] (recounting a kleptocracy forfeiture proceeding against former Ukrainian prime minister Pavlo Lazarenko that lasted more than fifteen years and describing how kleptocrats exploit privacy laws to conceal ownership of high-value assets). Perhaps for that reason, the guidelines "encourage[] settlements . . . to conserve the resources of both the government and claimants." ASSET FORFEITURE POLICY MANUAL, *supra* note 33, at 133.

become an important part of U.S. anticorruption policy[100] and compliance with UNCAC's asset recovery goals.[101]

### *B. Return*

Confiscation is only the first step of asset recovery under UNCAC. This Section addresses the next step: the return of assets to corruption victims. A 2019 Congressional Budget Office report estimated the Justice Department's Kleptocracy Asset Recovery Initiative—nearly ten years after its launch—had returned about $150 million in forfeited assets to victims and victim states using existing processes.[102] Despite this volume of repatriation, the United States has no obligatory legal procedure for asset return.

The Justice Department's Practical Guide for International Cooperation on Asset Forfeiture informs international partners that "[t]he United States has flexible legal authority to repatriate and dispose of confiscated assets to certain victims of crime or in

100. Alice W. Dery & Jennifer Bickford, *Transferring Forfeited Assets to Victims Through Remission, Restoration, and Restitution*, 67 DEP'T JUST. J. FED. L. & PRAC. 219, 219 (2019) (noting forfeiture is the "principal tool by which the [U.S.] government recovers criminal proceeds"). Indeed, the White House has recently turned to NCB forfeiture with renewed interest, asking Congress to permit kleptocracy forfeitures through administrative processes outside the courts. Press Release, White House, Fact Sheet: President Biden's Comprehensive Proposal To Hold Russian Oligarchs and Elites Accountable (Apr. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable [https://perma.cc/D86S-QAB3]; Background Press Call by Senior Administration Officials on the Ukraine Supplemental Budget Request, White House (Apr. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/background-press-call-by-senior-administration-officials-on-the-ukraine-supplemental-budget-request [https://perma.cc/F2N9-M8G7] (describing the Biden administration's plan as an "expanded and expedited administrative process that would allow for the forfeiture of property that would be conducted within the Department of the Treasury").

101. *See* UNODC, COUNTRY REVIEW REPORT OF THE UNITED STATES OF AMERICA 104 (2015), https://uncaccoalition.org/files/official-documents/country-review-report-usa.pdf [https://perma.cc/C4UJ-RUKN] (commending the United States for "go[ing] beyond the UNCAC requirements" by having "successfully implemented a two-tiered system of confiscation/forfeiture through its authority to pusrue [sic] conviction-based *in personam* forfeiture and [NCB] forfeiture").

102. H.R. REP. NO. 116-60, at 9 (2019). Note that this amount ballooned to over $1.2 billion in 2021, when the United States partnered with the Malaysian government to repatriate funds forfeited from the 1MDB scandal. Press Release, U.S. Dep't of Just., Over $1 Billion in Misappropriated 1MBD Funds Now Repatriated to Malaysia (Aug. 5, 2021) [hereinafter 1MDB Press Release], https://www.justice.gov/opa/pr/over-1-billion-misappropriated-1mdb-funds-now-repatriated-malaysia [https://perma.cc/V4EY-C79V].

recognition of a foreign government's assistance."[103] Legally, after a forfeiture action, the U.S. government has full title to forfeited property.[104] In kleptocracy forfeitures, the attorney general exercises control over disposition.[105] They have the discretion, in consultation with the secretary of state, to transfer forfeited assets "to any foreign country which participated . . . in the . . . forfeiture of the property."[106] The Justice Department's Asset Forfeiture Policy Manual adds that "the disposition of property forfeited to the United States is an executive branch decision and not a matter for the court . . . The Attorney General has complete authority to dispose of forfeited property 'by sale or any other commercially feasible means.'"[107]

If the attorney general decides to return assets to a foreign country, however, the process expands beyond the confines of the Justice Department. The department, which often executes sharing agreements in cooperative efforts with other law enforcement agencies as a matter of practice,[108] is required by federal law to do so in international asset return.[109] These agreements may then trigger the Circular 175 procedure, a State Department review process designed to ensure propriety of federal agreements with foreign countries.[110] And once the State Department approves, it must notify Congress of the return.[111] But not every asset sharing agreement is subject to these requirements. State Department regulations exempt the return of assets valued less than $25 million.[112]

---

103. U.S. ASSET RECOVERY, *supra* note 26, at 14.

104. 18 U.S.C. § 981(f); *see also* ASSET FORFEITURE POLICY MANUAL, *supra* note 33, at 129 ("Forfeiture divests an owner of property of all right, title, and interest in it, and vests the right, title, and interest in the government.").

105. Dery & Bickford, *supra* note 100, at 227–28 ("The final decision regarding remission or restoration always rests with the Attorney General.").

106. § 981(i)(1).

107. ASSET FORFEITURE POLICY MANUAL, *supra* note 33, at 126–27. Note that by delegation, the U.S. Marshals Service exercises primary management and disposal responsibilities over forfeited assets. *Id.* at 127. The attorney general may also, of course, retain the property for official use. 21 U.S.C. § 881(e)(1)(A).

108. U.S. DEP'T OF JUST. & U.S. DEP'T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 10 (2018).

109. 21 U.S.C. § 881(e)(1)(E)(ii).

110. U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL § 721 (2006), https://fam.state.gov/fam/11fam/11fam0720.html [https://perma.cc/LV47-WHVU].

111. Congressional notification is required under the Case-Zablocki Act. 1 U.S.C. § 112(b).

112. *See* U.S. AGENCY FOR INT'L DEV., BLANKET C-175 REQUEST FOR USAID TO NEGOTIATE AND CONCLUDE CERTAIN INTERNATIONAL AGREEMENTS 6 (2009), https://www.usaid.gov/sites/

The Justice Department also has statutory authority to engage third parties—including private custodians and trustees—in managing forfeited assets.[113] As a matter of policy, the department disfavors doing so, citing cost and the "labor-intensive nature" of administering third-party assistance.[114] Its guidelines go so far as to state that "all other alternatives" should be "considered and rejected" before resorting to third-party management, including not bringing a forfeiture action *at all* where assets will require "third party expertise" or "continuing capital investment" to maintain their value.[115] Still, when "clearly necessary," department guidelines outline procedures and standards to bring third-party experts aboard.[116] And the department appears cautious of the type and volume of assets it has the capability to manage. The guidelines counsel, for instance, that prosecutors should conduct net equity calculations and assess potential liabilities, and maintenance, storage, and disposal costs, "well in advance of forfeiture."[117]

Lately, Congress has shown more interest in the Justice Department's historically unilateral authority to manage and return forfeited kleptocracy assets. Last year, lawmakers introduced bills to guide the department's hand in disposing of assets forfeited from Russian kleptocrats[118] and channel those assets for the benefit of Ukraine.[119] And lawmakers recently greenlit the Kleptocracy Asset Rewards Program,[120] which directs the Department of the Treasury to

default/files/documents/1868/349maa.pdf [https://perma.cc/84UN-DPM5] ("The [State] Department has taken the position that grant agreements involving less than $25 million are not considered international agreements . . . ." (citing 60 Fed. Reg. 54320 (Oct. 23, 1995)).

113. 18 U.S.C. § 983(j) ("Upon application of the United States, the court may . . . appoint conservators, custodians, appraisers, accountants, or trustees . . . to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture."); ASSET FORFEITURE POLICY MANUAL, *supra* note 33, at 121.

114. ASSET FORFEITURE POLICY MANUAL, *supra* note 33, at 121.

115. *Id.*

116. *Id.* at 122–25.

117. *Id.* at 9.

118. *See, e.g.*, Asset Seizure for Ukraine Reconstruction Act, H.R. 6930, 117th Cong. (2022); Yachts for Ukraine Act, H.R. 7187, 117th Cong. (2022).

119. H.R. 6930, § 2(5) ("The President should use all liquidated funds for the benefit of the people of Ukraine . . . ."); H.R. 7187, § 2(a) ("[T]he President is authorized to take such action as may be necessary to use the amounts [obtained by the United States by imposing sanctions or forfeiture against Russian oligarchs] to provide humanitarian assistance to Ukraine.").

120. Kleptocracy Asset Recovery Rewards Act, Pub. L. No. 116-283, §§ 9701–03, 134 Stat. 4834, 4834–38 (2021).

offer money rewards for information leading to the forfeiture of stolen assets stashed in U.S. banks.[121] Though the program as enacted is funded with an appropriation, earlier versions of the bill proposed that rewards be paid from the proceeds of the forfeiture assets themselves.[122]

To conclude, the current U.S. legal framework for asset return gives the attorney general wide discretion over forfeited kleptocracy assets, which creates a broad variety of possible dispositions. Though disfavored by current department policy, the attorney general may also engage third parties to manage and dispose of assets. While Congress has recently expressed more interest in the disposition of forfeited assets, it has generally left this process to the executive branch. The next Part returns to the Nguema forfeiture to examine the framework in practice.

## III. KLEPTOCRACY ASSET RETURN IN PRACTICE

Thus far, this Note has taken stock of UNCAC's asset return provisions.[123] Part I has identified a narrow channel of conditions by which a victim state is entitled to unconditional return of forfeited assets but concluded many forfeiture actions require only "priority consideration" be given to return.[124] Part II has evaluated the legal mechanism for kleptocracy forfeitures under U.S. law, showing the attorney general has wide discretion over asset return following kleptocracy forfeitures.[125] This Part returns to the Nguema forfeiture, tracking what happened with those assets as a test case for U.S. asset return where sharing is inappropriate. For comparison, it briefly reviews other ways by which the Justice Department disposes of assets following kleptocracy forfeitures. It then concludes that uncooperative victim states can exploit weak points in the current U.S. legal policy for asset return, hindering some forfeitures from achieving their reparative function.

---

121. *Id.*

122. The House Committee Report included a provision that the secretary of the treasury "make such [reward] payments using the stolen assets recovered . . . before using appropriated funds." H.R. REP. NO. 116-60, at 13 (2019).

123. *See supra* Part I.

124. *Id.*

125. *See supra* Part II.B.

### *A. Revisiting the Nguema Forfeiture*

Prosecutors in the Nguema forfeiture struggled to trace stolen assets through a web of overseas shell companies and bank accounts.[126] The parties eventually settled in 2014, when Nguema agreed to forfeit about half of the assets the Justice Department was seeking and pay a fine in representation of the others.[127] Under the terms of the agreement, the assets were to be liquidated.[128] Following the sale, the bulk of the proceeds would be returned to the Equatoguinean people via a mutually agreed-upon charity.[129]

Sadly, the promise of the settlement rapidly gave way to legal and political reality. Under the liquidation provision of the settlement, the Justice Department was to sign off on the Malibu beach house sale, but it allowed Nguema to contract with an agent[130] and effectively oversee the brokerage process. In a twist, the property sold and then quickly

126. James V. Grimaldi, *When U.S. Targets Foreign Leaders for Corruption, Recovering Loot Is a Challenge*, WALL ST. J. (Oct. 10, 2014, 12:33 PM), https://www.wsj.com/articles/u-s-reaches-34-million-corruption-settlement-with-equatorial-guinea-official-1412948259 [https://perma.cc/XP27-WB2H] ("The Justice Department faced daunting obstacles in its fight against Mr. Obiang that are common in corruption cases against foreign leaders."); Leslie Wayne, *Wanted by the U.S.: The Stolen Millions of Despots and Crooked Elites*, N.Y. TIMES (Feb. 16, 2016), https://www.nytimes.com/2016/02/17/business/wanted-by-the-us-the-stolen-millions-of-despots-and-crooked-elites.html [https://perma.cc/SU4A-NWGR]. Kleptocracy forfeitures are often difficult work for prosecutors, not only because kleptocrats are adept at hiding assets through opaque transactions but also because "well-heeled targets of these actions . . . have the resources to hire good lawyers and hold up the judicial process." *Id.*

127. Nguema forfeited the Malibu mansion and the Ferrari automobile but kept the Gulfstream jet and much of the Michael Jackson memorabilia. *See* Stipulation and Settlement Agreement at 7–17, 19, 25–27, United States v. One Michael Jackson Signed Thriller Jacket, No. 2:11-cv-03582 (C.D. Cal. Oct. 10, 2014), ECF No. 127-1 [hereinafter Nguema Settlement Agreement] (forfeiting the real property and automobile, setting the fine, and dismissing the cases against the jet and certain memorabilia). Note also that the Equatoguinean justice system took no part in the forfeiture: "[T]he applicable anticorruption laws are not enforced against the Inner Circle [of the President], including Nguema." Nguema Forfeiture Complaint, *supra* note 1, at 14. As a result, Equatorial Guinea obtained no legal right to the assets under UNCAC. This forfeiture falls under Article 57(5) as a settlement.

128. Nguema Settlement Agreement, *supra* note 127, at 6–17 (setting forth terms of sale for the forfeited clifftop mansion and the forfeited Ferrari automobile).

129. The settlement dictated that liquidated funds from the sales of forfeited assets would first be used to pay court costs. *Id.* at 20. Then, it reserved $10.3 million for the United States. *Id.* at 20–21. The remainder would be paid to the agreed-upon charity. *Id.* at 21. The United States manifested an intent to use the remainder of its portion, after the Justice Department covered investigation costs, "for the benefit of the people of Equatorial Guinea." *Id.* at 22.

130. *Id.* at 9.

resold for roughly double a year later.[131] Nguema recovered $6.4 million in damages after settling a lawsuit against his realtor for breach of fiduciary duties.[132] The Justice Department declined to comment on whether it had signed off on the $32.5 million sale and never got involved in the subsequent dispute.[133]

Curiously, the Justice Department agreed to let Nguema "maintain control of" the proceeds from the real estate litigation, even though both parties acknowledged that they rightly belonged to the forfeiture fund.[134] Over a two-year period, Nguema tried repeatedly to misappropriate the funds, first by having the trustee cut him a $1.4 million personal check,[135] then by attempting to transfer the entire $6.4 million to the Equatoguinean treasury.[136] While both efforts failed, Nguema came close: he succeeded in removing the full balance into a trust account managed by Equatorial Guinea's counsel, without consulting the Justice Department.[137]

The problems did not end there. For years after the 2014 settlement, no one heard anything about the Nguema funds as negotiations carried on behind closed doors to figure out which charity to give them to.[138] In May 2021, a memorandum filed by the Justice

131. Koren & Leitereg, *supra* note 4. The property sold quickly for $32.5 million, without any marketing or publicity, reportedly at the request of Nguema. *Id.* Less than a year later, it resold for $69.9 million. *Id.*

132. *See* Memorandum of Points and Authorities in Support of Government's Motion To Enforce Settlement Agreement at 5, United States v. One Michael Jackson Signed Thriller Jacket, No. 2:11-cv-03582 (C.D. Cal. May 24, 2021), ECF No. 161-1 [hereinafter Nguema Enforcement Memorandum] ("After counsel . . . deducted legal fees allegedly owed, the Realtor Suit settlement funds amounts to $6.4 million.").

133. Koren & Leitereg, *supra* note 4. A Justice Department spokesman "could not confirm that the department approved [the agent's self-dealing] investment in the property, noting that the federal agency is not involved in the dispute over the sale." *Id.*

134. Nguema Enforcement Memorandum, *supra* note 132, at 7–8 ("These funds are additional Net Settlement Proceeds related to the disposition of [Nguema's] mansion . . . [and] should be subject to the Settlement Agreement."; "Counsel for [Nguema] acknowledged this point when he sought permission to deviate from the Settlement Agreement to keep the Realtor suit settlement funds in his trust account . . . .").

135. Declaration of the Hon. Susan N. Stevenson at 2, United States v. One Michael Jackson Signed Thriller Jacket, No. 2:11-cv-03582 (C.D. Cal. May 24, 2021), ECF No. 161-3 [hereinafter Stevenson Affidavit].

136. Nguema Enforcement Memorandum, *supra* note 132, at 8.

137. *Id.* at 8–9.

138. *See, e.g.*, Matthew Stephenson, *Whatever Happened with that Charity that the Obiang Settlement Was Supposed To Fund?*, GLOB. ANTICORRUPTION BLOG (Apr. 23, 2019) [hereinafter Stephenson, *Whatever Happened*], https://globalanticorruptionblog.com/2019/04/23/whatever-happened-with-that-charity-that-the-obiang-settlement-was-supposed-to-fund [https://perma.cc/

Department in support of a court enforcement order revealed the source of the hold up. Nguema and the Equatoguinean government were stonewalling disbursement of the assets.[139] The memorandum explained how Nguema "repeatedly negotiated a potential use for the [n]et [s]ettlement [p]roceeds based on proposals developed and suggested by the United States, only to abruptly change course at the last minute."[140] "After almost seven years of trying to negotiate," the department wrote in its filings, it resorted to using a bilateral panel to select a beneficiary charity.[141] In 2021, the panel finally reached a verbal agreement to use the money for COVID-19 vaccines.[142] But, again, Equatorial Guinea refused to sign off on the agreement.[143]

A judge finally resolved the matter in July 2021,[144] ordering disbursement of $19.25 million to COVAX to distribute COVID-19 vaccines in Equatorial Guinea and disbursement of the proceeds of the Malibu litigation to a Maryland charity for other health care services in the country.[145] Tensions remain. The Justice Department noted, "[W]ithout the consent of the government of the Republic of Equatorial Guinea, no organization will be able to [use the funds] in

---

X29X-RPK6]; Matthew Stephenson (Guest Post by EG Justice), *It's Time for Plan B on Dispersing the Obiang Settlement Money to the People of Equatorial Guinea*, GLOB. ANTICORRUPTION BLOG (May 16, 2019), https://globalanticorruptionblog.com/2019/05/16/guest-post-its-time-for-plan-b-on-disbursing-the-obiang-settlement-money-to-the-people-of-equatorial-guinea [https://perma.cc/R5UE-LURG] ("[T]housands of people in Equatorial Guinea have been asking themselves th[e] same question for the last five years . . . .").

139. *See* Nguema Enforcement Memorandum, *supra* note 132, at 5–7 (describing various measures undertaken by Nguema and the Equatoguinean government to avoid disbursing assets, signaling a "reluctance to proceed as agreed").

140. *Id.* at 6. Among the proposals scuttled by Nguema were grants to the United Nations Development Program and educational and health charities. *Id.*

141. *Id.* at 2–3. Under the terms of the settlement, if parties were unable to agree on a beneficiary charity, the Justice Department was to turn the assets over to a three-person panel to pick one. Nguema Settlement Agreement, *supra* note 127, at 18–19.

142. Stevenson Affidavit, *supra* note 135, at 2–3.

143. *Id.* at 3.

144. Order on Government's Motion To Enforce Settlement Agreement at 1–2, United States v. One White Crystal-Covered "Bad Tour" Glove and other Michael Jackson Memorabilia; Real Property Located on Sweetwater Mesa Road in Malibu, California; One 2011 Ferrari 599 GTO, No. 2:11-cv-03582 (C.D. Cal. July 20, 2021), ECF No. 169.

145. *Id.*; DOJ Press Release, *supra* note 36; Julian Pecquet, *US Seeks To Force Equatorial Guinea To Take Covid Vaccine Deal as Biden Steps Up Anti-Kleptocracy Fight*, AFRICA REPORT (Aug. 23, 2021, 07:37 AM), https://www.theafricareport.com/118817/usa-equatorial-guinea-forced-to-take-covid-vaccine-deal-as-biden-steps-up-anti-kleptocracy-fight [https://perma.cc/NV6P-V4DU].

country to deliver much needed services."[146] Discussions deteriorated to a point that the Justice Department opined in court filings it could pass the funds to the United Nations and let it deal with Equatorial Guinea.[147]

The Nguema forfeiture paints a complicated picture. To some extent, it is a remarkable success. Over $26 million was taken out of Nguema's pocket and returned (eventually) to benefit the Equatoguinean people. But certain elements of the Justice Department's procedure undermined the efficiency of the asset return. It took nearly a decade, enormous amounts of bureaucratic effort, and ultimately judicial intervention to open a channel of return. This kind of mixed result is not limited to the Nguema forfeiture. The next Section provides a brief overview of two other kinds of kleptocracy asset dispositions: direct asset sharing and a government-run charitable fund. Neither is free from the kinds of structural issues present in the Nguema forfeiture.

### *B. Alternative Dispositions and Their Outcomes*

To be sure, the Nguema forfeiture does not represent all or even most kleptocracy forfeitures. Many proceed with the cooperation of victim states as UNCAC envisions.[148] In those routine cases, the Justice Department can return assets directly to victim state governments subject to a bilateral asset sharing agreement, often subjecting the funds to conditions on use.[149] For instance, the Justice Department returned to Malaysia hundreds of millions of dollars that were misappropriated from the 1MDB fund, subject to the condition the funds be used to pay down Malaysia's sovereign debt.[150] But direct

146. Nguema Enforcement Memorandum, *supra* note 132, at 7.

147. *See id.* ("If [Nguema] continues to interfere with the United Nations Program, then the United States requests this Court modify the Settlement Agreement to allow the United Nations to use the funds at its discretion in a manner consistent with the terms of the Settlement Agreement.").

148. *See supra* note 86 and accompanying text. *See, e.g.*, Press Release, U.S. Dep't of Just., United States Assists Korean Authorities in Recovering over $28.7 Million in Corruption Proceeds of Former President of the Republic of Korea (Mar. 4, 2015), https://www.justice.gov/opa/pr/united-states-assists-korean-authorities-recovering-over-287-million-corruption-proceeds [https://perma.cc/28GH-CLHN] (returning funds recovered in a joint investigation into the former Korean president, which included a criminal prosecution in South Korea).

149. *See supra* note 103 and accompanying text; CAMILLERI, *supra* note 40, at 16, 18–19.

150. CAMILLERI, *supra* note 40, at 16.

transfers presume a stable and trustworthy victim state government.[151] As Michael Camilleri, a scholar of international aid and senior advisor at the U.S. Agency for International Development, has noted, "[O]ften a change in leadership is accompanied by the necessary political will to . . . undertake the necessary commitments."[152] Asset sharing is not an option in entrenched kleptocracies like Equatorial Guinea. Negotiating a bilateral agreement requires some degree of cooperation with the victim state government.[153] This is not always possible where geopolitical conditions are unfavorable.[154] Thus, direct conditional transfers are not a viable channel of return in all kleptocracy forfeitures.

When an asset sharing agreement is not practicable, the Justice Department has had to embrace more creative measures to return assets. In 2009, the United States settled a kleptocracy forfeiture action relating to kickbacks paid to Kazakhstani officials, resulting in recovery of $84 million.[155] The settlement incorporated a memorandum of understanding signed by the governments of the United States, Kazakhstan, and Switzerland.[156] It birthed the BOTA Foundation, a nonprofit entity designed to facilitate return of monies to the Kazakhstani people.[157] BOTA, governed by a seven-member board of Kazakhstani civil society representatives and American and Swiss diplomats, disbursed money via direct cash payments to poor

151. *Id.* at 18.

152. *Id.*

153. *See id.* at 19 (noting the difficulty of reaching a return agreement with the Equatoguinean government).

154. *See id.* at 22 (detailing the "practical obstacle[]" of repatriating assets to Venezuela when the U.S. government recognized then-National Assembly President Juan Guaidó even as Nicolás Maduro maintained control over the Venezuelan government).

155. Order Dismissing Case at 1, United States v. Approximately $84 Million Dollars Held in Deposit in Account No. T-94025, No. 2:07-cv-03559 (S.D.N.Y. Dec. 9, 2015), ECF No. 19-3. Note that the BOTA assets appreciated from $84 million to $115 million. *See* AARON BORNSTEIN, THE BOTA FOUNDATION: A MODEL FOR THE SAFE RETURN OF STOLEN ASSETS? 1 (2016), http://p-t-p.org/wp-content/uploads/PtP_Bota-Foundation-Case-Study_Bornstein.pdf [https://perma.cc/G72N-MMNZ].

156. Government's Notice of Final Release of Settlement Funds and Motion To Dismiss at 2, 5, United States v. Approximately $84 Million Dollars Held in Deposit in Account No. T-94025, No. 2:07-cv-03559 (S.D.N.Y. Dec. 9, 2015), ECF No. 19 [hereinafter Final Release of Settlement Funds]. The forfeiture action arose from payments made by an American businessman, James Giffen, to Kazakhstani officials. *Id.* The U.S. government alleged that the payments, deposited in Swiss bank accounts, were illegal bribes under the Foreign Corrupt Practices Act and U.S. money laundering laws. *Id.*

157. CAMILLERI, *supra* note 40, at 20.

households, grants to child welfare services, and scholarships to higher education institutions.[158] The BOTA Foundation was the first charity established to return kleptocracy assets.[159] IREX, a private non-governmental organization, managed operational aspects of the return.[160] BOTA achieved some success: external evaluators praised the foundation's "high levels of effectiveness."[161]

Despite its successes, the BOTA Foundation encountered challenges, most of which seem traceable to its bureaucratic operations. The foundation's board could not execute decisions independently: it required approval of all three governments, plus the World Bank, to make dispositions.[162] The result was an expenditure procedure described as "painstakingly slow."[163] Further, the seats on BOTA's board of trustees that were reserved for Kazakhstani civil society were filled by its government with individuals who had little expertise in administering aid.[164] Almost a third of revenues went to programmatic and administrative costs,[165] which exceeds a typical nonprofit organization's overhead expenditures.[166] And indeed, when Switzerland returned additional assets to Kazakhstan in 2012, it chose

158. *Id.*

159. Aaron Bornstein, *The BOTA Foundation Explained (Part Ten): Lessons from BOTA*, FCPA BLOG (Apr. 27, 2015, 11:08 AM) [hereinafter Bornstein, *Lessons from BOTA*], https://fcpablog.com/2015/04/27/the-bota-foundation-explained-part-ten-lessons-from-bota [https://perma.cc/P6NQ-V7B4].

160. INT'L RSCH. EXCH. BD., THE BOTA FOUNDATION: FINAL SUMMATIVE REPORT 4 (2015) [hereinafter THE BOTA FOUNDATION: FINAL SUMMATIVE REPORT], https://www.irex.org/sites/default/files/node/resource/bota-foundation-final-report.pdf [https://perma.cc/57XQ-B7EZ]. The BOTA Foundation's use of independent management approaches the type of procedure this Note envisions. *See infra* Part IV. This Note, however, goes further to propose independent management of all aspects of asset return, including the selection of beneficiaries.

161. THE BOTA FOUNDATION: FINAL SUMMATIVE REPORT, *supra* note 160, at 5 (quoting an independent evaluation of the organization conducted by Oxford Policy Management, a social research firm).

162. Bornstein, *Lessons from BOTA*, *supra* note 159; CAMILLERI, *supra* note 40, at 20.

163. Bornstein, *Lessons from BOTA*, *supra* note 159.

164. *Id.* (noting "several members of BOTA's local board . . . were not child welfare experts," but "individuals nominated behind closed doors to help monitor the spending of the restituted funds" causing governance of BOTA to "suffer[] as a result").

165. BORNSTEIN, *supra* note 155, at 29 ("About 15% of the funds were spent on direct program costs, and only 15.6% were spent on operations and overhead . . . .").

166. WILLIAM BEDSWORTH, ANN GOGGINS GREGORY & DON HOWARD, BRIDGESPAN GRP., NON-PROFIT OVERHEAD COSTS: BREAKING THE VICIOUS CYCLE OF UNREALISTIC EXPECTATIONS AND PRESSURE TO CONFORM 11 (2008), https://www.bridgespan.org/bridgespan/Images/articles/nonprofit-overhead-costs/Nonprofit-Overhead-Costs.pdf [https://perma.cc/PR4H-GX99].

to deposit them into a World Bank trust fund rather than revive BOTA—citing administrative bloat.[167]

### *C. Weaknesses in the Current U.S. Framework for Asset Return*

With the Nguema asset return and a couple of alternative methods in mind, this Section will summarize shortcomings of the Justice Department's existing approach to kleptocracy asset returns. It falls short in at least three areas: predictability, practicality, and accountability. These issues frame Part IV's discussion of a trust-based procedure for kleptocracy asset return.

1. *Predictability*. The lack of a consistent framework for kleptocracy asset return reduces the legitimacy of the process.[168] The Justice Department can often return funds directly to victim states.[169] But when this is not possible, it has no standard procedure case-to-case. In the Nguema forfeiture, for example, beneficiaries of the returned funds were selected in diplomatic negotiations.[170] But the Kazakhstani forfeiture established a new charitable organization to return funds.[171] This discretion to choose the mechanism of return is unmoored from the goal of returning assets to their rightful owners because it contributes to a "misplaced sense of ownership" over forfeited

167. FED. DEP'T OF FOREIGN AFFS. OF SWITZ., NO DIRTY MONEY: THE SWISS EXPERIENCE IN RETURNING ILLICIT ASSETS 26 (describing the BOTA Foundation as "administratively cumbersome" in recounting its decision to use another channel of asset return); BANK INFO. CTR., WORLD BANK OVERSIGHT OF ASSET RETURN: LACKING CLEAR VISION? 13–14 (2019) [hereinafter BANK INFO. CTR.] (describing Switzerland's use of a World Bank-administered trust fund to repatriate additional assets).

168. *See* Oluwafunmilayo Akinosi, *Asset Recovery and the Department of Justice's Discretion To Return*, GLOB. ANTICORRUPTION BLOG (Aug. 31, 2015), https://globalanticorruptionblog.com/2015/08/31/asset-recovery-and-the-department-of-justices-discretion-to-return [https://perma.cc/93CT-XKV5] ("[T]he recovery of stolen assets requires a sense of predictability that seized and forfeited assets will be returned.").

169. *See, e.g.*, 1MDB Press Release, *supra* note 102; Press Release, U.S. Dep't of Just., U.S. Repatriates Over $311.7 Million in Assets to the Nigerian People that Were Stolen by the Former Nigerian Dictator and His Associates (May 4, 2020), https://www.justice.gov/opa/pr/us-repatriates-over-3117-million-assets-nigerian-people-were-stolen-former-nigerian-dictator [https://perma.cc/X5UK-L2S9].

170. *See supra* note 141 (discussing procedure for returning the Nguema assets under the settlement).

171. Press Release, U.S. Dep't of Just., Justice Department Settlement Successfully Releases More than $115 Million in Alleged Corruption Proceeds to People in Kazakhstan (Dec. 9, 2015), https://www.justice.gov/opa/pr/justice-department-settlement-successfully-releases-more-115-million-alleged-corruption [https://perma.cc/K6U7-UJC9].

assets.[172] Further, discretion can undermine the effectiveness of asset return by denying victims a role in (or even awareness of) the process.[173] A standardized method of asset return would offer needed transparency and a starting point for settlements. Though the United States has no legal obligation as a holding state to return assets in many of these cases, predictability would establish return as a default, cutting against any sense of ownership over the assets.[174] It would also respond to requests from civil society that the Justice Department "establish a general process for the repatriation of assets seized [in forfeitures]."[175] By doing so, the Justice Department would reduce the perception, however undeserved, that the United States only returns forfeited assets at its own discretion and for its own benefit.[176]

2. *Practicality*. The Justice Department has proven itself an able, but not ideal or efficient, steward of kleptocracy assets. In fact, its own guidelines allude to difficulty managing complex assets.[177] Examples from practice support this notion. It is at least possible that stronger oversight of the Malibu sale may have avoided the resulting litigation and near depletion of the Nguema assets. And had those proceeds been invested prudently, the value could have appreciated over the years while a beneficiary was selected.[178] Instead, the department's hands-off approach to liquidating the property and failure to invest the proceeds deprived the beneficiaries of a larger amount they otherwise might have recovered.

---

172. Akinosi, *supra* note 168.

173. *See* KRISTIAN LASSLETT & THOMAS MAYNE, CORRUPTION & HUM. RTS. INITIATIVE, A CASE OF IRRESPONSIBLE ASSET RETURN?: THE SWISS-KAZAKHSTAN $48.8 MILLION 10–11 (2018) (arguing asset return cannot achieve reparative objectives "if victims and the wider public are not fully informed" and noting the importance of "victim voices" in return mechanisms).

174. Akinosi, *supra* note 168.

175. Attorneys representing the Socio-Economic Rights and Accountability Project ("SERAP"), a Nigerian NGO, made the request following the Justice Department's forfeiture of Dictator Sami Abacha's assets in 2014. Adetokunbo Mumuni, *U.S. Lawyers Seek Repatriation of Abacha Loot to Nigeria*, UNCAC COAL. (Mar. 19, 2014), https://uncaccoalition.org/us-lawyers-seek-repatriation-of-abacha-loot-to-nigeria [https://perma.cc/KF5G-6Y7G] (quoting letter from attorneys Alexander Sierck and Nicholai Diamond, *pro bono* counsel to a Nigerian NGO, to Attorney General Eric Holder).

176. *See* Akinosi, *supra* note 168 ("[F]orfeiture cannot be for the benefit of, or at the discretion of, the possessor state.").

177. *See supra* note 117 and accompanying text.

178. For an example of well-stewarded assets held and invested for public good, consider the management of state lottery funds, *see infra* Part IV.B.1.

Recent instances of asset return reveal other administrative inefficiencies. Court filings in the Nguema case show U.S. government officials' exasperation after years of unsuccessful negotiations with the Equatoguinean government.[179] Similar bureaucratic lethargy was the Achilles heel of the delay-prone BOTA Foundation.[180] Thus, contrary to the existing Justice Department guidelines on third-party management, it is not at all clear that the department is a more cost-effective or less labor-intensive manager of forfeited kleptocracy assets than a third party would be. Experience suggests, rather, that this kind of stewardship lies far outside its area of expertise.

3. *Accountability*. Political and diplomatic circumstances in the victim state influence kleptocracy asset return. Reforms, for instance, can improve a victim state's capacity to accept returned assets.[181] Conversely, negative developments raise the risk that returned funds will be reabsorbed into corruption.[182] Even charities are frequent subjects of political pressure in kleptocratic states,[183] whose operations can be curtailed or suspended with the change of political winds.[184] Operating under these conditions, holding states must employ procedures that provide for both transparent planning before the disbursement of funds and continuous monitoring through its completion.

---

179. *See* Nguema Enforcement Memorandum, *supra* note 132, at 7 (requesting modification of settlement agreement absent cooperation of Equatoguinean government).

180. *See supra* notes 162–167 and accompanying text.

181. The repatriation of the 1MDB funds, for instance, coincided with a change in Malaysia's government and a renewal of bilateral trust between it and the United States. *See* CAMILLERI, *supra* note 40, at 16, 18.

182. *See, e.g.*, LASSLETT & MAYNE, *supra* note 173, at 4, 6–8 (raising alarm that funds returned by Switzerland to Kazakhstan could "benefit those implicated in the original Swiss prosecution" after administrators selected an organization tied to Kazakhstan's kleptocratic government as a recipient of returned funds).

183. In just one example, notoriously corrupt Nicaraguan President Daniel Ortega ordered the closure of fifty nonprofit organizations for vague reasons in 2022, after ordering over one hundred to close earlier that year. *See Nicaragua Shuts Down 50 Non-Profits in New Crackdown*, BBC (May 5, 2022), https://www.bbc.com/news/world-latin-america-61333797 [https://perma.cc/WLT7-HW6M] ("Government opponents say the closures are part of a wider crackdown on anyone critical of the president . . . .").

184. Indeed, the Justice Department acknowledged that conveying funds to COVAX absent cooperation from the Equatoguinean government would not be worthwhile. *See* Nguema Enforcement Memorandum, *supra* note 132, at 6–7 ("[T]he fact is that without the consent of the government of the Republic of Equatorial Guinea, no organization will be able to operate in country to deliver much needed services.").

This reality is incongruent with the Justice Department's existing approach. Beneficiaries of the Nguema forfeiture were ultimately selected by a three-member panel[185] that had little accountability to civil society.[186] While the Justice Department held the Nguema assets, it was not required to provide accountings or keep records.[187] And since the assets were ordered to be transferred to the two charities, there is no record as to whether or how those organizations have spent the funds. A better framework would provide more opportunity for public contribution to the decision-making at the outset of a return and to monitoring after the assets are transferred out of U.S. government custody. And it would allow the steward of kleptocracy assets to reallocate funds if initial beneficiaries prove unable to put them to good use.[188]

This Section revisited the Nguema forfeiture to illustrate the Justice Department's existing methods of asset return. Though the Justice Department eventually routed some assets to charity for the benefit of the Equatoguinean people, the process laid bare structural inefficiencies that affect the predictability, practicality, and accountability of returns. Alternative methods of asset return employed by the Justice Department in other cases suffered similar shortfalls or are infeasible when assets cannot be shared directly with the victim state. With these weaknesses in mind, the next Part proposes reforms to asset return in kleptocracy forfeitures.

## IV. TRUST LAW AS AN IMPROVED SYSTEM OF ASSET RETURN IN KLEPTOCRACY FORFEITURES

This Part introduces principles of trust law as the basis of a new procedure for kleptocracy asset return in the United States. It argues private law trusts provide an efficient alternative to asset sharing in

185. Nguema Settlement Agreement, *supra* note 127, at 18–20; Stevenson Affidavit, *supra* note 135, at 2.

186. Nguema Settlement Agreement, *supra* note 127, at 19 ("All decisions of the panel are final and the Parties waive all rights to contest, appeal or otherwise challenge the [p]anel's decisions . . . .").

187. *See generally id.* (void of any requirement that the Justice Department account or report to the public on the assets). Commentators have also suggested that this information may fall under the Freedom of Information Act's exemption for information relating to law enforcement proceedings. *See* Stephenson, *Whatever Happened*, *supra* note 138.

188. Under the procedure this Note proposes, an independent trustee would have authority to manage and allocate funds until their full return, including reallocating funds from one beneficiary to another if necessary. *See infra* Part IV.C.

cases where the latter is infeasible. Specifically, the Justice Department should consider depositing recovered kleptocracy assets in trust funds governed by independent trustees for the benefit of corruption victims. Doing so would require the department to rethink its current policy toward third-party asset managers but would create a more predictable, practical, and accountable mechanism to return forfeited assets in challenging cases. Section A provides an overview of trust law and its applicability to asset return. Section B examines two trust-like entities—state lottery funds and mass tort settlement funds—noting elements from each that could inform a new kind of kleptocracy forfeiture fund. Section C sketches what such a trust might look like, and Section D situates the proposed reform in the context of existing proposals.

### *A. Trust Law and Asset Return*

A persistent challenge in kleptocracy forfeitures is that those who should presumably benefit from asset return are entire populations of people and thus are difficult to define and recompense.[189] When corruption harms the victim state's populace generally, the sovereign is the natural vessel for return.[190] But when leaders of victim states are themselves the corrupt actors from whom the money was seized, "it becomes unlikely that the people of that state would actually benefit from returned money."[191] On the other hand, holding states should not keep title to the assets indefinitely.[192] As discussed in Part III, they make inefficient and unaccountable managers themselves. The solution to this dilemma, then, is an arrangement where another entity,

189. *See* Capus & Brodersen, *supra* note 82 (suggesting that insofar as "criminal procedures tackling corruption . . . allow for recovering and returning proceeds of corruption to the owner," states should focus on victims of foreign bribery and their rights to remuneration).

190. *See* Moiseienko, *supra* note 67, at 692 ("Since the State acts in the interests of all 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.").

191. Capus & Brodersen, *supra* note 82; *see also* GLOB. F. ON ASSET RECOVERY, GFAR PRINCIPLES FOR DISPOSITION AND TRANSFER OF CONFISCATED STOLEN ASSETS IN CORRUPTION CASES 2 (2017), https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf [https://perma.cc/H2KQ-6HAK] (setting forth the principle that returned assets should "benefit the people of the nations harmed by the underlying corrupt conduct").

192. Doing so violates the spirit (and sometimes the letter) of UNCAC. *See supra* Part I.

a nonsovereign representative, manages kleptocracy assets belonging to the people of the victim state.[193]

The trust form produces just this sort of bifurcated arrangement.[194] A settlor conveys title to a trustee, who is both a legal owner of the assets and a fiduciary, holding them for the benefit of a class of equitable owners.[195] The fiduciary relationship entitles those equitable owners, or "beneficiaries," to seek redress for breaches of the trustee's duty.[196] For our purposes, the trust vehicle allows holding states to convey the *benefits* of assets back to the victim state and its people, without saddling the victim state with the *responsibilities* of stewardship—which it may be ill-equipped to undertake. By "separat[ing] the benefits of ownership from the burdens of ownership," the trust form solves the dilemma noted above by providing a nonsovereign vessel to manage return of kleptocracy assets.[197] Holding states can use the trust form to benefit victim state citizens while bypassing its sovereign—thereby protecting the assets.[198]

Trustees must act according to statutorily imposed duties and shoulder full responsibility for managing particular assets.[199] Commonly, trustees have a duty of loyalty to administer the trust solely in the interests of the beneficiaries and a duty of prudence to abide by a standard of reasonable care in trust administration.[200] Settlors may impose additional duties, such as a duty to inform and account.[201] In

193. Many civil society organizations agree with this notion: over thirty signed a letter to an UNCAC experts group recommending states "find alternative means of managing . . . stolen assets" in cases where victim states would be inappropriate stewards, including by "use of an independent non-state actor to disburse the returned assets." Letter from UNCAC Coalition Members to Ali Sulaiman, Comm'r, Fed. Ethics and Anti-Corruption Comm'n, Andrea Semadeni, Ambassador, Gov't of Switz. & Brigitte Strobel-Shaw, Chief, Conf. Support Sec., UNODC (Feb. 13, 2017), https://www.unodc.org/documents/corruption/AddisEGM2017/UNCAC_Coalition_Working_Group_Letter_to_Addis_Meeting.pdf [https://perma.cc/CSA3-HAQN] (emphasis removed).

194. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS & ESTATES 385 (10th ed. 2017).

195. *Id.*

196. *Id.*

197. *See* AUSTIN W. SCOTT & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS 4 (6th ed. 2019) (noting that trusts can be created for a wide variety of purposes).

198. SITKOFF & DUKEMINIER, *supra* note 194, at 696.

199. RESTATEMENT (THIRD) OF TRUSTS § 86 (AM. L. INST. 2007); SITKOFF & DUKEMINIER, *supra* note 194, at 395.

200. SITKOFF & DUKEMINIER, *supra* note 194, at 588.

201. *Id.* at 675.

the context of kleptocracy forfeitures, the duties of loyalty and prudence would help hold trustees accountable for failing to safeguard assets or allowing them to seep back into illicit channels.[202] A duty to inform and account would help ensure disbursements are predictable and transparent.[203] An independent trustee is an accountable, neutral manager.[204] Amid any foreseeable contingency, such as regime changes,[205] entrenchment of kleptocracy in the victim state,[206] changes of law in the holding state,[207] refusal to cooperate with charitable organizations,[208] or mootness of particular causes, assets held in trust remain under the safe control of an individual or entity legally obligated to serve predetermined interests and make disbursements according to a set of terms.[209]

Charitable trusts are especially well-suited to the context of kleptocracy forfeitures because they instruct the trustee to use the funds to benefit a set charitable purpose rather than make disbursements to a set of ascertained beneficiaries.[210] Such an arrangement is necessary here, as the victims of kleptocracy—generally the population of a victim state—are too numerous to count as a class of individuals. Charitable trusts can also endure in perpetuity,[211] and their disbursement terms are judicially modifiable under the *cy pres*

202. *Id.* at 396. Note that this duty may even extend to an "investment function"—meaning trustees could be required to grow assets rather than hold them frozen in escrow. *Id.*

203. *Id.*

204. *See id.* at 592 (noting that an independent trustee is "subject to . . . fiduciary duties").

205. *See* Capus & Brodersen, *supra* note 82, at 2–3 (arguing that restitution to kleptocratic states must "take into account possible regime changes and the role of international pressure").

206. *See* Sarah Saadoun, *Sale of a Seized Beach House Funds Covid-19 Vaccine Drive in Equatorial Guinea*, HUM. RTS. WATCH (Sept. 2, 2021, 12:00 AM), https://www.hrw.org/news/2021/09/02/sale-seized-beach-house-funds-covid-19-vaccine-drive-equatorial-guinea [https://perma.cc/5Z2N-VUBQ] (noting that the Equatoguinean government continues to "aggressively defend[]" Nguema and expressing some skepticism that the vaccination drive will "live[] up to the promise" of asset return).

207. The trust form also helps protect victims from changing laws in *holding* states that could presumably curtail their standing to seek return of stolen assets. *See* Capus & Brodersen, *supra* note 82, at 14 ("France seems to be making a step back in terms of rights for victim states to receive remedies. . . .").

208. *See supra* note 146 and accompanying text (acknowledging that even charitable giving—as in the case of Equatorial Guinea—requires the consent and cooperation of the recipient state).

209. *See* SITKOFF & DUKEMINIER, *supra* note 194, at 396 (describing the distribution function of the trustee).

210. *Id.* at 759.

211. *Id.*

doctrine.[212] As it turns out, many charitable trusts already in existence (or funds that operate like them) offer useful design elements that could be borrowed and implemented in the kleptocracy forfeiture trusts this Note envisions. The next Section samples two of those funds, highlighting features that might be applied to a kleptocracy forfeiture trust.

### *B. Principles from Existing Trusts or Trust-Like Vehicles*

Monies managed for the public good are all around us. Public charitable organizations reported total assets of $3.79 trillion in 2019.[213] Nonprofit entities, operating pursuant to particular charitable purposes, spend over a trillion dollars annually.[214] And the government has a hand in many charitable ventures of its own: setting aside the significant foreign assistance programs it manages directly,[215] everyone from lottery-ticket buyers to mass tort litigants interacts with government-organized or government-settled funds. Those ventures offer insights into how kleptocracy forfeiture funds could be designed, disbursed, and managed.

1. *Setting a Charitable Purpose and Applying Fiduciary Duties: State Lottery Funds*. State lottery funds demonstrate two ways kleptocracy assets might be managed in a trust-like vehicle. First,

---

212. The *cy pres* doctrine allows courts to modify application of charitable trust assets, recognizing the risk that changed circumstances could "render the trust's original purpose obsolete." *Id.* at 767. Courts employ the doctrine when a trust's purpose becomes illegal, impossible, impractical, or—in modern practice—wasteful. *Id.*

213. *The Nonprofit Sector in Brief 2019*, URB. INST. (June 4, 2020), https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019 [https://perma.cc/P5BY-D4C3].

214. *See id.* (reporting that nonprofit expenditures reached $1.7 trillion in 2019); *see also Exemption Requirements – 501(c)(3) Organizations*, I.R.S., https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations [https://perma.cc/3N2U-DWFP] (noting the requirement that public nonprofits operate "exclusively for exempt purposes," referring to the list of charitable purposes in 26 U.S.C. § 501(c)(3)). Much of the law governing nonprofits derives from that of charitable trusts. SITKOFF & DUKEMINIER, *supra* note 194, at 759.

215. *See, e.g.*, OFF. OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2023, at 90–91 (2022) (proposing that $3.2 billion be allocated to the U.S. Department of State "to support global democracy, human rights, anti-corruption, and good governance programming"). For examples of the charitable programming that the government administers in the anticorruption space, see generally U.S. DEP'T OF STATE, INL GUIDE TO JUSTICE SECTOR ASSISTANCE (2022), https://www.state.gov/wp-content/uploads/2022/09/INL-Justice-Guide-508-Compliant_PAPD-Edits.pdf [https://perma.cc/XED6-W2AG].

lottery funds are organized around government-imposed charitable terms. In North Carolina, for instance, the State Treasury maintains an enterprise fund that collects proceeds from the sale of lottery games and tickets and interest earned on existing principal.[216] A lottery commission, akin to a board of trustees, is statutorily bound to "allocate revenues . . . in order to increase and maximize the available revenues for education purposes."[217] To do so, state law obligates the commission to transfer net revenues from the lottery fund to the state at least four times a year.[218] Similarly, California's State Lottery Commission is bound by statute to "maximize the amount of funding allocated to public education,"[219] effectuated by quarterly distributions by the state controller.[220]

Second, although lottery funds are arms of state government, they are organized with a degree of managerial independence from the state. California makes clear that "[t]he operations of the [Lottery] Fund are separate and distinct from other operations of the State."[221] State law vests the lottery commission with authority to invest funds of the State Lottery Fund outside of the State Treasury system and allows it to purchase and sell securities.[222] In North Carolina, to be sure, the state treasurer serves as the fiduciary of the lottery fund, with a "duty . . . to invest the cash of the fund[] . . . in excess of [that] required to meet the current needs and demands on [the] fund[]."[223] But North Carolina does not require its treasurer to manage all investments

---

216. N.C. GEN. STAT. §§ 18C-160, 161 (2005).

217. *Id.* § 18C-162.

218. *Id.* § 18C-164; *see also* N.C. EDUC. LOTTERY, ANNUAL COMPREHENSIVE FINANCIAL REPORT FOR THE FISCAL YEARS ENDED JUNE 30, 2021 & JUNE 30, 2020, at 24 (2021) [hereinafter N.C. LOTTERY REPORT], https://nclottery.com/Content/Docs/ACFR_2021.pdf [https://perma.cc/EV9Q-2BWG] (explaining that the North Carolina lottery "transfers its net revenues to the Office of State Budget and Management," which distributes them "based on the budgeted distribution . . . recommended by the General Assembly").

219. CAL. GOV'T CODE § 8880.4 (West 2017).

220. *Id.* § 8880.5.

221. CAL. STATE LOTTERY, COMPREHENSIVE ANNUAL FINANCIAL REPORT 37 (2021).

222. CAL. GOV'T CODE § 8880.25.5 (West 2017). The commission, in turn, must submit quarterly financial reports to several California executive officials and the California legislature. *See id.* § 8880.22 (noting that the reports must also detail all revenues, disbursements, expenses, and changes in net assets of the Lottery Fund).

223. N.C. GEN. STAT. § 147-69.2(b) (2021) (setting forth duties of the state treasurer as to the investment of funds). The state treasurer must discharge investments "solely in the interest of the [fund's] intended beneficiaries," "[w]ith the care, skill, and caution" of a prudent investor. *Id.* § 147-69.7(a)(1)–(2) (2005).

internally.[224] The state permits "third-party investment management arrangements" subject to minimum liquidity and reporting requirements and indeed uses investment companies to manage certain state funds.[225]

This Note's proposed kleptocracy forfeiture trusts draw inspiration from those two features of state lottery funds' basic design. First, a kleptocracy forfeiture trust would borrow the kind of broad distributive terms statutorily imposed on state lottery funds. In the context of kleptocracy forfeitures, the charitable purpose might be to maximize funds returned for education, public health, or anticorruption initiatives in the victim state. Second, a kleptocracy forfeiture trust would mirror lottery funds' administrative separation from the state. Like lottery funds, kleptocracy forfeiture trusts would manage, invest, and distribute public funds. North Carolina and California both demonstrate (in different ways) structures by which states have introduced some degree of independent management over public funds.

2. *Returning Trust Assets and Enforcing Trust Purpose: Mass Tort Settlements*. Funds created by civil settlements contain distribution mechanisms that could be used in kleptocracy forfeiture trusts. Volkswagen's environmental mitigation trust is a good example. In 2015, Volkswagen admitted it had falsified emissions of nearly five hundred thousand diesel vehicles sold in the United States by installing software that could detect when a diesel engine was being tested for emissions and change performance to reduce them.[226] Hundreds of

224. *See id.* § 147-69.2(e) (2005) (setting forth conditions for third-party investment management).

225. *Id.* In general, money in the North Carolina lottery fund is managed internally. *See* N.C. LOTTERY REPORT, *supra* note 218, at 9 ("Idle funds are invested in the State Treasurer's Short Term Investment Fund (STIF). . . ."); *see also* N.C. DEP'T OF STATE TREASURER, *AGPIP and Investment Management Programs*, https://www.nctreasurer.com/divisions/investment-management/agpip-and-investment-management-programs#cash-management [https://perma.cc/82TC-49JJ] ("The [STIF] is the internally managed portfolio of highly liquid fixed income securities."). But the treasurer engages third parties to manage other funds pursuant to § 147-69.2(e). *See* OFF. OF THE STATE CONTROLLER, STATE OF N.C. ANNUAL COMPREHENSIVE FINANCIAL REPORT 97–103 (2021) (disclosing investments held outside the state treasurer, including funds managed by BlackRock, BNY Mellon, and others).

226. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC (Dec. 10, 2015), https://www.bbc.com/news/business-34324772 [https://perma.cc/C5A8-4HH5].

lawsuits were combined into one action brought by the Justice Department.[227] Volkswagen settled in 2016.[228]

Under the terms of its settlement, Volkswagen poured $2.7 billion into a Mitigation Trust to fund initiatives reducing emissions of nitrogen oxides, a pollutant in diesel exhaust.[229] The parties agreed that an independent entity, Wilmington Trust, N.A., would manage the assets in exchange for administration fees.[230] This Note likewise proposes independent management of kleptocracy forfeiture trusts. As discussed, management divorced from both the holding state and the victim state is best suited to invest and disburse assets when direct return is infeasible.[231] Independent management could also significantly reduce overhead and administrative costs, at least when compared to government-established entities like the BOTA Foundation.[232]

---

227. Order Granting the United States' Motion To Enter Proposed Amended Consent Decree at 1–2, United States v. Volkswagen AG, No. 16-cv-295 (N.D. Cal. Oct. 25, 2016), ECF No. 2103 [hereinafter Volkswagen Settlement].

228. *Id.* at 3.

229. *Id.* at 7.

230. *See Volkswagen Diesel Emissions Environmental Mitigation Trust*, https://www.vwenvironmentalmitigationtrust.com [https://perma.cc/T6PD-FYVL] ("The Defendants and Wilmington Trust, N.A. (the 'Trustee') have entered into an Environmental Mitigation Trust Agreement for State Beneficiaries"); Volkswagen Settlement, *supra* note 227, at 192 ("[T]he Mitigation Trust shall . . . reimburse the Trustee for the . . . expenses to the extent incurred by the Trustee in connection with the administration of the Trust.").

231. *See supra* Part IV.A.

232. Although annual administrative fees vary from trust to trust, they generally range from 0.5 percent at the lower end to 1 to 2 percent at private banks. Amy Feldman, *Trust Costs Go Up; Get Ready To Negotiate*, BARRON'S (Feb. 28, 2015), https://www.barrons.com/articles/SB513675781168750046937045804863919457838 42 [https://perma.cc/FG62-YBBT]. Parties in the Volkswagen case agreed to an annual administrative fee cap of 3 percent of the assets in the trust. Robert Weiss & David Vanaskey, *Key Considerations for Litigation Settlement Trustees*, LAW360 (Apr. 6, 2021), https://www.law360.com/articles/1364163 [https://perma.cc/F9FS-8HZZ]. A hypothetical 1.5 percent per annum fee over a five-year term (the operation period of the BOTA Foundation) yields a maximum compounded fee of 7.28 percent of a fund's assets. The actual value of the fee would be lower, as disbursements would reduce the principal from which the fee is taken. Still, this maximum fee is significantly lower than the BOTA Foundation's 15.6 percent expenditure on overhead. *See* BORNSTEIN, *supra* note 155, at 29 (describing the expenditures of the BOTA Foundation). Even a high trust fee, such as the 3 percent per annum fee in the Volkswagen trust, yields a lower maximum compounded fee (14.13 percent) over a five-year term than BOTA's overhead. *See id.* (noting the BOTA Foundation's 15.6 percent overhead expenditure). These rough overestimates are based on the author's own calculations, using a basic compound depreciation formula with the hypothetical fee as the rate of depreciation.

The Volkswagen fund's trustee is obligated to make investments "reasonably calculated to preserve the principal value."[233] Meanwhile, government entities, chiefly states and Native American tribes, were invited to certify their beneficiary status by filing with the court.[234] After submitting a plan detailing their intended use of the funds, each beneficiary had a right to an initial allocation of the trust funds.[235] Projects eligible for funding included various environmental measures, such as replacing fleets of diesel-run city buses and offering rebates to private companies to upgrade to low-emission freight vehicles.[236] After initial allocation, beneficiaries could submit funding requests to the trustee for additional mitigation projects.[237] The trustee has duties to review and approve supplemental funding requests and post accountings and project approvals on a public-facing website.[238] A similar discretionary mechanism might be useful in kleptocracy forfeiture trusts to allow charities and aid organizations to compete for grants of funds reviewed and selected by the trustee.[239] The Justice Department could even require the trustee to consult relevant stakeholders in the victim state, ensuring that the proposal is an effective use of the funds. A kleptocracy forfeiture trust could also borrow Volkswagen's means of allowing the trustee to "certify" entities as beneficiaries.[240] Certifying certain charitable organizations

233. Volkswagen Settlement, *supra* note 227, at 189.

234. *Id.* at 192–93, 207.

235. *Id.* at 193, 196–97.

236. *See, e.g.*, *id.* at 209–10 (showing "Appendix D-2: Eligible Mitigation Actions and Mitigation Action Expenditures").

237. *Id.* at 199.

238. *Id.* at 189–91, 200–01. Note, however, that the Volkswagen Trustee does not have a duty to monitor the implementation of these projects, a term that should likely be added in adopting a similar mechanism for international kleptocracy asset return.

239. Though a noncooperative victim state could still impede disbursements selected by a trustee, it may be less likely to do so. By placing a nonsovereign third party at the helm of asset return, a holding state avoids directly imposing terms on the victim state that may be viewed as disrespectful of its sovereignty. *Cf.* Rachael Hanna, *World Bank Monitoring of Repatriated Assets Should Be Part of Major Settlements*, GLOB. ANTICORRUPTION BLOG (July 6, 2020), https://globalanticorruptionblog.com/2020/07/06/world-bank-monitoring-of-repatriated-assets-should-be-part-of-major-settlements [https://perma.cc/3S6Y-QHXK] (advancing a similar argument to advocate a larger role for international financial organizations in kleptocracy asset return).

240. *See* Volkswagen Settlement, *supra* note 227, at 10 ("Upon the Trust's establishment, those same governmental entities may apply to become beneficiaries of the Trust by submitting a Certification Form."); *see also supra* note 234 (explaining which groups were invited to seek certification).

might confer special beneficiary status on those entities, giving them standing to seek judicial enforcement of the trust.[241]

### *C. Designing a Kleptocracy Forfeiture Trust*

These examples highlight features of existing trusts or trust-like vehicles that a new framework for asset return following kleptocracy forfeitures could incorporate. This Section combines those elements to propose a new kind of charitable trust for kleptocracy forfeitures. Imagine that the Justice Department, acting through the Kleptocracy Asset Recovery Initiative, forfeited millions of dollars traceable to a corrupt official. If the victim state participated in the forfeiture, the Justice Department should return the assets directly to the victim state pursuant to existing asset sharing procedures.[242] If the victim state did not participate in the forfeiture or would otherwise be an inappropriate vessel of return, this Note proposes that Congress prescribe a regular course of action for the Justice Department.[243]

A new statute that overrides existing Justice Department guidelines that disfavor third-party management would instead direct the department to transfer the assets to an independent trustee.[244] The independent trustee should have no ties to either the victim state or the United States. A bank or trust company—as was used in the Volkswagen mitigation trust—seems suited to this role.[245] The Justice

241. Certifying certain entities as beneficiaries, while not required for this model to function, offers a critical advantage: it would confer "special interest" on those entities. Courts generally define special interest in a charitable trust as entitlement to a particular benefit not available to the public. SITKOFF & DUKEMINIER, *supra* note 194, at 798. Special interest gives a cause of action to beneficiaries to enforce the terms of the trust in court. *See* RESTATEMENT (THIRD) OF TRUSTS § 94(2) (AM. L. INST. 2007) (noting how suits enforcing a charitable trust may be maintained only by public officers "or by another person who has a special interest in the enforcement of the trust").

242. *See supra* notes 103–107 and accompanying text (explaining the Justice Department's asset sharing authority).

243. The funds would fall into the "second bucket" of Article 57(3)(c). The United States would owe only "priority consideration" to the victim state in arranging repatriation. *See supra* Part I.B (explaining UNCAC's classifications).

244. A question raised by this proposal is whether the Justice Department's agreement with a trustee in this context would be considered an "international agreement," bringing it within the scope of the State Department's Circular 175 procedure and requiring congressional notification. *See supra* notes 109–112.

245. An alternative option may be to name as trustee an international development organization with experience in disbursement of aid, such as the World Bank, as Switzerland did in 2012. *See* BANK INFO. CTR., *supra* note 167, at 13–14; *see also* Hanna, *supra* note 239 (suggesting

Department would identify broad charitable terms to benefit the people of the victim state and instruct the trustee to liquidate any assets upon transfer and invest the funds prudently. These terms and attached duties could be modeled after the terms and duties attached to state lottery funds but tailored to this new kind of kleptocracy forfeiture trust.[246]

Once the trustee takes possession, it would have discretion to solicit proposals for charitable works within the scope of the trust terms and distribute funds pursuant to those proposals.[247] The trust terms could even provide for dissolution and disbursement of the principal to the victim state government if the state enacted satisfactory good governance reforms. Or, if the victim state government scuttled disbursements or stymied particular projects, the trustee could reroute the money to other beneficial uses. If war or sanctions precluded disbursements for a set time, the trustee could hold funds until they could be released. The statutory design could include other guardrails. As discussed, a procedure to certify beneficiaries could be used to confer standing, providing civil society a role in monitoring implementation of the trust.[248] The trustee should also be subject to regular reporting requirements to the Justice Department and the public.

### *D. Situating and Distinguishing a Kleptocracy Forfeiture Trust*

A key element of this proposal is that the trust vehicle transfers all ownership and management responsibilities away from the Justice Department by vesting them in an independent trustee. This separates the trust framework from other proposals put forward to reform

---

the World Bank and similar organizations are well-suited to monitoring the implementation of asset return agreements).

246. *See supra* notes 216–**Error! Bookmark not defined.** and accompanying text (explaining the terms and duties attached to state lottery funds).

247. Given the number of contingencies that could alter distributive needs over time, the trustee should be given discretionary power to ensure the trust is flexible. For more information on discretionary trust terms, see SITKOFF & DUKEMINIER, *supra* note 194, at 696–99.

248. *See supra* note 241 and accompanying text (explaining that "special interest" status could be used to give beneficiaries a cause of action). Beneficiary standing would correct a criticism of the World Bank-administered fund used by Switzerland to return assets in 2012, after which some charged that the World Bank may have breached a fiduciary duty in its stewardship of the assets. *See generally* LASSLETT & MAYNE, *supra* note 173 (criticizing the World Bank's disbursals). With this guardrail, certified beneficiaries (in addition to public officers) could seek judicial review of perceived breaches.

kleptocracy asset return. The remainder of this Part will contrast the trust-based proposal with other proposals, highlighting the ways in which trusts respond better to the issues raised in Part III.C.

Some scholars have proposed the Justice Department maintain title to forfeited assets, albeit with court-imposed duties to facilitate return under the doctrine of constructive trust.[249] This proposal corrects the accountability problem inherent in existing procedures.[250] But the constructive trust proposal leaves the Justice Department with its present charge of managing the repatriation of assets, a task that this Note suggests it is insufficiently resourced to take on. The department's hands-off approach to the Nguema forfeiture demonstrates problems with diligence and vigilance.[251] Recent forfeiture actions have saddled the Justice Department with ever-more-complicated assets to manage—leaving it to search, in at least one instance, for yacht crew.[252] These existing challenges can be expected to grow as kleptocracy forfeitures assume a prominent place in U.S. anticorruption policy.[253] Endowing the assets to a trust, as this Note proposes, would confine the Justice Department to conducting oversight, a role to which it is much better suited.[254]

Other proposals suggest mandating BOTA-like remedies where the United States would set up nonprofit entities managed by

249. For a detailed explanation of this proposal, see Davis, *supra* note 42, at 350–55.

250. *Id.* at 349–50.

251. *See supra* Part III.C. The Justice Department might be able to mitigate some of its practical problems by allowing an agency with more expertise in foreign assistance, such as the State Department, to administer returns. *See supra* note 215 (noting foreign aid programs that the State Department administers). But that does not address the issue of maintaining the assets themselves, nor would it provide an opportunity for civil society to play a role in the return process.

252. After seizing a superyacht owned by Russian oligarch Viktor Vekselberg in April 2022, the Justice Department assumed responsibility for upkeeping the asset to maintain its $95 million value. Devon Pendleton, *Seizing Oligarch's Superyacht Means U.S. Now Must Pay for Upkeep*, BLOOMBERG (Apr. 22, 2022), https://www.bloomberg.com/news/articles/2022-04-14/seizing-oligarch-s-superyacht-means-u-s-now-must-pay-for-upkeep [https://perma.cc/HXF6-W4RA]. Doing so is likely to cost over $9 million per year, including payroll for a full-time crew. *Id.*

253. *See* Daniel L. Stein, Gina M. Parlevecchio & Marie C. Notter, *Biden Highlights Anti-Money Laundering as Tool To Combat Corruption*, REUTERS (Jan. 19, 2022), https://www.reuters.com/legal/legalindustry/biden-highlights-anti-money-laundering-tool-combat-corruption-2022-01-19 [https://perma.cc/QY2C-TUJN] (describing the Biden administration's ongoing focus on anticorruption enforcement, including forfeiture).

254. There is a rich history of attorneys general supervising administration of charitable trusts, making this a natural role for the Justice Department. SITKOFF & DUKEMINIER, *supra* note 194, at 782–83.

stakeholders from both the United States and the victim state.[255] But the BOTA model, as discussed above, involves significant diplomatic coordination with the victim state.[256] As was the case in the Nguema forfeiture, endowing victim states with too much authority can (and does) obstruct the timely disbursement of assets.[257] Furthermore, the high overhead costs[258] of establishing new nonprofit foundations would be impractical in smaller-value forfeitures and unnecessary in forfeitures where the victim state has an existing network of charities.[259] A BOTA-like procedure is thus not adaptable enough to serve as a default alternative to asset sharing in kleptocracy forfeitures.

In all, the trust framework would best resolve the issues highlighted in Part III by providing a coherent protocol that is flexible enough to use in most any forfeiture where direct return to the victim state is impossible. It provides an accountable nonsovereign vessel to ensure that kleptocracy assets benefit the victim state population, while relieving the Justice Department of its cumbersome managerial obligations. And by constraining the Justice Department's discretion, Congress would add structure and predictability to the existing system of asset return.

## CONCLUSION

The Justice Department's agreement with Equatorial Guinea to repatriate the Nguema forfeiture assets reached a positive outcome, returning $26 million plundered through kleptocracy to Equatoguineans.[260] But procedural inefficiencies lengthened the time it took for these rightful owners to receive benefits of the return, left them without adequate monitoring and other safeguards, and exacted significant administrative strain on the Justice Department.[261] The

255. *See* CAMILLERI, *supra* note 40, at 24–25 (proposing such an approach).

256. *See supra* note 158 and accompanying text (noting that BOTA's board consisted of representatives from three sovereign governments and thus required a significant degree of cooperation).

257. *See supra* Part III.A.

258. *See supra* notes 165–166 and accompanying text (noting BOTA's high overhead costs).

259. *See* Bornstein, *Lessons from BOTA*, *supra* note 159 (noting that "[n]ot every country with assets to restitute would need to start a new foundation from scratch," as existing foundations can be used as vessels to restitute funds).

260. DOJ Press Release, *supra* note 36.

261. *See supra* Part III.A, C (recounting the return of the Nguema assets and describing issues faced during that process).

Nguema forfeiture thus demonstrates hindrances to returning assets when victim states are unsuitable vessels of direct return. Revisions to the Justice Department's asset return procedures in these cases could better achieve the reparative goal of kleptocracy forfeitures, ensuring stolen assets serve the interests of their rightful owners.

Kleptocracy forfeiture has caught the attention of lawmakers.[262] Current bills addressing asset return provide an opportunity to establish a default mechanism for repatriation when direct return of assets is infeasible.[263] In those cases, this Note suggests the Justice Department should swiftly convey title to forfeited assets to an independent trustee. Such a policy would close a gap in Justice Department procedure that has resulted in inconsistent methods of return, providing needed predictability. It would reduce the government's administrative burden by shifting management of complex assets away from the Justice Department. It would provide a fiduciary who is more accountable to beneficiaries. And it would more fully and finally realize UNCAC's goal to provide a timely return of assets to corruption victims.

262. *See supra* note 100 (noting recent White House interest in kleptocracy forfeiture).

263. *See supra* notes 118–122 and accompanying text (describing legislation proposed to amend asset return procedures).