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Clancy, Á. (2022) A better deal? Negotiated responses to the proceeds of grand corruption. *Criminal Law Forum*, 33 (2). pp. 149-188. ISSN: 1046-8374

<https://doi.org/10.1007/s10609-022-09436-6>

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ÁINE CLANCY* 



A BETTER DEAL? NEGOTIATED RESPONSES TO THE PROCEEDS OF GRAND CORRUPTION

Accepted: 12 March 2022; Published online: 6 April 2022

ABSTRACT. Judicially supervised negotiated settlements have featured heavily of late in discourse on responses to financial crimes committed by corporations. The United States has recently concluded a series of proceeds of kleptocracy settlements with individuals using processes which, from transparency and accountability perspectives, compare favourably to England’s asset recovery practice. This paper seeks to foster a conversation on whether the use of negotiated responses could or should be extended to arrangements with natural persons who are suspected of laundering the proceeds of grand corruption in England. It addresses some reservations that arise where negotiated responses to official corruption are employed and seeks to identify principled and practical justifications for the use of settlements instead of public civil recovery proceedings. It also draws on the US and English experiences in entering into settlements with companies for bribery offences in attempting to identify some of the main pitfalls and benefits implicit in utilising negotiated responses to corruption. The paper concludes by tentatively endorsing as an imperfect but pragmatic option the use of settlements as an alternative to existing asset recovery measures for corruptly-acquired assets.

I INTRODUCTION

Although no formal definition exists in international law, ‘kleptocracy’ is broadly agreed by international law scholars to constitute ‘instances of corruption committed by senior public officials involving large sums of money...’, or more literally, ‘rule by thieves’.¹ Frequently, the proceeds of kleptocracy are transferred abroad, beyond the reach of local law enforcement, and laundered. International political momentum against kleptocracy is building. Although, owing to the clandestine nature of the activities involved, it is impossible to evaluate quantitatively

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¹ Both definitions from: JC Sharman, *The Despot’s Guide to Wealth Management: On the International Campaign against Grand Corruption* (Cornell University Press, 2017), pps 3 and 2 respectively.

kleptocracy's impact, the link between grand corruption and its adverse effects on essential services and human rights is clear. The UN General Assembly ("UNGA") has held that '... it can exacerbate poverty and inequality and may disproportionately affect the most disadvantaged individuals in society.'² In June 2021, the UNGA unanimously adopted a political declaration reaffirming the UN's commitment to review gaps and challenges in international anti-corruption law and to implement measures to prevent and combat corruption.³ In the same month, the United States officially made the fight against corruption a core national security policy.⁴ It is currently proving itself reactive both in naming and shaming foreign corrupt officials,⁵ and in recovering the proceeds of corruption from them.⁶

This paper explores whether unease around entering into settlements with individuals to facilitate the recovery of grand corruption proceeds may or may not be justified when viewed through the prism of asset recovery processes in England. It evaluates critically whether civil recovery settlements meet the objectives of anti-corruption initiatives (including the United Nations Convention Against Corruption ("UNCAC")) as recently identified by Kevin Davis; namely, 'effectiveness, efficiency, and [observation of] due process.'⁷ It does this primarily by comparing civil recovery processes typically employed by English enforcement authorities with forms of privately negotiated settlement process, including those recently employed to recover corruptly-acquired assets held in the US (another common law legal system, with similarities in its approach to civil recovery) and with Deferred Prosecution Agreements ("DPAs") agreed by States with companies in foreign bribery contexts.

² Resolution S-32/1 adopted by UNGA on 02/06/2021: '*Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation*', p. 3.

³ *Ibid.*

⁴ The White House, 'Statement by President Joseph R. Biden, Jr. on the National Security Study Memorandum on the Fight Against Corruption' 03/06/2021.

⁵ See eg: US Dept of State, 'U.S. Releases Section 353 List of Corrupt and Undemocratic Actors for Guatemala, Honduras, and El Salvador' 01/07/2021, available at: <https://www.state.gov/u-s-releases-section-353-list-of-corrupt-and-undemocratic-actors-for-guatemala-honduras-and-el-salvador/> (all webpages referenced in this paper were last accessed on 31/03/2022).

⁶ *Infra* note 53 below and accompanying text.

⁷ Kevin E Davis 'What Counts as a Good Settlement?' in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar, 2020) p. 260.

After this introduction, the paper is presented in five Parts. Part II briefly sets out the international law context and jurisdictional considerations involved in dealing with the proceeds of grand corruption. Part III describes the current state of play around recovering the proceeds of official corruption in England and highlights how traditional civil recovery processes may not always be appropriate where the proceeds of grand corruption are involved. Part IV outlines the case in favour of negotiated settlements. After Part V specifically addresses due process concerns arising through settlement use, Part VI turns attention to further reservations that might accompany its availability. The paper concludes by tentatively endorsing negotiated arrangements as an imperfect but sometimes pragmatic means of dealing with the proceeds of grand corruption.

Rather than offering any firm conclusions on the efficacy or desirability of negotiated responses, this paper instead seeks to foster a conversation on whether the use of settlement responses could or should be extended to negotiated arrangements with alleged kleptocrats suspected of laundering the proceeds of grand corruption in England. It addresses some reservations that arise where negotiated responses to official corruption are adopted and identifies principled and practical justifications that might inform the use of settlements instead of public civil recovery proceedings in future. It also addresses pragmatic compromises that may need to be made in settlement processes. Assuming that in principle, the 'best' outcome of a settlement process from a legitimacy and effectiveness perspective is that both the amount of assets recovered *and* the level of transparency around settlements is maximised, in practice, it is suggested, one of these components may sometimes need to be privileged over the other.

Settlement agreements dealing with the proceeds of grand corruption are a strange beast. Traditionally, when parties enter into civil settlements, they do so to enforce specific obligations owed directly to each other. Parties predict the likely outcome of litigation, then settle on that basis, whilst benefiting from avoiding the costs and publicity of that litigation.⁸

Negotiation in, or adjacent to, the criminal law realm is different. The objectives of bargaining in that context include sanction and deterrence; bargains are informed to varying degrees by, *inter alia*,

⁸ Though really, settlements will be shaped by numerous additional extra-legal factors. See: Stephanos Bibos, 'Plea Bargaining Outside the Shadow of Trial' (2004) 8 *Harv L Rev* 2463.

enforcement authorities' preferences, investigative resource levels and sentencing guidelines.⁹ Notwithstanding its prevalence in Anglo-American criminal law, an 'astonishing amount remains unknown including much about [plea bargaining's] ... consequences, and dynamics.'¹⁰ Negotiated responses to corruption sit uneasily at the intersection of criminal and civil bargains, a binary which is unhelpful and perhaps artificial in a proceeds of grand corruption context. It results in acts of grand corruption and the proceeds of those acts being addressed using processes that are largely divorced from each other. Meaningful data on how negotiations are conducted, the processes deployed to conclude settlements, and what happens to realised proceeds subsequently is often limited. Although settlement agreements are formally civil in nature, they are concerned with some of the same public interest considerations central to criminal law enforcement. As this paper will demonstrate, navigating the competing demands of the two paradigms is not straightforward.

II GRAND CORRUPTION AND JURISDICTION

This Part outlines the normative basis in public international law for negotiated resolutions, and the scope of the duty to repatriate recovered assets. It also provides background for why asset recovery processes in Holding States typically take the form of non-conviction based civil or administrative proceedings instead of criminal proceedings.

The United Kingdom is a party to the two leading international anti-corruption conventions: the UNCAC and the Organisation for Economic Co-operation and Development's Anti-Bribery Convention ("OECD-ABC").¹¹

Since the UNCAC was introduced in 2005, a trend towards individual accountability of senior political officials who misappropriate their states' ("Affected States") assets through corrupt acts has

⁹ William J Stuntz, 'Plea Bargaining and Criminal Law's Disappearing Shadow' (2004) *Harv L Rev* 2548.

¹⁰ Mary Vogel, 'Plea Bargaining under the Common Law' in Darryl K Brown, Jenia Iontcheva Turner and Bettina Weisser (eds) *The Oxford Handbook of Criminal Progress* (OUP, 2018) p. 729.

¹¹ More correctly, the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.

crystallised into a norm,¹² and the term ‘grand corruption’ is now commonly used in anti-corruption circles.¹³ The prevalence of *laissez faire* attitudes to grand corruption which, before the end of the Cold War era, proved politically convenient to some states in the Global North,¹⁴ has largely abated. The asset recovery database maintained by the Stolen Asset Recovery Initiative (“**StAR**”) evidences a dramatic upswing from 2000 onwards in recoveries of grand corruption proceeds and their repatriation to Affected States by the overseas states in which such proceeds were concealed (“**Holding States**”).¹⁵

The UNCAC’s States Parties recently resolved that Holding States should redouble asset recovery and return efforts, urging use of ‘proactive measures.’¹⁶ They endorsed the employment of ‘alternative legal mechanisms and non-trial resolutions including settlements in corruption proceedings.’¹⁷ Little scrutiny has so far been afforded, in England and Wales at least,¹⁸ to the potential benefits of negotiating settlements with allegedly corrupt foreign senior public officials, their families and their close associates (collectively known as “**PEPs**” or ‘politically exposed persons’ in anti-corruption argot) as an alternative to pursuing civil recovery proceedings through the courts so as to fulfil asset recovery and return responsibilities under the UNCAC. In a grand corruption context, formal civil recovery proceedings

¹² See: Hun Joon Kim and JC Sharman, ‘Accounts and Accountability: Corruption, Human Rights, and Individual Accountability Norms’ (2014) 68 *Int Org* 418.

¹³ ‘Grand corruption’ and ‘kleptocracy’, each understood as meaning offences involving senior public officials committing acts resulting in what Transparency International (**TI**) refers to as the ‘gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group’, are used interchangeably in this paper. See: TI, *Submission to the 8th UNCAC CoSP Grand Corruption as a Major Obstacle to Achievement of the Sustainable Development Goals*, 12 December 2019, CAC/ COSP/ 2019/NGO/1.

¹⁴ See: Radha Ivory, ‘Asset Recovery in Four Dimensions: Returning Wealth to Victim Countries as a Challenge for Global Governance’ in Katalin Ligeti and Michele Simonato (eds), *Chasing Criminal Money: Challenges and Perspectives on Asset Recovery in the EU* (Hart, 2017) p.180.

¹⁵ StAR is a joint initiative of the World Bank Group and the UN Office on Drugs and Crime. It supports international efforts to end safe havens for corrupt funds through, *inter alia*, publication of enforcement data and research.

¹⁶ UNGA (*supra* note 2), para. 43.

¹⁷ *Ibid*, para. 50.

¹⁸ References to ‘England’ or ‘English’ laws or courts hereafter in this paper will be references to England and Wales, their laws and their courts respectively.

through the courts are not typically utilised in practice and might be perceived as somewhat problematic in principle for various reasons,¹⁹ so it is worthwhile looking at alternative options including negotiated responses to recovering the proceeds of corruption. However, commentators frequently question the suitability of ‘negotiated justice’ mechanisms as a means of targeting crimes committed by elites.²⁰ Their use, it is argued, ‘may not correspond with the public interest where social equality, fairness and justice is expected’²¹ because it promotes a view that wrongdoers can essentially buy their way out of meaningful sanction for their wrongdoing.

The OECD-ABC *inter alia* requires States Parties to criminalise bribe-making, and requires that any proceeds should be seized and confiscated.²² This has formed the basis for offences under the UK’s Bribery Act 2010, in turn resulting in twelve DPAs with corporates being finalised to date in England.²³ Pursuant to DPAs, enforcement authorities agree to defer prosecutions against companies accused of overseas bribery provided they share information, *inter alia*, which might lead to prosecutions of individuals who instigated the bribery.²⁴ DPAs are agreed with companies rather than individuals and might be regarded as formally criminal rather than civil.²⁵ Nevertheless, drawing literature on DPAs into a conversation on settlements with PEPs is worthwhile, because each comprises a form of negotiated response to grand corruption. Should negotiated responses to grand corruption become more common, many of the same benefits of and criticisms made of DPAs will apply to such settlements.

¹⁹ See the discussion in Part III below.

²⁰ See: Colin King and Nicholas Lord *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* (Springer, 2018), writing in the context of anti-bribery settlements with corporates.

²¹ *Ibid.*, p. 7.

²² OECD-ABC, Article 3(3).

²³ As of March 2022.

²⁴ This strategy is seemingly ineffective in practice – prosecutions in England against executives of companies who have agreed DPAs rarely ensue and have, so far, never succeeded.

²⁵ For DPAs, criminal proceedings are suspended subject to the performance by defendant companies of the terms of DPAs. See: Liz Campbell, ‘Trying Corporations: Why Not Prosecute?’ (2019) 31 *Curr Issues Crim Justice* 274.

The UNCAC, which is the subject of near-universal subscription,²⁶ is the more salient instrument in terms of dealing with PEPs who benefit from the receipt of bribes and who commit grand corruption offences. It requires States Parties to criminalise ‘embezzlement, misappropriation or other diversion by a public official for his or her benefit...’²⁷ and money laundering.²⁸ States Parties are asked to *consider* (on a non-mandatory basis) criminalising public officials soliciting or accepting bribes,²⁹ and introducing offences of illicit enrichment (that is, where PEPs hold inexplicable wealth).³⁰ Its most important provisions for this paper’s purposes relate to settlements, sovereignty and asset recovery. First, Article 37 requires States Parties to ‘take appropriate measures’ to:

encourage persons who participate or who have participated in the commission of an offence... to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.³¹

Although the UNCAC does not expressly contemplate settlements,³² cooperation is likely more feasible in non-adversarial, consensual contexts, and some commentators posit a view that negotiated resolutions are ‘clearly contemplated’ by the language used in Article 37.³³ More recently, the UN has again gestured towards settlements’ utility in recovering corruption proceeds, referring to its members ‘...employing alternative legal mechanisms and non-trial resolutions, including settlements, in corruption proceedings that have proceeds of crime for confiscation and return.’³⁴

Second, Article 4 of the UNCAC emphasises the importance of States Parties carrying out their obligations under the Convention ‘in a manner consistent with the principles of sovereign equality and territorial integrity of States’. This constitutes implicit deference to the

²⁶ It currently has 189 signatories.

²⁷ UNCAC, Article 17.

²⁸ UNCAC, Article 23.

²⁹ UNCAC, Article 16(2).

³⁰ UNCAC, Article 20.

³¹ UNCAC, Article 37(1).

³² Radha Ivory and Tina Søreide, ‘The International Endorsement of Corporate Settlements in Foreign Bribery Cases’ (2020) 69 *ICLQ* 955, 957.

³³ See Davis (*supra* note 7), p. 263.

³⁴ UNGA (*supra* note 2), para. 50.

public international law principle that enforcement jurisdiction for criminal offences generally lies with the State on whose territory an offence is committed.³⁵ Where another country purports to exercise enforcement jurisdiction over the relevant offence without the Affected State's prior consent or waiver, it may constitute an unlawful exercise of extraterritorial jurisdiction,³⁶ primarily because it interferes with the Affected State's sovereign prerogative to establish and enforce criminal legal jurisdiction within its own territory. Territorial jurisdictional primacy for criminal law enforcement is particularly important for the citizenries of states which have endured periods of concerted civil and/or political tumult and/or kleptocracy because it operates as a means of reasserting statehood.³⁷ Consequently, it is important that Holding States avoid usurping Affected States' rights to exercise criminal enforcement jurisdiction and to impose criminal sanctions by ensuring that punitive measures (or measures that might be regarded as punitive) are not imposed against suspected kleptocrats for crimes of corruption allegedly committed in and against the relevant Affected States.³⁸

Unfortunately, one result of kleptocrats being shielded from prosecution because of respect for territorial jurisdiction, particularly where they are part of a regime with permissive attitudes towards corruption is that they can often enjoy *de facto* impunity. The most immediately practical response to such corruption within the boundaries of respect for territorial jurisdiction for Holding States is often (i) to focus on asset recovery and repatriation, and (ii) to seek to hold those who commit or facilitate the commission of money laundering offences within their own jurisdictions to account.

Third, the UNCAC provides that returning corruptly acquired assets to Affected States is a 'fundamental principle.'³⁹ Notwithstanding its 'fundamental' nature, the notion of unconditional return of assets to Affected States is 'effectively confined to situations when a

³⁵ See: Neil Boister, *An Introduction to Transnational Criminal Law*, (2nd ed, OUP, 2018), pp. 245-79.

³⁶ *Ibid.*

³⁷ See: Pdraig McAuliffe, 'From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism', (2014) 13 *Chin J Intl Law* 272, 274.

³⁸ On formally punitive and quasi-punitive measures and the significance of the use of the latter from an international law perspective, see Anton Moiseienko and Saskia Hufnagel, 'Targeted Sanctions, Crimes and State Sovereignty' (2015) 6 *New J Eur Crim Law* 351.

³⁹ UNCAC, Article 51.

foreign judgment is recognized and enforced.⁴⁰ This is born of a sometimes legitimate concern that Holding States may be required to deliver assets back into the hands of the corrupt administrations who stole them in the first place.⁴¹ Beyond this, there is no obligation *per se* to return assets to Affected States. Holding States are merely asked to ‘give priority consideration’ to returning assets. In practical terms, this absence of a clear legal obligation to return assets or even to ensure that assets are used for the benefit of an Affected State’s citizens enables Holding States to elide what happens to recovered proceeds.⁴² This is recognised as a problem. In its recent Political Declaration, the UNGA evinced an intention to:

strive to ensure that [the return and disposal of recovered assets] is done in a transparent and accountable manner by making use of the options set out in the Convention, including giving special consideration to the possibility of concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.⁴³

Taking this (admittedly non-binding) statement of intent at face value, it is worth considering how, if at all, settlement-making can assist in achieving this goal.

III CIVIL RECOVERY IN ENGLAND

NGOs and other commentators variously claim that the UK is ‘a favourite destination for the corrupt to stash their ill-gotten gains’⁴⁴ and that there are ‘endless flows of illicit cash through the City of London’.⁴⁵ Although the value of grand corruption proceeds transferred overseas to England is unquantifiable, the laundering of those

⁴⁰ Anton Moiseienko, ‘The Ownership of Confiscated Proceeds of Corruption under the UN Convention against Corruption’ (2018) 67 *ICLQ* 683.

⁴¹ See: Pablo J Davis, ‘To Return the Funds at All: Global Anticorruption, Forfeiture, and Legal Frameworks for Asset Return’ (2016) 47 *U Mem L Rev* 322, p. 324, in which he cites a cautionary example of the prompt disappearance of funds returned to Bayelsa State, Nigeria.

⁴² *Ibid.*

⁴³ UNGA (*supra*, note 2), para. 48.

⁴⁴ Transparency International (UK) (“**TI(UK)**”), ‘Action – not words – makes money launderers feel the heat’, 16 October 2020. Available at: <https://www.transparency.org.uk/unexplained-wealth-order-uwo-uk-dirty-money>.

⁴⁵ Per Nicola Sturgeon, ‘Britain’s Failure to Tackle Russian Dirty Money has Enabled Putin’s Aggression’ *The Guardian* (London) 1 February 2022.

proceeds in the London property market has been demonstrated repeatedly in recent decades.⁴⁶ It is reasonable to describe the UK's track record in recovering the proceeds of corruption from PEPs as patchy.⁴⁷ From 2014 to mid-2018, enforcement authorities returned a relatively modest £49m worth of assets to Affected States.⁴⁸ This sum represented the proceeds from a mere five investigations, only two of which involved assets seized from corrupt PEPs.⁴⁹ A database maintained by StAR tracking grand corruption proceeds recovery shows that after a flurry of new investigations were opened by the UK in respect of assets originating in Libya, Tunisia and Egypt following the Arab Spring uprisings in 2011, very few recovery processes were initiated subsequently.⁵⁰ Even accepting that as of the time of writing, StAR's database appears incomplete and apparently most recently updated in 2019, the UK's recovery rate seems low

⁴⁶ Eg limited success in England in recovering corruptly acquired assets originating in Ukraine and, following the Arab Spring, countries in North Africa. See: Dimitris Ziouvas, 'International Asset Recovery and the United Nations Convention against Corruption' in Colin King, Clive Walker and Jimmy Gurulé (eds) *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018, hereafter, the *Handbook of Criminal Financing Law*) 608.

⁴⁷ Per s. 362B of the UK's Proceeds of Crime Act 2002 ("POCA"), a PEP is 'an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or an EEA State' or a family member or close associate of that individual.

⁴⁸ SFO, 'News release: New Joint Principles Published to Compensate Victims of Economic Crime Overseas', 1 June 2018, available at: <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>.

⁴⁹ Both cases involved PEPs. The recoveries were from the matter comprising *SFO v Saleh* ([2018] EWHC 1012) (the "**Chad Oil case**") and the proceeds of corruption laundered by a public official convicted for fraud and bribery offences in Macau.

⁵⁰ The StAR database is available at: <https://star.worldbank.org/asset-recovery-watch-database>. As of March 2022, the only asset recoveries shown to have been subsequently initiated by the UK were in respect of: in 2014, assets misappropriated by Sani Abacha and assets the subject of the Chad Oil case (ibid); and in 2013, Tanzanian assets linked to a DPA made between Standard Bank Plc and the SFO.

given the issues identified by NGOs⁵¹ and its Government's own analysis.⁵²

Other countries are far more active. With the cooperation of its international counterparts, the US claims to have 'restrained in U.S. courts more than \$3.2bn in assets linked to foreign corruption'.⁵³ As of September 2020, the US had recovered or assisted in the recovery of over \$1bn worth of funds to Malaysia pursuant to a series of settlement agreements with individuals alleged to have conspired to misappropriate over US\$4.5bn from the 1Malaysia Development Berhad sovereign fund, a scandal first uncovered in 2015.⁵⁴ The subject matter of the 1MDB Settlements comprises not only assets held in the US, but also various London properties.⁵⁵ In May 2020, the US agreed to return to Nigeria \$300m misappropriated by former president Sani Abacha.⁵⁶ The value of funds actually repatriated to

⁵¹ See, for example, TI (UK), *Faulty Towers: Understanding the Impact of Corruption on the London Property Market*, March 2017, available at: https://www.transparency.org.uk/sites/default/files/pdf/publications/TIUK_Faulty_Towers_August_24.pdf.

⁵² HM Treasury and the Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing 2020*, December 2020, at para. 4.8: 'A considerable threat to the UK arises from overseas PEPs laundering their illicit gains through the UK.'

⁵³ US Department of State and DOJ, *US Asset Recovery Tools & Procedures: A Practical Guide for International Cooperation*, available at: https://star.worldbank.org/sites/default/files/2020-12/booklet_-_english_final_edited%20%281%29.pdf.

⁵⁴ US Department of Justice, Press Release 20-865, 'United States Reaches Settlement to Recover more than \$60 Million Involving Malaysian Sovereign Wealth Fund', 02/09/20.

⁵⁵ See, without limitation: Stipulation and Request to enter Consent Judgement of Forfeiture dated 6 May 2020 *United States v Real Property Located in Beverly Hills, California* No. 2:16-CV-5379-DSF-PLA (the "**al Qubaisi Settlement**"); Stipulation and Request to enter Consent Judgement of Forfeiture dated 30 October 2019: *United States v Any Rights to Profits, Royalties and Distribution Proceeds Owned by or Owed relating to EMI Music Publishing Group et al* CV 16-5364-DSF (PLAx) (the "**Low Settlement**"); and Stipulation and Request to enter Consent Judgement of Forfeiture dated 2 September 2020 *United States v Real Property Located in New York, New York* No. 2:16-CV-05371-DSF (PLAx) (one of a number of agreements forming part of the "**Riza Settlement**") (collectively, the "**1MDB Settlements**").

⁵⁶ DOJ Press Release, 'U.S. Repatriates over \$311.7 Million in Assets to the Nigerian People that were Stolen by Former Nigerian Dictator and His Associates', 4 May 2020. Available at: <https://www.justice.gov/opa/pr/us-repatriates-over-3117-million-assets-nigerian-people-were-stolen-former-nigerian-dictator>.

Affected States by the US is difficult to pin down, but based on the foregoing, it is likely substantially higher than the UK's figure.⁵⁷

Moreover, viewed against the UK's recent activity, the US's willingness to pursue *unilaterally* the proceeds of grand corruption (that is, otherwise than at an Affected State's request) is more apparent. In 2014 for example, it famously pursued a civil asset forfeiture case against US-based assets owned by Teodoro 'Teddy' Nguema Obiang Mangué, the sitting vice president of Equatorial Guinea – a country with one of the world's lowest standards of living – leading to a settlement agreement pursuant to which Obiang *inter alia* agreed to forfeit \$30m worth of his assets to the US authorities (the “**Obiang Settlement**”).⁵⁸ It should be noted at this juncture that the US settlements briefly discussed in this paper are specific case studies and should not be taken as representative of the American criminal justice systems' approaches to the proceeds of corruption more generally.⁵⁹ The discussion should be read in the context of a federal US criminal justice system that is in general more reliant on and familiar with 'bargaining' in case management than its English counterpart. There is rich scope for analysis of how this aspect of the American federal criminal justice system impacts upon approaches to negotiating the proceeds of corruption. Owing to space constraints however, it will not be made in this piece.

In contrast to the US's history of taking cases unilaterally, grand corruption-linked civil recoveries in England are pursued only in respect of assets owned by individuals or those connected to individuals either against whom parallel criminal proceedings have been instituted and/or concluded in their Affected States or, as in the Arab Spring matters, in respect of notoriously corrupt PEPs already ousted from office.

⁵⁷ The report footnoted *supra* at note 53 says the US's Kleptocracy International Recovery Initiative has 'successfully completed recovery and assisted foreign governments in the recovery of over \$150 million in assets' since 2010. A House Report dated 14/05/2019 of the US House of Representatives (H Rpt 116-60) on the then-proposed Kleptocracy Asset Recovery Rewards Act notes that 'the Department of State and the Internal Revenue Service have similar programs' suggesting that additional sums may have been repatriated, the numbers for which are not included in the report.

⁵⁸ See further: Donna Cline, 'Seizing Equatorial Guinea's Future: Punishing Foreign Kleptocracy with Civil Asset Forfeiture' (2015) 23 *Cal Intl Law J* 34.

⁵⁹ Cautioning against comparative works making such grand claims without extensive contextualisation, see: David Nelken, *Comparative Criminal Justice; Making Sense of Difference* (Sage, 2010).

The reasons for the UK's recent dormancy in recovering kleptocratic proceeds are unclear but might be partly informed by enforcement authority resources. For grand corruption proceeds, the best practice expectation is that recovered proceeds (less reasonable investigation and enforcement expenses) will be restored to Affected States.⁶⁰ This means that proactive unilateral pursuit of such proceeds must be premised at least partially on an altruistic sensibility on an enforcement authority's part.⁶¹ By contrast, for wholly domestic matters, enforcement authorities are incentivised by the prospect of a cut of sums recovered through civil recovery processes.⁶² Policy concerns around disincentivising foreign direct investment ("FDI"), which has a net positive impact on the economy,⁶³ might also explain the low propensity toward enforcement.⁶⁴

This is not to say that recovery efforts are non-existent. The National Crime Agency ("NCA") recently exercised non-conviction based asset recovery powers to recover assets from Zamira Hajiyeva, the wife of a jailed former president of an Azeri state-owned bank using unexplained wealth orders ("UWOs").⁶⁵ In England, an UWO is an investigative order for which enforcement authorities can apply to the High Court against property holders who hold assets apparently incommensurate with their known legal incomes and who are either (i) PEPs or (ii) suspected of involvement with serious crime (or

⁶⁰ UNCAC, Article 57(3).

⁶¹ See: Davis (*supra* note 7), 265.

⁶² Through the Asset Recovery Incentivisation Scheme. See: Peter Alldridge, 'Civil Recovery in England and Wales: An Appraisal', *Handbook of Criminal Financing Law*, pp. 519-523.

⁶³ UK Department for International Trade, *Understanding FDI and its Impact in the United Kingdom for DIT's Investment Promotion Activities and Services: Phase 2 Analytical Report*, 05/03/2021.

⁶⁴ The tension between encouraging FDI yet discouraging inflow of corrupt assets is highlighted by TI UK's criticisms on the operation of the UK's Tier 1 visa scheme, which confers a visa and, after five years, residency rights in return for a minimum £2m investment in UK bonds or shares. From 2008-2015, 97 per cent of Tier 1 investors, including the respondent in the *Hajiyeva* case (*infra* note 65) came to the UK during a 'blind faith' period whereby the authorities did not examine the source of funds invested by applicants – TI UK, *Gold rush: investment visas and corrupt capital flows into the UK*, October 2015, available at: <https://www.transparency.org.uk/sites/default/files/pdf/publications/GoldRush-TI-UK.pdf> .

⁶⁵ *Hajiyeva v NCA* [2020] EWCA Civ 108.

being connected with someone so involved).⁶⁶ UWO respondents who fail to provide a credible explanation as to the licit origin of their assets risk having their property civilly recovered. The measure was introduced *inter alia* to address the proceeds of kleptocracy being laundered in the UK.⁶⁷

The *Hajiyeva* case was notable not just because it is the first and, to date,⁶⁸ only successful use of an UWO against a PEP in England, but also because of the rarity of asset recoveries instituted against elites through the English courts more generally. Additionally, outside of the courts, some appetite to recover assets from individuals through settlements apparently exist. In December 2019 for example, the NCA reached a settlement worth £190m following an investigation into Malik Riaz Hussain, a Pakistani businessman with assets in England. Recovered assets included a £50m London property held through an offshore company and the contents of a number of bank accounts (the **Hussain Settlement**). This matter is discussed further in Part V.⁶⁹

3.1 *How are the Proceeds of Grand Corruption Pursued in England?*

There is some scope for the proceeds of grand corruption held in England to be recovered by means of conviction-based confiscation, even if the relevant PEP's Affected State has not instituted criminal proceedings against them. Where a constituent element of a theft or fraud offence occurs in England, even if all of the other elements occur in another jurisdiction, then the English courts may establish jurisdiction over those offences.⁷⁰ Prosecutions for foreign grand corruption are, however, very rare.⁷¹ Whilst there may be scope in theory to prosecute fraud and theft offences in some circumstances,⁷²

⁶⁶ POCA, s. 362B. For more on UWOs generally, see: See: Áine Clancy, 'Proving the Dough: National Crime Agency v Baker & Ors' (2021) 84 *MLR* 168.

⁶⁷ Presenting the measure at a Public Bill Committee, Ben Wallace MP noted that: '*Domestically, we must tackle grand corruption and protect the integrity of the UK's financial sector. Unexplained wealth orders will help us to do that*': Criminal Finances Bill Deb, 17 November 2016, col 86.

⁶⁸ March 2022.

⁶⁹ See *supra* notes 147 and 148 below and accompanying text.

⁷⁰ Criminal Justice Act 1993, s. 2.

⁷¹ A notable exception to this trend is three former governors of federal states in Nigeria being charged by the Metropolitan Police with money laundering offences in three separate cases in London in the 2000s.

⁷² See *supra* note 70 and accompanying text.

or to prosecute for money laundering offences where assets are laundered through financial institutions or properties in England,⁷³ for complex transnational financial crimes, it is difficult in practice to accumulate evidence sufficient to meet the standard of guilt beyond reasonable doubt usually required to secure a conviction.⁷⁴

Enforcement authorities have noted the particular difficulties in obtaining evidence from overseas,⁷⁵ and delays, bureaucracy and lack of cooperation frequently bedevil the functioning of mutual legal assistance (MLA) and less formal police agency cooperation processes.⁷⁶ MLA problems may apply, of course, to all offences committed abroad, but can be exacerbated in recovering the proceeds of grand corruption because of a PEP's political or institutional influence and allegiances in an Affected State,⁷⁷ or because the Affected States' institutions are so impacted by kleptocracy that the institutional capacity no longer exists to facilitate MLA requests.⁷⁸ Invocations of state,⁷⁹ or diplomatic immunity,⁸⁰ although not always successful, can also impede prosecutorial progress.

⁷³ Pursuant to ss 327, 328 and 329 of the POCA.

⁷⁴ Home Office and HM Treasury, *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance* (April 2016), at para. 2.32: '... in many cases the country in which the offences took place lacks either the will, the capability, or the human rights record that would allow effective cooperation to take place. This can result in assets suspected of being the proceeds of crime overseas remaining in the UK out of the reach of our law enforcement authorities'. Michael Levi has observed that the most commonly prosecuted international money laundering cases are uncomplicated: Michael Levi, 'Money for Crime and Money from Crime: Financing Crime and Laundering Crime Proceeds' (2015) 21 *Eur J Crim Policy Res* 275. Case studies of grand corruption cases of the 1990s and 2000s (eg those discussed by Ivory, *supra* note 14), show that complex structures using multiple jurisdictions, financial institutions and corporate and trust vehicles were commonly used.

⁷⁵ *Supra* note 74.

⁷⁶ For examples, see: Tim Daniel and James Maton 'Is the UNCAC an Effective Deterrent to Corruption?' in Jeremy Horder and Peter Alldridge (eds) *Modern Bribery Law: Comparative Perspectives* (2013, CUP) (hereafter *Modern Bribery Law*) 293.

⁷⁷ *Ibid.*

⁷⁸ See: Radha Ivory, *Corruption, Asset Recovery, and the Protection of Property in Public International Law: The Human Rights of Bad Guys* (CUP, 2014) discussing Haiti's difficulties in responding to requests for MLA.

⁷⁹ See eg the Pinochet judgments: *R v Bow St Metropolitan Stipendiary Magistrate* [2000] 1 AC 61, 119 and 147.

⁸⁰ Unsuccessfully claimed by Teddy Obiang seeking immunity from prosecution in France.

Assuming a corrupt foreign official *is* convicted of a crime in the UK, it will be open to enforcement authorities to seek a confiscation order for assets representing the proceeds of that crime from the offender and/or from a third party transferee.⁸¹ Alternatively, if a final judgment has been handed down against an asset-holder in an Affected State, assistance may be sought from English enforcement authorities to recover the proceeds of the relevant offences.

As to civil law options, where the High Court is satisfied on the balance of probabilities that property constitutes the proceeds of crime, it must make a civil recovery order (**CRO**) in respect of that asset.⁸² Civil recovery is an *in rem* proceeding meaning that formally, the property the subject of proceedings rather than the holder of that property is tainted with criminality. Unlike *in rem* asset recovery proceedings in the US where observation of formalities extends to naming the relevant asset as a party to proceedings,⁸³ in English proceedings, the holder of the impugned asset is typically named in the case title as respondent. Two key consequences flow from these facts which are significant to the discussion in this paper.

First, no adjudication is formally made on the guilt or innocence of a respondent to an enforcement authority's application for a CRO. Consequently, criminal proceedings may be subsequently instituted in an Affected State against a respondent in respect of the wrongdoing leading to their possessing the relevant asset without offending *non bis in idem* principles. The Affected State's prerogative to prosecute the offence is preserved.

Second, the dominant view amongst penal theorists is that punishment for crimes comprises two key elements: public censure for wrongdoing, and the imposition of some kind of hard treatment by way of sanction.⁸⁴ Where a State other than an Affected State pursues individuals using civil recovery powers on the basis that they are suspected of holding the proceeds of crime, it meets a censorial objective synonymous with, and more appropriately achieved as part of, criminal punishment. Liz Campbell observes that:

⁸¹ Pursuant to Part 2 of the POCA.

⁸² POCA, s. 266. 'Enforcement authorities' in England include the NCA, the Director of the SFO and the Director of Public Prosecutions: POCA, s. 316(1).

⁸³ See, for example, *supra* note 55 above.

⁸⁴ See: Lucia Zedner, 'Penal subversions: When is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20 *Theor Criminol* 6.

Civil recovery in fact places the label of criminal on a person without due process protections... the assets seized are described as the 'proceeds of crime', both in relevant legislation and by the courts. This represents a declaration that encourages the public to believe the owner of the property to be guilty of criminality, broadly speaking.⁸⁵

Procedures relied upon in pursuing CROs are *formally* civil rather than criminal in nature, and so do not impose the other facet of punishment – some form of hard treatment – on respondents. Commentators have, however, identified a number of attributes paradigmatic of criminal matters arising in civil recovery proceedings including, *inter alia*, a State enforcement authority as a party; the application of investigative powers typically only available for criminal proceedings, a penal objective of crime deterrence (rather than simply restitution or compensation to the wronged party), and the weightier societal condemnation implicit in a criminal conviction.⁸⁶ Each of these elements consonant with criminal proceedings is present to some degree in civil recovery processes.

The condemnatory element is heightened in civil recovery proceedings involving PEPs, the scale and impact of publicity in relation to which can be seen as being tantamount to itself being a form of hard treatment. It is clear from the tenor of the UK press's coverage civil recovery proceedings, which frequently refers to PEP-specific UWOs as 'McMafia' orders, that it is not necessary for individuals to be convicted or even charged with a crime to attract public opprobrium. The extent of the adverse impact experienced as a result of individuals' identities being publicly tied – however tenuously – to the commission of crimes is something that has been recognised in recent English claims for damages made against media organisations. In those cases, the reputational impact wrought by publication of the fact that named individuals were merely being *investigated* (and not subsequently charged) by enforcement authorities on suspicion of involvement with serious crimes was found to be sufficiently harmful to allow those individuals succeed in privacy tort actions for damages.⁸⁷

⁸⁵ Liz Campbell, 'Criminal labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76 *MLR* 705.

⁸⁶ Colin King, 'Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture' (2012) 16 *E&P* 338-9.

⁸⁷ See, eg: *Sicri v Associated Newspapers Ltd*, [2020] EWHC 3541 (QB); *Richard v BBC* [2018] EWHC 1837 (Ch).

In this way, publicised civil recovery proceedings can constitute a *de facto* but not a *de jure* punitive response to crime, particularly where there is the prospect of a high degree of public interest and media attention in the proceedings. Civil recovery proceedings involving PEPs are, based on the limited data available, significantly more newsworthy – and therefore pack a stronger condemnatory punch – than corresponding proceedings involving non-PEPs.⁸⁸

The European Court of Human Rights (ECtHR) to date has disagreed with this characterisation of civil recovery as a punitive or quasi-criminal mechanism,⁸⁹ notwithstanding that such proceedings succeed in labelling a respondent as criminal (or, at least, as suspected of benefitting from criminality).⁹⁰ States subject to the Court's jurisdiction have seemingly viewed this as an invitation to introduce civil recovery processes without providing for heightened procedural protections closer to those usually applicable only in criminal law cases (including, for example, the prosecutorial requirement to prove guilt beyond reasonable doubt and the presumption of innocence).⁹¹ However, as a matter of practicality and for the reasons discussed,

⁸⁸ To demonstrate this, two searches were conducted across the three leading UK broadsheet newspapers– The Telegraph, The Times and The Guardian – on LexisLibrary's news search function. The first search was against Zamira Hajiyeva, the only PEP to date against whom UWOs have been successfully sustained in England – for the period of one year from and inclusive of the date on which Mrs Hajiyeva's name was first made public in an UWO context. A second search was made on the same basis against Mansoor Hussain, the only publicly named non-PEP against whom UWOs have been made at the time of writing. Mrs Hajiyeva was mentioned in a total of 64 hits. Mr Hussain was mentioned in nine.

⁸⁹ The ECtHR leans heavily on deference towards States' margin of appreciation in designating such measures as 'civil' and has cited civil recovery's 'compensatory and preventative' purposes while disregarding the censorial impact of civil recovery on respondents in finding that civil recovery is *not* a criminal law measure. Most recently reaffirmed in *Gogitidze and Others v Georgia* [2015] ECHR 475, App No. 36862/05, 12 May 2015, paras [107] – [108].

⁹⁰ There is room for broader discussion on whether the civil / criminal law binary that informs this analysis is now essentially otiose in circumstances where legislatures opt to use 'hybrid' mechanisms featuring elements of both paradigms to achieve crime control objectives. Recognising the binary's increased irrelevance might form the basis for policy-makers to consider a *sui generis* model of procedural protection for respondents to hybrid measures.

⁹¹ In the UK for example, the POCA was introduced shortly *Phillips v UK* (ECtHR App no 41087/98, ECHR 5 July 2001), in which the ECtHR opined that 'criminal lifestyle' confiscation proceedings under the Drug Trafficking Act 1994 were distinct from the underlying offence, and therefore did not engage protections provided for under Article 6.2 of the European Convention on Human Rights.

civil recovery proceedings which are not held in private⁹² and the publicity accompanying them encompass a clear punitive aspect,⁹³ and thus potentially serve to undermine an Affected State's enforcement prerogative to deliver penal consequences. One potential means of addressing this problem is through the use of negotiated responses to asset recovery which, unlike contested civil recovery proceedings, do not involve public court proceedings instituted by enforcement authorities.

IV THE CASE FOR SETTLEMENTS

This Part continues the discussion of advantages to negotiated responses to grand corruption by reference to the three UNCAC objectives in recovering and returning the proceeds of grand corruption identified in Part II, namely: achieving efficiency, observation of due process (or more specifically in the case of negotiated settlements, avoiding due process problems), and effectiveness respectively.⁹⁴

4.1 *Efficiency*

The first and most obvious advantage of negotiated responses to grand corruption is that they are relatively efficient when compared to the civil recovery investigations necessary to institute, and the actual hearing of, adversarial court proceedings.

In complex financial crime contexts, there is usually an asymmetry in the information available to enforcement authorities and the information held by alleged offenders. As has been noted in analysis on DPAs, investigating allegations of benefit from financial crime

⁹² The default position is that civil recovery hearings must be held in public albeit Rule CPR 39.2(c) of the English Courts' *Civil Procedure Rules* provides that judges must hold a hearing in private where they are *inter alia* satisfied that a case involves: 'confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality'.

⁹³ On the expressive significance of punishment, see: Joel Feinberg, 'The Expressive Function of Punishment' (1963) 49 *The Monist* 397.

⁹⁴ See *supra* note 7 and accompanying text.

often requires highly specialised expertise.⁹⁵ Exacting investigation into complex matters can involve capabilities which relevant enforcement authorities' may not possess.⁹⁶ In settlement scenarios, negotiating enforcement authorities will need to be satisfied as to the veracity of various facts justifying the recovery of property so that any statements of fact released within or accompanying settlements are accurate.⁹⁷ Although impossible to establish a benchmark on how much 'traditional' civil recovery pursued through the courts typically costs in enforcement authority time and resources relative to the costs involved in agreeing settlements, where asset holders agree to cooperate in investigations, this avoids expending resources involved in seeking various investigative orders including, in an English context, production orders or UWOs,⁹⁸ and contesting adversarial civil recovery proceedings. As a matter of pragmatism therefore, respondents' cooperation is often required if a matter is to be successfully and efficiently resolved.

As to why a PEP might opt to voluntarily cooperate in a process which is likely to conclude in the recovery of their property, enforcement authorities can offer a number of incentives with which to persuade elites to enter into negotiations. These include agreements not to pursue proceedings publicly, to agree mutually acceptable settlement agreement language, and/or to anonymise parties' identities and the identities of the settlement assets. In return, enforcement authorities are made privy to the extent of an individual's assets in the jurisdiction and, potentially, incriminating information on professionals who may have facilitated laundering.

PEP willingness to share information may also be explained by reference to work produced by certain writers on law and eco-

⁹⁵ Jacinta Anyango Oduor and others, *Left out of the Bargain: Settlement in Foreign Bribery Cases and Implications for Asset Recovery* (StAR | World Bank Publications, 2013) p. 46; and see King's and Lord's (*supra* note 20) observations (at p. 133) of the 'evident lack of appetite to prosecute complex corporate criminal offences.'

⁹⁶ See the comments of Tom Keatinge of the Royal United Services Institute: "... on what they call high-end money laundering, with the best will of the world, your average NCA officer is not going to understand the kinds of structures that we used to put together at JP Morgan", House of Commons Foreign Affairs Committee. *Moscow's Gold: Russian Corruption in the UK. Eighth Report of Session 2017/19.* (May 2018) at para. 55.

⁹⁷ On concerns around accuracy of statements of facts in negotiated settlement contexts, see Campbell (*supra* note 17) pp. 272-3.

⁹⁸ Pursuant to ss 345 and 362A of the POCA respectively.

nomics.⁹⁹ Those writers persuasively argue that confidentiality holds an economic value for defendants in civil negotiations (because of *inter alia* loss of reputation, litigation costs, a perception that a defendant is a ‘mark’ for other plaintiffs), thereby expanding the upper range of what a plaintiff will sacrifice in order to settle.¹⁰⁰ The prospect of certainty and the implicit or explicit promise from enforcement authorities of no further sanctions or recovery being pursued following the settlement may also be economically valuable to them.

For enforcement authorities in anti-corruption contexts, the ability to publicise negotiation outcomes is important. They are keen to show that they are delivering ‘value’ to their ‘shareholders’ (the public), and regard media coverage as a tool of deterrence.¹⁰¹ The confidentiality / publicity value to each party is therefore at a premium in such negotiations. Enforcement authorities may agree to partial confidentiality (by, for example, publishing limited details, as in the Hussain Settlement¹⁰²) or to full confidentiality to maximise disclosure and/or recovery. Employing rational choice evaluations,¹⁰³ it is conceivable that for some corrupt PEPs, the economic value to them of confidentiality will outweigh the value of their English-based assets, *eg* where future earnings are contingent on perceptions of their honesty and credibility. Such asset holders can be induced into negotiations and will agree to a full forfeiture of their English assets and disclosure of potentially useful information in exchange for non-

⁹⁹ See, *inter alia*, Richard A Posner, *Economic Analysis of Law* (9th ed, Wolters Kluwer Law & Business, 2014); Scott A Moss, ‘Illuminating Secrecy: A New Economic Analysis of Confidential Settlements’ (2007) 105 *Mich L Rev* 867.

¹⁰⁰ Moss, *ibid*, 878-80 citing Posner, amongst others.

¹⁰¹ See: NCA’s policy on *Civil Financial Investigations and Associated Publicity* (available at: <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/496-nca-civil-financial-investigations-policy-and-associated-publicity/file>) at para 5. It provides: ‘The general principle [around publicising settlement deals] will be of transparency and accordingly we will not normally accede to requests to limit the publicity around settlements.’ at para. 3.

¹⁰² See notes 147 and 148 *infra* and accompanying text.

¹⁰³ Rational choice theory is popular amongst criminal law policymakers in England, who assume that individuals rationally calculate the costs and benefits of engaging in criminal acts to decide whether to commit crimes. See: Jackie Harvey, ‘Asset Recovery: Substantive or Symbolic?’ in Colin King and Clive Walker (eds) *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets* (Ashgate, 2014) 184-7; albeit both Harvey (at 184-5) and Bibos (*supra* note 8 at 2467) question this assumption’s reliability.

disclosure of their identities and/or some or all of the settlement terms. By allowing for negotiated settlements rather than public civil recovery proceedings in court, relative confidentiality is commodified as a bargaining chip to obtain that cooperation.¹⁰⁴

Enforcement authorities entering into settlements avoid risking unsuccessful court applications for investigative orders or CROs eventuating and consequently having to pay respondents' costs,¹⁰⁵ thereby potentially diverting resources from other investigations. Successful settlements avoid the lengthy delays a feature of judicial appeals processes. Efficiencies can extend beyond property recovery *simpliciter*. The asset holders involved in the 1MDB Settlements and the Obiang Settlement variously provided undertakings that they would make bona fide efforts to produce information and documents required to facilitate reasonably expedient sales of the relevant assets and would assist in opposing claims from any third-party claimants, where necessary.¹⁰⁶

4.2 *Effectiveness*

Second, where respondents do not have to engage in public court proceedings which may widely advertise their wrongdoing, the impetus against cooperating with investigations, making full disclosures of assets or reaching settlements is reduced. If it subsequently becomes apparent that an asset holder has been less than forthcoming on, for example, the extent of their assets in the jurisdiction, then public civil recovery proceedings (and the attendant publicity) in respect of those assets are still available to enforcement authorities. It is acknowledged that where settlements are made and their terms published, these are likely to be similarly reported upon in the media and that there will be some degree of censure implicit in that reportage. However, the media coverage afforded to settlement agreements (and indeed, the amount of reportable material generated by

¹⁰⁴ See: Peter Alldridge, 'Bribery and the Changing Pattern of Criminal Prosecution' in *Modern Bribery Law*, 247.

¹⁰⁵ For example, the NCA was on the hook for significant costs following *Baker v NCA* ([2020] EWHC 822 (Admin)), a case where respondents successfully overturned UWOs on the basis that they were made on a 'flawed basis.' See: Sean O'Neill, '£1.5m Legal Bill Forces Rethink over McMafia Wealth Orders' *The Times* (London), 13/07/20, p. 16. Recent amendments to the POCA have sought to address this problem.

¹⁰⁶ See: the Low Settlement at paras. 20-21, the al Qubaisi Settlement at para. 11, the agreement cited in respect of the Riza Settlement at p. 8 and the Obiang Settlement at paras. 19, 21 and 46.

settlements) when viewed against reportage of multi-day public civil recovery proceeding hearings is comparatively modest. The punitive aspect of such publicity is mitigated for settling asset-holders.¹⁰⁷¹⁰⁸

Third, negotiation processes allow scope for Affected State envoys (whether State representatives or, if appropriate, NGOs or other parties acting in the citizens' interests¹⁰⁹), at least theoretically, to be consulted on the negotiation itself and on the fate of recovered assets. StAR has specifically criticised the absence of victims participating in negotiations on, and benefiting from, penalties imposed pursuant to, DPAs.¹¹⁰ The DOJ's press releases accompanying each of the 1MDB Settlements made reference to the 'significant assistance' provided by the Malaysian authorities in its investigations,¹¹¹ but provided no insight into whether those authorities were consulted as part of the negotiation or repatriation processes.¹¹² Consultation with Affected States is something that may be more feasible in relatively informal negotiation contexts than it would be in either civil recovery proceedings through the Courts or through criminal proceedings because the process is less procedurally rigid.

Fourth, negotiated responses facilitate discretion to save kleptocrats' dependents from destitution by virtue of having to cover expenses including legal costs, sales taxes for realised assets, etc once matters are concluded (there is admittedly an argument, as was successfully made in the *Agidi* case,¹¹³ that to the extent that legal costs can be covered from a respondent's own assets, these should be used instead). Each of the 1MDB Settlements made provision for a

¹⁰⁷ Eg searches made against variations of Malik Riaz Hussain's (the counterparty to the Hussain Settlement) name on the same basis as the searches described in note 88 *supra* resulted in a total of five hits compared to Mrs Hajiyeva's 64.

¹⁰⁸ To varying degrees, depending on the respondents: see the accompanying text to note 118 below.

¹⁰⁹ Both Moiseienko (*supra* note 40) at 669-70 and Davis (*supra* note 41) at 325-27 refer to the example of the BOTA Foundation which was established by the US, Swiss and Kazakh governments and supervised by the World Bank as a means of returning US\$115m in assets allegedly misappropriated by Kazakh PEPs to Kazakhstan. The Foundation applied the funds in support of poor Kazakh children and their families.

¹¹⁰ Oduor et al (*supra* note 95), 49.

¹¹¹ DOJ press releases 20-382 of 14/04/2020; 20-431 of 06/052020; and 20-865 of 02/09/2020.

¹¹² It seems likely that they were consulted as part of the Riza Settlement, at least-see note 122 *infra* and accompanying text.

¹¹³ Note 132 *infra*.

portion of the recovered proceeds to be applied *inter alia* in satisfaction of asset holders' legal expenses. This is unlike, for example, the rigid requirements of the formal English civil recovery structure under the POCA, about which the Court of Appeal, in a case where it refused an appeal to a CRO, expressed sympathy to an impecunious divorcée who had no knowledge of her former husband's wrongdoing and was seeking to retain the matrimonial home. The Court noted that the trial judge had acknowledged that 'if the court had an unfettered discretion [under the POCA] there would be much to be said in favour of allowing her to keep [the family home] but the court does not have an unfettered discretion or indeed any discretion at all.'¹¹⁴ The POCA powers allowing for settlement agreements on the other hand, permit the English High Court may 'make any further provision which [it] thinks appropriate' where its consent is sought to the terms of a civil recovery agreement between a respondent and an enforcement authority.¹¹⁵

4.3 *Due Process Advantages*

Fifth, published settlement agreements allow parties to acknowledge formally that respondents have not been charged with, nor are they formally suspected of any crime by Holding State enforcement authorities. In the US, settlements dealing with the proceeds of foreign grand corruption typically include a statement along the following lines: 'This Consent Judgment does not constitute a finding of guilt, fault, liability and/or any form of wrongdoing on the part of [asset holders]'¹¹⁶ Statements of this type may bear communicative value for asset holders in diffusing some of the public censure that might otherwise be attracted by settlements. Such statements help to relegate the asset recovery made pursuant to the settlement to the league of what penologists refer to as non-punitive 'morally neutral sanctions', akin for example to tax settlements.¹¹⁷ These statements will have varying degrees of effectiveness. More 'passive' holders of the alleged proceeds of corruption (*ie* family members of senior

¹¹⁴ *Sanam v NCA* [2015] EWCA Civ 1234, para. 22.

¹¹⁵ POCA, section 276(2)(b).

¹¹⁶ See: the Low Settlement, para 8; the al Qubaisi Settlement, para. 5; and the agreement cited in respect of the Riza Settlement at p. 2.

¹¹⁷ Andrew von Hirsch, *Censure and Sanctions* (Clarendon, 1993), p. 11.

public officials like the minor children who were represented as counterparties to the al Qubaisi Settlement¹¹⁸) will benefit from such statements. Khadem al Qubaisi was prosecuted and convicted for misappropriation offences linked to the 1MDB scandal in the UAE.

‘Primary’ corrupt actors (that is, public officials responsible for allegedly directly instigating the alleged corruption in question, *eg* Teddy Obiang) will, quite reasonably, benefit from such statements to a lesser degree. In Obiang’s case, and in, for example, the case of Jho Low, the proceeds of whose alleged corruption was the subject of one of the 1MDB Settlements and who remains on the run and the subject of an Interpol Red Notice,¹¹⁹ the public will have strong and well-founded views on their actual culpability. In those contexts, such statements may serve as a practical means of pre-empting future claims in criminal proceedings in an Affected State’s or a Holding State’s criminal courts that negotiated responses to corruption are quasi-criminal proceedings capable of violating double jeopardy claims. This will not, however, be effective across the board because of the different ways in which States apply *ne bis in idem* rules.¹²⁰

Where, on the other hand, the basis on which suspicions were raised against a settlement party are not publicised (as in the Hussain Settlement), and it is confirmed by an enforcement authority that an individual has been investigated and not charged, this has the potential to be significant in expressive terms for the respondent in question.

Sixth, realpolitik considerations have operated in the past to impede enforcement authority investigations, even if there was apparently sufficient evidence for those investigations to proceed. The most notorious recent example of this in England was the political pressure brought to bear by the Government leading to the SFO ending its investigation into BAE Systems’ alleged bribery of Saudi Arabian

¹¹⁸ See *supra* note 53.

¹¹⁹ See *supra* note 55.

¹²⁰ Eg, while an acquittal in another State will operate as a bar to prosecution in England (see Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process*, (5th ed, OUP, 2019) p. 422), the ECtHR’s view is that *ne bis in idem* only applies where courts *in the same State* try an individual more than once for the same alleged offence – *Krombach v France* App no. 67521/14 (ECtHR, 29 March 2018). The US takes exceptions to the double jeopardy rule further again by allowing prosecution of the same crime under both federal and state laws under its ‘separate sovereigns’ doctrine – see *US v Gamble* 139 S. Ct. 1960 (2019).

officials.¹²¹ As investigations into the proceeds of grand corruption implicitly impugn actions undertaken by someone who is or was a senior member of the Affected State's political or administrative establishment, they spotlight corrupt practices in Affected States and are therefore fundamentally more politically challenging than other proceeds of crime investigations.

It is conceivable that there will be circumstances where Holding States will be reluctant to take court action against members of another's country's ruling class to recover the proceeds of grand corruption, not least because it may, justifiably or otherwise, elicit a perception of that Holding State criticising an Affected State's political institutions. This is unsatisfactory. Such prosecutorial considerations result in an unequal application of the law based on contemporary geopolitics instead of being based solely on an enforcement authority's reasonably held suspicion that a respondent is benefiting from the proceeds of crime.

Conversely, it is possible for settlement negotiations to be leveraged by corrupt actors as a means of avoiding criminal liability, as in the case of Aziz Riza, the stepson of the former Malaysian prime minister, who had money laundering charges in Malaysia against him discharged on a basis 'not amounting to an acquittal' on condition that he returned assets held in the US,¹²² as part of the 1MDB Settlements.¹²³ This apparently politically-driven arrangement plainly misses the point that settlement agreements should be used only where criminal prosecution and confiscation are not possible or likely, that is, as an inferior means of accountability which at least ensures that the corrupt cannot enjoy assets the licit origins of which they cannot establish.

Unfortunately, there is no obvious solution to address such *realpolitik* problems where they arise, other than for civil society groups and media organisations to call attention to the obvious double standards applied as a means of discouraging future political influence on prosecution decisions.¹²⁴ Compared to public civil recovery proceedings, settlements represent a potentially discreet route to

¹²¹ For an account of the Al-Yamamah matter, see: Peter Alldridge, 'The U.K. Bribery Act: The Caffeinated Younger Sibling of the FCPA' (2012) 73 *Ohio St LJ*, 1193-8.

¹²² See: Richard Paddock, 'Malaysia Drops Charges Against Movie Producer', *New York Times* (New York, 15/05/2020), Business p. 6.

¹²³ See *supra* note 55.

¹²⁴ See for example the case cited at n 128 below.

avoiding these diplomatically fraught issues, while ensuring that corrupt PEPs are at least partially held to account.

A final corollary advantage unrelated to the UNCAC's objectives is the scope for Holding States to burnish their soft power credentials internationally by embracing negotiated responses. The US Secretaries of State and the Treasury recently issued a statement lauding the UK for imposing sanctions against *inter alios* Teddy Obiang pursuant to its Global Anti-Corruption Sanctions *regime*.¹²⁵ Although important not to overstate the (in any event, unquantifiable) value of such actions on the UK's part, they certainly do not *harm* its position when seeking to demonstrate its shared values with the US while, for example, seeking to expedite a post-Brexit trade agreement between the countries.¹²⁶ Successful asset recovery and repatriation processes are concrete examples of anti-corruption activities which advertise a State's commitment to particular values. Settlements offer one comparatively straightforward means of achieving this objective.

V DUE PROCESS RESERVATIONS

Turning to the disadvantages of settlement processes, what of the elements of due process that are sacrificed in service of efficiency and effectiveness gains achieved by settlements? Is the threat of prospectively expensive and aspersive court proceedings not essentially a means of coercing PEPs into handing over assets, regardless of those assets' provenance, to avoid the stigma of a public proceeding? What is the appropriate role of enforcement authorities in recovery settlements? And how can the public evaluate the performance of this role when negotiations take place in private? There has been no public discourse on these questions in the UK, and they raise concerns as to the accountability of enforcement authorities in negotiation processes, and to the transparency of those processes more generally. These intertwined considerations will now be discussed.

¹²⁵ US Department of the Treasury, 'Joint Statement by Secretary Janet L. Yellen and Secretary Antony J. Blinken Commending the United Kingdom's Anti-Corruption Sanctions' 22/07/2021, available at: <https://home.treasury.gov/news/press-releases/jy0287> .

¹²⁶ Edward Malnick 'Trade Deal with US on Hold Until 2023' *Sunday Telegraph* (London, 11/07/2021) News, p. 6.

5.1 *Accountability*

StAR observes, writing in the context of DPAs, that negotiated settlements are subject to ‘inadequate or no judicial supervision’.¹²⁷ This criticism speaks to the legitimacy of such arrangements, because it raises questions on whose authority enforcement authorities are acting under, and whose interests they are required to uphold, when entering into negotiations or in finalising settlements. Given civil recovery’s ‘civil’ character in England, enforcement authorities can settle proceedings in the same way that it is possible to settle any other civil dispute – behind closed doors, without having to resort to the courts, and in a completely ad hoc manner.¹²⁸ It is not clear however why enforcement authorities are considered the most appropriate counterparty to those agreements; nor is it clear why and whether they should be regarded as the parties best-placed to represent the interests of Affected States and/or Holding States in negotiations.

As mentioned in Part III, judicially approved civil recovery settlements are possible pursuant to s. 276 of the POCA, which contemplates the High Court making consent orders staying civil recovery proceedings ‘on terms agreed by the parties for the disposal of the proceedings’,¹²⁹ while having discretion to add ‘any further provision which the court thinks appropriate.’¹³⁰ It is difficult to see

¹²⁷ Oduor et al (*supra*, note 95), p. 48. Although StAR makes this observation about foreign bribery settlements globally, it singles out as an example the OECD’s criticism of the UK’s tendency to rely on civil recovery settlements with a ‘low level of information on settlements made publicly available’ rather than, for example, criminal plea agreements, and the transparency and accountability problems implicit in this approach.

¹²⁸ It is possible that third parties (eg NGOs or Affected States unhappy with the terms of a settlement) might seek judicial review of the exercise of an enforcement authority’s discretion, but as Lord Bingham observed in *R (on the application of Corner House Research) v Director of the Serious Fraud Office* ([2008] UKHL 60; [2009] 1 AC 756), the ‘authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator’ (at p. 840).

¹²⁹ POCA, s. 276(1).

¹³⁰ POCA, s. 276(2).

much evidence of its use in practice,¹³¹ albeit cases making reference to cash forfeiture settlements or civil recovery settlements occasionally arise before the courts.¹³² Section 276 appears to contemplate judicial involvement only at the very final stage of the process.

At the core of the accountability problem around settlement agreements in England is the fact that there is little publicly available guidance (to the extent it exists at all) for enforcement authorities acting in negotiating settlements either within or outside a s. 276 process.¹³³ On the evidence of the limited information available from the Hussain Settlement,¹³⁴ enforcement authorities appear able generally to finalise settlements without court approval. Given the paucity of published principles or standards to be met by negotiated settlements, when English enforcement authorities enter into settlements at all, they must be made on a relatively ad hoc basis, leaving the public with very little insight into the considerations taken into account in agreeing settlement terms. This lack of clarity has adverse implications for a component of legitimacy that criminologists describe as the *normative validity* of the negotiation; that is, ‘the justifiability of established rules and the enforcing of these by responsible anti-corruption authorities that meet societally accepted standards of rightful authorization...’¹³⁵

¹³¹ A case law search across all jurisdictions of the terms ‘section 276’ and ‘s 276’ on Westlaw UK on 26 January 2022 yielded no cases referring to consent orders actually made. This is not to say that consent orders are never made, but if they are, they are apparently not published or reported upon, and are rarely, if ever, the subject of subsequent litigation. A FOI request made to the Home Office on the number of consent orders made to date (with PEPs and others) and the value of assets recovered pursuant to them resulted in the Home Office advising that it does not hold this information (FOI 65430 of 20 August 2021).

¹³² See, eg, *SOCA v Agidi* [2011] EWHC 175 (QB).

¹³³ A single exception is the *Proceeds of Crime Act 2002: Guidance under Section 2A for Relevant Authorities* (June 2021) published by *inter alios* the Secretary of State (Home Office), the Treasury, and the Attorney General which provides (at para. 10):

A relevant authority may agree to accept a reduced sum in satisfaction of a civil recovery claim if satisfied that:

- the sum is reasonable, having regard to all relevant circumstances including the chances of recovering the full amount claimed and the time and public funds likely to be expended in attempting to do so; and
- accepting the reduced sum would not damage public confidence.

¹³⁴ See notes 147 and 148 *infra* and accompanying text.

¹³⁵ Nicholas Lord, ‘Establishing Enforcement Legitimacy in the Pursuit of Rule-Breaking ‘Global Elites’: the Case of Transnational Corporate Bribery’ (2016) 20 *Theor Criminol* 380.

Where few or no formal rules are evident, the normative validity of a process simply cannot be determined.

On a cynical view, the primary motivations of enforcement authorities as directors of negotiation processes are more likely to be inherently transactional than a court's. In the context of criminal proceedings, enforcement authorities are required to fulfil a 'minister of justice' role, thereby compelling them to act fairly in the course of investigations and processes.¹³⁶ Negotiations in a civil sphere are of a different complexion: negotiators usually act on unreservedly partisan bases. They may be pursuing reasonably presentable outcomes or using the negotiation process to obtain information to facilitate future domestic prosecutions as much or more than they may wish to maximise asset recovery for Affected States. Entrusting agreement of settlements to enforcement authorities thus seems contextually inconsistent with their broader functions and risks fomenting what plea bargain critics fear: 'a process based on a culture of extortionate relationships which extract crude cost/benefit actuarialism from everyone involved.'¹³⁷

In the federal US jurisdiction, courts appear to be comparatively involved in settlements throughout the process in grand corruption contexts. The Department of Justice (the "**DoJ**") has published detailed and publicly available enforcement guidance for prosecutors on civil forfeiture settlements.¹³⁸ Settlements are typically made following the institution of civil forfeiture proceedings, whereby enforcement authorities (typically the DoJ's Money Laundering and Asset Recovery Unit in the context of recovering the proceeds of grand corruption) file 'Complaints for Forfeiture *In Rem*' in an appropriate District Court. These documents set out the bases on which enforcement authorities believe that the assets the subject of the relevant forfeiture actions were illicitly acquired, and typically name the alleged offenders.¹³⁹ Notice of proposed forfeitures are published

¹³⁶ See: Meredith Blake and Andrew Ashworth 'Some Ethical Issues in Prosecuting and Defending Criminal Cases' (1998) *Crim LR* 17-18.

¹³⁷ Mike McConville, 'Plea Bargaining: Ethics and Politics' (1998) 25 *J of Law & Soc* 562.

¹³⁸ See: DoJ, Justice Manual - Title 9: Criminal; 9-113.000 Forfeiture Settlements. Available at: <https://www.justice.gov/jm/jm-9-113000-forfeiture-settlements>.

¹³⁹ See, for example, *US v 'The Wolf of Wall Street Motion Picture'*, Case No CV 16-16-5362 (CD Cal 20 July 2016), one of the forfeiture actions resolved as part of the Riza Settlement. In criminal proceedings, federal enforcement agencies also sometimes rely on so-called 'speaking indictments' providing detailed particulars of the alleged crimes and/or alleged criminals, and demonstrating the thoroughness of

on a government website to alert any parties who may have an interest on the property,¹⁴⁰ and is served on the asset holders.¹⁴¹ It is a requirement of ‘critical principle’ that civil forfeiture settlements ‘should not be used to gain an advantage in a criminal case,’¹⁴² although it is hard to see how this requirement is upheld in practice because any information-sharing presumably takes place on a confidential basis. Before a settlement is finalised, a draft consent judgment of forfeitures taking the form of the proposed settlement agreement is submitted to the presiding court, which then typically approves those terms.

Notwithstanding the more structured nature of the US process, on the evidence of the 1MDB Settlements and the Obiang Settlement, it still suffers from some fundamental accountability problems. It appears there is no general obligation upon enforcement authorities to rationalise the bases on which decisions were made throughout the process. This in turn stymies first principles applicable to dealing with the proceeds of grand corruption or with asset-holders from emerging. This is a missed opportunity not only to ensure enforcement authority accountability, but also to reap communicative benefits and legal certainty around what allegedly corrupt PEPs should expect if they are found to hold assets of dubious provenance. Moreover, it raises the spectre of arbitrary settlements in the service of ‘wins’. This is a high price to pay for relative efficiency. Nevertheless, the relatively high levels of court oversight and published guidance allowing for appraisals of normative validity render the US process superior to its English counterpart in terms of enforcement authority accountability.

5.2 Transparency

Criminal proceedings are typically held in public because of their inherent communicative value,¹⁴³ and because they reflect the values of modern liberal democracies whereby States must exercise their

Footnote 139 continued

their investigations. Views on the fairness of speaking indictments, which can include information which some perceive as inflammatory or misleading, are mixed: Anthony S Barkow and Beth George, ‘Prosecuting Political Defendants’ (2010) 44 *Ga L Rev* 1003-5.

¹⁴⁰ www.forfeiture.gov.

¹⁴¹ Required under, *inter alia* Supplemental Rule G for Admiralty or Maritime Claims and Asset Forfeiture Actions under the *Federal Rules for Civil Procedure*.

¹⁴² See *supra* note 138 at para 9-113.100.

¹⁴³ See Feinberg, *supra* note 93.

powers against individuals in open, accountable and non-oppressive ways. In the civil sphere, by contrast, we are told that recourse to the courts for civil disputes should be a last resort, relied upon only if the parties are unable to resolve their dispute by non-adversarial means. This is because public proceedings can compromise the privacy of the parties and exhaust their resources, resulting in a single outright 'winner'. There is thus a strong public policy justification for peaceful, mutually agreed settlements.¹⁴⁴ To the extent that civil court proceedings are necessary, litigants are entitled in principle to a public hearing because 'this protects them against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained'.¹⁴⁵

Part III argued that the condemnatory impact of public civil recovery proceedings and the accompanying media attention is inconsistent with the *in rem* character of civil recovery, and that the impact is intensified where PEPs are concerned. Nevertheless, it would be a mistake to adhere too faithfully to the idea that civilly recovering the proceeds of grand corruption should be treated in the same way as any other privately-settled civil dispute. Unlike the vast majority of civil matters, the outcomes of such settlements directly concern public, national and international interests. In the absence of any criminal proceedings ensuing against a suspected PEP offender in an Affected State, settlements involve an important expressive component because they communicate that the relevant PEP cannot act with complete impunity. Settlement processes dealing with the proceeds of grand corruption are therefore required to achieve outcomes which are in tension with each other. Settlements must avoid overtly impugning the characters of asset-holders. At the same time, they must assure interested parties of the adverse consequences of attempting to conceal the proceeds of grand corruption abroad and ensure that sufficient information is available to evaluate the performance of Holding State authorities in upholding this value.

The OECD has criticised the UK's failures to meet transparency standards in its anti-bribery regime.¹⁴⁶ Similar criticisms can be made

¹⁴⁴ See: speech given by Sir Ernest Ryder, UK Senior President of Tribunals, *Securing Open Justice* at Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, 01/02/2018.

¹⁴⁵ *Malhous v the Czech Republic* [GC], App no 33071/96 (ECtHR 12 July 2001).

¹⁴⁶ See: OECD, *Implementing the Anti-Bribery Convention: Phase 4 Two Year Follow-up Report: United Kingdom*, 06/03/2019, p. 8, where the UK's failure to publish sentencing remarks and judgments in foreign bribery cases routinely is noted.

of its civil recovery settlement agreement process. There is vanishingly little information publicly available on what asset recovery settlement agreements English authorities have entered. Where settlements are made to recover assets, the agreements are not regarded as public documents, and are therefore not published. In the Hussain Settlement, for example, the NCA released a short statement confirming the settlement and, unusually, noting that the settlement concerned ‘a civil matter, and does not represent a finding of guilt.’¹⁴⁷ It subsequently removed the statement from its website. Beyond these facts, no details, including the terms of the settlement agreement and the reason for the investigation against Mr Hussain, were made publicly available by the NCA. The settlement appears not to have had the input of the courts, and it is not known whether the settlement assets comprised all of Mr Hussain’s assets held in England. Most of the assets in question have apparently since been returned to Pakistan.¹⁴⁸ Based on the lack of publicly available information available around the Hussain Settlement, all that it is possible to conclude is that English enforcement authorities are open in principle to conducting civil recovery negotiations and to agreeing to keep the terms confidential.

Confidentiality assurances are of practical use to enforcement authorities as a bargaining tool, as discussed in Part IV. Additionally, there may be operational reasons why an exhaustive publication of terms will not always be appropriate. The respondent may have provided information incriminating other kleptocrats or evidence relating to those who facilitated the laundering in exchange for an agreement to keep the matter out of the courts. Nevertheless, confidentiality or redaction clauses in settlement agreements should be approached with extreme caution and on an exceptional basis, given the legitimacy implications. Some redaction may be agreed, but confidentiality terms should not preclude at a minimum publication of some details on the assets recovered, whether a respondent was

¹⁴⁷ The statement released at the time is no longer on the NCA’s website. The above quote is taken from: Kate Beioley, ‘Pakistan Family Hands over £190m in ‘Dirty Money’ Probe’ *Financial Times* (London, 03/12/2019). It is reasonable to assume that Mr Hussain required this public confirmation from the NCA as a condition of the settlement.

¹⁴⁸ NCA, *Annual Report and Accounts 2019-20*, p. 24. Available at: <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/467-national-crime-agency-annual-report-and-accounts-2019-20/file> .

permitted to keep any assets (and on what grounds) and some overview of the relevant facts.

Publication allows civil society groups to consider whether a settlement conforms with, for example, the principles published by Global Forum on Asset Recovery.¹⁴⁹ Where a published agreement recites full details of assets recovered and assets investigated but not recovered, it allows civil society, journalists and others to audit the veracity of the disclosures made by asset holders, and to track the repatriation of those assets by enforcement authorities to Affected States, thereby keeping all parties ‘honest’. This is consistent with States’ obligations under the UNCAC, which requires States Parties to ‘take appropriate measures...to promote the active participation’ of such groups by *inter alia* ‘enhancing the transparency of and promoting the contribution of the public to decision-making processes [...and...] ensuring that the public has effective access to information.’¹⁵⁰

The US federal approach to publicising the terms of settlements is more transparent. Typically, where a US enforcement authority reaches a grand corruption proceeds settlement, the DoJ releases a detailed press release on its website, and publishes a copy of the settlement agreement filed with the District Court as a public document. The settlement agreement will include details of, *inter alia*, the relevant assets, the beneficial and legal holders of those assets, a confirmation that no criminal liability has been admitted by any party, an acknowledgement that the asset-holders will cooperate in the efficient disposition of the property, and the US-based assets, if any, in which the DoJ has waived a potential interest.¹⁵¹ As such, it is appropriate that settlement agreements are (i) subject to judicial approval; and (ii) so far as is possible, published for public scrutiny (albeit it is acknowledged that this may need to sometimes be on a redacted or anonymised basis). To the extent that settlements (including any additional terms imposed by the courts as a condition of approving the agreements) are made publicly available, there is

¹⁴⁹ Principle 9 of which, for example, precludes ‘benefit to offenders’ in the disposition of the proceeds of corruption. See: GFAR, Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, Washington DC 06/1217, available at: https://star.worldbank.org/sites/default/files/20171206_gfar_communique.pdf

¹⁵⁰ UNCAC, Article 13.

¹⁵¹ These terms were included in each of the 1MDB Settlements and the Obiang Settlement.

opportunity for a body of precedents to develop, and to ensure that cases are treated in a reasonably consistent manner so that a base level of certainty and equality of approach evolves.

VI FURTHER RESERVATIONS

This Part concerns negotiated resolutions' seeming ineffectiveness at restoring assets to Affected States by highlighting the invisibility of Affected States in settlement negotiations. It also examines the problem of perceived differential treatment for PEPs wrought by grand corruption proceeds settlements.

6.1 *Effectiveness*

The authors of the StAR report remark upon the absence of the victim in the settlement in DPA contexts.¹⁵² There is similarly little evidence of active Affected State involvement in settlement negotiations with individuals. As discussed in the previous Part, settlement processes are sufficiently flexible to allow for consultation with Affected States or their representatives. One reason why Holding States may be reluctant to engage with Affected State envoys (whether State officials or civil society groups) during the negotiation process is that determining appropriate trustees for recovered proceeds may be diplomatically fraught, particularly where there are concerns around restoring assets to the very corrupt regimes that misappropriated them in the first place.

The past decade has, however, provided a number of both successful and unsuccessful models in involving Affected States in the asset restoration process,¹⁵³ which might allow for the development of normative responses to the question of victim participation. Examples of well-designed restoration processes enlisting the services of Affected State-based administrators in deploying returned funds for the benefit of Affected States' citizenries are emerging all of the

¹⁵² Odour *et al*, *supra* note 95, p. 49.

¹⁵³ See Davis, *supra* note 41.

time. These include the establishment of the BOTA Foundation, which was responsible for administering the proceeds of corruption in Kazakhstan,¹⁵⁴ and a recent Memorandum of Understanding signed by the UK's Home Office and Moldova, pursuant to which £456,068 seized from the London-based student son of the former Moldovan Prime Minister is to be used for the benefit of Moldovans with severe disabilities.¹⁵⁵

Another reason for failure to involve Affected States is that Holding States, having put the work and resources into recovering assets, may wish to retain the fruits of their efforts. As mentioned in Part II, there is nothing in the UNCAC *requiring* Holding States to return assets to Affected States where they have unilaterally taken action to seize in those assets their own territories. Enforcement authorities in England have gestured towards the importance of repatriation, but in practice go no further than the UNCAC requirements by assuring the public that 'compensation is *considered* in every case'¹⁵⁶ of recovery from overseas economic crimes.¹⁵⁷ The proprietary rights of Holding States to sums misappropriated from Affected States are not at all clear. The logical conclusion for Holding States making claims to norm entrepreneurship or moral leadership by warning of the deleterious effects of corruption on Affected States' development¹⁵⁸ would be to make a normative push towards mandatory restoration of recovered assets for the benefit of the populaces of Affected States. This is yet to happen in practice.

A corresponding problem - insufficient recovery – can also arise in grand corruption settlement contexts and raises questions as to whether enforcement authorities have, or should have, authority to

¹⁵⁴ See *supra* note 109.

¹⁵⁵ Home Office, *MOU between UK and Moldova on the return of funds forfeited by the National Crime Agency in relation to Luca Filat*, 22 September 2021, available at: <https://www.gov.uk/government/publications/return-of-funds-forfeited-by-the-national-crime-agency-luca-filat-agreement-between-uk-and-moldova/mou-between-uk-and-moldova-on-the-return-of-funds-forfeited-by-the-national-crime-agency-in-relation-to-luca-filat>.

¹⁵⁶ Emphasis added.

¹⁵⁷ See: SFO, 'New joint principles published to compensate victims of economic crime overseas', News release dated 01/06/2018, available at: <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>.

¹⁵⁸ See, eg: UK Cabinet Office, *Against Corruption: a Collection of Essays* (The Stationary Office, 12/05/2016) and in particular the foreword by then-Prime Minister, David Cameron.

allow concessions to asset holders in exchange for cooperation. In 2019 for example, Swiss parliamentarians reacted with dismay to the news that the Swiss Attorney General's office had agreed to unfreeze a superyacht owned by Teddy Obiang in exchange for the sale proceeds of 25 luxury cars and Obiang's payment of the Swiss government's legal fees.¹⁵⁹ Similarly, in Obiang's US settlement, the DoJ's decision to drop its case against Obiang's private jet and some valuable memorabilia in exchange for his cooperation in the negotiation was criticised.¹⁶⁰ Assuming Holding States are (morally, if not legally) bound to retrieve misappropriated assets on behalf of Affected States who hold proprietary interests in those assets, it is problematic that those Holding States can and do allow alleged offenders to bargain for and/or take the benefit of some of those misbegotten gains.

6.2 *Equality Before the Law*

A final concern lies around the risk of a public perception that because of their elite status, PEPs benefit from differential treatment procedurally because they are allowed negotiation privileges in asset recovery contexts that are simply not afforded to non-PEP members of the population.¹⁶¹¹⁶² Such negotiation processes thus could be viewed as conflicting with values of equality in the administration of justice. There may however be pragmatic justifications for special rules to PEPs apply in many instances – some examples of the difficulties involved in taking action against foreign PEPs are outlined in Part 3. It may be challenging consequently for enforcement authorities to establish to a court that property constitutes the proceeds of

¹⁵⁹ The settlement failed to abide by the GFAR principles (*supra*, note 149), despite Swiss state representatives being instrumental in their development. See Corruption and Human Rights Initiative, 'Open Letter: Switzerland's Appalling Decision to Return Seized \$100 million Yacht to Known Kleptocrat', March 2019. Available at: <https://corruptionandhumanrights.org/publications/open-letter-switzerlands-appalling-decision-to-return-seized-100-million-yacht-to-known-kleptocrat/>

¹⁶⁰ See: Davis, *supra* note 41, p. 329.

¹⁶¹ Commentators note that such perceptions, particularly where enforcement actions against elites are involved, are often informed by the public's preconceptions of and/or pre-existing prejudices towards a particular cohort- see: Barkow and George (*supra* note 139).

¹⁶² See similar criticisms made by King and Lord (*supra*, note 20) in the context of the procedural responses to crimes committed by white collar criminals (at pp. 2-3).

corruption on the balance of the probabilities. The best response to kleptocracy, and one that all enforcement authorities should aspire to in principal and proceed on the basis of in the first instance in practice is to support as far as possible the obtaining of a criminal conviction with accompanying confiscation measures.¹⁶³ Should it become apparent that achieving this is not realistic in particular cases, and to ensure that assets are recovered nevertheless, settlements may offer an imperfect but practical alternative.

VII SOME CONCLUSIONS

Historically, shifts in anti-corruption approaches have been precipitated by dramatic events, for example the introduction of the UN-CAC following the post-Cold War ‘corruption eruption’ of the late 1990’s,¹⁶⁴ or the proliferation of money laundering rules focusing on terrorist financing following the 2001 attacks on the World Trade Centre in New York.¹⁶⁵ It remains to be seen whether the recent anti-corruption political momentum identified in the introduction heralds the arrival of another anti-corruption ‘moment.’

A number of themes on more effective, efficient and legitimate forms of negotiated settlements processes have emerged for consideration in the course of this paper. An ideal process would allow enforcement authorities to acknowledge formally that no adjudication or finding of guilt or innocence or admission of liability is being made, and would include no allusions to suspected predicate offences. This would ensure a clear delimitation of a Holding State’s non-criminal jurisdiction and avoid uncertainty around *ne bis in idem* issues should an Affected State subsequently opt to prosecute. It also has the potential to mediate messaging around the fact no findings of guilt are involved, thereby mitigating the collateral aspersive consequences inherent in respondents’ experiences in asset recovery proceedings. Whilst some public scepticism around the guilt or otherwise of respondents may remain, the fact that enforcement authorities emphasise no finding of criminal guilt is nevertheless potentially

¹⁶³ This principle is reflected in section 2 of the POCA, which notes: “...the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings.”

¹⁶⁴ See Ivory, *supra* note 14.

¹⁶⁵ Eg the Financial Action Task Force, the international standard-setter on money laundering procedures, published its *FATF IX Special Recommendations on Terrorist Financing* (October 2001).

expressively potent, particularly where those statements are made in respect of officials' family members or associates found holding the proceeds of suspected corruption.

It is preferable that settlements reached become a matter of public record and identify the relevant public officials, the assets recovered, the key terms agreed and memorialise the fact that the settlement does not constitute a determination of criminal wrongdoing. Representatives of the Affected States' citizenry would be involved in the negotiation and/or conversations on the application of proceeds. Enforcement authorities in Holding States would publish data on sums repatriated, the use to which such funds are put, and the jurisdictions to which they are returned, thereby bolstering the expressive impact of asset recovery and allowing analysts and scholars to evaluate quantitatively Holding States' anti-corruption endeavours.

Above all, enforcement authorities in Holding States would proactively and vigorously pursue the proceeds of grand corruption. Until 'material salient risks' that the proceeds of grand corruption will be seized through well-resourced and robust enforcement strategies exist,¹⁶⁶ there is no reason to expect improvements in the amount of 'dirty money' feared to be laundered annually. Negotiated settlements are worthy of wider consideration as one potentially effective and efficient means of addressing the problem. They are not a panacea, not least because they remain disquieting from a due process perspective. Should settlements go 'mainstream', it is imperative that a procedural architecture is developed to clarify conceptions of the roles of enforcement authorities, courts, PEP counterparties and Affected State representatives. Should Holding States fail to rationalise properly the processes surrounding and outcomes of negotiations, the arbitrary and unjust decision-making characteristic of kleptocracies will join the proceeds of grand corruption as an unwelcome import to Holding States.

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¹⁶⁶ Making a parallel case for anti-bribery action against corporates, see: Jennifer Arlen, 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US' in *Negotiated Settlements*, p. 158.

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