

# Toward a More Effective Implementation of Anti-Corruption Measures

Suggestions for the Strengthening of Existing Frameworks and Institutions

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## Preface

Corruption is a criminal offence resulting in widespread economic distortions in less developed and industrialized states, which are felt equally, albeit to different effects. The global prevalence of corruption and its highly detrimental impact on sustainable development have made the UN Convention against Corruption (UNCAC) one of the few multilateral treaties with near-universal ratification<sup>1</sup>. And yet, implementation lags far behind avowed commitments – corruption continues to remove trillions of dollars annually from the legitimate global economy.

The present paper seeks to identify the most trenchant gaps in the implementation of States' legal obligations in the fight against corruption and to offer some elements for practical and practicable solutions. It is not a research paper, nor does it purport to be a comprehensive overview of the international anti-corruption framework or an in-depth study of methodologies for combating corruption. The views and suggestions herein are based on the author's discussions and engagements with practitioners, government officials, and members of civil society, as well as on decades of professional experience in pursuing meaningful results through multilateral engagement. In short, after listening to a number of consistent complaints and aspirations to proposed solutions as well as concerns those might trigger in turn, the author has put together a simple summary of her views together with recommendations on what measures might usefully be taken, given known political and other constraints.

After reviewing known implementation gaps and addressing the pros and cons of one proposed solution, an International Anti-Corruption Court, the author concludes that it would be ineffective to address corruption primarily through criminal prosecution. Redressing the economic distortions created by corruption can be more effectively achieved by taking away its profits and repurposing those for the benefit of the societies from which they were stolen. Asset seizure, confiscation, forfeiture, and repurposing would, moreover, serve to incentivize state action, while doing so through non-conviction-based forfeiture would significantly enhance the volume, speed, and impact of economic realignment.

Given the reluctance within the international community to create new institutions and frameworks, the author proposes to expand the capabilities of existing ones – in particular, the UN Office on Drugs and Crime and the Permanent Court of Arbitration – to address state capacity gaps in tracking, tracing, seizing, and forfeiture. Access to independent third-party direct assistance would reduce political considerations and assist states in identifying reliable channels for the

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<sup>1</sup> As of 18 November 2021, UNCAC has 189 States Parties. Only the DPRK and Eritrea have neither signed nor ratified the treaty, while Syria has signed but not ratified.

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return or repurposing of corruptly obtained assets. Resource requirements for the effective implementation of such measures are also considered.

The paper concludes with a series of concrete recommendations and an outline of the necessary international processes through which these proposals (and others) could be discussed at the expert level and placed before the international community for consideration and eventual adoption.

# 1. Introduction

## 1.1. The Issues

As the UNCAC celebrates its 20<sup>th</sup> year, there appears to be widespread agreement among governments, international organizations, thought leaders, and civil society that the global anti-corruption framework is not working efficiently or effectively and requires better implementation and strategic strengthening, particularly concerning Grand Corruption<sup>2</sup>. However, views on how to redress identified shortcomings diverge – both among industrialized States, between the most industrialized States and those of the Global South, and among civil society and practitioners.

Points of debate include how best to strengthen the implementation of existing frameworks and obligations and whether new institutions, treaties, or amendments to the existing legal framework may be required. The latter discussion includes proposals for creating a new international criminal tribunal for the prosecution of Grand Corruption offences, i.e., an ‘International Anti-Corruption Court’, or IACC); so far, this idea has been endorsed by a small number of UN Member States and, most recently, the European Parliament.

The widespread existence of corruption as an economic phenomenon raises deep policy questions as to whether corruption is most efficiently addressed through an individual criminal accountability framework or whether States should prioritize redressing the resulting economic distortions. Such an approach might focus on asset seizure, forfeiture, and repurposing – including through non-conviction-based forfeiture (NCBF) – rather than privileging prosecution as a first step<sup>3</sup>. A further question is what role should be played by stressing prevention and how to address the underlying systems and ecosystems that enable illicit financial flows (e.g., through economic reforms, strengthening of regulatory frameworks and cooperation, etc.).

A related issue, often conflated with corruption, is what to do with assets frozen pursuant to unilateral sanctions resulting from so-called “Magnitsky laws”. Since Russia’s invasion of Ukraine, moreover, some USD330B of Russian assets have been frozen by Western allies, in particular assets belonging to members of the Putin government and the Russian oligarchy. None of these freezes are linked to criminal processes, even if they are popularly presumed to be proceeds of

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<sup>2</sup>As stated in Public Safety Canada’s [Research Brief No. 48, Definitions of Corruption](#), “Grand corruption involves higher ranking government officials and elected officials who exploit opportunities that are presented through government work. It is more often the result of bribes offered or paid in connection with larger scale government projects, such as infrastructure and construction projects.”

<sup>3</sup> See, for example, the civil forfeiture actions carried out in the USA to effect the repatriation of assets of Nigeria’s former President, the late Sani Abacha, which resulted in the return of some \$332.4m in assets to Nigeria by the US to date (e.g., 17 November 2022 press release from the US Department of Justice: <https://www.justice.gov/opa/pr/united-states-repatriates-over-20-million-assets-stolen-former-nigerian-dictator>)

corruption. In December 2022, Canada became the first country to seize and pursue the forfeiture of assets belonging to a Russian oligarch, using new authorities that allow the government to seize assets belonging to persons sanctioned under the *Special Economic Measures (Russia) Regulation*.<sup>4</sup> If the process succeeds, the proceeds will be able to be used for the reconstruction of Ukraine and compensation to victims of the Russian invasion; the Canadian model has attracted considerable attention and could usefully be exported.

Shared methodologies and channels in respect of this type of forfeiture and possible repurposing of assets would be desirable, *inter alia*, to reduce duplication of tracking, tracing, and cooperative mechanisms and to allow States to benefit from best practices. That said, political and legal considerations pertaining to unilateral sanctions may ultimately require separate approaches<sup>5</sup>.

Lastly, corruption proceeds tend to flow from poorer States to richer ones, where their influx may be touted as evidence of a flourishing investment climate. As a result, there is a pressing and immediate need to even the playing field for States that lack the capacity to address implementation gaps or to access relevant mechanisms, especially in the face of reluctance by “receiving” States to look behind well-appointed curtains. But technical assistance and capacity-building are not cheap. Activities carried out by the UN, or regional organizations rely on extra-budgetary donor engagement. As a result, and even if carried out bilaterally between States, such efforts tend to be fenced, time-limited, and project-based rather than programmatic or strategic, raising questions of selectivity, inequity, and ultimately, inadequacy.

## 1.2. Understanding the Art of the Possible

Given the variable geometry of interests, needs and aspirations, a one-size-fits-all solution to global corruption, including Grand Corruption, is unlikely. For reasons outlined below, this author is not convinced that establishing an International Anti-Corruption Court will offer immediate solutions, given the timeframe required for negotiations of a constituent treaty, entry into force, and full functionality.

A flexible and modular approach may be more achievable in the short term – one that allows addition and subtraction based on what the multilateral diplomatic/political “market” will bear, while also providing a runway for the eventual establishment of an IACC. Efforts to create entirely new mandates, bodies and mechanisms tend to be difficult, making it preferable to fit the different

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<sup>4</sup> <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html>

<sup>5</sup> The potential repurposing of such assets to satisfy Ukrainian reparation claims (e.g., through a mechanism as contemplated in UN Resolution A/Res/ES-11/5 of 14 November 2022), raises issues quite similar to those arising from the confiscation of proceeds of crime, but due to political considerations will likely require the creation of a separate mechanism, e.g., one patterned on the UN Compensation Commission established under UNSC Resolution 687(1991).

elements into existing central frameworks rather than forcing the creation of new ones. The latter, opponents will readily argue, would almost inevitably lead to inefficiency due to fragmentation, duplication, and turf wars, as well as extra costs due to the required new bureaucracy.

It would be reasonable, therefore, to look to the UN Office on Drugs and Crime (UNODC). The UNODC is the only established universal intergovernmental body with the mandate, capabilities, and expertise in the global fight against corruption; it has an existing network and strong partnerships with States and other international actors, as well as being “plugged into” the broader UN system. Accordingly, this paper recommends the strategic strengthening of the UNODC – to close several implementation gaps and allow the agency to become an effective, one-stop clearing house for States requiring assistance in the fight against corruption, particularly Grand Corruption.

Given the high likelihood of the need for independent determinations and decisions, the paper also considers the possibility of enhanced collaboration between UNODC and the Permanent Court of Arbitration, whose existing adjudicative powers include non-state actors and organizations, all the while being rooted in state consent.

### **1.3. How To Get To “Yes” In Stepping Up The Fight Against Corruption**

The proposals in this paper seek to incentivize the necessary political will to fight corruption by redressing economic distortions and, in the process, allowing States to meet their commitments to realizing the Sustainable Development Goals (SDGs). They seek to achieve this through the tracing, identification, seizure, forfeiture, and ultimately, the repurposing of corruptly obtained assets for development and restitution (and possibly, down the road, to effect reparations for wrongful acts against third parties).

While rooted in principles of accountability and restorative justice, the proposed measures are not in any way intended to take the place of criminal prosecution. Indeed, they are complementary and could indeed pave the road to hold the perpetrators of Grand Corruption to account through criminal prosecution, including possibly via an IACC.

An essential step will be to socialize and strengthen measures aimed at determining that assets are indeed proceeds of corruption, with sufficient certainty to justify their confiscation without prior criminal process and to ensure that such determinations are made within a rights-based legal framework, with the necessary procedural guardrails.

In any event, though, any steps aimed at strengthening the international anti-corruption framework — including measures the author may not have considered here — will need to be discussed by intergovernmental experts to test their acceptability and feasibility and consider the necessary and most effective steps for realization. To that end, this paper includes recommendations for two sequential intergovernmental processes to ensure maximum “buy-in” by the UN Member States. It is important to note that these processes would be time-limited, purpose-driven, and outcome-oriented, rather than serve as political tick marks and substitutes for action.

Of course, effective action against corruption will not come cheaply; its perpetrators have bottomless wallets. States professing to want to be at the forefront of the fight against corruption must put money on the table upfront and without too many strings attached. Ultimately, asset forfeiture, seizure and repurposing may become self-financing, but that day has not yet come. Investments will need to be made.

Finally, returning assets to the economies whence they were diverted will be fraught with concerns about new forms of corruption, as well as meeting possible resistance by constituencies that have benefited, economically and politically, from their presence. The first requires guardrails and clear channels for the appropriate disbursement of funds, which the broader multilateral system can serve; both require political commitment far beyond soundbites and short-term platforms of convenience.

## 2. What Needs to Be Addressed: Gaps in the Existing Framework and Its Implementation

At the recent High-Level Meeting on Anti-Corruption in The Hague (Nov 28-29), led jointly by Ministers from Canada, the Netherlands and Ecuador<sup>6</sup>, participants identified some critical gaps.

### 1. Impunity, or “the persistent criminal responsibility gap”

With every country except Syria, Eritrea, and the DPRK having ratified the *UN Convention Against Corruption (UNCAC)*, acts of corruption and related offences have been (or should have been) criminalized everywhere. And yet they are allowed to continue, usually by self-supporting domestic power structures and imbalances. On the one hand, perpetrators of Grand Corruption, in particular, are shielded from accountability by their grip on the reins of power. On the other, accusations of corruption can be easily (and effectively) weaponized against political opponents. Both seed doubt and undermine public confidence in governance and criminal justice systems.

### 2. Economic distortion

Diversion of financial assets from the lawful economy, particularly in developing countries, into the hands of corrupt actors thwarts States’ ability to generate revenue to pursue legitimate policy initiatives. In addition to diverting scarce resources, corruption distorts everything from law-making and economic decision-making to infrastructure engineering in ways that can cripple development for future generations, making it one of the principal impediments to achieving the SDGs. Moreover, such assets tend to be deposited or invested in developed States to benefit those economies; artificial economic “successes” create political blind spots in receiving States, reducing the political will to combat corruption effectively and holistically.

### 3. Lack of effective mechanisms to track, trace, identify<sup>7</sup>, recover, and seize stolen money and to restore it to lawful purposes

Without effective means to freeze, seize, confiscate, and return/repurpose the fruits of corruption, its economic distortions will persist. Effective mechanisms must include legal certainty and due process of law; equal access by and equality of arms between actors; and confidence that any repurposing of assets benefits

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<sup>6</sup> The meeting was by invitation only, but given its wide participation, including by many civil society groups, points raised during the proceedings must be considered as being in the public domain.

<sup>7</sup> While proceeds are usually traced, ‘identification’ could include reverse-onus schemes (such as “unexplained wealth orders”), under which assets can be seized if the holder cannot prove they came from legitimate sources.

identifiable victims and economies of origin without leading to further corrupt diversion.

Such mechanisms as are available – such as the UNODC’s capacity-building programs, World Bank’s *STAR* project, or the International Center on Asset Recovery at the Basel Institute on Governance – are either under-resourced or not universally accessible, especially by States lacking in domestic capacity<sup>8</sup>. Critically, there is no well-resourced one-stop shop or global clearing house to support the implementation of *UNCAC* by providing States consistently and reliably with all of the following:

- a. access to ‘best practices’, model legislation, information exchanges and data;
- b. concrete technical and operational assistance in legislative drafting, complex transnational cases, and asset tracking, tracing, and recovery;
- c. advice on channels for the equitable and effective repurposing of the proceeds of corruption; and
- d. assistance in effecting the transfer of forfeited assets to guard against their re-diversion.

#### **4. Obstacles to effective international cooperation**

*UNCAC* creates a multilateral legal framework for cooperation but relies on national implementation and bilateral relations to make it work; regional or plurilateral mechanisms that support the Convention’s policy goals can be helpful but are limited in reach. There are many reasons why cooperation can break down, even where the necessary political will exists:

- a. Lack of capacity, human and financial resources, especially in developing States;
- b. Inadequate domestic legal implementation and operational hurdles, such as lack of expertise, databases, and digital resources, as well as fragmentation of responsibilities between government actors;
- c. Trust deficits between and among Parties;
- d. Differing legal bases and requirements, systems, standards, safeguards, policies, and mechanisms for the prosecution of corrupt acts and the freezing, seizure, forfeiture, confiscation, or repurposing of assets obtained through corruption, including non-conviction-based forfeiture;
- e. Practical/operational obstacles arising between States, such as dual criminality requirements for extradition and mutual legal assistance;

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<sup>8</sup> The expertise of these existing mechanisms should, however, be taken into account in the further development of the proposals herein, together with any opportunities for cooperation and avoidance of duplication of efforts.

- differing banking secrecy and privacy protections; lack of recognition of foreign judgments, including orders of forfeiture or confiscation; and
- f. Last but not least, unequal application of human rights norms and standards, particularly those relating to due process of law.

These are broad strokes, as noted by this diplomatic practitioner. A more detailed analysis would benefit from input from experts and, in particular, by practitioners in legal drafting, judicial processes, law enforcement, economics, finance, and banking, as well as private sector specialists, e.g., from accounting firms with global reach and those familiar with international financial flows.

But assuming these are the most critical gaps, could they be resolved through a single mechanism?

### 3. Could a New Court Resolve Grand Corruption?

*“If all you have is a hammer, everything looks like a nail”*: The notion that since corruption is *prima facie* a criminal activity, it requires a criminal law response first and foremost, is one well worth testing – both as a matter of principle and with regard to the suggestion that a new judicial institution is the most promising solution.

Given the above-noted impunity gap, an IACC could indeed offer the potential for criminal convictions in cases where a state is unable or unwilling to prosecute. Such a Court could do so either by being given jurisdiction over the offences set out in UNCAC, e.g., through an optional protocol, or via its own specific set of offences.

Increased and well-publicized convictions could provide a deterrent effect to corruption. But who would be prosecuted, and for what? Criminal tribunals require codified criminal offences and jurisdiction over the person, the offence, the place, and the time the offence was committed. This means that, like under the *Rome Statute* that created the International Criminal Court, IACC prosecution would likely be limited to offences committed by nationals, or on the territory, of a closed circle of States Parties.

The questions are obvious, especially to any practitioner familiar with the genesis, history, and operational reality of the International Criminal Court (ICC): Would a state whose senior leaders are engaged in corruption ratify the necessary treaty creating a new judicial institution that might make them vulnerable to prosecution?

What would be the Court’s jurisdictional basis, given that universal jurisdiction was considered by States, but not included in UNCAC<sup>9</sup>? Would States consent to their nationals being tried if they themselves are not a member of the Court? Current proposals for an IACC suggest that jurisdiction could be based on what amounts to the “effects doctrine”, accepted in some legal systems – or a *de facto* codification of the 14 November 2019 ruling of the ICC’s Pretrial Chamber III concerning the Bangladesh/Myanmar situation. In light of the high mobility of corruptly obtained assets this would be a desirable expansion of the jurisdictional provisions contained in UNCAC, but it would likely require a significant diplomatic lift.

How would complementarity work, in light of the probable multiple transnational monetary transactions? Retroactivity issues also arise. Would States Parties be willing to accept opening doors to past transgressions on their territory? If offences

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<sup>9</sup> Jurisdictional scope in UNCAC is governed by Art 42, giving primacy and discretion to domestic law concerning the exercise of jurisdiction in respect of all but territorial jurisdiction; Art 4(2) expressly preserves territorial sovereignty.

are based on the existing provisions of the UNCAC, would there be agreement to apply them, retroactively, to a new prosecution and adjudication regime?

Then there is the question of efficiency and effectiveness. Even when it works, international justice can take a long time, not the least, because the prosecution of senior figures from a given state tends to require a change in political circumstances, not just as a basis of jurisdiction but also to ensure investigative and evidentiary cooperation. The ICC has been in existence for two decades now. In that time, it has dealt with 31 cases; issued 38 arrest warrants; 21 people have been detained and appeared before the Court; and there have been ten convictions and four acquittals. Non-party States to the Rome Statute, of course, have no obligation to assist and can, in fact, actively undermine the work of the Court. Due to the consent principle underlying international treaty law, this would be the case for any new tribunal unless it were to be created or directed by the UN Security Council under Chapter VII.

Assuming an IACC was created and did start work, following fundamental precepts of criminal law, any orders of confiscation and forfeiture of illicitly acquired assets would be restricted to cases on the docket and be predicated on conviction. Alleged “proceeds of crime” can usually be frozen or seized at an earlier stage. Still, their ultimate return or other disposition requires a criminal verdict that an offence was committed and that the assets are derived from that offence. As a result, the restitutive value of the Court would be limited, and only a fraction of the estimated annual \$2.6 trillion, or 5% of global GDP,<sup>10</sup> would possibly be restored to the global economy, with limited impact on global illicit financial flows.

Of course, there is real value – actual, symbolic, moral, and legal value – in achieving high-profile convictions in the fight against impunity for corruption, especially for Grand Corruption, not just for deterrence purposes but also as a statement of principle and commitment by States to the rule of law. Depending on which States become party to an IACC and how the heads of jurisdiction are framed, an IACC could be well positioned to deter perpetrators from moving assets from, through, and to the territory of States Parties. But we will also need to be clear that convictions will be limited in both number and global reach, and many perpetrators will be able to restructure their activities to avoid IACC jurisdiction.

Extending the *in rem* jurisdiction of the ICC to corruption offences might avoid some elements of institutional redundancy but would not address these fundamental issues. It would also raise other questions about the framing of corruption offences, the number of States Parties willing to accept such jurisdiction, the time it would take for amendments to enter into force, and how to

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<sup>10</sup> [“What are the costs of corruption?”](#) Till Johannes Hartmann & Carlos Ferrera, World Bank Blogs, 22 Dec 2022

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include current non-Parties to the Rome Statute. Finally, the ICC is undergoing an extensive reform process to improve its efficiency and effectiveness; throwing an entirely new head of jurisdiction into the mix could be deeply counter-productive.

Criminal prosecutions clearly have a role to play in the fight against corruption, but not necessarily the primary one – at least not at this stage.

## 4. Follow (and Recover) the Money: Put Focus on Proceeds, Not Perpetrators

Corruption, in short, is about unjust enrichment; the incentive is the accumulation of wealth and power by means that benefit the individual while avoiding and damaging integrity-based structures that benefit everyone. This raises the question of whether efforts to strengthen the global anti-corruption framework should focus first and foremost on *removing the proceeds of corruption* from unlawful actors and *incentivising the return of wrongfully diverted assets* to lawful actors and the lawful economy.

Criminal prosecution is only one of the available tools in the fight against corruption. Unexplained Wealth Orders and civil forfeiture both operate without prior conviction but have a similar effect — namely, they serve to attach the proceeds of corruption. Non-conviction-based forfeiture (NCBF) would of course require strong procedural safeguards; still, these would not be as onerous as those attached to criminal prosecution and punishment - while offenders have human rights, assets do not. The methodologies for tracking and tracing assets and the channels for cooperation are indistinguishable from those deployed in criminal proceedings.

Such an approach would not only focus more directly on removing the primary motivations for corruption and correcting the economic distortions it causes but might make it possible for the international community to move forward more quickly, with less resistance, broader consensus, and fewer legal and political obstacles.

Of course, care will need to be taken that the return of assets does not, in turn, give rise to further corrupt activities and that distribution is effective, efficient, reliable, and accountable. To that end, identifying appropriate channels and recipients for recovered assets will require careful consideration and direction.

The return of proceeds of corruption to the economies from which they were taken would, in the author's view, have two critical impacts; namely, it would:

1. punish perpetrators by depriving them of the benefits of wrongdoing; and
2. redirect diverted funds to legitimate policy purposes, including:
  - a. compensation of identifiable victims;
  - b. strengthened capacity of developing countries to implement UNCAC and UNTOC; and
  - c. advancement of the SDGs.

Given the benefits and incentives outlined above, the author would postulate that the focus on strengthening the international anti-corruption framework should be

placed on creating a new and accessible one-stop mechanism with global reach to facilitate the confiscation, forfeiture, and repurposing or return of the funds and physical assets acquired through corruption. In light of many States' reluctance to agree to the creation of new institutions, it would make sense to locate these capabilities within an existing and experienced agency, namely the UN Office on Drugs and Crime (UNODC), supported by the Permanent Court of Arbitration.

#### 4.1. Expanding the Mandate of the UNODC

A strengthened UNODC could function as such a clearing house, with an expanded mandate to facilitate and administer asset recovery requests and distribution, based upon the request and consent of relevant States. Such requests could stem from both criminal and NCBF proceedings but would be expected to focus on the latter.

Through decisions taken by the Parties to UNCAC and/or the UN Commission on Crime Prevention and Criminal Justice (CCPCJ), as appropriate, and approved by the General Assembly via ECOSOC, the UNODC could be tasked with, *inter alia*,

Via the temporary deployment of expert practitioners,

- Assessing and building States' capacity to identify, seize, freeze, and confiscate proceeds;
- Assisting States, via the temporary deployment of experts, with gathering evidence that assets on the territory or under the jurisdiction of holding States are the proceeds of corruption, including the tracking and tracing of financial flows and identifying appropriate avenues for confiscation and forfeiture;
- Facilitating the necessary negotiations to effect liquidation and return of frozen assets across borders;

Via a specially created and constituted committee or commission [see, e.g., the UN Compensation Commission as a helpful analogous model],

- ▶ Assessing the legal and factual basis of a State's request for liquidation, forfeiture, and return, including potential requests by intervenors or third parties with claims on the assets, and making recommendations to relevant parties in respect thereof;
- ▶ Holding funds in escrow or trust pending resolution of a request for restitution (subject to UN rules and oversight relating to trust funds);
- ▶ Receiving submissions from interested States on the proposed disposal of assets and making recommendations on effective, efficient, trustworthy, and equitable channels for their return, including via independent third-

party actors operating for the benefit of the State concerned (e.g., UNDP or victims' trust funds); and

- ▶ Facilitating the payment of reparations for internationally unlawful acts, as determined by an internal court or arbitral tribunal, decision of the UN Security Council or resolution by the UN General Assembly, including through an appropriate *ad hoc* or generally applicable claims procedure.

#### **4.2. Dispute Resolution, Procedural Safeguards and Binding Decision-Making**

Disputes could be resolved through an existing dispute settlement mechanism, such as the Permanent Court of Arbitration (PCA), with strengthened membership and roster of experts.

The PCA could also offer procedural protections, particularly on matters of determination of ownership, confiscation and forfeiture of private property, including by convening hearings, receiving evidentiary submissions from interested parties and making binding decisions thereon.

Its role could include hearing submissions and settling on appropriate channels for the return and/or repurposing of assets if these cannot be agreed between States. The PCA could also be asked to step in for certain of the functions described above if States were to consider these to be outside the mandate of the UNODC.

## 5. Specific Proposals to Close Implementation and Capacity Gaps in the International Anti-corruption Framework

The following section contains a series of specific recommendations, many gleaned from suggestions made by officials or members of civil society at the Hague meeting in November 2022. The author labours under no illusion that all of these proposals will be acceptable to all States but believes that the time has come for concrete and concerted action in the fight against corruption - this requires positive steps to help States better implement their existing obligations and access both existing and new avenues for cooperation.

Note that appropriate avenues and potential timelines for elaborating and making recommendations to States on these and other options, via appropriate inter-governmental processes, are set out at the end of the paper.

### 5.1. Expanding the Role of the UNODC

- ▶ Expand the existing mandate and authorities of the UNODC by creating a dedicated new “Asset Recovery and Disposition Branch” to facilitate the tracking, tracing, confiscation and forfeiture, liquidation, and repurposing of corruptly obtained assets, and to ensure their return to legitimate and beneficial purposes, with qualifying processes to include conviction- and non-conviction-based forfeitures.
- ▶ Such mandate expansion should not require a new underlying treaty but would require a General Assembly mandate to be created – e.g., following recommendations of an open-ended intergovernmental expert meetings, and based on a resolution adopted by the UNCAC COSP and transmitted to the GA via the Economic and Social Council (ECOSOC).<sup>1</sup>
- ▶ The new Branch would act as a global clearing house to assist States with the recovery and redistribution of proceeds of corruption, at any stage in the process.
- ▶ Adding new functions, capacities and resources to the UNODC will have Program Budget Implications (PBIs) and as such will be subject to approval of UN Member States, via resolution of the UNCAC COSP, ACABQ, and the UN General Assembly.

### 5.1.1. Scope & Application

The capacities and services of an expanded UNODC could be made available under the following circumstances:

- ▶ Upon unilateral request and/or upon consent of relevant State Parties,
  - To provide advice and assistance in the tracing and identification of corruption proceeds and derived assets;
  - To assist in the return of assets following a lawful domestic process declaring them to have been obtained by corruption, e.g., in connection with domestic criminal proceedings or convictions, unexplained wealth orders, or sanctions imposed by legislative action or executive order;
  - To facilitate requests for cooperation, mutual legal assistance and return of corruptly obtained assets between a requesting and requested State (including under UNCAC or UNTOC), in particular where one or more of the Parties lack the capacity to adequately prepare or respond to such requests or to effectively access existing frameworks;
  - To cooperate, and to facilitate state cooperation, with existing domestic, international, or inter-governmental mechanisms<sup>11</sup>, with a view to minimizing duplication of efforts, achieving synergies, and maximizing outcomes;
- ▶ To assist States in satisfying and implementing orders for the return of assets or for reparation and restitution where a competent international tribunal, such as the International Court of Justice or the Permanent Court of Arbitration, has issued a legally binding decision to that effect (precedent: *see Art 75 of the Rome Statute*);
- ▶ Pursuant to a decision of the UN Security Council under Chapter VI or VII of the UN Charter or a resolution of the UN General Assembly exercising its residual powers under Art 12 of the UN Charter (precedent: *UN Compensation Commission established under UNSC Resolution 687 (1991)*);
- ▶ Decisions by other international or regional Organizations consistent with Chapter VIII of the UN Charter; or
- ▶ Upon a conviction by an International Court or Tribunal with a mandate to try cases of Grand Corruption and/or to effect orders of forfeiture, restitution or repurposing of assets held by the convicted person.

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<sup>11</sup> For example, the International Anti-Corruption Cooperation Centre in the UK; the Basel Institute for Governance and its NCBF program; the World Bank's STAR project; and others.

### 5.1.2. Structure

The new Branch could be headed by a **Director** (e.g., an ASG-level appointment, reporting to the USG/Executive Director of the UNODC) and could include the following divisions:

- ▶ **A Secretariat** consisting of experienced administrative staff to:
  - serve as the official channel of communication for States and litigants;
  - ensure safe custody of documents in respect of cases under adjudication;
  - provide administrative support and technical services, such as financial administration and governance;
  - logistical and technical support for meetings and hearings;
  - travel arrangements; and
  - general secretarial and linguistic support.
- ▶ **A Cooperation and Complementarity Section**, consisting of experienced legal staff to:
  - assess the admissibility of referrals and requests for third-party intervention;
  - make recommendations about issues requiring legal determination before UNODC engagement (e.g., where asset ownership remains under dispute or domestic legal processes have not been completed);
  - identify and liaise with relevant international organizations, specialized agencies, courts, and tribunals (e.g., ICJ, PCA, ICC, World Bank, UNDP), or States;
  - to conduct and report on cooperation with implicated parties on all matters relating to the identification, location, and movement of assets;
  - make recommendations to States for the referral of matters under dispute to a competent dispute resolution mechanism (such as the PCA or an ad hoc arbitral tribunal to be set up by implicated States).
- ▶ **An Investigative and Forensic Accounting Section**, to assist States in:
  - assessing and confirming the ownership, legal status, and value of frozen assets; and
  - conducting any necessary additional tracking and tracing of assets.
- ▶ **An Asset Holding and Disposition Section**, to:
  - receive, hold in escrow, administer, and disburse assets;

- effect sales of physical assets at fair market value upon request by a holding or requesting State;
- assess the suitability of proposed channels for disbursement, including through consultations with relevant UN agencies as identified and facilitated by the Cooperation and Complementarity Division;
- recommend the most appropriate recipient(s) for forfeited assets and on principles of lawful ownership, equity, equality, restorative justice, and reparation for injuries; and
- disburse funds.

### **5.1.3. Rules of procedure:**

To provide clarity and certainty to States wishing to engage with the UNODC, clear principles and rules in respect of the following should be approved by States via resolution of the UN Commission on Crime Prevention and Criminal Justice (CCPCJ), forwarded through ECOSOC to the UN General Assembly for approval - to include provisions on the following:

- ▶ Admissibility, processing, and disposition of requests;
- ▶ Conditions for engagement or consultation with, and referrals to, third parties (including other UN organizations or dispute settlement mechanisms);
- ▶ representation, appearance, burden of proof, admissibility of evidence, etc.;
- ▶ consideration of international human rights protections against the enforcement and adjudicative powers of territorial States;
- ▶ provisions clarifying whether an “asset” may include capital gains, interest and profits and whether “owners” are entitled to protect basic living expenses pending or following forfeiture;
- ▶ creation of a dedicated trust/escrow mechanism to hold and disburse funds;
- ▶ fiduciary, asset management and fair market value sales issues;
- ▶ funding of relevant activities (see the proposal on funding below).

- ▶ **Create a Pool of Experts to assist States directly and to enhance UNODC’s ability to provide technical assistance and capacity building.**

The UNODC should be tasked with creating and administering a *Pool of Experts*, available to deploy to the territory of Member States upon request, to provide direct technical assistance in domestic processes, training, and capacity-building, *inter alia* in

- ▶ legislative drafting;
- ▶ criminal proceedings;
- ▶ determination of legal title and status of assets;
- ▶ forensic accounting, tracking, and tracing;
- ▶ asset seizure, confiscation, and repurposing.

Experts could be made available for short-term interventions or to provide continuous assistance for extended periods of time.

Options for constituting the pool could include the following:

- (a) An external, independent roster, with names to be submitted by Member States or obtained via callout to relevant networks such as The Global Operational Network of Anti-Corruption Law Enforcement Authorities (GlobE Network), to be quality-checked and confirmed, classified by categories of specialization, maintained, and regularly updated by UNODC;
- (b) Experts seconded to UNODC by Member States for specific issues or on an open-ended basis;
- (c) Salaried regular UNODC staff members funded out of the regular budget;
- (d) Fixed-term UNODC staff members funded out of extra-budgetary (project) resources; or
- (e) Consultants.

Experts can either be posted to the requesting country or be sent on mission(s) as needed, subject to relevant UN terms and conditions of deployment; remuneration for specific services or salaries would be paid by UNODC, funded either by the seconding or receiving country or out of other extra-budgetary contributions to UNODC, including from the private sector<sup>12</sup>. They would be assigned in consultation with States who have requested UNODC assistance.

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<sup>12</sup> UNODC already has a number of Anti-Corruption Advisors posted in Field Offices, just as they have Anti-Money Laundering Advisors and others, through different Global Programs, depending on need and availability of funding. The anticipated roster would strengthen that capacity to allow direct technical assistance.

▶ **Increase and stabilize funding for the UNODC's anti-corruption activities.**

UNODC already assists member States on some of these issues (subject to its current mandate) but is constrained by lack of regular budget/core funding, restrictions on funding provided by donor States, and a shortage of human resource capacity to provide expertise in the field. Both UNODC's existing work and the operations of the proposed new Branch will require ongoing, new, and reliable financing either through:

- ▶ the UN's regular budget (RB), possibly via an increase in States Parties' assessed contributions;
- ▶ predictable, non-earmarked (or soft-earmarked) extra-budgetary (XB) contributions; and/or
- ▶ repurposed seized assets for which UNODC is agreed to be a beneficiary recipient.

Any necessary PBIs would have to be addressed along with the mandates by the ACABQ and approved by the General Assembly when the mandate extension is submitted for approval.

That said, and to make the creation of new UNODC capabilities more acceptable to States concerned with PBIs or increases in assessed contribution, States submitting requests for assistance could be required to allow the UNODC to retain an "administrative surcharge" to attain full cost recovery<sup>13</sup>. In addition, UNODC itself would be open for designation as a beneficiary of the repurposing of seized assets, given its role in the achievement of the SDGs through its capacity-building and technical assistance mandate.

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<sup>13</sup> UNODC currently imposes a "project support cost" on States funding specific projects through XB contributions, so as to maintain core capacity and support services associated with the implementation of such projects.

## 5.2. Engagement of the Permanent Court of Arbitration

- ▶ **The Permanent Court of Arbitration (PCA) already plays a significant role in the pacific resolution of disputes, resolving questions of fact and law between parties, and ruling on economic disputes arising between States. It is uniquely well-placed to play this role in connection with questions arising out of the freezing, seizing, confiscation, and repurposing of assets.**

The PCA possesses the necessary and existing expertise to resolve inter-state disputes on a wide range of issues, including mediation/conciliation, arbitration, fact-finding and commissions of inquiry, and mass claims proceedings. Arbitrators provided by the PCA could, under its existing rules, be empowered by States and international organizations to assist them to:

- ▶ resolve disputes or uncertainties between the parties and any intervenors, in particular as pertains to ownership, directed forfeiture, and appropriate pathways for the release and return of assets [see powers granted to the UN Compensation Commission under its [Decision 114](#)];
- ▶ Assess evidentiary submissions, including holding in-person hearings;
- ▶ Issue rulings on:
  - Questions of admissibility of referrals or requests, recognition of judgments by domestic and international courts and tribunals, and matters of complementarity;
  - Granting or refusing intervenor status;
  - Legal and beneficial ownership of assets;
  - Directing the movement of assets to be held in escrow or a designated trust; and
  - Making binding orders of forfeiture or return of assets;
- ▶ Upon submissions, recommend the most appropriate recipient(s) for forfeited assets based on principles of lawful ownership, equity, equality, restorative justice, and reparation for injuries, where this cannot be agreed upon between implicated States; and
- ▶ Directing the release of assets to interested parties, including determining appropriate pathways for disbursement.

States seeking the engagement of the UNODC in relation to assets that are the proceeds of corruption could, as a prior condition of such engagement, be

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requested to consent to the PCA as the forum for resolution of any dispute, including on a summary basis.

Increased use of the PCA, particularly if referred by the UNODC, may have budgetary implications and require the nomination of additional – possibly specialized – members by States; as such, it may require consideration by its Administrative Council. Cost recovery could be addressed per the PCA's existing rules of procedure.

## 6. Moving Forward: Recommendations for Next Steps

The above, as previously noted, is an ambitious list of proposals for discussion - to be scaled, refined, added to, or reduced via expert analysis, input, and recommendations. Input from relevant international actors, organizations, civil society, and interested private sector members<sup>14</sup> as to their feasibility (technical and mandate-based) will be essential if any of these proposals go forward.

To that end, States should be called on to mandate an inter-governmental group of experts to examine technical proposals (including the present one) to implement, strengthen, and better resource the existing international anti-corruption framework.

It should be noted that at the UN General Assembly Special Session on Corruption on 21 May 2021, a recommendation for the creation of an Experts Group to consider measures for strengthening UNCAC implementation was rejected. That said, this UNGASS focused on more specific issues (the role of access to information, transparency, and protection of journalists) rather than discussing the international anti-corruption framework. The UNCAC Conference of States Parties can be expected to be more receptive to this discussion, especially if the groundwork is laid sufficiently in advance.

The author's immediate recommendation to States interested in strengthening the international anti-corruption framework, therefore, would be as follows:

1. **The creation (by the UN General Assembly via ECOSOC, upon recommendation by the UNCAC Conference of States Parties), of an inter-governmental group of experts**, mandated to make concrete recommendations on measures to strengthen the international anti-corruption framework, based on UNCAC, within existing institutions, and consistent with existing legal instruments, with a focus on asset tracking, tracing, recovery, and repurposing/return, including in particular non-conviction based forfeiture proceedings.
2. The Inter-governmental Group of Experts should be mandated to **solicit and consider representations from States, stakeholders in relevant UN and regional agencies and institutions, international financial institutions, practitioners' associations, civil society organizations, and the private sector**, including metrics on the global cost and economic distortions caused by corruption; legal, technical, operational, and capacity gaps in implementation of UNCAC; and suggestions for strengthening existing

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<sup>14</sup> Of particular interest in this regard may be insights from international accounting firms or consultants such as Price Waterhouse Cooper, Ernst & Young, KPMG.

institutions and frameworks. The substance of the above proposals could be referenced in the experts' mandate as possible points for consideration.

3. The Inter-governmental Group of Experts should hold 2-3 meetings (of 5-10 business days each) and its Chair be asked to **report to the Commission within a year**.
4. Following the Expert Group recommendations, **an Open-Ended Inter-Governmental Working Group should be tasked** to draft the necessary mandates, based on those recommendations, for approval by the UN General Assembly.
5. **Organization of these meetings would logically fall to the UNODC**, given its existing infrastructure and capacities as Secretariat to both the CCPCJ and the Conference of States Parties for UNCAC.
  - ▶ **Funding for both these processes will create PBIs** (conference services, secretariat support, interpretation/translation, document generation and distribution, etc.). States that have declared an interest in strengthening the implementation of UNCAC and the international anti-corruption framework should **consider making extra-budgetary contributions** available to the UNODC for these purposes and advise the ACABQ of their commitments to that end.

## Timelines for consideration

- ▶ Preliminary discussions by interested States at the next **High-Level Meeting (Quito, Ecuador, March 2023)**.
- ▶ Informal follow-up discussion with interested States and stakeholders, leading to the **main annual meeting<sup>15</sup> of the CCPCJ**.
- ▶ **The next main meeting of the CCPCJ will take place in Vienna in May 2023**; the primary recommendations in this paper, including the need to convene an inter-governmental Group of Experts, could be circulated informally, through side events, or formally via a resolution directed at the UNCAC Conference of States Parties.
- ▶ A resolution calling for the creation of an Inter-Governmental Group of Experts (with the appropriate mandate and a possible reference to the Open-Ended Working Group that would take its work further) could be placed before the next meeting of the **UNCAC Conference of States Parties (to be held 11-15 December 2023, in Atlanta, GA)**, with a view to placing the same before the UN General Assembly, via ECOSOC, in 2024.

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<sup>15</sup> The CCPCJ meets twice annually, with the "main meeting" taking place in the Spring and a "resumed session" usually in December, to finalize and approve budget documents for transmittal to NY.

## **World Refugee & Migration Council**

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