BRIEFING

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Towards an International Anti-Corruption Court?

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ABSTRACT

Momentum is building globally for the establishment of an International Anti-Corruption Court, which would have jurisdiction over acts of grand corruption and fill the domestic accountability vacuum in kleptocratic regimes. Before such an institution can become reality, though, a number of practical, political and legal concerns will have to be addressed, for instance in relation to state ratification and cooperation. Hence, this Briefing identifies key issues which the European Parliament should assess and consider when forming its position. However, irrespective of its support for an International Anti-Corruption Court, the European Parliament may also want to strengthen other mechanisms enhancing legal accountability, such as existing international courts or extraterritorial jurisdiction. It may also continue to promote more indirect tools for advancing the fight against impunity such as anti-corruption clauses in trade agreements, targeted sanctions, and global asset recovery.

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List of abbreviations

CICIG	International Commission against Impunity in Guatemala
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EP	European Parliament
EPPO	European Public Prosecutor's Office
EU	European Union
EULEX	EU Rule of Law Mission in Kosovo
GHRSR	Global Human Rights Sanctions Regime
IACC	International Anti-Corruption Court
ICC	International Criminal Court
IACCC	International Anti-Corruption Coordination Centre
ICJ	International Court of Justice
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
UBO	Ultimate Beneficial Owner
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNSC	United Nations Security Council
USA	United States of America

Introduction

The European Parliament (EP) in its recommendation of 17 February 2022 calls on the Council and High Representative of the Union for Foreign Affairs and Security Policy to 'advance discussions about an international infrastructure to address the impunity of powerful individuals involved in large-scale corruption cases', including the possible establishment of an International Anti-Corruption Court (IACC) (European Parliament, 2022:13). This Briefing takes stock of the case for and against an IACC, as one cog in the wheel of global anti-corruption efforts and will also assess how other international anti-corruption mechanisms could be strengthened, whether or not an IACC is established. It will end with recommendations for the EP. The author has consulted relevant literature as well as primary legal sources and has spoken to a number of experts closely involved in efforts to put the establishment of an IACC on the international agenda[1].

This Briefing first presents the case *for*[2] an IACC, as originally made by Judge Mark L. Wolf, Senior United States of America's (USA) District Court Judge, for the District of Massachusetts (Section 1). It will go on to present a critical assessment of the proposal for establishing an IACC (Section 2) and outline its possible mandate (Section 3). It will subsequently discuss the strengthening of other international anti-corruption mechanisms (Section 4) and conclude with recommendations (Section 5).

1 Judge Wolf's case for an International Anti-Corruption Court

The case for an IACC was made for the first time in 2014 by US Judge Wolf. Wolf argued that an IACC, is 'necessary and appropriate because of the consequences of grand corruption' (Wolf, 2014: 2018), in particular, because '[p]owerful, corrupt leaders understandably do not permit the honest, energetic investigation and prosecution of their friends, families, and, indeed, themselves' (Wolf, 2014: 5), even if their states have formally signed up to the United Nations (UN) Convention against Corruption (Wolf et al., 2022: 1). Accordingly, the main rationale for the establishment of an IACC is to fill the domestic accountability vacuum in kleptocratic regimes. This mirrors the rationale for establishing the International Criminal Court (ICC) in 1998 (ICC Rome Statute, 1998: Preamble). It is no surprise then to learn that Wolf conceived of an IACC as being modelled on the ICC, albeit structurally different in that there would be no pre-trial chambers and a more limited jurisdiction (Wolf et al., 2022: 11).

This new court would focus only on 'grand corruption', i.e., 'the abuse of public office for private gain by a nation's leaders (kleptocrats)' (Wolf et al., 2022: 1). It would have an independent prosecutor and operate on the basis of complementarity (Wolf, 2014: 10), which means that the IACC would step in only where states party are unable or unwilling to prosecute and investigate cases of corruption genuinely (ICC Rome Statute, 1998: to compare with Article 17). Accordingly, it should bring pressure to bear on states party to strengthen their domestic anti-corruption framework and strategies if they wish to prevent IACC intervention in accordance with its jurisdiction. Interestingly, Wolf conceived of the IACC as not just a criminal court, like the ICC, but also, taking his cue from US legal practice, a court 'empowered by international law to hear civil fraud and corruption cases brought by private "whistleblowers"' (Wolf, 2014: 10).

2 Reactions to Judge Wolf's proposal

Wolf's proposal has been supported by such leading voices as Richard Goldstone, the first chief prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda as well as Robert Rotberg, President Emeritus of the World Peace Foundation (Goldstone and Rotberg, 2018). Furthermore, a large group of former officials, business leaders as well as representatives of civil society and government,

[1] Through snowball sampling, the author spoke to four experts (from civil society, government and academia) who are closely involved in efforts to establish the IACC or have critically reflected on such efforts. Given the political sensitivity of the subject, names and affiliations are not disclosed.

[2] All in-text italics emphases from the author.

dedicated to promoting human rights, human health together with international peace and security adopted a Declaration in 2021 calling for the creation of an IACC. The Non-Governmental Organisation (NGO) *Integrity Initiatives International*, on whose board Wolf, Goldstone and Rotberg serve, has convened the international coordinating committee for the IACC campaign. NGOs have also supported the campaign[3]. Furthermore, a small number of states, such as Colombia (Alsema, 2019), the Netherlands (Government of the Netherlands, 2022) and Canada (Prime Minister of Canada, 2021), have thrown their weight behind the creation of an IACC. However, despite some clear increase in momentum following Wolf's proposal, most states have as yet not formally supported the idea.

Canada, the Netherlands and Ecuador will convene a High-Level Roundtable in The Hague on 28-29 November 2022, to examine effective ways of combatting grand corruption, including proposals for the establishment of an IACC. The Roundtable will comprise a ministerial session and a multi-stakeholder event. An expert committee set up by *Integrity Initiatives International* is currently preparing a document with core principles which would guide the drafting of the statute for an IACC.

Clearly, proposing the establishment of this new court is in itself laudable and hence very much welcomed by certain scholars (Darling, 2017; Ayodeji, 2019). Nevertheless, others have voiced major practical concerns over the feasibility and effectiveness of such an IACC (notably Stephenson, 2016; 2018; Stephenson and Schütte, 2019; Schaefer et al., 2014; Whiting, 2018).

As to feasibility, doubt has been cast over whether or not the most corrupt countries would ever submit to the jurisdiction of an IACC, let alone be incentivised to take part in such a system voluntarily (Stephenson and Schütte, 2019: 4). Moreover, leading nations such as the USA may not join the IACC (Schaefer et al., 2014). An impression may thus be created that wealthy countries could exert pressure on poor countries to join, while potentially not participating in the IACC themselves. Even if Western countries were to take part, such a court may be perceived as pursuing Western neo-imperialist objectives aimed at subduing non-Western countries. This may in turn arguably entrench the position of kleptocrats in their blaming the West for its interventionist posture (Stephenson and Schütte, 2019: 5).

Regarding the value of an IACC, many are skeptical about its potential to generate actual deterrent effects. In particular, to gather evidence the court would crucially depend on the cooperation of states (party) and there is a clear risk that such cooperation may not be forthcoming or may at least be seriously delayed (Stephenson and Schütte, 2019: 6; Whiting, 2020). In addition, an IACC may be very expensive to create and maintain. It may have opportunity costs, in the sense that resources could be diverted from other anti-corruption tools which are already available or easier to access (Stephenson and Schütte, 2019: 7). Furthermore, there is concern that considering corruption as an international crime subject to international jurisdiction may trivialise other international crimes, such as war crimes, crimes against humanity, genocide and aggression (Schaefer et al., 2014: 11).

Opponents of an IACC have invited its advocates to answer these criticisms (Stephenson, 2016), which IACC supporters – Wolf, Goldstone and Rotberg – have recently done in a paper for the American Academy of Arts and Sciences, published in September 2022 (Wolf et al., 2022). As to costs, they argue that the court could be run cost-effectively, as it has a more limited mandate compared with the ICC, and as '[f]ines imposed by the IACC might be used to defray, and possibly cover, the costs of its operation' (Wolf et al., 2022: 11). As to the challenge of obtaining evidence should states refuse to cooperate, they draw attention to the fact that 'enhanced international efforts have been undertaken to trace the flow of illicit funds', for instance within the International Anti-Corruption Coordination Centre (Wolf et al., 2022: 11). They also note that private investigators could track illicit assets; investigative journalists and whistleblowers could discover evidence; and evidence obtained in national proceedings (e.g., USA) could be used (Wolf et al., 2022: 11). As to the concern that kleptocrats would not allow their countries to join the IACC, Wolf et al.

[3] M. Wolf, 'Leader's Statement, An International Anti-Corruption Court for Grand Corruption', Anti Corruption Manifesto, Leader's Statement, n.d.

retort that these kleptocrats 'regularly launder the proceeds of their criminal activity through major financial centers, invest them in foreign countries, and conspire with enablers in foreign countries to do both'. Hence, for an IACC to be effective, it would not need universal participation (Wolf et al., 2022: 11-12).

Criticism formulated against an IACC partly mirrors that levelled against the ICC, which has heard only a limited number of cases, yet has been denounced for using double standards and has faced major obstacles in regard to cooperation. However, while concerns regarding the ICC are valid, Reed Brody (formerly at Human Rights Watch, currently on the International Commission of Jurists) correctly notes that 'the ICC has had an important impact on global justice, through its governing Rome Statute which has been transposed into many national laws, and the baseline international presumption in favour of accountability (Stromseth, 2017) it helps promote, as well as through the pressure it has exerted on some states like Colombia (Liévano, 2021) to undertake prosecutions or risk an ICC investigation' (Brody, 2022). Seen in this light, the establishment of an IACC may be more than just an act of political symbolism; it may have real-life effects in that it promotes the notion that grand corruption is off-limits.

While initially only 'well-behaved' countries may become involved, if the IACC shows some results, then other initially hesitant countries might contemplate joining at a later stage. In this respect, Stuart Yeh has outlined *why* leaders of countries where corruption is endemic may find it politically expedient to join. Yeh argues that others would want to avoid being seen as pariah states and wish to maintain international trade and financial concessions (Yeh, 2021: 2). On the basis of historical analysis, which includes case-studies of the USA, the United Kingdom (UK), Romania, Guatemala, Honduras and Ukraine, he states 'that heads of state choose to publicly sign and support anticorruption measures, regardless of their probity and personal ethics'. 'Voters prefer the candidate who appears to be tough on crime' and 'will "drain the swamp" of government corruption' (Yeh, 2021: 14). Accordingly, a combination of international and domestic pressure may well convince government leaders to sign up to the IACC. A similar scenario has played out in respect of the ICC, which currently counts 123 states party, including some where international crimes have been or continue to be committed.

This Briefing remains neutral as to whether an IACC should or should not be established. As outlined above, there are good arguments in favour and against an IACC. Moving forward, more time must be devoted to solving thorny practical and legal issues. Hence, in the next Section, some issues relating to the institutional design of an IACC will be presented, in particular its jurisdictional mandate. The author is assuming that this new entity is primarily likely to be a criminal court. Still, as with the ICC, it may have the power to order (civil) reparations to victims (ICC Rome Statute, 1998: to compare with Article 75), more specifically to recover and return stolen assets (Wolf et al., 2022: 9; Darling, 2017: 441-444).

3 Issues related to the potential IACC mandate

The jurisdictional mandate which states party confer on an IACC determines what conduct falls within its ambit and what is expected from its Prosecutor (Reydams and Odermatt, 2012). The mandate sets out *over what, when and where* the IACC would have jurisdiction, understood here as the legal authority or power to prosecute and investigate offences of grand corruption. Accordingly, it is a core aspect of the court's institutional design. We can distinguish between substantive, temporal, geographical and personal jurisdiction. In this Section, the issues presented require close attention in a draft statute for the IACC.

As to an IACC's **substantive jurisdiction**, it is likely to cover acts of 'grand corruption'. However, there is as yet no internationally agreed definition of grand corruption, albeit there is some consensus on elements such as 'i) misuse or abuse of high-level power; ii) large scale and/or large sums of money; iii) harmful consequences' (Duri, 2020). Accordingly, the statute drafters will have to agree on a definition. They could rely on those criminal offences which are already listed in existing anti-corruption conventions, such as bribery, embezzlement, trading in influence, abuse of functions, illicit enrichment, laundering of the proceeds of crime and concealment (UNDOC UNCAC, 2003: Articles 15-42). To enhance legal certainty and put potential defendants on notice, the statute could benefit from more specificity regarding the definition

of these offences. Alternatively, the statute could use legal definitions of grand corruption under domestic law and thus allow the IACC to prosecute offenders for violating the domestic law of states party (Wolf et al., 2022: 6). This is not unheard of for an international criminal tribunal; for instance, the law applied by the Special Tribunal for Lebanon is Lebanese law rather than international criminal law (Statute of the Special Tribunal for Lebanon, 2007: Article 2). Allowing the IACC to apply domestic law may undermine legal coherence, though, in that states' domestic definitions of (grand) corruption may differ. Furthermore, in cases of transnational corruption when more than one state is involved, the question arises as to which domestic law would apply.

As to the IACC's **temporal jurisdiction**, in light of the legality principle, it is likely that the IACC will have jurisdiction with respect to crimes committed only after the statute's entry into force, as with the ICC Statute (ICC Rome Statute, 1998: to compare with Article 11.1). However, it is not impossible for the statute to confer temporal jurisdiction on the IACC for acts committed before its entry into force. Indeed, it is very likely that such acts will already have been made punishable by international conventions and domestic law, thereby substantively satisfying the legality principle.

As to the IACC's **geographical reach**, proponents favour jurisdiction based on territoriality. This is understandable insofar as, with a few narrow exceptions, only territorial jurisdiction is mandatory under the UN Convention Against Corruption (UNCAC), whereas other grounds of jurisdiction are merely optional (UNDOC UNCAC, 2003: Article 42(1)(a)). Territoriality would allow the IACC to prosecute acts of corruption committed on the territory of a state party not only by its own nationals but also by nationals of other states (Wolf et al., 2022: 6). Importantly, territoriality does not mean that *all* relevant conduct needs to have taken place on the territory of a state party. In fact, it may suffice that *one element* of a global corrupt practice took place on the territory of a state party, for instance, the handing of a bribe, or the concealment of property, whereas other acts may have taken place on the territory of states non-party. Most importantly perhaps, the territoriality principle may allow the IACC to exercise jurisdiction over territorial acts of money-laundering. In this case, we understand money-laundering as the conversion or transfer of property for the purpose of concealing or disguising the property's illicit origin[4]. The primary, predicate offence of corruption which has produced the unlawful funds may have taken place abroad in a state which has not ratified the IACC but it may just happen that the state where the offender launders the proceeds of crime, such as a global financial centre, has ratified the IACC (Wolf et al., 2022: 6-7). In this scenario, the IACC would have territorial jurisdiction over the act of money-laundering.

As a point of comparison regarding the potential 'extraterritorial' reach of this territoriality principle, the ICC allowed the exercise of jurisdiction over the crime of alleged deportation of the Rohingya minority from Myanmar to Bangladesh. This was on the grounds that some elements of this crime had taken place in Bangladesh, a state party, even if Myanmar which had actually deported the Rohingya was not (ICC, 2019a). The element-based conception of territoriality carries risks, though, as there is no international consensus on how strong a territorial nexus should be to ground territorial jurisdiction (Szigeti, 2017). This risk is particularly pronounced in the field of economic crime where impugned practices may span the globe and accordingly have territorial connections with multiple states, both party and non-party to an IACC Statute. Thus, there is a risk that the IACC could prosecute corrupt practices that may have only a relatively tenuous territorial nexus with a state party. To manage this risk and to prevent assertions of territorial jurisdiction by the IACC which are too broad (say, a jurisdiction that is merely based on sending an email through a server based in the territory of a state party), states party may wish to specify the territoriality principle's reach. Such specification will provide notice to defendants as to precisely what 'territorial conduct' will fall within the court's ambit.

[4] See for the definition of money-laundering in Article 3.1 United Nations, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

It is pointed out that, regardless of whether or not a particular situation has a (territorial) nexus with a state party to the IACC, the statute could consider allowing the United Nations Security Council (UNSC) to refer a situation to the court under Chapter VII of the UN Charter, taking their cue from the ICC (ICC Rome Statute, 1998: Article 13(b)). For the UNSC to act under Chapter VII, though, it would need to link corruption with a 'threat to the peace, breach of the peace, or act of aggression' (UN Charter, 1945: Article 39). Despite its undeniable pernicious effects, it is not immediately obvious that corruption directly endangers international peace and security. Admittedly, in 2018 remarks to the UNSC on 'the importance of tackling corruption as part of our efforts to maintain international peace and security', UN Secretary-General António Guterres stated that '[c]orruption can be a trigger for conflict' and that '[a]s conflict rages, corruption prospers' (Guterres, 2018). In so doing, he appeared to imply that, at least in some situations, corruption may fall within the UNSC's remit. Nevertheless, it is unlikely that this broad reading of the UNSC's mandate will garner the support from a majority of UNSC members. Furthermore, given the current geopolitical situation, the UNSC cannot be expected to play an active role in referring situations to the IACC. Statute drafters are thus not very likely to include a UNSC referral power.

Finally, the IACC's **personal jurisdiction** over grand corruption would almost certainly extend to Heads of State or Government, high-level officials and their helpers. However, under international law, state officials normally enjoy functional immunity (also called immunity *ratione materiae*) before foreign courts in relation to acts undertaken in an official capacity, while some high-ranking officials enjoy absolute personal immunity while in office (immunity *ratione personae*). However, states party to an IACC can agree among themselves that immunity does not apply to proceedings before the court. Thus, a statute is likely to contain a provision modelled on Article 27 of the ICC Statute, which provides that the Statute 'shall apply equally to all persons without any distinction based on official capacity' and that 'immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. Based on such a provision, the IACC would face no obstacles in prosecuting officials of states party. However, under the principle of the relative effect of treaties (UN Vienna Convention on the Law of Treaties, 1969: Article 34), it is uncertain whether this court would be authorised to prosecute officials of *states non-party*. Proponents believe that it would have (Wolf et al., 2022: 5-6) and moreover, there is an ICC case-law (ICC, 2019b: paras. 113 and 115) in support of this position[5]. It is in any event not inconceivable that the IACC may specifically want to indict officials of states non-party, notably when they are linked to conduct falling within its territorial jurisdiction, for instance in cases where a bribe has been handed or money has been laundered in the territory of a state party. In fact, the more the IACC espouses an expansive interpretation of territoriality, the more likely claims of jurisdiction over officials of states non-party will become. From an accountability perspective, this may be welcome as it limits impunity but at the same time, it may be in tension with the international law of immunity (Akande, 2019). Similar legal problems bedevil the potential establishment of an *ad hoc* international tribunal to try Russia's aggression against Ukraine (Dannenbaum, 2022). IACC proponents claim that, under customary international law, immunity does not apply before international tribunals (Wolf et al., 2022: 6). While they have the ICC precedent on their side, it is not entirely clear whether that truly represents international law. In particular, there are doubts over whether or not there is sufficient state practice supporting the proclaimed norm. That said, customary international law could always change if states want it to change (Advisory Committee on Public International Law, 2022).

[5] In the abovementioned 2019 decision on the Judgment in the Jordan Referral re Al Bashir Appeal, the ICC's Appeals Chamber held that such officials cannot avail themselves of immunity, as 'there is neither State practice nor *opinio juris* that would support *the existence* of … immunity under customary law *vis-à-vis* an international court', given that international tribunals act 'on behalf of the international community as a whole'.

4 Strengthening global anti-corruption mechanisms

IACC detractors have noted the absence of a plan to overcome practical obstacles facing the establishment and operation of such a court. They have instead suggested that existing anti-corruption mechanisms should be strengthened (Stephenson and Schütte, 2019: 7). Given the current lack of state buy-in, an IACC is in any event unlikely to be established in the short term.

Even if such a court were to be established, it would not work in isolation from other mechanisms but rather on the basis of complementarity. This Section discusses a number of alternative mechanisms that could be established or strengthened to combat corruption globally. A distinction is made between, on the one hand, legal accountability mechanisms that directly address impunity and, on the other, forms of indirect accountability that put political pressure on states to address impunity.

4.1 Direct legal accountability mechanisms

The following direct legal accountability mechanisms could be enhanced in order to strengthen the fight against global corruption: (a) extraterritorial jurisdiction; (b) international and regional anti-corruption enforcement and investigative agencies; as well as (c) regional and international courts other than an IACC.

4.1.1 Extraterritorial jurisdiction

Whenever certain countries fail to investigate corruption, other countries may step in and assume their responsibility by exercising forms of 'extraterritorial' jurisdiction which are allowed by UNCAC (UNODC UNCAC, 2003: Article 42). EU Member States may want to prosecute foreign corrupt practices more vigorously, such as acts of corruption committed abroad by EU nationals or corporations registered in the EU, or non-EU-based persons' laundering of ill-gotten gains in the EU. They may want to draw inspiration in this respect from the US enforcement of its Foreign Corrupt Practices Act (Bixby, 2010) and the UK enforcement of its Bribery Act (Bowden, 2021). Recent data from the Organization for Economic Co-operation and Development Working Group on Bribery shows that in a considerable number of EU Member States there have been very few decisions on criminal foreign bribery cases (Organization for Economic Co-operation and Development, 2021). This may undercut EU efforts to combat corruption in third countries. For the time being, there is little merit in pushing for universal jurisdiction over corruption, namely jurisdiction without any connection to the prosecuting state, as some states have as yet not fully used the potential of other extraterritorial jurisdictional grounds.

4.1.2 International and regional anti-corruption enforcement and investigative agencies

In order to combat corruption, Transparency International in particular has proposed the establishment or further development of international/regional anti-corruption prosecutors and enforcement agencies (Transparency International, 2020). Transparency International has cited the new European Public Prosecutor's Office (EPPO) as a potential model to follow. EPPO is an independent EU prosecution office, which has the power to investigate and prosecute crimes against the EU budget, such as corruption (Council of the European Union, 2017). In October 2022, EPPO confirmed that it had an ongoing investigation into possible malversations relating to the acquisition of COVID-19 vaccines in the EU (European Public Prosecutor's Office, 2022). As EPPO became operational only in 2021, it is too early to assess its performance as a regional anti-corruption enforcement agency.

Transparency International has also called for the development of international/regional investigative agencies (Transparency International, 2020). It cited in this respect the International Anti-Corruption Coordination Centre (IACCC), established by the UK in 2017. IACCC is hosted by the National Crime Agency in London and funded by the UK. According to its mandate, IACCC 'brings together specialist law enforcement officers from multiple agencies around the world to tackle allegations of grand corruption'

and 'will improve fast-time intelligence sharing, assist countries that have suffered grand corruption and help bring corrupt elites to justice'[6]. Only a number of English-speaking countries participate in the IACCC, although Germany and Switzerland are observers, some smaller financial centres are associate members and Interpol at times provides support[7]. There is little information in the public domain on the activities of the IACCC[8]. As a somewhat more inclusive initiative, in 2022 Interpol established its own global coordination centre, the Interpol Financial Crime and Anti-Corruption Centre. This Centre will provide investigative, operational and analytical support, as well as capacity-building in the 195 Interpol member countries (Interpol, 2022).

The international community could also consider establishing and supporting *ad hoc*, country-specific investigative bodies. A fine example is the UN-sponsored International Commission against Impunity in Guatemala (CICIG), which built a strong 'legacy of institutional knowledge and relationships of trust' (Kuris, 2019). CICIG was an independent investigative body operating under Guatemalan law and assisting the country's prosecutors but internationally supported by the UN and financially backed largely by the USA. It has helped indict hundreds of high-profile persons, for which the EU praised the work of CICIG (European Union External Action Service, 2017). In 2019, CICIG was discontinued by the president of Guatemala, after it started to investigate illicit campaign financing implicating political and business elites; it did not help that the USA under the Trump presidency withdrew its support from CICIG (WOLA, 2019). Still, it has been observed that 'many of the reforms promoted by the CICIG will prove to be a long-term game-changer for Guatemala's justice system' (WOLA, 2019). Given the ongoing rule of law backsliding in Guatemala (Goldman, 2022), this optimistic assessment may have to be revised somewhat. If anything, the vicissitudes of CICIG highlight the need for sustained international support for anti-corruption bodies, alongside genuine willingness among local authorities to prosecute even if this is directed towards the local elite.

It is also noted that EU civilian missions sometimes support anti-corruption efforts in third countries, especially in the EU Neighbourhood (Bouris and Dobrescu, 2017), albeit success has been at best sporadic. The EU Rule of Law Mission in Kosovo (EULEX), for instance, has achieved only limited success (Rashiti, 2019). The success of international support and engagement with domestic anti-corruption efforts ultimately depends on a variety of factors. For instance, the apparent greater success of the aforementioned CICIG, as compared to EULEX, has been attributed to the fact that its leaders 'doggedly pursued the mission of disrupting corruption networks, while EULEX leaders did not when they diverted attention to competing objectives and indefinite projects of state-building' and that 'CICIG fostered more peer learning than EULEX because it was structured to encourage collaboration between foreign and local partners on joint investigations and reform efforts' (Kuris, 2019).

Inspired by CICIG, is also proposed to create 'an international corps of anticorruption inspectors that are independent of manipulation by domestic elites'; these inspectors would then hand cases to a system of dedicated domestic anticorruption courts, possibly on the basis of an UNCAC Protocol (Yeh, 2021: 1). These courts would serve as first-instance courts, whilst the IACC could serve as a 'supreme court' (Yeh, 2021: 2). It is unclear whether or not there is any international political support for this quite radical proposal. Yeh believes, in any event, that 'it is feasible to obtain agreements permitting independent international inspectors, dedicated domestic anticorruption courts and independent vetting of judges selected for those courts—even in nations where corruption thrives and even in cases where corrupt individuals control the president's office' (Yeh, 2021: 11).

[6] National Crime Agency, 'International Anti-Corruption Coordination Centre' webpage as of 21 October 2022.
[7] National Crime Agency, 'International Anti-Corruption Coordination Centre' webpage as of 21 October 2022.
[8] The Centre has only made available a summary of activities of 2018, see National Crime Agency, 'International Anti-Corruption Coordination Centre' webpage as of 21 October 2022.

4.1.3 International and regional courts other than the IACC

Corruption could fall within the jurisdiction of existing international and regional courts, even if such jurisdiction has in practice rarely been triggered. Alternatively, one could consider expanding the jurisdiction of existing courts to include corruption or establishing entirely new courts apart from an IACC. A differentiation is made between IACC-like criminal courts, such as the ICC and courts of more general jurisdiction, such as the International Court of Justice.

As to **criminal courts**, it has been argued that the ICC, even if it does not have jurisdiction over corruption as such, could incorporate a corruption lens when prosecuting atrocity crimes. Such a focus would help to 'explain the systematic nature of what might otherwise seem to be random patterns of high levels of violence' (Roht-Arriaza and Martinez, 2019: 1067) but which on closer inspection find their basis in a climate of pervasive corruption. One could obviously also consider expanding the ICC's jurisdiction to make possible the formal inclusion of grand corruption. Judge Wolf initially considered making the IACC part of the ICC (Wolf, 2014: 3). However, he has opposed this idea of late on the grounds not only that an amendment of the ICC Statute to include corruption would not be politically feasible, but also that the ICC would be lacking in resources to handle such cases (Wolf et al., 2022: 11). To this can be added that the ICC lacks expertise in investigating complex financial-economic crime and that separating the IACC from the ICC undercuts concerns that the existing international crimes subject to ICC jurisdiction would be trivialised.

It is of further note that the African Union adopted the Malabo Protocol in 2014 which would give the African Court of Justice and Human Rights criminal jurisdiction over *inter alia* corruption and money-laundering (African Union, 2014: Article 28A). This Protocol has not yet entered into force, though. But even if it were, practical concerns have been raised over the ability of states party to cooperate with the Court regarding prosecutions for economic crime (Fernandez, 2017). In Latin America, a group of non-governmental organisations has proposed the creation of a Criminal Court for Latin America and the Caribbean against Transnational Organized Crime, which would include corruption. This group has drafted a Statute for that Court in 2018 but for the time being it lacks state support.

As to **non-criminal courts**, the International Court of Justice (ICJ) has jurisdiction over any dispute between UNCAC Parties concerning any interpretation or application of the convention that cannot be settled through negotiation or arbitration (UNODC UNCAC, 2003: Article 66(2)). In September 2022, Article 66 UNCAC was for the first time invoked in a dispute between Equatorial Guinea and France (ICJ, 2022). In this case, Equatorial Guinea claims that France failed to comply with its asset recovery obligations under UNCAC, after France confiscated assets following its conviction of the son of the President of Equatorial Guinea for misappropriation of public funds. A state may though also want to consider bringing ICJ cases under UNCAC against another state, even if the former state is not directly affected by the latter's state conduct (Rose, 2022). Such a state would then start litigation simply in the public interest, in order to safeguard the integrity of UNCAC. Public interest litigation could also be brought before regional courts. For instance, the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption in 2001 allows disputes between parties to be referred to the ECOWAS Court of Justice, not just by other state parties but also by the ECOWAS Authority of Heads of State and Government (ECOWAS, 2001: Article 27). So far, no inter-state cases have been brought before the ECOWAS Court.

Regional courts could also be accessible to *non-state actors*, though. Recently, an anti-corruption case was brought before the ECOWAS Court by Transparency International, Ghana Integrity Initiative, and Ghana Anti-Corruption Coalition against Ghana, with these NGOs claiming that a deal to sell Ghana's gold royalties in perpetuity was riddled by corruption and violated the rights of the people of Ghana (Opoku, 2022)[9]. This case, which is partly based on the African Charter on Human and Peoples Rights, also highlights the potential for regional human rights courts, including the European Court of Human Rights (ECtHR), to hold

[9] A court verdict was announced for 13 July 2022, but, at the time of writing, this was not yet available.

states accountable for failures to prevent corruption, which amount to or lead to human rights violations. The ECtHR has already heard a number of cases that relate to corruption in relation to judicial independence, freedom of speech, freedom of assembly and the funding of political parties; going forward, it is possible that the ECtHR will also link corruption to other human rights violations (GRECO/Council of Europe, 2018).

4.2 Indirect tools for promoting accountability

The international community, including the EU, could strengthen tools that put pressure on states to take the fight against corruption more seriously and thus indirectly address impunity. This includes, for instance, anti-corruption clauses in trade agreements 'Magnitsky'-style anti-corruption sanctions and international human rights mechanisms. It also includes global asset recovery efforts, which ensure that assets stolen by kleptocrats are seized, recovered and returned. Insofar as it reduces the financial gains from corrupt activities, asset seizure has a deterrent effect on corruption, whereas the return of assets to their rightful owners ('the people') enhances the accountability of rulers towards their citizens.

4.2.1 Anti-corruption clauses in trade agreements

In an earlier study for the EP, it was suggested that corruption in third countries could be addressed indirectly by the conclusion of international free trade agreements, as such agreements increase competition, create a fairer and more transparent business environment and diminish the power of rentier companies (Mungiu-Pippidi, 2018). In fact, a free trade agreement would generate positive anti-corruption effects even without specific legal provisions for combating corruption (Mungiu-Pippidi, 2018: 37). Such positive effects could arguably be increased in cases where EU agreements with third countries feature 'deep provisions' on good governance, including anti-corruption. This has also been the EP's position in its 2022 recommendation regarding corruption and human rights, in which it recommended the inclusion 'in all EU-third country trade and investment agreements [of] a strong and mandatory human rights conditionality framework with transparency provisions and binding and enforceable human rights and anti-corruption clauses' (European Parliament, 2022: 7, under P). For such provisions to be truly effective, third country compliance with such clauses will need to be monitored, though, preferably by an independent organisation (Jenkins, 2018: 13). In cases of non-compliance, as a last resort sanctions or suspension of the agreement may have to be imposed (European Parliament, 2022: 7, under P), although such a drastic step cannot be expected to improve the climate of corruption in any third country. The proper implementation of anti-corruption clauses in EU agreements ultimately depends largely on third-country capacity and willingness, although successful implementation could be strengthened through increased EU support of domestic anti-corruption bodies in third countries.

4.2.2 'Magnitsky'-style anti-corruption sanctions

In 2020, the EU adopted a Global Human Rights Sanctions Regime (GHRSR), which permits the imposition of travel bans and asset freezes on those (natural and legal) persons responsible for, or associated with serious human rights abuses, wherever in the world these may have occurred (Council of the European Union, 2020: 13-19). While this is a regime under EU law, it has a global reach. Alongside similar regimes in the USA, the UK and Canada, it could at least potentially contribute to combating global corruption by raising the costs for corrupt persons.

The Council of the EU has already designated a number of persons under the GHRSR (e.g., Council of the European Union, 2021), albeit this does not yet extend to (grand) corruption unlike the 'Magnitsky' regimes in the USA (US Congress Global Magnitsky Act, 2016: Section 1263(a)(3)) and the UK (UK Houses of Parliament Global Anticorruption Sanctions Regulations, 2021). As corruption is linked to human rights, the EU could consider extending this regime to include corruption (European Parliament, 2022: 15, under (al)). Including corruption would allow the EU to pursue a wider value-based foreign policy that prizes transparency and democracy (Gordini, 2022). EU Commission President von der Leyen, in her State of the

Union address on 14 September 2022, made a firm commitment to include corruption in the human rights sanctions regime (European Commission, 2022a) and accordingly EU institutions have started work on options for legal implementation.

Sanctions cannot as such ensure legal accountability of targeted individuals but can expose exceptionally grave cases of grand corruption and contribute to the freezing of related assets, which could also be relevant in case of parallel or subsequent criminal or civil court procedures against perpetrators.

4.2.3 International human rights mechanisms

Increasingly, corruption is not just considered as the abuse of power for personal gain or illicit enrichment but also at least in some circumstances as a violation of human rights (Peters, 2018). This happens for instance where public officials embezzle funds that are earmarked for housing, schools and hospitals, thereby compromising the right to housing, education and health. Data shows that international human rights mechanisms increasingly make the connection between corruption and human rights (Prasad and Eeckeloo, 2019). However, they may often fail to do so, which has led to calls for the establishment of a new UN thematic mandate on corruption and human rights (Eeckeloo, 2021). Moreover, the EP has called on Member States to support the introduction of a UN Special Rapporteur on financial crime, corruption and human rights (European Parliament, 2017). If a new mandate materialises, the EU may want to provide generous financial assistance, as UN-appointed independent experts are chronically underfunded, which potentially adversely affects their performance (United Nations, 2020).

While UN human rights special procedures are not direct accountability mechanisms, they indirectly contribute to accountability by conducting studies, raising awareness, and sending communications to states regarding individual cases of violations or more structural concerns (United Nations 2022).

4.2.4 Asset recovery

Kleptocrats tend to transfer the proceeds of their corrupt activities – the funds and other assets they gained – to 'safe havens', often in Western countries boasting strong property protection and financial security, as brought to light by the Panama, Paradise and Pandora Papers. Since 2007, the Stolen Asset Recovery Initiative, a partnership between the World Bank Group and the UN Office on Drugs and Crime, assists states in dismantling such safe havens and returning stolen assets. Furthermore, Interpol assists states in this respect, via its Global Focal Point Network on Anti-Corruption and Asset Recovery, which 'facilitates the secure exchange of sensitive information' among authorised law-enforcement officers from each Interpol member country[10].

The USA is particularly active in recovering the proceeds of foreign official corruption that has ended up within its borders, on the basis of its Kleptocracy Asset Recovery Initiative within the Department of Justice. The US Congress has also established the 'Kleptocracy Asset Recovery Rewards Program', which can 'pay rewards to qualified individuals who provide information leading to the restraint or seizure, forfeiture, or repatriation of "stolen assets," […] linked to foreign government corruption'[11]. For its part, the European Union (EU) has prioritised the confiscation of crime proceeds in the context of its fight against organised crime (European Commission, 2021). Commendable in this respect is the Commission's May 2022 proposal for a new Directive on Asset Recovery and Confiscation (European Commission, 2022b), which will build on previous legislation and in which the EP is involved as co-legislator. This proposal allows for confiscation without a conviction and makes it possible for EU Member States to confiscate unexplained wealth that is linked to criminal activities[12]. Moreover, it requires them to establish asset management offices that

[10] Interpol, 'Anti-corruption and asset recovery' webpage as of 21 October 2022.

[11] United States Department of Treasury, 'Kleptocracy Asset Recovery Rewards Program' webpage, as of 21 October 2022.

[12] Article 15-16, European Commission, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245 final, 25 May 2022b.

maintain the value of confiscated assets[13]. If adopted, the Commission should closely monitor the adequate implementation of this Directive by Member States.

It is key that states follow a human rights-based approach to asset recovery and return of proceeds efforts, in keeping with the 2022 Office of the United Nations High Commissioner for Human Rights (OHCHR) Recommended Principles. This means, *inter alia*, that receiving states 'should allocate returned assets in an accountable, transparent and participatory manner', and 'use recovered assets in a manner that contributes to the realization of human rights' and that requested states 'should return embezzled public funds to requesting states' (Principles 7-9). Some states have adopted the good practice of concluding agreements on asset return, in which this human rights-based approach is enshrined and which includes monitoring obligations, e.g., the agreement between the USA, Switzerland and Kazakhstan (US Government, 2006).

As corrupt persons tend to establish complex financial and corporate vehicles to hide the true ownership of assets and funds, tracking these down is key to identifying their Ultimate Beneficial Owners (UBOs). For this purpose, Member States, under the Commission's supervision, should ensure that they properly implement the EU's Fourth and Fifth Anti-Money Laundering Directives, which require *inter alia* that Member States hold in a central register information on beneficial ownership for companies (European Parliament and Council of the European Union, 2015; 2018). Most Member States have already implemented the UBO registration obligation (PricewaterhouseCoopers International, 2022). Going forward, the EU may now want to push for the adoption of a *global* financial registry, which logs financial instruments and their UBOs on a worldwide basis. Such a registry may eventually dismantle offshore havens which thrive on registering shell companies that hide their ultimate beneficiary owners (Alvaredo et al., 2018: 265; Zucman, 2014).

5 Recommendations

The EP may want to look further at the legal design, feasibility and potential effectiveness of an IACC as a tool to tackle grand corruption globally and to close the impunity gap. It should call for particular attention regarding the definition of grand corruption, the geographic scope of the IACC's Statute, the IACC's temporal jurisdiction and immunities of foreign state officials (especially those of states non-party).

Meanwhile, the EP may also want to call for the strengthening of other mechanisms aimed at tackling grand corruption globally. In particular, it may want to consider supporting:

1. International asset recovery and return, on the basis of a human rights-based approach as enunciated by the OHCHR and as facilitated by Interpol, the World Bank/UN Office on Drugs and Crime and the EU itself.
2. The exercise of criminal jurisdiction by states over acts of corruption committed abroad by EU-based persons, or non-EU persons' laundering of ill-gotten gains in the EU.
3. International and regional anti-corruption enforcement and investigative agencies, such as EPPO, the International Anti-Corruption Coordination Centre and the Interpol Financial Crime and Anti-Corruption Centre.
4. Country-specific anti-corruption bodies assisted by the international community, including the EU, while calling for further research regarding the factors determining the success of such bodies.
5. States' and non-state actors' access to and use of international and regional dispute-settlement mechanisms with potential jurisdiction over grand corruption, including the ICJ and regional human rights courts such as the ECtHR.

[13] Article 21, European Commission, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245 final, 25 May 2022b.

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