THE PROPOSAL FOR AN INTERNATIONAL ANTI-CORRUPTION COURT: WHAT LAW SHOULD THE COURT APPLY?*

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ABSTRACT: If the International Anti-Corruption Court (IACC) were established, the question of what law it should apply would be an essential one. That would determine what offences the IACC would adjudicate and, by extension, what contribution it would be able to make to international accountability for corruption. This article sheds some light on how this issue might be addressed by discussing a broad range of relevant considerations, including: the IACC's objectives; the (incomplete) international consensus on the definition of corruption; the ramifications of including money laundering within the IACC's jurisdiction; the extent to which it should defer to domestic laws of the state where the alleged offence took place; and the implications of the principle of legality.

Key words:
- Applicable law
- Money laundering
- Corruption
- Principle of legality
- Jurisdiction
- Complementarity

1. INTRODUCTION

In 2014, US federal judge Mark Wolf proposed the establishment of an International Anti-Corruption Court (IACC) to redress the impunity enjoyed by corrupt officials in some countries.[1] The proposal has generated academic debate and garnered (limited) governmental support, including endorsements by Canada, Colombia, Ecuador and the Netherlands.[2] These discussions can be viewed in the context of a broader suite of options being considered to address high-level corruption, often known as 'grand corruption', including its prosecution as a category of inhumane conduct in the International Criminal Court (ICC),[3] establishing universal jurisdiction over corruption offices,[4] or using targeted sanctions against alleged perpetrators.[5]

An essential aspect of the IACC's functioning, should the proposal ever take off, would be the substantive law that it would apply. That will determine what offences the Court will address and, by extension, what contribution it will be able to make to international accountability for corruption. Furthermore, the law that the IACC will apply will inevitably reflect a certain vision of what it takes for the Court to be effective and legitimate. For instance, one of the many issues that arise is the appropriate role for the domestic law of the state where alleged corruption takes place.

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1 Mark Wolf, 'The Case for an International Anti-Corruption Court' (Brookings Institution 2014).

2 Mark L. Wolf, Richard Goldstone and Robert I. Rotberg, *The Progressing Proposal for an International Anti-Corruption Court* (American Academy of Arts & Sciences 2022).

3 Ilias Bantekas, 'Corruption as an International Crime and Crime against Humanity' (2006) 4 *J* Int'l Crim Just 466.

4 Paul Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case Against the "Other" Impunity' (2004) 15 Leiden J Int'l L 749; Brian Harms, 'Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption' (2000) 33 Cornell Int'l LJ 159.

5 See Anton Moiseienko, *Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans* (Brill 2019).

The latest iteration of Mark Wolf's proposal, co-authored with Richard Goldstone and Robert Rotberg, is relatively light on the details insofar as applicable law is concerned. This is not a criticism as, in line with the overall gist of the proposal, their outline of the IACC is best understood as an invitation to discussion. Specifically, the relevant part of the proposal identifies a range of options:

> The IACC would have the authority to enforce the laws required by the UNCAC [UN Convention against Corruption], particularly those criminalizing bribery, embezzlement of public funds, misappropriation of public property, money laundering, and obstruction of justice. This could be done by giving the IACC jurisdiction, with the consent of the state party concerned, to enforce existing domestic laws, a uniform version of them included in the treaty creating the court, or both.[6]

Since no international court or tribunal has yet adjudicated the criminal offences of corruption,[7] one cannot learn directly from current international experience and must reason from first principles instead. In dealing with the overarching question of what law the IACC should apply, therefore, various factors may come into play. One may disagree as to the precise list of considerations that should feature in this analysis, but several things would appear to be uncontroversial.

Firstly, as with any other aspects of the IACC's functioning, the definition of its applicable law should be guided by its overall objectives. With that in mind, the first factor considered below is the objectives of the IACC and the bearing they have on the issue of applicable law.

Secondly, in order to ensure the IACC's legitimacy, it would seem inevitable that, to the extent there is an international consensus on what corruption is, it should inform, if not determine, the law applied by the Court. Therefore, the (incomplete) international consensus on the definition of corruption is the second factor under consideration.

Thirdly, for reasons that will be explored below, the inclusion of the offence of money laundering within the Court's jurisdiction is essential to its ability to address corruption in non-party states. Such an ability will be unprecedented in the history of international courts and tribunals, and its implications deserve serious consideration. Here, one will observe the complex interplay between considerations of applicable law, jurisdiction, and the Court's complementarity to domestic justice systems.

Fourthly, another aspect of that same interplay is the extent to which the Court should defer to domestic laws of the state where the alleged offence took place. Here, too, the answer will be infused by varying considerations of effectiveness, legitimacy and practicality.

Fifthly, and finally, throughout this discussion, one must be cognisant of the implications of the principle of legality, often expressed in the Latin maxims *nullum crimen sine lege* and *nulla poena sine lege*. Simply put, it prohibits punishment for conduct that did not constitute an offence at the time it was committed. One must not lose sight of this requirement behind all the other considerations at play, and thus this article concludes with a summary of its implications.

While I lay no claim to these issues being an exhaustive compendium of concerns that arise insofar the IACC's applicable law is concerned, their analysis is likely to advance the conversation on the 'art of the possible': the range of the options that the IACC statute's drafters might in due course wish to entertain. In dealing with these topics, this article draws on the practice and discourse surrounding existing domestic efforts against overseas corruption,

[6] Wolf, Goldstone and Rotberg (n 2) 6.

[7] As discussed below, there is no single criminal offence of 'corruption' known at the international level, but rather a catalogue of offences that can be included within that umbrella – hence the 'offences' of corruption.

particularly foreign bribery laws, money laundering prosecutions, and the use of targeted sanctions, ie, government-imposed asset freezes and travel bans. Such a cross-sectoral analysis sheds light on the principles involved, and also helps to identify the added value that the IACC might have, even though no position is taken here on the merits of establishing such a court.

2. THE OBJECTIVES OF THE IACC

The objectives of the IACC form a natural point of departure for any discussion of the Court's essential features, its applicable law being among them. Its basic objective can be put very simply, namely to address the impunity enjoyed by those involved in significant corruption.[8] It is well known that certain states are affected by corruption that is not merely widespread, but also involves wrongdoing by those at the highest levels of government. Such corruption is often referred to as 'grand corruption', in recognition of the financial amounts involved and its profound adverse impact on government integrity.[9] Terms such as 'kleptocracy' and 'state capture' are also in circulation, the latter evocative of the image of a state subverted to serve private interests.[10]

Grand corruption is characterised by what might be described as the 'turkeys don't vote for Christmas' problem: since powerful individuals are involved, they will not countenance any attempts to investigate their wrongdoing or prevent further abuse. Even if criminal investigation and prosecution follows at a later date as a result of regime change, genuine accountability and the new government's political vendetta may be fused together to the point of being inseparable.[11] It is this set of problems that the proposed establishment of the IACC intends to address.

This sets the stage for our consideration of the law that the IACC should apply. At a minimum, two precepts are apparent. First, the IACC is plainly intended to deal with serious, rather than trivial, corruption. Secondly, its operation cannot be based entirely on states parties' domestic laws since its very establishment rests on the premise that certain domestic legal systems are subverted by vested interests.

A focus on serious corruption can be ensured in at least two ways. One approach is, in essence, a procedural one: unless a state party to the IACC statute refers a situation to the IACC, the IACC would only get to undertake investigations *proprio motu* into serious instances of corruption that the territorial state is unable or unwilling to investigate, so as not to duplicate, or prejudice, the workings of functional domestic justice systems.[12] The need to sensibly allocate the IACC's limited resources should naturally result in more serious cases being prioritised. In undertaking such 'triage', the IACC could be guided by a set of broad parameters, such as the financial harm involved, the seniority of the perpetrator, the systemic nature of the conduct, and the likely beneficial consequences of putting an end to it.[13]

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8 Wolf, Goldstone and Rotberg (n 2) 1.

9 See, eg, Ben Bloom, 'Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption' (2014) 29 American University Int'l L Rev 627; Simon Young, 'Immunity in Hong Kong for Kleptocrats and Human Rights Violators' (2012) 41 Hong Kong LJ 105.

10 See, eg, Nikolay Ouzounov, 'Facing the Challenge: Corruption, State Capture and the Role of Multinational Business' (2004) 37 Thurgood Marshall *L Rev* 1181.

11 One example, if one were to assume the facts are accurately rendered, would be the alleged human rights violations in Uzbekistan in the course of investigating corruption by Gulnara Karimova, the now-convicted daughter of the country's late president: Richard Messick, 'Will the Swiss Government Condone Gross Human Violations in Returning Stolen Assets to Uzbekistan?' (*Global Anti-Corruption Blog*, 22 July 2018) <https://globalanticorruptionblog.com/2018/06/22/will-the-swiss-government-condone-gross-human-violations-in-returning-stolen-assets-to-uzbekistan/> accessed 8 August 2023.

12 On the IACC's complementarity principle, see Wolf, Goldstone and Rotberg (n 2) 8-9.

13 For reference, see the considerations that shape the UK's use of corruption- or human rights-related targeted sanctions: Foreign, Commonwealth and Development Office, 'Global Anti-Corruption Sanctions:

Another possibility is to reflect the seriousness requirement in the definitions of offences: either through a modifier such as 'serious' or 'significant' corruption, through a monetary threshold, or by tailoring the list of offences within the IACC's jurisdiction to those that form inherently 'serious' forms of corruption, provided that such can be identified *in abstracto*, without reference to the circumstances of a particular case.

In considering these options, states' use of corruption-related sanctions presents a useful comparator. By their nature, those sanctions are predominantly aimed at addressing overseas corruption. Since there is no lack of corruption around the world, this presents challenges of prioritisation similar to those that the IACC would face. Of course, targeted sanctions are dramatically different from the IACC's prosecution in that they are not conventionally thought of as a criminal justice measure.[14] But this does not change the fact that, in using them, states encounter some of the same issues as those with which the IACC would have to grapple.

Of the three options proposed above, the first one appears to be the most tenable one: that is, limiting the IACC's remit to 'serious' or 'significant' corruption. Notably, the US Global Magnitsky Act 2016, which is the cornerstone of US corruption and human rights-related sanctions regimes, authorises targeted sanctions by reference to 'acts of significant corruption'.[15] (The later Executive Order 13818 drops the qualifier 'significant' and authorises sanctions in response to 'corruption'.)[16] By contrast, the threshold approach is impracticable given the variation in countries' circumstances, uncertainty about the amounts involved until investigations are concluded, and the importance of broader integrity-related considerations beyond the financial factor. Likewise, isolating the forms of corruption that are intrinsically 'serious' is likely to prove elusive, as discussed below: it is true that some types of conduct are universally accepted as corruption whereas others remain debatable, but that is not necessarily a reflection of their seriousness.

Before proceeding to discuss the definitions of corruption offences, though, one should recall that there are multiple other issues relevant to the law that the court will apply. Other areas of substantive law must likewise be considered, such as modes of participation in crime (including complicity and inchoate offences) and defences.[17] For instance, whether the IACC statute will provide for a version of command responsibility is significant.[18] To give another Global Magnitsky example, one of the other extensions to US corruption sanctions introduced via Executive Order 13818 was to authorise sanctions against those who are, or have been, 'a leader or official of (…) an entity, including any government entity, that has engaged in, or whose members have engaged in' corruption.[19] This is even before one considers the development of adjectival law, namely the rules of procedure and evidence, and the degree to which they should be modelled on those of the ICC or other existing international precedents.[20] For the purposes of this article, suffice it to say that there is no feasible alternative to those

Consideration of Designations' (26 April 2021), 4; Foreign, Commonwealth and Development Office, 'Global Human Rights Sanctions: Consideration of Designations' (6 July 2020), 4.

14 See, eg, Iain Cameron, 'EU Sanctions and Defence Rights' (2015) 6 New Journal of European Criminal Law 335.

15 22 USC § 10102(a)(3) (2016).

16 Executive Order 13818: Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, 82 FR 60839 (20 December 2017).

17 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 25(3) (modes of responsibility) and Article 31 (grounds for excluding criminal responsibility).

18 ibid, Article 28.

19 ibid, section 1(C)(1).

20 See ICC, Rules of Procedure and Evidence, as amended (adopted 9 September 2002) ICC-ASP/1/3 (ICC RPE.

rules being designed specifically for the IACC, as opposed to any reliance on domestic legal norms.

3. THE INTERNATIONAL CONSENSUS ON THE DEFINTIION OF CORRUPTION

In addition to the IACC's objectives, the current state of the international consensus (or lack thereof) as to the definition of corruption is likely to be of particular relevance for the operation of the IACC. Practical considerations aside, such as the unlikelihood of states parties coming together to agree to an idiosyncratic, experimental definition of corruption, it also has principled implications: for instance, as discussed later in this article, the principle of legality would potentially forestall international prosecutions for conduct that is not unambiguously accepted as corrupt at the international level.

The main source of definitions of corruption offences at the international level is the UNCAC.[21] It does not define corruption as such, but rather lists a range of offences that states parties either must criminalise or must consider criminalising. The mandatory offences include: (a) active and passive bribery of national and foreign public officials, as well as officials of international organisations; (b) embezzlement, misappropriation, or other diversion of property by public officials; (c) corruption-related money laundering; and (d) the obstruction of justice.[22] The non-mandatory offences include: (a) active and passive bribery in the private sector; (b) embezzlement of property in the private sector; (c) trading in influence; (d) any other abuse of functions for an undue advantage; (e) concealment of the proceeds of corruption; and (f) illicit enrichment.[23]

This presents a rudimentary, two-tier hierarchy between various forms of corruption: those whose criminalisation is relatively uncontroversial and well-established, and those that are, for various reasons, more disputed or peripheral to the notion of corruption. Few would argue against the criminalisation of public-sector bribery, embezzlement of public property, the laundering of proceeds of such crime, or obstruction of justice. By contrast, whether corruption in the private sector ought to be criminalised, and to what extent its harms parallel those of public-sector corruption, has been the subject of some debate.[24] It stands to reason that, other things being equal, the deleterious impact of corruption on the integrity of public administration presents a greater threat to society than bribery or embezzlement in a purely private-sector context.[25] This distinction is predicated on the notion that the criminalisation of corruption seeks to contribute to good governance, which is especially important in the context of *public* administration. Other 'optional' offences, such as a broadly couched criminalisation of abuse of powers or illicit enrichment, present rule of law concerns that have hindered widespread adoption.[26]

It would appear, therefore, that there is international consensus as to corruption encompassing, at a minimum, public-sector bribery and misappropriation of public property. This happens to be precisely how corruption is defined for the purposes of the UK's corruption

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21 UN Convention against Corruption (adopted 31 October 2003, entry into force 14 December 2005), 2349 UNTS 141.

22 Articles 15, 16, 17, 23 and 25 respectively.

23 Articles 21, 22, 18, 19, 24 and 20 respectively.

24 Stuart Green, 'Official and Commercial Bribery: Should They Be Distinguished?' in Jeremy Horder and Peter Alldridge (eds), *Modern Bribery Law: Comparative Perspectives* (Cambridge University Press 2013) 65.

25 See, eg, Guy Stessens, 'The International Fight Against Corruption' (2001) 72 Revue Internationale de Droit Pénal 891, 914–915; Peter Alldridge, 'The Sentencing of Corruption' in Cyrille Fijnaut and Leo Huberts (eds), *Corruption, Integrity and Law Enforcement* (Martinus Nijhoff 2002) 174–175.

26 See, eg, Lindy Muzila et al, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (Stolen Asset Recovery Initiative 2012) 29–30 (on illicit enrichment).

sanctions regime, instituted in 2021.[27] Here, too, corruption-related sanctions present a useful comparator because they involve a sanctioning state targeting a foreign citizen based on its own definition of corruption. Same as for the IACC, the credibility and thus legitimacy of that definition is essential, which militates against overly broad or idiosyncratic approaches.

That said, some policymakers go beyond that narrow approach. For instance, the EU's proposed directive on combating corruption, published in May 2023, covers bribery in the public sector, bribery in the private sector, misappropriation (in both public and private sectors), trading in influence, abuse of functions, obstruction of justice and enrichment from corruption offences.[28] This is very close to the UNCAC's full menu, including both mandatory and non-mandatory offences. The only major difference is that the EU's proposed directive does *not* include the offence of illicit enrichment. (Confusingly, the similarly termed offence of enrichment from corruption offences refers, in effect, to one public official laundering the proceeds of corruption by another public official.)[29]

Regardless of whether future member states of the IACC opt in favour of a broad or narrow approach to identifying corruption offences, it is arguably desirable to criminalise related offences, namely corruption-related money laundering and obstruction of justice. As mentioned above, both are mandatory offences under the UNCAC. They involve the criminalisation of attempts to cover up corruption or deal in its proceeds, and have therefore been referred to as crimes 'in support of corruption'.[30] That they should be criminalised is likewise uncontroversial, but interesting considerations arise in connection with vesting an international court with jurisdiction over corruption-related money laundering, as discussed below.

4. THE JURISDICTIONAL EFFECT OF PROSECUTING MONEY LAUNDERING

Moving on from big-picture issues such as the IACC's objectives and the international consensus as to what corruption is, it is useful to consider now the matters that arise in connection with including the offence of money laundering within the Court's jurisdiction. At first sight, this might appear to be an oddly specific question to focus on. In reality, however, the IACC's ability to prosecute money laundering is essential to Mark Wolf's proposal while giving rise to a range of complications at the same time.

The reason that including money laundering within the Court's jurisdiction is crucial is because it would enable the IACC to overcome the obstacle of states most affected by corruption being the least likely ones to sign up to the IACC's jurisdiction. This is how Wolf, Goldstone and Rotberg set out the argument:

> [S]ome have argued that the IACC will not be effective because kleptocrats will not permit their countries to join a court that might prosecute them. However, 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. The IACC would have jurisdiction over crimes committed by nationals of an IACC member state and crimes committed by

27 Global Anti-Corruption Sanctions Regulations 2021 (UK), Regulation 4.

28 Articles 7-13 in the proposed Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, Doc No 2023/0135(COD).

29 EU's proposed Directive (n 28), Article 13.

30 UN Office on Drugs and Crime, *The Compendium of International Legal Instruments on Corruption* (2003) 10.

> nonnationals in the territory of an IACC member state. Countries that are home to international financial centers polluted by the proceeds of corruption, as well as countries that are popular destinations for laundered money, are promising candidates to join the IACC. If, for geopolitical or other reasons, an IACC member state were unwilling or unable to prosecute a kleptocrat who has engaged in money laundering or another crime involving corruption in its jurisdiction, the kleptocrat would be subject to prosecution in the IACC.[31]

This line of reasoning is correct, but it also gives rise to unique challenges that no international court has yet had to confront. Given the centrality of this issue to the IACC's functioning, it is worth considering it in detail. To do so, it is useful to begin by outlining the concept of money laundering and its jurisdictional implications.

In essence, money laundering is the crime of using the proceeds of crime.[32] If a person robbed a bank and then deposited the proceeds into an account with another bank, they would thereby be committing a distinct, self-standing crime of money laundering in addition to bank robbery. Compared to some of the complex, multi-jurisdictional money laundering schemes that sometimes make the headlines, that offence would be on the opposite end of the spectrum of sophistication, but it would be money laundering nonetheless. If the same person who commits the underlying offence (known as the predicate crime) then launders the proceeds, that is known as 'self-laundering', as distinct from 'third-party laundering'.[33]

In some countries, prohibitions on the multiplicity of charges or other similar domestic principles preclude prosecutions for 'self-laundering'.[34] In a cross-border setting, however, such prosecutions can fulfil a vital jurisdictional function by bringing someone to account for money laundering in State A, even though the predicate crime took place in State B. Since by its very nature money laundering often takes place in major economic hubs, this provides those jurisdictions with an opportunity to investigate and prosecute crime whose effects are most immediately felt elsewhere, especially in developing nations. Whether developed countries do so often enough (probably not), and whether they are guided by self-interest or considerations of principle when they do so, is a matter subject to ongoing debate.[35]

Grand corruption almost invariably involves multi-jurisdictional laundering, and therefore opportunities arise for the prosecution of such money laundering in countries other than those where the underlying corruption occurred. This has several implications for the IACC proposal. At a macro level, one could query the rationale behind the court. Part of the reasoning underpinning its proposed creation is that investigations and prosecutions in the natural forum state, where corruption occurs, are forestalled by the high-level corruption among its elites. But, once one takes into account the availability of money laundering prosecutions abroad, the assumption becomes more problematic, as does the application of the ICC-like 'unable or unwilling' formula.

Much of the money laundering activity is bound to occur in major economic hubs with a generally functional justice system, such as, say, the UK, US, Singapore, France and so on. One of the reasons often cited for their failures to investigate or prosecute a particular money laundering scheme is that they remain, at the end of the day, reliant on the availability of

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31 Wolf, Goldstone and Rotberg (n 2) 12-13.

32 For details, see Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing 2003).

33 See Roberto Durrieu, *Rethinking Money Laundering & Financing of Terrorism in International Law: Towards a New Global Legal Order* (Martinus Nijhoff 2013) 29.

34 ibid.

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

evidence concerning the commission of the predicate offence, which may require at least a modicum of cooperation on the part of the state where it occurred.[36] Of course, it can be difficult to isolate this factor from other, less innocuous considerations, such as laundering the proceeds of overseas crimes simply not being high on the investigatory or prosecutorial agenda.[37] This raises somewhat of a chicken-and-egg dilemma: there is no evidence because the case is not prioritised, and the case is not prioritised because of the likely challenges in obtaining evidence.

In essence, this means that the fundamental premise behind the creation of the IACC – namely, that an accountability gap remains at the domestic level – is sound. But, insofar as states that could launch money laundering prosecutions are concerned, the operation of the complementarity principle cannot simply follow the same pattern as in the ICC. Specifically, there may be merit to the IACC's involvement even if the domestic decision to forego prosecution is wholly legitimate and justified by, for instance, evidentiary limitations.

However, the above-cited passage by Wolf, Goldstone and Rotberg presupposes a more conventional, ICC-like approach to complementarity, which would only come into play if illegitimate considerations or capacity issues led to a state's failure to prosecute. This is likely to prove particularly difficult to ascertain. Examples such as that of the British Al-Yamamah case, where an investigation into overseas corruption was stalled by the Attorney General based on foreign policy sensitivities, are few and far between.[38] Much more common are failings to act because the evidence of predicate crimes is located overseas, especially so in cases where a jurisdiction's involvement in a money laundering scheme is limited to, for instance, being a location of company incorporation, rather than a destination for the money involved. For instance, some of the considerations that contribute to the widespread failures to investigate or prosecute money laundering in international financial centres, such as British Overseas Territories or Crown Dependencies, have been summarised as follows:

> [C]ountries more directly affected by the alleged criminality may have better information and greater incentives to investigate. In many instances, companies incorporated in a jurisdiction may be exploited but bank accounts will be opened elsewhere and no money will pass through its banking system. (…) If, the argument goes, 'onshore' law enforcement agencies are not in a position to process the vast masses of relevant information and commence investigations into crimes of concern to them, the chances of international financial centres, with their limited resources, being able to do that job are even lower.[39]

In short, the inclusion of money laundering within the IACC's jurisdiction gives rise to novel issues that no other international court or tribunal has had the occasion to consider. Theoretically, the African Court of Justice and Human and Peoples' Rights could have jurisdiction over corruption, money laundering and a range of other crimes following the

[36] See, eg, Transparency International UK, *Empowering the UK to Recover Corrupt Assets: Unexplained Wealth Orders and Other New Approaches to Illicit Wealth and Asset Recovery* (Transparency International UK 2015, updated March 2016).

[37] Thus, Peter Alldridge recounts the anecdote of a minister in a former Soviet republic asking, incredulously, why he should *oppose* foreign criminals investing their wealth in his country: Alldridge (n 32) 29.

[38] The discontinuation of the investigation was unsuccessfully challenged in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

[39] Tom Keatinge and Anton Moiseienko, 'For Whose Benefit? Reframing Beneficial Ownership Disclosure Around Users' Needs' (*RUSI Occasional Paper*, 23 November 2020), 19. < https://www.rusi.org/explore-our-research/publications/occasional-papers/whose-benefit-reframing-beneficial-ownership-disclosure-around-users-needs> accessed 8 August 2023.

adoption of the Malabo Protocol in 2014, but the Protocol has not yet entered into force.[40] (Its very existence is bitterly ironic given that Malabo is the capital of Equatorial Guinea, a state with a deeply problematic track record of high-level corruption.)

There is also another issue of principle involved. One might ask whether prosecuting money laundering in relation to a foreign predicate offence amounts to unlawful exercise of jurisdiction over that latter offence. If that were so, the IACC would not be able to exercise such jurisdiction either, on the basis that member states cannot endow it with jurisdictional powers they themselves do not possess, following the principle of *nemo dat quod non habet*. In the case of *Equatorial Guinea v France* before the International Court of Justice (ICJ), Equatorial Guinea argued, among other things, that France's prosecution of the Equatoguinean vice-president Theodoro (Theodorin) Obiang for corruption-related money laundering in France constituted an exorbitant exercise of French criminal jurisdiction and thus an unlawful interference with Equatorial Guinea's internal affairs. The ICJ ruled it had no jurisdiction to consider those claims.[41] In any event, key international instruments – including the UNCAC, the UN Convention against Transnational Organized Crime (UNTOC) and the Financial Action Task Force's (FATF) technically non-binding 40 Recommendations – require states to establish jurisdiction over money laundering involving the proceeds of overseas crime, which means that Equatorial Guinea's argument was doomed to fail.[42]

In that case, however, the nexus to France was strong. The proceeds of corruption in Equatorial Guinea were invested in France to purchase real estate, luxury vehicles and art. Consider a situation where, for instance, funds misappropriated from Nigeria are moved using UK companies' bank accounts in Latvia before being invested in France. In those circumstances, money laundering offences may be taking place in each of the UK, France and Latvia, despite the varying nature of the nexus of the overall scheme to each of those states. For the purposes of the IACC's jurisdiction, though, the crucial question is not whether those states actually establish criminal jurisdiction over the acts at hand, but whether they could lawfully do so under international law – and, therefore, whether they could delegate their powers to do so to the IACC. The limits of criminal jurisdiction under international law is a subject of great uncertainty, but the overarching principle appears to be that of 'a genuine connection between the subject-matter of jurisdiction and the territorial base or reasonable interests of the state in question'.[43]

On balance, therefore, there is no bar to the IACC's jurisdiction over money laundering involving foreign predicate offences, and exercising it may indeed be essential to ensuring the Court's wide jurisdictional reach. However, compared to the ICC's experience, adjustments may need to be made to the operation of the complementarity principle. Moreover, as seen below, regardless of whether a given IACC prosecution targets corruption directly or focuses

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40 See Dominique Mystris, 'Transnational Crime in the African Union' in Valsamis Mitsilegas, Saskia Hufnagel and Anton Moiseienko (eds), *Research Handbook on Transnational Crime* (Edward Elgar 2019) 482.

41 *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Judgment on the Preliminary Objections) I.C.J Reports 2018, p 292.

42 Article 6(2)(c) UNCAC (n 21), Article 6(2)(c); United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, Article 23(2)(c); Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (February 2012, updated March 2022), Interpretive Note to Recommendation 3, [5]. See also UN Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* (2006) 165.

43 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 457. See also Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, Oxford University Press 1992) 457-458.

on ensuing money laundering, there is no failproof way of sidestepping challenges related to inadequate domestic laws in the state where corruption takes place.

5. THE RISKS OF DEFERRING TO DOMESTIC LAWS

Concerns about inadequate domestic laws are unlikely to be limited to prosecutions involving money laundering alone. At a higher level of generality, they give rise to one of the key questions about the functioning of the IACC, namely the extent to which domestic laws of states where alleged corruption takes place should feature in the IACC's applicable law.

As mentioned above, one of the options Mark Wolf outlines is to bring corrupt individuals to account based on existing domestic laws. This has the advantage of holding defendants to the laws in force in their respective countries, so that no conceivable breaches of the legality principle arise. However, this raises the spectre of 'legalised corruption', or a situation where domestic law fails adequately to criminalise corruption.

In this respect, one ought to distinguish between two situations. The first one is a failure to criminalize certain forms of corruption in line with the UNCAC's mandatory provisions, such as bribery or misappropriation of public property. There does not appear to be any research on how widespread such a failure might be, although there are indications that almost all states do criminalize those two offences.[44] The situation is broadly similar in relation to money laundering and, one might surmise, the obstruction of justice too.[45] However, deviations are possible. For instance, to take another Equatorial Guinea-related example, Theodorin Obiang's affidavit submitted in a South African court reportedly indicated that the laws of Equatorial Guinea allowed government ministers to share in the proceeds of contracts entered into by the government.[46] This, if correct, would have been a transparent violation of the obligation to criminalize bribery under the UNCAC, had Equatorial Guinea been bound by the UNCAC at the time, which it was not.[47]

Another issue is of a more subtle nature, and relates to what constitutes misappropriation and, perhaps to a lesser extent, bribery. The misfeasance of corrupt officials can have a veneer of legality, such as government contracts being granted to well-connected recipients in ostensible compliance with procurement rules drafted with specific companies in mind.[48] As noted by Jai Ramaswamy, then-Chief of the Asset Forfeiture and Money Laundering Section at the US Department of Justice, this means that the more corrupt a country is, the more challenging it can be to prove corruption in a court of law.[49] Thus, even if the

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[44] See, eg, UNCAC Conference of States Parties, Implementation Review Group, 'Effective action against bribery: criminalization and enforcement of national and transnational bribery offences under the United Nations Convention against Corruption', UN Doc CAC/COSP/IRG/2020/CRP.16, (13 November 2020), 2 ('the majority of States parties had criminalized the active and passive bribery of domestic public officials').

[45] States' criminalisation of money laundering is evident from the FATF's mutual evaluation reviews, summarised at FATF, *Consolidated Assessment Ratings* (20 February 2023) <www.fatf-gafi.org/media/fatf/documents/4th-Round-Ratings.pdf> accessed 8 August 2023. Compliance with Recommendation 5, which requires criminalisation of money laundering, is reflected in the 'Technical compliance' part of the table.

[46] As reported in US Senate, Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, *Keeping Foreign Corruption out of the United States: Four Case Histories* (US Senate 2010) 22-23.

[47] Equatorial Guinea acceded to the UNCAC in May 2018. See <https://www.unodc.org/unodc/en/corruption/ratification-status.html> accessed 8 August 2023.

[48] See, eg, Alexander Cooley and John Heathershaw, *Dictators without Borders: Power and Money in Central Asia* (Yale University Press 2017) 9-12 (discussing Central Asian countries).

[49] Center for Strategic & International Studies, 'Returning Stolen Assets: Current Issues and Future Challenges for the International Community' (24 October 2014), 30:55–31:52 <https://www.youtube.com/watch?v=xD8krqIiroU> accessed 8 August 2023.

IACC applied its own definitions of offences, presumably based on the UNCAC, they may need to be utilised in the overall context of the territorial state's legal system: to wit, did someone's conduct constitute misappropriation, or did it merely concern the legitimate award of a government contract? This is the kind of issue that does not arise, or at least not with any particular prominence, in relation to other crimes prosecuted by international courts or tribunals. Whether or not something is a crime against humanity is independent of any domestic legal framework. This can create unique difficulties for the IACC as extensive engagement with domestic law may ultimately prove to be inevitable.

A possible solution is to ensure that offences are defined in a manner calculated to minimise recourse to domestic laws. This means eliminating, insofar as possible, cross-references to notions such as the breach of official duty under domestic law. This is familiar in the context of foreign bribery laws. For instance, the Interpretative Notes to the UNCAC, which were adopted by its states parties, state as follows in relation to the offence of bribing foreign public officials or officials of international organisations:

> [A] statute that defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard set forth in each of these paragraphs, provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and that this was an "autonomous" definition not requiring proof of the law or regulations of the particular official's country or international organization.[50]

This wording stems directly from the official commentaries to the OECD Anti-Bribery Convention, which provides that it is sufficient to demonstrate a public official 'act or refrain from acting in relation to the performance of official duties' in exchange for a payment or its promise.[51] Should a state define foreign bribery in a manner contingent on the law of the overseas state where it occurs, it will thereby be in breach of the OECD Anti-Bribery Convention.[52]

In line with this approach, there is merit to considering whether offences within the IACC's jurisdiction could be defined by reference to 'autonomous' concepts independent of domestic laws. Such concepts could include, for instance, impartiality or avoiding conflicts of interest. Since domestic laws give concrete expression to these abstract, high-level principles, the practical effect thereof will likely be not to rule out any need to inquire into domestic rules altogether, but rather to weed out manifestly illegitimate instances of legalised corruption. Understood in that limited fashion, this application of autonomous definitions decoupled from any domestic legal order is unlikely to contravene the principle of legality, as discussed below.

6. THE PRINCIPLE OF LEGALITY

So far, this article has explored a range of considerations that are likely to, and arguably should, determine the shape that the IACC's applicable law might take if the idea is

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[50] Ad Hoc Committee for the Negotiation of a Convention against Corruption, 'Revised Draft United Nations Convention Against Corruption', UN Doc A/AC.261/3/Rev.5 (15 August 2003), 15.

[51] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 17 December 1997, entry into force 15 February 1999) OECD Doc DAFFE/IME/BR(97)20, Article 1(1).

[52] Ingeborg Zerbes, 'Article 1. The Offence of Bribery of Foreign Public Officials' in Mark Pieth, Lucinda Low and Nicola Bonucci (eds), *The OECD Convention on Bribery: A Commentary* (2nd edn, Cambridge University Press 2014) 57-58.

implemented. This analysis would be incomplete without some thought being given to a key limiting factor, namely the implications of the principle of legality.

In principle, if the IACC were to define and prosecute corruption in a manner inconsistent with domestic law, human rights concerns could arise relating to the principle of legality. This is because one would be prosecuted for conduct that did not constitute a crime under his or her country's domestic law at the time of commission. This is a familiar concern pertaining to the operation of international criminal courts or tribunals.[53] It is ordinarily resolved by stipulating that certain activities are criminal under international law regardless of their domestic legal status. Earlier international criminal tribunals, such as the Nuremberg, Tokyo, Yugoslavia and Rwanda ones, deemed it sufficient for the defendant's conduct to constitute a crime under customary international law, whether or not codified in a treaty.[54] In that fashion, the domestic legal status of the defendant's conduct is relegated to irrelevance.

It is uncontroversial that it would be a breach of international human rights law to prosecute conduct that is not, at the time of its commission, criminal under applicable domestic or international law. Relevant provisions are contained in all major international human rights treaties.[55] (Indeed, as one commentator notes, the principle of legality is a 'rare (…) non-derogable norm in all of the major human rights conventions').[56] Inevitably, compliance with this norm, as well as other internationally recognised human rights, will be required of the IACC. By way of comparison, Article 21(3) of the ICC's Statute states that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.' Even in the absence of an express provision to that effect, it is inescapable that the IACC would have to operate within the constraints of international human rights law.[57] This raises the question of what happens if the respective corruption offence is not criminalised in the relevant state(s), ie, the state of the defendant's nationality and (if different) the state where the defendant's conduct took place.

Corruption has hitherto not been considered an international crime. Some have argued it should be deemed one.[58] There is no defined formula of what qualifies a crime as an international one, and historically that has been a product of mixed considerations of principle and practicality, from maritime piracy to crimes against humanity. Ultimately, whether corruption is to be considered an international crime boils down to how states choose to interpret international law. Given the harm that grand corruption wreaks on afflicted countries, as well as the overwhelming ratification of the UNCAC, it is potentially arguable that mandatory offences under the UNCAC qualify as an international crime. However, unless and until that is conclusively accepted, there remains scope for officials in states that fail to incorporate such offences in their domestic law to argue that prosecuting them for respective acts would run afoul of the principle of legality.

Once again, there is an extra layer of complexity that arises if one considers money laundering offences. Suppose that State A criminalized the laundering of the proceeds of crime,

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53 See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd end, Oxford University Press 2016) 539-549 (analysing Article 22 of the ICC's Statute).

54 Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (4th end, Oxford University Press 2020) 48-49.

55 Article 15 of the International Covenant on Civil and Political Rights (ICCPR); Article 7 of the European Convention on Human Rights (ECHR); Article 9 of the Inter-American Convention on Human Rights; and Article 7(2) of the African Charter on Human and Peoples' Rights. Note that Article 15(2) of the ICCPR and Article 7(2) of the ECHR expressly say that do not prejudice prosecutions for crimes under international law.

56 Schabas (n 53) 539.

57 As did the *ad hoc* international criminal tribunals: see Alexandre Skander Galland, 'The Systemic Effect of International Human Rights Law on International Criminal Law' in Martin Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press, 2019) 87, 92-93.

58 See Bantekas (n 3).

with what constitutes crime defined by reference to its own law, irrespective of whether such conduct is also criminal in State B, where it takes place. The question emerges of whether State A's prosecution of money laundering on that basis would contravene the principle of legality. If the answer is 'yes', then surely prosecution of money laundering on that basis by an international court, namely the IACC, would suffer from the same defect.

The example of such a State A is not a hypothetical one. For instance, the UK defines money laundering offences precisely in the manner just described. For the purposes of its domestic law, how the underlying conduct that generates criminal income is treated in the state where it occurs is irrelevant, unless the offence in question would be punishable by imprisonment for a maximum term not exceeding 12 months if it took place in the UK.[59]

It does not look as though this has ever been described as problematic from the standpoint of the legality principle. It is up to the UK to decide how it defines what constitutes money laundering, and someone engaged in conduct that is legal elsewhere but criminal in the UK can simply avoid investing the proceeds in the UK, provided he or she is advised of UK law. The issue is a well-known one, and colloquially described as the 'Spanish bullfighter problem', referring to the hypothetical predicament of a matador wishing to invest the proceeds of his activity in the UK.[60]

But, even if no issues arise in the municipal context, there could still be difficulties at the IACC's level. It would be glaringly inconsistent if an individual *could not* be prosecuted for a corruption offence unless respective conduct were criminal where it took place, yet *could* be prosecuted for laundering the proceeds of that very offence. To avoid that, one would have to accept that money laundering offences within the IACC's jurisdiction are limited to the laundering of the proceeds of the conduct that is in fact criminal in the state where it took place. This is a sensible and acceptable limitation, and is in fact in line with the dual criminality requirements posited in the UNCAC and UNTOC.[61] The upshot is that the IACC's criminalisation money laundering would have to be narrower in scope than that in the domestic legislation of, say, the UK.

This line of thinking supplies another argument in favour of an autonomous definition of offences within the IACC's jurisdiction. Otherwise, its involvement in cross-border money-laundering cases could engender issues related to whose state's laws it should apply. Suppose that a money-laundering scheme involves the purchase of real estate and the deposit of funds into bank accounts in multiple states. Suppose, further, that the money-laundering laws of those states differs in significant ways, for example in relation to whether conduct that is legal in the state where it occurs can constitute a predicate offence. There is no precedent in current international criminal law for how to deal with choosing from a menu of potentially applicable

[59] Relevant definitions of money laundering offences in sections 327-329 of the Proceeds of Crime Act 2002 provide that a person does *not* commit an offence if:

> the relevant criminal conduct—
>
> (i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and
> (ii) is not of a description prescribed by an order made by the Secretary of State.

The conduct prescribed by the Secretary of State under (ii) is defined in The Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006 to include 'conduct which would constitute an offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the United Kingdom if it occurred there', with several exceptions.

[60] Law Commission, Anti-Money Laundering: *The SARs Regime*, Law Com No 384, 2019, 193-195.

[61] UNCAC (n 21) Article 6(2)(c): UNTOC (n 42) Article 23(2)(c).

domestic laws. To mitigate that challenge, once again, the use of autonomous definitions of offences appears to be the optimal solution.

7. CONCLUSION

Deciding what law the IACC should apply, if it were ever created, primarily involves balancing the benefits of utilising an international, non-nation-specific set of rules with the likely necessity of resorting, for certain purposes, to the domestic law of the state where the offence allegedly occurred. In principle, the definitions of offences within the IACC's jurisdiction could be limited to, and defined based on, the mandatory offences under the UNCAC. That would minimise the human rights concerns arising if respective conduct were lawful in the state where it took place. However, the nature of corruption offences, especially that of misappropriation of public property, would likely still require some reference to domestic laws at least in some circumstances, such as to ascertain the lawfulness of governmental procurement practices.

This leaves the door ajar for what is often described as 'legal corruption': the operation of domestic laws that facilitate, or at least permit, conduct arguably involving the abuse of public power for private gain. An alternative is to disregard such domestic laws through reliance on certain higher-order, autonomous principles, such as impartiality or avoidance of conflict of interests. As long as those principles are only used to filter out manifestly illegitimate instances of legalised corruption, any tensions with the principle of legality are likely to be manageable.

A series of complications may stem from the inclusion of money laundering within the IACC's jurisdiction. On the one hand, it helps to navigate the problem of highly corrupt states not signing up to the IACC's jurisdiction, so long as jurisdiction is only established over money laundering offences with a substantial connection to an IACC's member state. On the other hand, this will place under strain its ICC-like approach to complementarity, since it is likely to be particularly difficult to demonstrate that a particular state is 'unable or unwilling' to prosecute such money laundering. It is therefore advisable that the IACC's application of the complementarity principle be fashioned in line with these realities.

At a more fundamental level, the issues identified in this article bear testimony to the unprecedented nature of legal challenges that the IACC's establishment would give rise to. This is intended as a neutral comment, and 'unprecedented' is by no means the same as 'insurmountable'. Rather, the implication is that the IACC statute's drafters will have to give careful thought to issues that have not arisen in international courts or tribunals before – a task both exciting and daunting.