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## **Flexible institution building in the international anti-corruption regime: proposing a transnational asset recovery mechanism**

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## FLEXIBLE INSTITUTION BUILDING IN THE INTERNATIONAL ANTI-CORRUPTION REGIME: PROPOSING A TRANSNATIONAL ASSET RECOVERY MECHANISM

By Laurence R. Helfer, \* Cecily Rose, \*\* and Rachel Brewster \*\*\*

### ABSTRACT

*Asset recovery is a fundamental principle of anti-corruption law, without which the financial damage from corruption cannot be repaired. Yet recovering assets is notoriously difficult and time-consuming, and the United Nations Convention Against Corruption provides little technical or institutional support to facilitate such returns. To remedy this, we propose the creation of a transnational asset recovery mechanism that could provide myriad services to states upon request, including gathering and publishing information, providing technical assistance and capacity building, helping to conclude agreements on asset return, and monitoring returned funds. Theoretically, we introduce the concepts of customizability and selectability to explain why a flexible transnational asset recovery mechanism has advantages over more formal international institutions, such as an international anti-corruption court. These benefits include lower financial and political costs, enhanced adaptability, and a greater likelihood of enhancing interstate cooperation regarding asset returns.*

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## I. INTRODUCTION

Corruption is a major scourge, adversely affecting legal and policy domains as diverse as human rights, economic development, and democratic governance. States have recognized the importance of combatting corruption by adopting a succession of widely ratified anti-corruption treaties to prevent and punish such practices. These international lawmaking efforts have not, however, been matched by the creation of robust international institutions. Moreover, bribery and the theft of public assets continue unabated in many parts of the globe. The steady accumulation of major corruption scandals, often coupled with no or weak domestic enforcement, has led to growing discontent with existing legal and policy approaches.

In response to this dissatisfaction, momentum appears to be building toward new international institutions and norms to combat corruption. Much of the debate among civil society, governments, and scholars has focused on the creation of an international anti-corruption court (IACC) that would have the power to indict, convict, and sentence individuals. This idea, which is modeled on the International Criminal Court (ICC), has attracted ardent proponents and detractors, but has yet to attract a critical mass of supporters. Moreover, the attention devoted to a new court has eclipsed discussions about other international institutions to combat corruption.

This Article seeks to fill this gap by sketching the contours of an alternative: a transnational asset recovery mechanism. The envisaged mechanism would focus not on criminal

prosecution, but on facilitating cross-border repatriation of assets, a notoriously difficult process for both destination states—the jurisdictions where proceeds of corruption are located—and states of origin—which seek the return of embezzled public funds. Asset recovery merits such attention because of the importance of repairing the financial damage of corruption by depriving perpetrators of their ill-gotten gains, repatriating stolen wealth, and compensating victims.

An international mechanism focused on asset recovery could perform a wide range of services for states. Possibilities include information gathering, technical assistance and capacity building, mediation between destination states and states of origin, maintaining an escrow account for confiscated assets, and monitoring returned funds. With such a diverse range of functions, some of which would be quite novel, the proposed mechanism would move well beyond the existing anti-corruption treaties and monitoring mechanisms, thereby advancing the global anti-corruption agenda. The mechanism would also align with recent research finding that informal and flexible international bodies are better suited to promoting interstate cooperation in policy domains that are already densely populated by multilateral treaties and formal intergovernmental organizations.

Existing anti-corruption obligations are found in international conventions that require states parties to criminalize corrupt conduct in their domestic legal systems and to cooperate with each other in areas such as mutual legal assistance, extradition, and asset recovery. These treaties are premised not on international prosecutions, but on domestic implementation and enforcement, facilitated by interstate cooperation. The United Nations Convention against Corruption (UNCAC), concluded in 2003, came on the heels of a number of other regional and plurilateral anti-corruption treaties concluded in the mid- to late-1990s.<sup>1</sup> The 2000 United Nations Convention against Transnational Organized Crime (UNTOC) also addresses corruption to a certain extent.<sup>2</sup> Most of these treaties are accompanied by international monitoring mechanisms that provide for some form of peer review, whereby states parties assess each other's implementation of the agreements' criminalization provisions, and, to a lesser extent, domestic enforcement. On the basis of these peer reviews, the monitoring mechanisms issue reports that recommend responses to compliance problems and assess achievements and good practices.

These monitoring bodies have significant shortcomings, however. For example, the UNCAC Review Mechanism has functions, working methods, and a track record that are modest, partly by design.<sup>3</sup> The Review Mechanism avoids pressuring states or issuing sharply worded critiques, it cannot sanction non-complying states parties, and it has not facilitated any significant norm development. In addition, the Review Mechanism's activities have proceeded

<sup>1</sup> See, e.g., Inter-American Convention Against Corruption, *entered into force* Mar. 6, 1997; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *entered into force* Feb. 15, 1999, 37 ILM 1; Council of Europe Criminal Law Convention on Corruption, *entered into force* July 1, 2002, CETS No. 173; African Union Convention on Preventing and Combating Corruption, *entered into force* Aug. 5, 2006, 43 ILM 5; United Nations Convention Against Corruption, *entered into force* Dec. 14, 2005, 2349 UNTS 41.

<sup>2</sup> United Nations Convention Against Transnational Organized Crime, Art. 8, *entered into force* Sept. 29, 2003, 2225 UNTS 209.

<sup>3</sup> According to a recent civil society report, “most countries have yet to fully implement important provisions of the Convention, including . . . [its] asset recovery frameworks.” UNCAC Coalition, 2023–2026 Strategy, 10 (2023), at <https://uncaccoalition.org/wp-content/uploads/UNCAC-Coalition-Strategy-2023-26.pdf>.

very slowly; its assessment of the four core chapters of UNCAC is not expected to be completed until approximately 2025—twenty years after the treaty’s entry into force in 2005.<sup>4</sup>

More could and should be done to develop international norms and to build more robust international institutions to combat corruption. However, creating an IACC to undertake prosecutions, is not, in our view, the most effective or feasible path forward—at least in the near term. We instead argue for the creation of a transnational asset recovery mechanism that would offer a wide range of services to states in response to requests for assistance. Such a flexible institution would be more modest than an IACC in its formal powers, legal authority, and institutional footprint. But it would be unique in its focus on all stages of the asset identification and repatriation process. The mechanism could also provide a foundation for further normative development, institution building, or international bribery prosecutions in the future.<sup>5</sup>

This Article begins by reviewing the current state of the debate with respect to proposals for an IACC and the previously unexplored benefits of creating a more flexible transnational asset recovery mechanism (Part II). We next introduce a recent wave of international law and international relations literature theorizing the turn by states to informal and flexible international institutions, and introduces the concepts of “customizability” and “selectability” as our contributions to this scholarship (Part III). We then describe the scope and principal functions and services of the proposed mechanism and discusses key institutional choices that its creators would need to make, which include its legal basis and its relationship to other existing institutions in the international anti-corruption regime (Part IV). After identifying and responding to potential counterarguments to our proposal (Part V), the Conclusion (Part VI) considers the broader implications of our analysis.

## II. INSTITUTION BUILDING IN THE ANTI-CORRUPTION FIELD

### A. *The Debate on Creating an International Anti-corruption Court*

The proposal to create an IACC has gained some traction in recent years, and currently represents the most important reform initiative in the international anti-corruption field. Proponents argue that an IACC would overcome the legal and practical obstacles to domestic anti-corruption prosecutions of government officials. While all states have adopted laws prohibiting bribery, embezzlement, and the misappropriation or diversion of funds, the structural capacity and political will to enforce these laws against national leaders is often lacking: “[C]orrupt Heads of State and Government, and many other corrupt senior government officials, are able to commit their crimes with impunity in their own countries because they control the police, prosecutors, and courts.”<sup>6</sup> IACC advocates argue that impunity is a

<sup>4</sup> See Implementation Review Group, Performance of the Mechanism for the Review of Implementation of the United Nations Convention Against Corruption, and the Measures Required for the Completion of Its First Phase, as Well as Initial Considerations Regarding the Next Phase of the Mechanism, paras. 25–26, UN Doc. CAC/COSP/IRG/2022/CRP.2 (Aug. 12, 2022).

<sup>5</sup> Initial proposals for the ICC did not seek to create “a standing full-time body,” but an ad hoc mechanism “that would be established under a treaty in such a way as to be available when and as soon as required.” James Crawford, *The ILC’s Draft Statute for an International Criminal Tribunal*, 88 AJIL 140, 142 (1994).

<sup>6</sup> Mark L. Wolf, Richard J. Goldstone & Robert I. Rotberg, *The Progressing Proposal for an International Anti-corruption Court*, AM. ACAD. ARTS & SCI., at 1 (2022), at <https://www.amacad.org/publication/proposal-international-anti-corruption-court/section/6>.

significant global problem, undermining development, obstructing the realization of human rights, and harming vulnerable populations.

According to its proponents, an IACC would close this impunity gap by providing a mechanism to investigate and prosecute corruption at the international level if national authorities are unable or unwilling to do so. The new tribunal would fulfill several policy goals, including incapacitating corrupt political leaders and returning assets to victims, and it would have a deterrent effect through the credible threat of international prosecution and imprisonment of government officials.<sup>7</sup>

The IACC proposal is still evolving but its general contours are clear. A statute creating the IACC would require states parties to submit to the court's jurisdiction and explicitly waive the immunity of current or former government officials from prosecution before the court. In addition to having the authority to investigate and prosecute nationals of states parties to the statute, including current and former government officials and private actors who aid or abet them,<sup>8</sup> the court would also have jurisdiction over nationals of non-parties if the person committed a crime, such as money laundering, on the territory of a state party (likely a destination state).<sup>9</sup> The court would hear cases brought against individuals for acts of corruption specified in the IACC statute, including bribery and embezzlement, money laundering, and obstruction of justice.<sup>10</sup> It would also have the power to order restitution and disgorgement of illicit assets and impose prison sentences.<sup>11</sup> Proponents further envision that the court could eventually hear civil cases brought by private whistleblowers seeking damages against officials for alleged government fraud or corruption.<sup>12</sup>

The IACC proposal models itself on the ICC in its legal principles and institutional design.<sup>13</sup> Like the ICC, an IACC would be based on the principle of complementarity, which seeks to foster domestic prosecutions by only allowing intervention by the new court when national authorities with jurisdiction over a covered crime are unable or unwilling to investigate or prosecute. The court would also have comparable jurisdictional principles and would be staffed by independent investigators and prosecutors with expertise in financial crimes. However, like the ICC, it would rely on cooperation from states parties to obtain evidence and custody of defendants.

An IACC would also assist with the return of stolen assets, for example by ordering the disgorgement and restitution from convicted defendants. If the court is authorized to hear civil claims, this could be another means to return funds to states of origin or individual victims.<sup>14</sup>

<sup>7</sup> *Id.*

<sup>8</sup> See Wolf, Goldstone & Rotberg, *supra* note 6, at 10.

<sup>9</sup> *Id.* at 5–6. As discussed below, there are important unsettled issues regarding the immunity of government officials from states that are not a party to the IACC statute.

<sup>10</sup> *Id.* In basing jurisdiction on crimes that states are required to adopt under UNCAC, proponents argue that the IACC would not need to develop new norms and could instead rely on established treaty law.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 9.

<sup>13</sup> Mark L. Wolf, *The World Needs an International Anti-Corruption Court*, 147 *DAEDALUS* 144, 149–52 (2018); Wolf, Goldstone & Rotberg, *supra* note 6, at 5–9.

<sup>14</sup> Wolf, Goldstone & Rotberg, *supra* note 6, at 9.

The proposal does not currently indicate whether there would be any restrictions on the use of returned funds or if the court would monitor the funds' disposal.<sup>15</sup>

Skeptics of the IACC proposal raise a range of political, legal, and institutional objections. The first set of political concerns relates to whether key states would join the IACC statute. Government leaders in states with high rates of corruption, which the IACC would seek to target, are unlikely to participate.<sup>16</sup> Proponents originally argued that these states could be convinced to ratify the IACC statute if doing so were made a condition of membership in the World Trade Organization or other trade agreements.<sup>17</sup> These linkages are highly unrealistic, however, and this idea appears to have been abandoned.<sup>18</sup>

An IACC statute may also not receive support of states with lower rates of corruption. Moreover, major powers, such as the United States and China, are likely to have objections to the broad waivers of immunity that would be required by an IACC statute, and concerns that their officials could be targeted for political reasons. The United States and China have not joined the ICC, and they may be even more reluctant to join an IACC if that court would have jurisdiction over financial crimes, which are more commonplace than the crimes over which the ICC has jurisdiction.

Proponents respond that only a few destination states (such as Switzerland, the United States, and the UK) would need to join in order for an IACC to be operational, because the court could prosecute money laundering that takes place in these states regardless of the nationality of the official who has committed the corrupt act.<sup>19</sup> This argument raises important and unresolved legal questions regarding the immunity of government officials before the court, in particular officials who are not nationals of states parties to an IACC statute. States parties would potentially violate international law on immunity by arresting and transferring to the court accused officials of non-states parties.<sup>20</sup> Consequently, an IACC may have great difficulty in obtaining custody of officials of non-states parties who commit crimes in a destination state party—contrary to the claims of the IACC proponents.<sup>21</sup> Even if these immunity issues were resolved, a court that primarily targeted nationals of non-states parties might lead to claims of bias or illegitimacy. The ICC has been criticized for primarily prosecuting nationals of African states, and an IACC might be subject to similar critiques if nationals of non-state party developing countries were the primary defendants.

<sup>15</sup> The return of assets to countries of origin is frequently subject to monitoring or restrictions on use. See Cecily Rose, *The Normative Development of International Asset Recovery Law* (forthcoming).

<sup>16</sup> Matthew C. Stephenson & Sofie Arjon Schütte, *An International Anti-corruption Court? A Synopsis of the Debate*, U4 ANTI-CORRUPTION RESOURCE CENTRE, at 4–5 (U4 Brief 2019:5), at <https://www.u4.no/publications/an-international-anti-corruption-court-a-synopsis-of-the-debate.pdf>.

<sup>17</sup> Mark L. Wolf, *The Case for an International Anti-corruption Court*, BROOKINGS, at 10 (2014), at <https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf>.

<sup>18</sup> More generally, states have been reluctant in the past to incorporate non-trade matters into trade agreements. See Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . ."*, 96 AJIL 77 (2002).

<sup>19</sup> Wolf, Goldstone & Rotberg, *supra* note 6, at 11.

<sup>20</sup> See Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-397, Judgment in the Jordan Referral re Al-Bashir Appeal (May 6, 2019).

<sup>21</sup> Wolf, Goldstone & Rotberg, *supra* note 6, at 7–8 (“If even one element of an offense were committed by a kleptocrat in an IACC member state, the crime could be prosecuted there. If the state were willing but lacked the capacity to prosecute, or was for geopolitical or other reasons unwilling to prosecute, the kleptocrat and his or her coconspirators could be prosecuted in the IACC.”).

There are also institutional concerns regarding the court's potential effectiveness given the difficulty of obtaining evidence of complex financial crimes such as corruption and money laundering. An IACC would be designed to prosecute cases where domestic institutions, such as the police and judiciary, protect government leaders. The court might thus receive little or no cooperation from national authorities, even if its statute obligates them to share evidence.<sup>22</sup> International prosecutors might be able to gain access to bank records if an IACC statute were to require states parties to adopt legislation requiring their financial institutions to provide such evidence. However, such laws would raise political concerns in destination states. Evidentiary challenges might be easier to address following a change of government, but the IACC's proponents have prioritized addressing the impunity of current political leaders.<sup>23</sup>

In part for these reasons, the cost of creating an international court capable of prosecuting corruption cases is likely to be substantial. The ICC's current annual budget is €155 million; it is unclear if a similar amount would be needed for an IACC. Proponents maintain that an anti-corruption court would require fewer resources. But even if the budget were similarly large, supporters contend that creating the court would be a financially wise proposition. They emphasize that an IACC would help to deter grand corruption, which costs trillions of dollars every year.<sup>24</sup> Proponents further maintain that the court could eventually be financed from fines levied on defendants.<sup>25</sup>

Skeptics respond that generating an operating budget from fines would require high rates of convictions and would decrease assets available for repatriation, which would likely be politically unacceptable to many states of origin.<sup>26</sup> They further contend that the resources needed for an international court would be better spent on other initiatives, such as supporting domestic anti-corruption efforts, establishing UN-based investigative bodies, strengthening rules against money laundering, or building greater capacity for asset recovery.<sup>27</sup>

The IACC campaign has recently gained momentum, with Canada, Ecuador, the Netherlands, and numerous former heads of state expressing their support.<sup>28</sup> However, the proposal is still at an embryonic stage and progress toward establishing a court, even if ultimately successful, will be slow and incremental. Yet, filling the normative and institutional gaps in the existing international anti-corruption regime remains an urgent and ongoing concern.

<sup>22</sup> Stephenson & Schütte, *supra* note 16, at 6.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> Wolf, Goldstone & Rotberg, *supra* note 6, at 11.

<sup>25</sup> *Id.*

<sup>26</sup> Stephenson & Schütte, *supra* note 16, at 7.

<sup>27</sup> *Id.* at 7–10; Juanita Olaya Garcia, *Why an International Anti-corruption Court Is Not the Answer*, UNCAC CIV. SOC'Y COAL. (Dec. 6, 2022), at <https://uncaccoalition.org/why-an-international-anti-corruption-court-is-not-the-answer>.

<sup>28</sup> Government of the Netherlands, *Netherlands Says More Funding Needed for Efforts to Combat Impunity Worldwide* (Apr. 11, 2022), at <https://www.government.nl/latest/news/2022/04/11/netherlands-says-more-funding-needed-for-efforts-to-combat-impunity-worldwide>; Adam Taylor, *Ex-Leaders Call for Global Anti-corruption Court to Tackle Putin, More*, WASH. POST (May 25, 2022). Forty-two former heads of state, including Gordon Brown, and several Nobel laureates have signed Integrity Initiatives International's declaration in support of the IACC, at <http://integrityinitiatives.org/declaration>.



## B. *The Need to Broaden the Debate and Consider More Flexible Alternatives*

The debate over whether to create an IACC has helpfully focused attention on the need to enhance interstate cooperation to combat corruption, but it has also diverted attention from other ways to achieve that goal. In particular, the campaign for a new permanent international criminal tribunal—established by a binding multilateral treaty and supported by a secretariat and full-time judges, prosecutors, and staff—has obscured the possibility of creating a more flexible international body that could be founded more quickly and at lower cost and that would appeal to a broad array of origin and destination states by offering a range of functions and services to both groups of countries.<sup>29</sup>

This Section lays the foundation for one such proposal: a new transnational mechanism to facilitate the recovery of public assets stolen by government officials. We first explain why asset recovery is a topic ripe for further institutional and normative development. We then consider the preferences of states of origin and destination states relating to asset recovery, revealing that both groups of countries have broadly shared interests in facilitating asset returns that are not being adequately realized in the existing international anti-corruption regime. This analysis sets the stage for Part III, which discusses the theoretical literature on flexible international institutions and our contribution to that literature, and Part IV, which describes the substantive and design features of a transnational asset recovery mechanism and identifies the advantages of a flexible institution for facilitating the return of stolen assets.

### 1. *Why Transnational Asset Recovery?*

As UNCAC and other anti-corruption conventions demonstrate, corruption is a vast and complex topic. Why, then, does our proposal focus on the recovery of assets that have been embezzled or misappropriated by public officials, which are often subject to money laundering and transfer to another national jurisdiction?<sup>30</sup>

As an initial matter, asset recovery forms a key part of the anti-corruption regime.<sup>31</sup> Chapter V of UNCAC designates the return of assets as a “fundamental principle” of the convention.<sup>32</sup> The inclusion of provisions on cross-border asset recovery has been widely hailed as “a major breakthrough in international law.”<sup>33</sup> Asset recovery advances normative, strategic, and practical objectives of the international anti-corruption regime. It deprives perpetrators of the proceeds, property, and instrumentalities that could be used to engage in further corrupt acts, and it may enable the compensation of victims for the financial harm caused by

<sup>29</sup> In this respect, we agree with the author of a recent study that “the current zeitgeist renders the establishment of new [international courts] increasingly unlikely,” and that the demand for global governance institutions is likely to be realized, at least in the near time, by “less intrusive and more flexible quasi- or non-judicial review mechanisms . . . .” Andrej Lang, *Alternatives to Adjudication in International Law: A Case Study of the Ombudsperson to the ISIL and Al-Qaida Sanctions Regime of the UN Security Council*, 117 AJIL 48, 49 (2023).

<sup>30</sup> See Section IV.A *infra* for a discussion of this phrasing, which is based on multiple articles in UNCAC.

<sup>31</sup> See generally Larissa Gray, Kjetil Hansen, Pranvera Recica-Kirkbride & Linnea Mills, *Few and Far: The Hard Facts on Stolen Asset Recovery 9* (StAR Initiative 2014).

<sup>32</sup> UNCAC, *supra* note 1, Art. 51.

<sup>33</sup> StAR Initiative, Mapping International Recoveries and Returns of Stolen Assets Under UNCAC: An Insight into the Practice of Cross-Border Repatriation of Proceeds of Corruption Over the Past 10 Years, at 3, UN Doc. CAC/COSP/2021/CRP.12 (Dec. 13, 2021), at [https://www.unodc.org/documents/treaties/UNCAC/COSP/session9/CAC-COSP-2021-CRP.12\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/COSP/session9/CAC-COSP-2021-CRP.12_E.pdf) [hereinafter 2021 StAR Report].

perpetrators' corrupt acts.<sup>34</sup> Asset recovery may also act as a deterrent or a preventive measure.<sup>35</sup>

In addition, there is a global consensus on the wrongfulness of the underlying conduct and the need for return. UNCAC and other anti-corruption treaties require states parties to criminalize the embezzlement, misappropriation, and diversion of public funds, as well as money laundering.<sup>36</sup> These acts are now proscribed in nearly all national criminal codes.<sup>37</sup> There is also widespread agreement, reflected most clearly in UNCAC Article 57, that embezzled public assets remain the property of the state of origin even when an official has transferred them to another jurisdiction. From an international justice perspective, therefore, asset recovery facilitates the repatriation of stolen wealth to states that may have an "ownership" claim over the funds.<sup>38</sup> Provided that certain conditions (discussed in detail below) are met, UNCAC mandates the return of such assets to the state of origin by the destination state.<sup>39</sup>

Recent developments have underscored the demand for new norms and processes to facilitate asset return. In 2022, for example, the United Nations High Commissioner for Human Rights published a set of Recommended Principles on Human Rights and Asset Recovery, which include best practices.<sup>40</sup> Civil society groups have also advanced a number of proposals.<sup>41</sup> In addition, the UNCAC Review Mechanism is due to complete its second cycle of reviews in 2025, which focuses in part on asset recovery. The review will generate significant empirical data that could support efforts to adopt new norms or institutions.<sup>42</sup> Lastly, the ongoing armed conflict in Ukraine has highlighted the importance of stemming illicit

<sup>34</sup> UNCAC, *supra* note 1, Arts. 35, 53(b).

<sup>35</sup> See, e.g., International Law Association, *White Paper 3: Fight Against Corruption*, at 17 (May 2023), at <https://www.ilaparis2023.org/wp-content/uploads/2022/09/ADI-ILA-corruption-VHD-EN.pdf> [hereinafter ILA White Paper].

<sup>36</sup> See, e.g., UNCAC, *supra* note 1, Arts. 17, 23; Inter-American Convention Against Corruption, *supra* note 1, Art. XI(1)(d); Council of Europe Criminal Law Convention on Corruption, *supra* note 1, Art. 13; African Union Convention on Preventing and Combating Corruption, *supra* note 1, Arts. 4(1)(d), 6.

<sup>37</sup> UNODC, STATE OF IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: CRIMINALIZATION, LAW ENFORCEMENT AND INTERNATIONAL COOPERATION 39 (2d ed. 2017).

<sup>38</sup> UNODC, LEGISLATIVE GUIDE FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION, para. 522 (2006).

<sup>39</sup> See Section IV.A *infra* for a discussion of these conditions.

<sup>40</sup> UN Office of the High Commissioner for Human Rights (OHCHR), OHCHR Recommended Principles on Human Rights and Asset Recovery (Mar. 2, 2022), at <https://www.ohchr.org/en/documents/tools-and-resources/ohchr-recommended-principles-human-rights-and-asset-recovery-2022>. One of the co-authors of this article, Cecily Rose, worked as a consultant for the OHCHR on this project. The opinions expressed in this Article are the author's alone and do not represent those of the OHCHR.

<sup>41</sup> E.g., Civil Forum for Asset Recovery, Civil Society Principles for Accountable Asset Return, at [https://cifar.eu/wp-content/uploads/2020/10/CSO-Principles\\_EN.pdf](https://cifar.eu/wp-content/uploads/2020/10/CSO-Principles_EN.pdf); Transparency International and UNCAC Civil Society Coalition, Proposal for a Multilateral Agreement on Asset Recovery (June 2020); Transparency International France, *Le sort des biens mal acquis et autres avoirs illicites issus de la grande corruption*, at 14–15 (2017), at <https://transparency-france.org/actu/sortbiensmalacquis-2> (TI France's proposed five key principles that should govern the allocation of assets derived from grand corruption).

<sup>42</sup> Conference of the States Parties to UNCAC, Performance of the Mechanism for the Review of Implementation of the United Nations Convention Against Corruption, para. 68, UN Doc. CAC/COSP/IRG/2020/2 (Mar. 30, 2020).

financial flows across borders as well as the problematic role of destination countries, such as the United Kingdom, in facilitating the laundering of illicit Russian wealth.<sup>43</sup>

## 2. *The Interests of State of Origin and Destination States in Asset Returns*

The consensus in favor of returning stolen public assets reflects the common interests of states of origin and of destination states in facilitating asset recovery. However, the preferences of the two groups of states are not perfectly aligned. Each group approaches the topic from divergent normative perspectives and focuses on different practical considerations. The effectiveness of asset recovery efforts has been shaped and at times hindered by this distinctive configuration of state preferences, as this Section explains.

The overarching commonality of interests is revealed by the number of states of origin and destination states that have participated in asset returns over the past decade. In the late 2000s, only a handful of states—mostly OECD members—reported pursuing asset recovery cases.<sup>44</sup> However, a recent report by the Stolen Asset Recovery Initiative (StAR) identified sixty-one countries in all regions of the world that were involved in at least one cross-border asset freeze, confiscation, or return of corruption proceeds between 2010 and 2021.<sup>45</sup> The central take-away of the report is that “the ‘club’ of states pursuing cross-border asset recovery cases involving corruption proceeds is growing rapidly.”<sup>46</sup>

The terms governing the repatriation of embezzled and laundered assets are often set forth in bilateral or multilateral agreements, which typically take the form of memoranda of understanding (MoUs). In 2020, for example, Switzerland and Uzbekistan negotiated a framework agreement for the return of more than U.S. \$130 million in previously confiscated assets related to criminal proceedings against the daughter of the former Uzbek president. In 2021, the United Kingdom repatriated to Nigeria £4.2 million stolen by a former state governor, and separately, it returned to Moldova £450,000 forfeited by the son of a former prime minister.<sup>47</sup> These and other MoUs include a range of approaches to overcome the normative, institutional, and practical hurdles to asset return—issues that we discuss in greater detail below.

Governments have also collaborated on asset returns in multilateral fora. In 2017, for example, the United States and United Kingdom co-organized the Global Forum on Asset Recovery (GFAR), in partnership with the World Bank and United Nations Office on Drugs and Crime (UNODC), to discuss asset repatriation.<sup>48</sup> The meeting produced ten principles

<sup>43</sup> UK Government, Factsheet: Economic Crime and Corporate Transparency Bill Overarching (June 20, 2023), at <https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-economic-crime-and-corporate-transparency-bill-overarching>.

<sup>44</sup> E.g., JACINTA ANYANGO ODUOR ET AL., LEFT OUT OF THE BARGAIN: SETTLEMENTS IN FOREIGN BRIBERY CASES AND IMPLICATIONS FOR ASSET RECOVERY (2014); Gray, Hansen, Recica-Kirkbride & Mills, *supra* note 31.

<sup>45</sup> 2021 StAR Report, *supra* note 33, at 34.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> *Id.* at 1–2.

<sup>48</sup> Global Forum on Asset Recovery Communique, Washington D.C. (Dec. 4–6, 2017), at [https://star.worldbank.org/sites/default/files/20171206\\_gfar\\_communique.pdf](https://star.worldbank.org/sites/default/files/20171206_gfar_communique.pdf).

for the disposition and transfer of confiscated stolen assets<sup>49</sup> and facilitated the conclusion of several return agreements.<sup>50</sup>

The policy pronouncements, laws, and practices of states of origin and destination countries reflect a general consensus in favor of asset recovery. Yet these sources also illustrate the divergence of preferences regarding the manner and modalities of return. For their part, states of origin have demanded asset returns with no strings attached. The African Union's Common Position on Asset Recovery, for example, emphasizes that "the recovery and return of African assets is therefore a top priority . . . as such recovered assets can be applied toward Africa's development agenda."<sup>51</sup> States of origin strongly prefer the return of assets without restrictions on how the funds are spent, transparency requirements, or auditing of the funds' dispersal.<sup>52</sup> For example, Nigeria and South Africa underscored their commitment to the "unconditional return" of stolen assets in their respective submissions in 2021 to different UN bodies concerned with corruption.<sup>53</sup> The governments of these and other states of origin even go so far as to label conditions on asset returns as unacceptable infringements on their sovereignty.<sup>54</sup>

Nevertheless, the economic benefits and political salience of recovering purloined public funds have induced many states of origin to negotiate agreements with destination countries that include a variety of substantive and procedural restrictions on asset returns. This dynamic—vociferous support by origin states for a hardline "no conditions" policy in multilateral venues, paired with deviations from that position in specific cases—has parallels in other areas of international law. In the context of international investment law, for example, developing countries' common position about the limited protection owed to foreign investment has been eroded by the bilateral bargaining power of industrialized countries.<sup>55</sup>

<sup>49</sup> GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases (2017), at <https://star.worldbank.org/sites/default/files/the-gfar-principles.pdf>

<sup>50</sup> See U.S. Dep't of Justice, Office of Public Affairs Press Release, U.S. Repatriates Over \$311.7 Million in Assets to the Nigerian People That Were Stolen by Former Nigerian Dictator and His Associates (May 4, 2020) (recovered funds are to be used to finance the construction of infrastructure in specific economic zones); U.S. Dep't of Justice, Office of Public Affairs Press Release, U.S. to Repatriate Nearly \$1 Million to Federal Republic of Nigeria (Feb. 16, 2023) (recovered funds are support health care centers in the Nigerian state of Bayelsa).

<sup>51</sup> African Union, Draft Common African Position on Asset Recovery, Sec. 4.2, para. 15, EX.CL/1213, (XXXVI) Add.1 Rev.1 (Feb. 9, 2020).

<sup>52</sup> See Anton Moiseienko, *The Ownership of Confiscated Proceeds of Corruption Under the UN Convention Against Corruption*, 67 INT'L & COMP. L. Q. 669, 681–82 (2018) (discussing the views of states of origin during the UNCAC negotiations that no strings should be attached to the return of confiscated assets).

<sup>53</sup> Intervention by Adv. Priya Biseswar, Joint Sessions of the 12th Resumed Implementation Review Group and the 15th Working Group on Asset Recovery (Sept. 6–10, 2021), at [https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2021-September-6-10/Statement\\_SOUTH\\_AFRICA.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2021-September-6-10/Statement_SOUTH_AFRICA.pdf); Nigeria's Contribution on the Structure and Substance of the Draft Political Declaration to be Adopted by the General Assembly at Its Special Session Against Corruption (2021), at [https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/VIENNA-AGENDA\\_FOR\\_2021\\_COMMENTS\\_BY\\_NIGERIA.pdf](https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/VIENNA-AGENDA_FOR_2021_COMMENTS_BY_NIGERIA.pdf).

<sup>54</sup> See, e.g., Statement of the G-77 and China During the Fourteenth UN Congress on Crime Prevention and Criminal Justice, Kyoto, Japan, at 3 (Mar. 7–12, 2021); African Union, Common Position on Asset Recovery, *supra* note 51, Intro., para. 5; see also Cecily Rose, *The Normative Development of International Asset Recovery Law* (forthcoming).

<sup>55</sup> See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 666–74 (1998).

The interests of destination states are also nuanced, but in a different way. These countries do not actively encourage the deposit of embezzled or laundered assets in their jurisdictions. Because money laundering is detrimental to the integrity of a state's financial system, most destination states have an incentive to prevent such deposits. Destination states require banks and other financial intermediaries to "know their customers" and to report suspicious activity to prevent transfers of illicit funds. However, implementation and enforcement of anti-money laundering laws and regulations is variable and often inadequate, with the result that money laundering occurs even in highly regulated financial centers, such as New York, London, and Zurich.<sup>56</sup>

Even if enforcement is imperfect, destination states generally have no desire to retain embezzled funds that enter their respective financial systems. The willingness of destination countries to repatriate is demonstrated by the creation of domestic programs to freeze or seize and confiscate embezzled foreign assets. Destination countries including Canada, France, Luxembourg, Switzerland, the United Kingdom, and the United States have established such programs.<sup>57</sup> Destination states will generally freeze, seize, and confiscate embezzled funds if the relevant legal requirements are met.<sup>58</sup> However, most destination countries have robust property protections and high evidentiary standards for the confiscation of assets based on a criminal conviction.<sup>59</sup> As a result, destination states' pursuit of stolen assets is not always successful.<sup>60</sup> Another practical difficulty in the recovery of assets has been a narrow focus by states on criminal forfeiture, as opposed to non-conviction based forfeiture mechanisms.<sup>61</sup>

Once assets have been seized and are available for return, a primary concern of destination states is ensuring that the funds are not again subject to corruption.<sup>62</sup> This concern is reflected in MoUs that include commitments as to how and to whom money is distributed, for what purpose, and whether the funds are subject to external monitoring. For example, the United States, Jersey, and Nigeria agreed in 2020 that over \$300 million in assets stolen by former president Sani Abacha would be returned to Nigeria to help finance specific infrastructure

<sup>56</sup> KEVIN M. STEPHENSON ET AL., BARRIERS TO ASSET RECOVERY, STOLEN ASSET RECOVERY INITIATIVE 33–35 (2011).

<sup>57</sup> See, e.g., The United States' Kleptocracy Asset Recovery Rewards Program, which is part of the Department of Justice's Criminal Division's Money Laundering and Asset Recovery Section; and the introduction of unexplained wealth orders in the United Kingdom. U.S. Department of Justice Money Laundering and Asset Recovery Section, at <https://www.justice.gov/criminal-mlars>; Ali Shalchi, *Research Briefing: Unexplained Wealth Orders*, HOUSE OF COMMONS LIBRARY, at para. 2.6 (Apr. 14, 2022); see also Hugh Carnegie, *Campaigners Target Suspicious Assets of Foreign Leaders in France*, FIN. TIMES (Oct. 6, 2013).

<sup>58</sup> See, e.g., UNCAC, *supra* note 1, Arts. 46, 54–55.

<sup>59</sup> JEAN-PIERRE BRUN, ANASTASIA SOTIROPOULOU, LARISSA GRAY, CLIVE SCOTT & KEVIN M. STEPHENSON, ASSET RECOVERY HANDBOOK: A GUIDE FOR PRACTITIONERS, ch. 7 (2d ed. 2021).

<sup>60</sup> For example, the U.S. Department of Justice initially sought to recover over \$70 million in stolen assets from Teodoro Nguema Obiang Manue, the son of Equatorial Guinea's president, but it settled the case for \$30 million. U.S. Dep't of Justice, Office of Public Affairs Press Release, Department of Justice Seeks to Recover More Than \$70.8 Million in Proceeds of Corruption from Government Minister of Equatorial Guinea (Oct. 25, 2011); U.S. Dep't of Justice, Office of Public Affairs Press Release, Second Vice President of Equatorial Guinea Agrees to Relinquish More Than \$30 Million of Assets Purchased with Corruption Proceeds (Oct. 10, 2014). For a discussion of the UK's failure to obtain an unexplained wealth order in the case of Rakhmat Aliyev, see Shalchi, *supra* note 57, paras. 3.3–3.4.

<sup>61</sup> ILA White Paper, *supra* note 35, at 17.

<sup>62</sup> See Leslie Wayne, *Shielding Seized Assets From Corruption's Clutches*, N.Y. TIMES (Dec. 30, 2016); Phil Mason, *The End Game: Asset Recovery and Return – An Unfinished Agenda*, CHR. MICHELSON INST. (2020).

projects.<sup>63</sup> The United States adopted a different approach with regards to assets recovered in a civil forfeiture settlement with Teodoro Nguema Obiang Mangue, the son of the president of Equatorial Guinea. It gave \$19.25 million of the funds to the United Nations for the purchase and distribution of COVID-19 vaccines in Equatorial Guinea, thereby benefiting the state while bypassing the national government.<sup>64</sup>

The foregoing examination of the preferences of origin and destination states highlights the need for a flexible mechanism that could help to resolve normative and practical differences between the two groups of countries. While both groups, in principle, share a common interest in asset return, their interests are not entirely aligned. States of origin prefer to avoid any conditions on return or at least limit those conditions, while destination states seek to prevent the re-corruption of returned funds. Negotiation over these issues continues to pose significant challenges for the asset recovery process.

### III. THEORIES OF INTERNATIONAL INSTITUTIONS

The campaign for an IACC, and our alternative proposal for a transnational asset recovery mechanism, are relevant to a longstanding theoretical debate over how different types of international institutions facilitate interstate cooperation.<sup>65</sup> This Part situates our proposal within that debate. Section A begins with a high-level overview of the theoretical literature, revealing that a focus on formal international organizations has expanded over time to encompass a broader array of informal and flexible forms of international governance. Section B takes a deeper dive into the recent scholarship on these mechanisms. This work helpfully identifies the benefits of informality and flexibility and opens up promising avenues for future research. But the literature is also hampered by inconsistent definitions and conceptual ambiguities. Section C introduces our contribution to this literature. We identify and define two characteristics of flexible international institutions—“customizability” and “selectability”—that existing studies have overlooked and that are relevant to analyzing the benefits and costs of creating such institutions, including the transnational asset recovery mechanism that we propose in Part IV.

#### A. *From Formal to Informal International Organizations*

Formal and informal organizations have long been a focus of study in international law and international relations. This Section provides a thumbnail sketch of this literature to provide a foundation for the analysis that follows. The legal and institutional landscape we portray is

<sup>63</sup> Agreement Among the Government of the Federal Republic of Nigeria and the Baliwick of Jersey and the Government of the United States of America Regarding the Sharing, Transfer, Repatriation, Disposition, and Management of Certain Forfeited Assets (Feb. 3, 2020).

<sup>64</sup> U.S. Dep’t of Justice, Office of Public Affairs Press Release, \$26.6 Million in Allegedly Illicit Proceeds to Be Used to Fight COVID-19 and Address Medical Needs in Equatorial Guinea (Sept. 20, 2021).

<sup>65</sup> The international law and international relations literature “lacks a widely accepted definition of international institutions. . . .” John Duffield, *What Are International Institutions?*, 9 INT’L STUD. REV. 1, 1 (2007). We follow Keohane’s influential and capacious define of institutions as “persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations.” Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379, 383 (1988).

necessarily painted with a very broad brush, omitting theoretical and empirical contributions that a comprehensive literature review or intellectual history would include.<sup>66</sup>

A basic initial puzzle for scholars was explaining why states act through formal organizations when they can achieve their national interests unilaterally or by cooperating with other countries on an ad hoc basis. The canonical answer to this question is that such organizations offer benefits in terms of centralization, independence, and expertise that outweigh the financial and political costs of delegating sovereignty or of repeated interstate bargaining.<sup>67</sup> Yet this explanation raised additional questions. For example, what are the typical characteristics of formal international organizations? What accounts for the broad range of institutional forms that embody those characteristics? And why do states sometimes choose more flexible modes of cooperation?

The answer to the first question has coalesced around three characteristics: creation by a binding international agreement, membership limited to states, and the existence of secretariats or other independent bodies to carry out the organization's mandate.<sup>68</sup> Scholars have also investigated variations along each of these dimensions, including differences in the bindingness of legal norms that formal organizations generate and their institutional structures, as well as the diversity in membership, size, and substantive focus.<sup>69</sup>

Beginning in the early 2000s, however, a growing body of international law and international relations scholarship identified a pronounced shift away from treaties and formal organizations toward non-binding norms and less bureaucratic institutions.<sup>70</sup> Scholars posited a range of theories to explain these trends. Among the most influential were studies of rational design,<sup>71</sup> the relationship between the form and substance of international agreements,<sup>72</sup> new types of informal international lawmaking,<sup>73</sup> and the growth of less formal intergovernmental organizations.<sup>74</sup>

Significantly, the rise of these softer norms and institutions rarely supplanted the legally binding commitments and formal organizations that preceded them; rather, the newer

<sup>66</sup> For a comprehensive introduction, see Beth Simmons & Lisa Martin, *International Organizations and Institutions*, in HANDBOOK OF INTERNATIONAL RELATIONS 192 (Walter Carlsnaes, Thomas Risse & Beth Simmons eds., 2002).

<sup>67</sup> Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RES. 3, 5–8 (1998).

<sup>68</sup> CHARLES B. ROGER, THE ORIGINS OF INFORMALITY: WHY THE LEGAL FOUNDATIONS OF GLOBAL GOVERNANCE ARE SHIFTING, AND WHY IT MATTERS 24–26, n. 5 (2020) (reviewing the literature identifying these three characteristics of formal international organizations).

<sup>69</sup> See, e.g., CATHERINE BRÖLMANN, THE INSTITUTIONAL VEIL IN PUBLIC INTERNATIONAL LAW: INTERNATIONAL ORGANISATIONS AND THE LAW OF TREATIES (2007); Jan Klabbbers, *Formal Intergovernmental Organizations*, in THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 133 (Jacob Katz Cogan, Ian Hurd & Ian Johnstone eds., 2016); Thomas J. Volgy, Elizabeth Fausett, Keith A. Grant & Stuart Rodgers, 45 J. PEACE RES. 837 (2008).

<sup>70</sup> This trend has been documented in numerous case studies as well as large-n empirical studies. See, e.g., ROGER, *supra* note 68, at 42.

<sup>71</sup> Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); BARBARA KOREMENOS, THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN (2016).

<sup>72</sup> Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581 (2005).

<sup>73</sup> INFORMAL INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012).

<sup>74</sup> Felicity Vabulas & Duncan Snidal, *Organization Without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements*, 8 REV. INT'L ORG. 193 (2013).

forms of interstate cooperation were layered alongside pre-existing agreements and organizations.<sup>75</sup> As result, the number and diversity of international institutions and instruments increased across a range of issue areas. The result was complex networks of multiple and overlapping rules and institutions operating in the same policy domain.<sup>76</sup> “[W]hen the global governance space is saturated with so many other institutions and actors,”<sup>77</sup> there are substantial costs—in terms of financing, time, and political capital—involved in establishing another formal international organization or negotiating a new binding multilateral instrument.<sup>78</sup> These costs provide additional incentives for states to create flexible and nimble international bodies.

### B. *The Recent Turn to Informality and Flexibility*

The last few years have seen an outpouring of interdisciplinary scholarship devoted to informal and flexible international institutions. Numerous symposia, books, and journal articles have advanced new theories,<sup>79</sup> conceptual frameworks,<sup>80</sup> typologies,<sup>81</sup> and empirical evidence<sup>82</sup> to analyze entities that, according to one study, “presently constitute about 40% of all international organizations—a large and growing share of the total IO population. . . .”<sup>83</sup> This burgeoning literature offers fresh insights for understanding international cooperation in an era when many policy domains are densely populated with legal rules and institutions. However, the studies also have an important limitation: they use inconsistent definitions of “informality” and “flexibility,” and different labels to describe the same or similar phenomena.

Beginning with the insights, a central theme that links these recent studies is identifying the benefits of informality and flexibility. As compared to formal international organizations, informal and flexible bodies have lower creation and operating costs.<sup>84</sup> They can be “fine-tuned . . . to fit specific problem characteristics and contextual features more easily and effectively than those of treaty-based institutions,” and they can be “adapted to new conditions, information, issues, preferences, and governance demands.”<sup>85</sup> Such bodies also “feature

<sup>75</sup> See, e.g., Karen J. Alter, *The Promise and Perils of Theorizing International Regime Complexity in an Evolving World*, 17 REV. INT’L ORG. 375, 377 (2021) (describing the strategy of “layering new initiatives over existing and entrenched institutions”).

<sup>76</sup> See, e.g., Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 ANN. REV. L. & SOC. SCI. 329 (2018); Mette Eilstrup-Sangiovanni & Oliver Westerstam, *Special Issue: The Global Governance Complexity Cube: Varieties of Institutional Complexity in Global Governance*, 17 REV. INT’L ORG. 233 (2021); Amandine Orsini et al., *Forum: Complex Systems and International Governance*, 22 INT’L STUD. REV. 1008 (2019).

<sup>77</sup> Kristina Daugirdas & Katerina Linos, *Back to Basics: The Benefits of Traditional International Organizations*, 14 HARV. J. NAT’L SEC. L. 181, 193 (2023).

<sup>78</sup> See JOSEPH JUPILE, WALTER MATTILI & DUNCAN SNIDAL, INSTITUTIONAL CHOICE AND GLOBAL COMMERCE 9–10 (2013) (arguing that states rarely add new international institutions to highly institutionalized environments).

<sup>79</sup> ROGER, *supra* note 68, at 51–77 (book chapter devoted to theorizing informal international organizations).

<sup>80</sup> Andrew F. Cooper et al., *Special Issue: The Cascading Dynamics of Informal Institutions: Organizational Processes and Governance Implications*, 60 INT’L POL. (2022); Charles B. Roger & Sam S. Rowan, *Analyzing International Organizations: How the Concepts We Use Affect the Answers We Get*, 17 REV. INT’L ORG. 597 (2022).

<sup>81</sup> Lisa L. Martin, *Formality, Typologies, and Institutional Design*, 16 REV. INT’L ORG. 175 (2021).

<sup>82</sup> Felicity Vabulas & Duncan Snidal, *Cooperation Under Autonomy: Building and Analyzing the Informal Intergovernmental Organizations 2.0 Dataset*, 58 J. PEACE RES. 859 (2021).

<sup>83</sup> Roger & Rowan, *supra* note 80, at 601.

<sup>84</sup> Kenneth W. Abbott & Benjamin Faude, *Choosing Low-Cost Institutions in Global Governance*, 13 INT’L THEORY 397, 403 (2021).

<sup>85</sup> *Id.* at 405.



decision-making . . . and operating procedures that are less elaborate and complicated than those of treaty-based institutions.”<sup>86</sup> As such, they are well placed to “perform functions such as adopting coordination standards, disseminating information, and building trust” among stakeholders.<sup>87</sup> These characteristics enable flexible and informal institutions to fit more easily within international regimes already comprised of multiple organizations and treaties.<sup>88</sup>

The shortcomings of recent studies are definitional and conceptual. For example, a book devoted to informal organizations defines informality by reference to two characteristics: creation by a non-binding instrument, and the absence or small size of a secretariat or similar body.<sup>89</sup> In contrast, the introduction to a special issue on “informal governance in world politics” posits three types of informality—“informality of institutions, within institutions, and around institutions”<sup>90</sup>—while the concluding essay in the same symposium identifies six dimensions to assess informality: decision-making procedures; bindingness of obligations; transparency; participation of non-state actors; hierarchy; and rigidity of institutional structures.<sup>91</sup> A similar confusion exists in the literature on flexible institutions. Some studies distinguish between “designed and emergent” flexibility,<sup>92</sup> while others conceive of flexibility as related to the low cost of creating a body,<sup>93</sup> or emphasize the “short-notice set-up, task specificity and temporality” of flexible initiatives.<sup>94</sup>

### C. *Introducing Customizability and Selectability*

The definitional and conceptual confusion of recent scholarship on informal and flexible institutions reflects the profusion of attention devoted to a vast and understudied topic in a

<sup>86</sup> *Id.* at 402.

<sup>87</sup> Kenneth W. Abbott & Benjamin Faude, *Hybrid Institutional Complexes in Global Governance*, 17 *REV. INT’L ORG.* 263, 273 (2022).

<sup>88</sup> Vabulas & Snidal, *supra* note 82, at 42; *see also* Abbott & Faude 2021, *supra* note 84, at 418; Eilstrup-Sangiovanni & Westerwinter, *supra* note 76, at 245.

<sup>89</sup> ROGER, *supra* note 68, at 6–7.

<sup>90</sup> Oliver Westerwinter et al., *Special Issue: Informal Governance in World Politics*, 16 *REV. INT’L ORG.* 1, 1 (2021) (emphasis in original).

<sup>91</sup> Martin, *supra* note 81, at 178. Recent studies offer different explanations for why flexible institutions have proliferated. *See* ROGER, *supra* note 68, at 52–71 (analyzing functionalist, power-based, and preference formation and aggregation theories to explain the growth of informal international institutions). They also make inconsistent claims about the functions that informal bodies are better suited to perform. *Compare* ROGER, *supra* note 68, at 34 (arguing that informal institutions are more flexible, agile, and better suited to confidential tasks, while formal organizations have greater independence and “can take on highly complex tasks and provide a wider range of services to states”) *with* Abbott & Faude 2022, *supra* note 87, at 273 (asserting that informal institutions “cannot perform many of the governance functions” of treaties or formal organizations, but are well suited to “adopting coordination standards, disseminating information, and building trust”).

<sup>92</sup> Zoltán I. Búzás & Erin R. Graham, *Emergent Flexibility in Institutional Development: How International Rules Really Change*, 64 *INT’L STUD. Q.* 821, 821 (2020) (analyzing flexibility that is “not intentionally crafted by rule-makers” but “subsequently discovered, activated, and accessed by creative rule-users”); *see also* Jessica Edry, *Shallow Commitments May Bite Deep: Domestic Politics and Flexibility in International Cooperation*, 46 *INT’L INTERACTIONS* 669 (2020) (arguing that flexibility mechanisms allow states to make “shallow commitments” that initially require few changes in behavior but “can and often do deepen over time”).

<sup>93</sup> Abbott & Faude 2021, *supra* note 84, at 399 (analyzing the benefits of “low cost institutions,” which include “malleability, flexibility, and reduced risk, as well as relaxed constraints on state action”).

<sup>94</sup> Yf Reykers et al., *Ad Hoc Coalitions in Global Governance: Short-Notice, Task- and Time-Specific Cooperation*, 99 *INT’L AFF.* 727, 739 (2023).

relatively short period of time. In terms of informality, we generally agree with studies that focus on the non-binding or temporary status of a body's founding instrument and its light institutional footprint. However, we think that greater conceptual clarity can be achieved with respect to flexibility. To that end, we identify two qualities of flexible international institutions that recent studies have overlooked: customizability and selectability. We define these terms below and distinguish them from similar concepts in the literature. Part IV explains how these characteristics apply to our proposal for a transnational asset recovery mechanism.

### 1. Customizability

Customizability describes the full spectrum of potential choices available to states when creating a new international institution. These choices can often be quite expansive. They include the substantive functions or services that the body will carry out (such as convening meetings, gathering information, or identifying best practices); how it is created and structured (including its legal basis, financing, and whether it has a permanent secretariat and staff); and its relationship to treaties and institutions in the same issue area (for example, whether it is housed within an existing organization or is a freestanding body, and the extent to which its activities overlap with those performed by other bodies). Customizability is not limited to informal international bodies. However, the range of choices is broader for informal mechanisms, including non-binding, temporary, or lower-cost options that are generally unavailable for more formal organizations.

An extensive literature on rational design has examined decisions about how international institutions are structured.<sup>95</sup> This literature has investigated whether certain features—such as membership, scope, centralization, control, and flexibility—correspond to different cooperation problems that states face, including enforcement and distribution, the number of actors, and different types of uncertainty.<sup>96</sup> Our conception of customizability draws inspiration from the rational design framework, but differs from it in several important ways.

First, rational design literature has a fairly narrow conception of flexibility. It focuses on the micro-level decisions that states make when negotiating legally binding commitments, such as escape clauses and renegotiation provisions, to anticipate and respond to various types of future uncertainty.<sup>97</sup> This overlooks the fact that states have a much wider array of choices when creating a new institution, including whether to found it on a non-binding instrument or make its services or functions available upon request.

Second, rational design studies tend to view each institution as a freestanding entity whose delegated powers operate in isolation from other international bodies. Customizability, in contrast, foregrounds the relational aspects of new international mechanisms, in particular how informal institutions interact with pre-existing treaties and organizations in the same issue area whose mandates may be overlapping or potentially duplicative.

<sup>95</sup> The 2001 special issue of the journal *International Organization* on “The Rational Design of International Institutions” is the canonical authority. Koremenos, Lipson & Snidal, *supra* note 71.

<sup>96</sup> Barbara Koremenos, Charles Lipson & Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1052 (2001).

<sup>97</sup> Koremenos, Lipson & Snidal, *supra* note 71, at 773 (offering these examples to illustrate the “adaptive and transformative” flexibility provisions of binding multilateral treaties).

Third, rational design scholars seek to explain the structure of international institutions already in existence rather than those that could be established in the future. This creates a risk of “driving with the rear view mirror,”<sup>98</sup> that is, seeking to understand how institutions are designed by examining, after the fact, the fit between articulated objectives and achievements. At that later vantage point, however, it may be difficult to reconstruct the options that the creators considered.<sup>99</sup> In contrast, customizability’s *ex ante* perspective foregrounds the spectrum of potential choices to address gaps or shortcomings in existing organizations and treaties, and the tradeoffs among them.

## 2. Selectability

Selectability relates to the particular functions or services that states request once a new international institution is operational. At this later vantage point, the institution’s delegated authority has already been fixed (although it may later be expanded) and attention shifts to which of the body’s activities are activated and in what circumstances. Selectability is an attribute of flexibility because it allows a state to engage with only those functions or services that it views as beneficial. Selectability also recognizes that individual countries or groups of states may have variable preferences among these activities and that their preferences may change over time.

Defined in this way, flexibility bears some resemblance to variable geometry, plurilateral commitments, and *à la carte* multilateralism. In international trade, these terms describe arrangements in which a subset of states agree to commitments governing specific trade-related topics.<sup>100</sup> Similar approaches exist in other issue areas. In international criminal law, for example, state parties to the Rome Statute are free to recognize (or not) the ICC’s jurisdiction over the crime of aggression and, if so, with certain limitations. In the human rights context, member countries of a UN or regional treaty can decide whether to ratify an optional protocol or optional declaration committing to additional rights protections or delegating additional functions to an international court or monitoring body.

<sup>98</sup> Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, 55 INT’L ORG. 1019, 1020 (2001) (identifying alternatives “to the proposition that institutions are rationally chosen and to the proposition that they are designed”).

<sup>99</sup> Studies of the High-Level Political Forum (HLPF or Forum) on Sustainable Development illustrate this difficulty. Established by the UN Conference on Sustainable Development in 2012, the HLPF was given a capacious remit to follow up on all UN sustainable development goals. Yet despite its “dauntingly expansive mandate,” the Forum was given limited powers and few resources. Kenneth W. Abbott & Steven Bernstein, *The High-Level Political Forum on Sustainable Development: Orchestration by Default and Design*, 6 GLOB. POL’Y 222, 223 (2015).

Why would the HLPF’s founders structure the body in this way? According to some scholars, the Forum was created as an “orchestrator” that would operate indirectly through intermediaries using soft modes of influence. Other observers, in contrast, argue that the HLPF was “cynically designed to fail” because its proponents preferred “another talk shop” to an impactful mechanism that could meaningfully promote sustainable development. Marianne Beisheim & Filicita Fritzsche, *The UN High-Level Political Forum on Sustainable Development: An Orchestrator, More or Less?*, 13 GLOB. POL’Y 683, 684 (2022) (quotation omitted); see also Radoslav S. Dimitrov, *Empty Institutions in Global Environmental Politics*, 22 INT’L STUD. REV. 626 (2020). To assess these competing perspectives, one might investigate the details of how the Forum was created. Yet even observers involved in the negotiations offer mostly speculative accounts based on “hindsight” and by “infer[ring]” what states intended from the Forum’s unusual mandate. Abbott & Bernstein, *supra* note 99, at 224; see also *id.* at 223 (conceding that “[w]e have no evidence that negotiators actually used the term ‘orchestration’”).

<sup>100</sup> Bernard M. Hoekman & Petros C. Mavroidis, *WTO “à la carte” or “menu du jour”? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT’L L. 319 (2015).

Selectability differs from these concepts in at least two respects. First, variable geometry focuses on a decision by a group of states to accept international legal obligations that bind them on an ongoing basis. In contrast, selectability, as we define it, involves the ad hoc decision by one or more states to request an institution's assistance with addressing a particular legal problem or resolving a specific dispute. The state or states making such requests do so on a voluntary basis. They are not undertaking any binding or non-binding international commitments, although such commitments may be one outcome of the institution's facilitative efforts.

Second, plurilateral agreements are generally limited in subject matter. Selectability, in contrast, encompasses a wide ranges of services or functions that states can select on an individual basis or mix and match as needed. In addition, whereas variable geometry arrangements are housed under the umbrella of an existing multilateral organization or treaty, an institution characterized by selectability could either be linked to such entities or established as a freestanding body.

A few international institutions illustrate how selectability operates in practice. The most relevant example is the Permanent Court of Arbitration (PCA), established in 1899 following the first Hague Peace Conference to promote the "friendly settlement of international disputes."<sup>101</sup> In addition to providing numerous services relating to international arbitration, the PCA has evolved to offer an exceptionally broad range of other functions.<sup>102</sup> These include creating fact-finding commissions, supervising mass claims processes, providing mediation and conciliation services, and drafting rules and recommendations concerning environmental law disputes.<sup>103</sup> The PCA's dispute settlement services can also be accessed by a wide range of actors, including "any combination of states, international organizations, and private entities."<sup>104</sup>

Another example is the Advisory Centre on World Trade Organization (WTO) Law.<sup>105</sup> The Centre, which is economically and politically independent of the WTO, was created in 2001 to address concerns that developing and least developed country members of that organization lacked the legal expertise and financial means to participate meaningfully in the global trade regime. The Centre offers a variety of services to these states upon request, including assisting in WTO dispute settlement proceedings, issuing advisory opinions, and training government lawyers.<sup>106</sup> We discuss the distinctive manner in which the Centre is funded and staffed in great detail below.

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<sup>101</sup> Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1799. As this example illustrates, selectability can be a feature of formal institutions as well as informal ones.

<sup>102</sup> With regard to international arbitration, states have "called on the PCA to assist in drafting detailed procedural rules regarding matters such as evidence and confidentiality, the hearing of witnesses, the allocation and sharing of costs, and the publication of the award." Tjaco T. Van Den Hout, *Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes*, 21 LEIDEN J. INT'L L. 643, 654 (2008).

<sup>103</sup> See, e.g., Committee of Legal Advisers on Public International Law, *The Permanent Court of Arbitration – Background Information*, COUNCIL OF EUR. (Mar. 2007); Van Den Hout, *supra* note 102, at 655.

<sup>104</sup> Van Den Hout, *supra* note 102, at 647.

<sup>105</sup> Advisory Centre on WTO Law (ACWL), at <https://www.acwl.ch>.

<sup>106</sup> DAVID PALMETER, PETROS S. MAVROIDIS & NIALL MEAGHER, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION* 30–31 (3d ed. 2022).

The transnational asset recovery mechanism that we now analyze has high degrees of both customizability and flexibility. Although there is no precise model for such a body, this is not an impediment to our proposal. The growing number and diversity of informal and flexible institutions reveals that states have considerable experience in tailoring such bodies to their needs and circumstances. Our proposal offers a range of options for states to consider—both when creating the mechanism and after it is operational—that we believe will facilitate the return of stolen public assets, thus contributing to ongoing anti-corruption efforts in international law.

#### IV. THE PROPOSED TRANSNATIONAL ASSET RECOVERY MECHANISM

This Part begins by explaining the scope of our proposal for a transnational asset recovery mechanism, focusing on key provisions of UNCAC. We identify a range of substantive functions and services that states could delegate to the mechanism (customizability) and from which they could choose as needed once the mechanism is operational (selectability). The next Section discusses the mechanism's institutional features, including its potential legal basis, relationship to existing international anti-corruption organizations and treaties, as well as funding and staffing. A final Section reiterates the benefits of flexibility for the mechanism that we propose.

##### A. *Scope*

The proposed mechanism would focus primarily on the recovery of public funds that have been embezzled, misappropriated, or diverted; and embezzled, misappropriated, or diverted public funds that have been laundered.<sup>107</sup> For the sake of brevity, this Article refers only to “embezzled public funds,” which in practice are typically laundered. The mechanism might also assist with the repatriation of assets resulting from other corrupt acts in which states of origin do not have a clear ownership claim or where the legal basis for return is less well developed. In all, there are four different scenarios in which the mechanism could apply.

The first situation concerns mandatory returns of embezzled public funds. Two conditions, both set forth in Article 57 of UNCAC, must be met before a requested state party is obliged to return such funds to the state of origin. First, the confiscation must have been executed by the requested state in accordance with a request for international cooperation under Article 55 of UNCAC, which is a provision governing mutual legal assistance for the purpose of confiscation. The second condition requires a final judgment in the requesting state, such as a final determination following the criminal prosecution of a public official in that state.<sup>108</sup>

Taken together, these two conditions are narrow and thus limit the circumstances in which asset returns are required under international law. For example, the first condition would not be met where a destination state has confiscated proceeds as a result of its own domestic procedures in the absence of a request for confiscation by the state of origin.<sup>109</sup> The second

<sup>107</sup> UNCAC, *supra* note 1, Art. 17 (embezzlement, misappropriation, or other diversion), Art. 23 (money laundering).

<sup>108</sup> *Id.* Art. 57(3)(a). This provision stipulates that the requested state party may decide to waive this condition.

<sup>109</sup> Pinar Ölcer, *Article 57*, in *THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: A COMMENTARY* 527 (Cecily Rose, Michael Kubiciel & Oliver Landwehr eds., 2019).

condition would not be satisfied where criminal proceedings in the requesting state are still ongoing, are yet to be initiated, or have ended in a settlement rather than a judgment.<sup>110</sup> Even when both conditions are fulfilled, UNCAC does not require states parties to reach an agreement on the disposal or ultimate use of returned assets. Instead, the convention simply flags the possibility of such agreements,<sup>111</sup> creating a normative and institutional gap that the proposed mechanism could fill.

The second scenario relates to the large majority of instances in which the return of embezzled public funds is not obligatory. In such cases, UNCAC Article 57(3) requires only that destination countries “give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners, or compensating the victims of the crime.”<sup>112</sup> This provision gives destination states considerable leeway to negotiate customized MoUs or other agreements that include conditions and procedures relating to the repatriation, including whether funds are returned to the state of origin itself, to other “legitimate owners,” or to the victims of corruption offenses. The vast majority of return agreements appear to involve discretionary returns. The mechanism could facilitate the negotiation of such agreements by helping origin and destination states to resolve a number of controversial and practical issues that we discuss in greater detail below.

Third, the mechanism could extend the scope of its work to include the recovery of proceeds of other corruption offenses covered by UNCAC, such as bribery, trading in influence, abuse of functions, illicit enrichment, and private sector embezzlement.<sup>113</sup> The return of proceeds of these other corrupt acts will almost always be left to the discretion of the requested state. Although bribery and other similar offenses may cause significant harm to the requesting state, proceeds of bribery do not typically represent the funds or property of the requesting state. As a result, requesting states cannot demonstrate an “ownership claim” over the proceeds of bribery and other similar offenses, which therefore fall outside of the scope of UNCAC’s mandatory return provision.<sup>114</sup>

Lastly, the proposed mechanism could help to mediate between states where one government reaches a non-trial resolution with companies or individuals in foreign bribery cases.<sup>115</sup> Although the return or sharing of the settlement’s proceeds is not mandated by UNCAC or other anti-corruption treaties, the mechanism could facilitate agreements whereby the prosecuting state agrees to provide compensation for the damage caused to the state where the

<sup>110</sup> The requirement for a final judgment may, however, be waived by the requesting party. An interpretive note in the *travaux préparatoires* indicates that a requested state should consider such a waiver “where final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.” UNODC, TRAVAUX PRÉPARATOIRES OF THE NEGOTIATIONS FOR THE ELABORATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION 516 (2010).

<sup>111</sup> UNCAC, *supra* note 1, Art. 57(5) (“Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.”).

<sup>112</sup> *Id.* Art. 57(3)(c).

<sup>113</sup> *Id.* Arts. 15–16, 18–21

<sup>114</sup> *Id.* Art. 57(3)(b).

<sup>115</sup> Currently, governments only share the proceeds non-trial resolutions when multiple states coordinate a global settlement. See Elizabeth Acorn, *Law and Politics in FCPA Prosecutions of Foreign Corporations*, 17 REVISTA DIREITO GV 1, 13 (2021).

bribery occurred.<sup>116</sup> The mechanism could also potentially provide the expertise needed for the challenging task of quantifying the damage caused by corruption.

### *B. Functions and Services*

As we have explained, the transnational asset recovery mechanism would feature selectability, meaning that states would be free to pick and choose from among the range of tasks delegated to it. The range of services and functions that the mechanism offers must first be chosen by its creators, raising issues of customizability. The following Subsections discuss the mechanism's possible activities in the order of their innovativeness, beginning with the least ground-breaking and concluding with the most novel or potentially controversial. We also note where the mechanism's activities would overlap with those of existing international bodies, an issue that we discuss in greater detail in Part V.

#### *1. Convening Meetings and Conferences*

The proposed mechanism could convene bilateral or multilateral meetings or conferences concerning asset recovery and provide organizational or administrative support for such events convened by other actors. Bilateral meetings between origin and destination states may facilitate the negotiation of agreements concerning the return and disposal of confiscated assets. For example, at the 2017 GFAR, discussed above, over eighty bilateral and multilateral meetings were reportedly held between a few key destination states (Switzerland, the United Kingdom, and the United States) and a four states of origin (Nigeria, Sri Lanka, Tunisia, and Ukraine).<sup>117</sup> The large number of meetings held at this standalone conference suggests that there may be a demand for a mechanism that could facilitate such exchanges on an ad hoc or continuing basis and for a larger group of origin and destination states.

The proposed mechanism could also convene multilateral meetings for specific purposes, such as to facilitate information sharing among practitioners, exchange best practices, or to advance normative development in the asset recovery field. Within UNCAC, regular meetings of the Conference of States Parties and its subsidiary body, the Working Group on Asset Recovery, serve as fora for exchanging information and best practices concerning asset recovery. To date, however, normative development has not been a significant feature of their work.<sup>118</sup> In addition, the meetings of the UNCAC Review Mechanism and the Working Group on Asset Recovery have not been open to meaningful participation by civil society organizations active in the anti-corruption field,<sup>119</sup> notwithstanding the fact that UNCAC provides a basis for such participation.<sup>120</sup> In contrast, conferences and meetings hosted by the mechanism could include both states and non-state actors.

<sup>116</sup> ILA White Paper, *supra* note 35, at 21 (noting the need to harmonize enforcement mechanisms around non-trial resolutions).

<sup>117</sup> GFAR Communique, *supra* note 48.

<sup>118</sup> The Conference of States Parties holds biennial sessions and has held nine sessions thus far. The Working Group on Asset Recovery, which is a subsidiary body of the Conference of States Parties, holds annual sessions, and has held sixteen thus far.

<sup>119</sup> CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS: THEIR CREATION AND INFLUENCE ON DOMESTIC LEGAL SYSTEMS 53 (2015).

<sup>120</sup> UNCAC, *supra* note 1, Art. 13.

## 2. *Information Collection and Publication*

The proposed mechanism could gather and publish a wide range of information about asset recovery. This would include domestic asset recovery laws and regulations, mutual legal assistance treaties, written agreements providing for the return and disposal of recovered assets, and other information about asset recovery cases.

The collection and publication of MoUs and other agreements could be especially valuable given that many such agreements have not been published, are difficult to find, or are not available in a central location. The publication of these MoUs would promote the availability of information that could be useful to other states engaged in asset return negotiations. It could also allow practitioners and researchers to determine which agreements have not been made publicly available. This, in turn, could facilitate freedom of information requests and other efforts geared toward the release of unpublished agreements. The mechanism could also encourage states to publish such MoUs, preferably in their entirety but if necessary with redactions of confidential or sensitive information.

Heightened accessibility of existing asset recovery agreements could also encourage greater transparency in the future by helping to normalize the publication of asset recovery agreements as standard practice. Such a transparency-promoting function would be in keeping with Article 13 of UNCAC, which requires states parties to facilitate the “active participation of individuals and groups outside the public sector . . . in the prevention of and the fight against corruption . . .,” including through effective access to information.<sup>121</sup>

Several existing anti-corruption entities already collect, synthesize, and publish information about the implementation of UNCAC in general and asset recovery cases in particular. However, these efforts leave substantial room for improvement. For example, both the UNODC and StAR gather and publish information concerning asset recovery. UNODC maintains a platform known as TRACK (Tools and Resources for Anti-Corruption Knowledge), which assembles existing resources on the implementation of the convention, organized according to the structure of the treaty and by theme.<sup>122</sup> TRACK also hosts a Legal Library which provides some information about implementing legislation in most, but not all, UNCAC states parties.<sup>123</sup> The information contained in the Legal Library is neither complete nor up-to-date. In addition, although StAR, a joint initiative of the World Bank and UNODC, previously maintained an Asset Recovery Watch Database with information about ongoing and completed asset recovery efforts,<sup>124</sup> in recent years this database has been “temporarily disabled.”<sup>125</sup>

<sup>121</sup> *Id.* Art. 13(1)(b).

<sup>122</sup> UNODC, TRACK, at <https://track.unodc.org>. TRACK’s thematic areas include civil society, education and youth, environment, gender, international investment, private sector, public health, and sport.

<sup>123</sup> UNODC, TRACK Legal Library at <https://track.unodc.org/track/trackview/search.html#!/search>.

<sup>124</sup> Stolen Asset Recovery Initiative, *Asset Recovery Watch Database*, at <https://star.worldbank.org/asset-recovery-watch-database>.

<sup>125</sup> StAR, *Asset Recovery Watch Database*, at <https://star.worldbank.org/asset-recovery-watch-database>. A rudimentary excel spreadsheet remains accessible on the StAR website.



### 3. *Technical Assistance and Capacity Building*

The proposed mechanism could also support incipient or ongoing asset recovery efforts by providing technical assistance to states and by helping to build their domestic capacity. UNCAC addresses these issues, but does not create an entity that facilitates or centralizes such assistance. The convention requires states parties to train their own officials and to provide technical assistance to other parties, namely developing countries. However, these obligations are vague and leave much room for interpretation.<sup>126</sup> Moreover, the demand for technical assistance is very high and growing. The UNCAC review cycles have given rise to thousands of requests by states parties for technical assistance with respect to the chapters on prevention, criminalization and enforcement, international cooperation, and asset recovery.<sup>127</sup> The large number of outstanding requests suggests a strong need for an institution that could facilitate providing such assistance.<sup>128</sup>

The proposed mechanism could temporarily assign its officials to work with states of origin in government ministries engaged in efforts to recover the proceeds of corruption. Officials seconded to these ministries could, for example, provide assistance with respect to preventing the transfer of proceeds of corruption (including through anti-money laundering measures) as well as detecting and freezing such proceeds. Technical assistance could also take the form of training in drafting mutual legal assistance (MLA) agreements, and assistance with preparing MLA requests pursuant to those agreements and to UNCAC itself.

The successful completion of MLA requests by states of origin has special legal significance under UNCAC. As explained above, the absence of a successful request can make a return of stolen assets discretionary rather than mandatory. The need for technical assistance in this area is recognized and facilitated in the legislation of one major destination state, Switzerland. The Swiss Foreign Illicit Assets Act (2015) provides that the Swiss government may provide a country of origin with technical assistance in the form of training, legal advice, and the secondment of experts.<sup>129</sup> The envisaged transnational mechanism could institutionalize support for such technical assistance among a larger number of states, regardless of any pre-existing bilateral relationship between the state of origin and the destination state.

Technical assistance could also take the form of direct support by officials of the mechanism in the investigation and prosecution of corruption offenses, especially in states of origin. Even where the political will exists for anti-corruption investigations and prosecutions, such efforts may be thwarted by the legal and practical difficulties of obtaining and analyzing evidence, including complex financial documentation. Because of the inherently cross-border character of large-scale corruption cases that give rise to asset recovery efforts, MLA requests

<sup>126</sup> States parties must carry out domestic training programs “to the extent necessary.” UNCAC, *supra* note 1, Art. 60(1). The provision of technical assistance to parties, especially developing countries, is required “according to their capacity.” *Id.* Art. 60(2).

<sup>127</sup> The country review reports produced during the UNCAC review process record these requests for technical assistance. As of May 31, 2021, a total of 4,038 technical assistance needs had been identified through both review cycles, which cover UNCAC Chapters II–V. Implementation Review Group, Technical Assistance in Support of the Implementation of the United Nations Convention Against Corruption, Including an Analysis of the Responses to the Technical Assistance Needs Identified Through the Implementation Review Mechanism, para. 5, UN Doc. CAC/COSP/IRG/2021/CRP.1 (June 11, 2021).

<sup>128</sup> Garcia, *supra* note 27.

<sup>129</sup> Foreign Illicit Assets Act, Art. 12 (2015) (Switz.).

may often be necessary to obtain such evidence. Sending the mechanism's experienced investigators and prosecutors to states of origin would also facilitate both the enforcement of domestic anti-corruption laws and the eventual recovery of stolen assets.<sup>130</sup>

The mandates of several existing anti-corruption bodies include technical assistance, but the extent to which such help is actually provided appears to be limited. While StAR reportedly assists a number of countries each year, the details of such assistance have not been made public and appear to be on a small-scale.<sup>131</sup> The International Centre for Asset Recovery (ICAR), which is part of the Basel Institute on Governance, a Swiss non-profit organization,<sup>132</sup> provides training programs and help with specific asset recovery cases in countries with low levels of expertise, including assistance with intelligence gathering and analysis, asset tracing, investigation and prosecution strategies, and mutual legal assistance. However, it appears that ICAR's provision of technical assistance is also on a relatively limited scale.<sup>133</sup>

#### 4. Mediation

The mechanism could provide mediation services for states that encounter difficulties in negotiating or implementing agreements to return confiscated assets. Mediation may be useful where the return of assets is not mandated under UNCAC. The assistance of a mediator could be especially appropriate in cases where a significant power imbalance exists between requested and requesting states. Even when both states stand on relatively equal footing, asset returns often raise a host of issues in which legal, political, policy, and economic factors should be taken into account. Mediation could help to resolve such interdependent issues.

While parties to asset recovery proceedings are the most likely to use mediation services to facilitate returns, mediation might also be useful at an earlier stage in the process when parties are engaged in asset identification, tracing, freezing, or confiscation. Mediation could also be relied upon at a later stage if a disagreement relating to the interpretation or application of a MoU arises after assets have been returned. For example, a mediator could assist the parties in resolving disagreements about the recipients and uses of returned assets, as well as monitoring mechanisms and the inclusion of civil society.

Mediation could also be useful in the context of foreign bribery prosecutions. When a prosecuting state enters into non-trial resolutions with corporations or individuals, the settlement often involves multi-million dollar payments to the government that include disgorgement of profits, interest on those profits, legal costs, and criminal fines (among other remedies). Frictions can arise regarding which of these funds should be eligible for return to states of origin as well as how the funds should be allocated when a foreign bribery case involves multiple states. Mediation could help resolve these often contentious issues.

In order to facilitate mediation, the mechanism could maintain a list of qualified individuals who possess a high level of competence in anti-corruption law, asset recovery law, or non-

<sup>130</sup> We discuss the secondment of government experts to the mechanism in Section IV.C *infra*.

<sup>131</sup> In 2021, five countries received StAR support in order to improve international cooperation processes. Stolen Asset Recovery Initiative, at <https://star.worldbank.org>.

<sup>132</sup> Basel Institute on Governance, International Centre for Asset Recovery, at <https://baselgovernance.org/asset-recovery>.

<sup>133</sup> According to the website of the Basel Institute on Governance, ICAR currently provides assistance to 10+ countries, <https://baselgovernance.org/asset-recovery>.

legal aspects of asset recovery. This list could include government officials, although these individuals would serve in their individual capacities, and not as state representatives. High-level staff of the mechanism who possess the requisite expertise might also serve as mediators.

At present, mediation is not a feature of international asset recovery instruments or bodies. UNCAC includes a dispute settlement provision that refers to negotiation, arbitration, or adjudication before the International Court of Justice (ICJ), but it does not mention mediation. To date, only one case has been referred to the ICJ under the convention's compromissory clause: *Request Relating to the Return of Property in Criminal Proceedings (Equatorial Guinea v. France)*.<sup>134</sup> This recently filed proceeding appears to involve a situation in which the return of confiscated assets is discretionary rather than mandatory.<sup>135</sup> At the merits stage (should the case proceed that far), the ICJ will have limited competence to address the broader policy issues implicated by such discretionary asset returns. Mediation, rather than binding adjudication, would thus appear to be a more effective and less costly way to resolve the dispute between France and Equatorial Guinea.

### 5. *Monitoring of Returned Funds*

The mechanism could facilitate the monitoring of returns, with the aim of ensuring that the funds are not re-corrupted or used for purposes other than those agreed by the parties. The available MoUs on asset return suggest that monitoring or auditing is common, even though UNCAC omits any mention of such accountability mechanisms.<sup>136</sup> Monitoring may entail a periodic review of the disposal of returned funds, an assessment of whether the expenditures accord with the agreed uses of funds, and the preparation and publication of written reports. Monitoring bodies may be comprised of government officials of the state of origin and external actors, such as members of civil society or officials from international organizations such as development banks.

The proposed mechanism could provide various forms of assistance to give effect to the monitoring provisions in asset return agreements. It could, for example, embed its staff in an existing monitoring body or maintain a list of available experts to play such a role. Because monitoring involves auditing the entity tasked with the disposal of the funds, it would be appropriate for these individuals to have a background in accountancy or the other types of expertise mentioned above. The mechanism could also develop protocols and best practices to guide the work of other monitoring entities. At present, monitoring

<sup>134</sup> *Request Relating to the Return of Property in Criminal Proceedings (Eq. Guinea v. Fr.)*, Application, (Int'l Ct. Just. Sept. 29, 2022), at <https://www.icj-cij.org/public/files/case-related/184/184-20220930-APP-01-00-FR.pdf>.

<sup>135</sup> Equatorial Guinea does not appear to have met the requirements for mandatory return under Article 57 because it has not prosecuted the corrupt conduct at issue in its own jurisdiction.

<sup>136</sup> *See, e.g.*, Agreement Between the Swiss Confederation and the Republic of Uzbekistan on the Modalities for the Return of Illegally Acquired Assets Forfeited in the Swiss Confederation to the Benefit of the Population of the Republic of Uzbekistan, Art. 7 (2022). Memorandum of Understanding Between the United Kingdom and Nigeria on the Modalities for Return of Stolen Assets Confiscated by the United Kingdom, Annex 1, paras. 16–33 (Mar. 2021); Amended Memorandum of Understanding Among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan, Sec. 3.10 (2008).

bodies do not appear to benefit from such institutional support, although the World Bank has been involved in some monitoring.<sup>137</sup>

### 6. *Applicable Law and Norm Development*

Several functions that the mechanism could perform raise issues concerning applicable law and the development of new legal norms. Such issues could arise, for example, if the body were to offer legal or technical support regarding the implementation of anti-corruption treaties and the drafting of MLA agreements or if it were to offer mediation services to states negotiating asset return agreements.

In these contexts, UNCAC's asset recovery chapter provides an important legal backdrop. Given the convention's nearly universal membership and the hard-fought compromises it embodies, both origin and destination states are highly unlikely to deviate from that chapter where the treaty requires particular conduct. As explained above, however, UNCAC Article 57, which governs the return of assets, makes return mandatory only in a narrow set of circumstances. For the vast majority of cases in which return is discretionary, states are free to negotiate a customized return agreement that sets out the applicable laws or norms for the purposes of that return. In addition to facilitating the negotiation of such agreements as part of its technical assistance and mediation services, the mechanism could be asked to help resolve disputes relating to the agreements, which, in turn, might involve interpreting its provisions.

The experience that the mechanism would gain from these activities could deepen its expertise and ultimately facilitate the development of new international norms on asset recovery, thereby helping to close gaps in UNCAC and other anti-corruption treaties. These gaps are extensive and go well beyond the question of whether to impose conditions on the use and monitoring of returned assets. For example, UNCAC Article 54, which regulates freezing, seizure, and confiscation, does not require early, proactive measures by states parties, although the Working Group on Asset Recovery now considers such measures to be good practices.<sup>138</sup> In addition, the convention does not adequately address whether and under what conditions prosecuting states should return proceeds from the resolution of foreign bribery prosecutions or which types of remedies are appropriate. Given the large sums often involved in foreign bribery prosecutions, this could be an important area for future norm development.

Efforts to address these issues have made only limited progress in the more formal existing institutions of the international anti-corruption regime. For example, although the mandate of the Working Group on Asset Recovery allows it to produce normative guidance, norm development has not been a significant feature of its work. The Working Group has not generated any norms on transnational asset returns and cannot be expected to do so until after the UNCAC Review Mechanism completes its second review phase in 2025. There also have been initiatives by states, civil society, and international organizations operating outside of the UNCAC framework to supplement existing treaty rules. The GFAR Principles for

<sup>137</sup> Amended Memorandum of Understanding Among the Governments of the United States of America, the Swiss Confederation, and the Republic of Kazakhstan, *supra* note 135.

<sup>138</sup> Conference of States Parties to the UNCAC, Implementation of Chapter V (Asset Recovery) of the United Nations Convention Against Corruption: Thematic Report Prepared by the Secretariat, at 5, UN Doc. CAC/COSP/2021/6 (Oct. 11, 2021).

Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases, discussed above, are a prominent example of a state-led effort to highlight the importance of cooperation, transparency, inclusiveness, and accountability in asset return.<sup>139</sup> However, the principles lack detail and cannot be regarded as the final word on this subject.

The proposed mechanism would provide an additional venue for consolidating and potentially expanding these norm development initiatives. Working with actors across the international anti-corruption regime, the mechanism could assist with the drafting of best practices or non-binding principles that provide guidance to states engaged in asset recovery. These soft law standards might eventually provide a foundation for negotiating a new protocol to UNCAC that would codify these norms.

### 7. *Escrow Account*

The maintenance of an escrow account for confiscated funds, as well as funds related to non-trial resolutions in foreign bribery cases, would be the one of the mechanism's most novel and innovative functions. When a destination state confiscates assets, the liquidated proceeds are typically absorbed by the treasury of that state or another government account.<sup>140</sup> The destination state retains the assets while it and the state of origin negotiate their return. The proposed mechanism would create another approach. After confiscating the assets (and liquidating them if necessary), the destination state would transfer the proceeds to an escrow account held by the transnational mechanism, where they would remain until the assets are returned to the state of origin. In the case of non-trial resolutions in foreign bribery cases, the escrow account could potentially be used to hold disgorged profits, interest on those profits, or criminal fines.

Given that the return of confiscated assets may often be the subject of difficult, politically sensitive negotiations, such assets should arguably be held in the escrow account of a neutral third party such as the transnational mechanism until a resolution is achieved. An escrow account could also help to address concerns raised by some states of origin and civil society groups that destination countries stand to benefit financially from confiscated assets, and thus have little incentive to negotiate for their return in a timely or satisfactory manner. If confiscated assets were routinely transferred by destination states to such an escrow account, the transnational mechanism could play an important role in reducing the perception that destination states are, in effect, profiting by confiscating the proceeds of corruption. Even in the absence of routine transfers, individual destination countries could make a showing of good faith by transferring funds to the escrow account, thereby facilitating negotiations for their eventual return.

UNCAC does not provide for the creation of an escrow account, although it does reference a "United Nations funding mechanism" that receives voluntary contributions to provide technical assistance to developing states and countries with economies in transition.<sup>141</sup> In practice, this funding mechanism has taken the form of the UN Crime Prevention and Criminal Justice Fund (CPCJF), which pre-dates UNCAC and also receives funds for the implementation of UNTOC. The extent of the contributions to the CPCJF for technical assistance remains

<sup>139</sup> GFAR Principles, *supra* note 49.

<sup>140</sup> BRUN, SOTHIROPOULOU, GRAY, SCOTT & STEPHENSON, *supra* note 59, at 200.

<sup>141</sup> UNCAC, *supra* note 1, Art. 62(2)(c).

unclear, but in recent years it has funded relatively small projects to promote the implementation of UNCAC.<sup>142</sup> Given the limited scope of these initiatives, the prospect of housing an escrow account within the CPCJF appears unlikely, at least in the near term.

An escrow account would test the limits of domestic legislation in many UNCAC states parties. If the proposed mechanism were to maintain a standing escrow account, many states would likely need to enact legislation to authorize the government to transfer proceeds to that account. In some states, however, the executive might be able to authorize such transfers on an ad hoc basis without the enactment of new legislation. The diversity of state practice in this area provides another justification for the selectable character of the proposed mechanism.

The creation of an escrow account would represent a major innovation in the area of transnational asset recovery, but it would not be unprecedented in public international law. A significant number of international institutions have created escrow accounts, including international tribunals that maintain such accounts to facilitate compensation at the conclusion of proceedings.<sup>143</sup> Escrow accounts have also been maintained by various entities responsible for mass compensation programs.<sup>144</sup> Given the large sums involved in many asset recovery cases, and the degree of controversy that surrounds returns, the asset recovery field is arguably ready for the creation of such an escrow account.

### C. Institutional Features

The substantive services and functions that the mechanism offers is just one dimension of the choices facing the founders of this new body. This Section reviews the customizability of the mechanism's institutional features, including its legal basis, relationship to existing treaties and organizations in the international anti-corruption regime, as well as funding and staffing.

#### 1. Legal Basis

All international institutions require some legal basis for their existence. A common approach is to establish such bodies when negotiating multilateral treaties that set forth new substantive legal obligations. The UNCAC Review Mechanism is a prominent example in the anti-corruption context. International bodies can also be created or given additional authority in protocols or amendments to such treaties. The activities that such bodies can perform are often specified in detail in these instruments. This need not be the case, however. The services of the UN secretary-general, for example, have evolved through practice to include a range of selectable services not expressly indicated in the UN Charter. These include good offices, mediation, facilitation, and arbitration.<sup>145</sup>

<sup>142</sup> UNOV/UNODC, Call for Proposals: Guidelines for Grant Applicants (2020) (provided for grants not exceeding \$15,000); UNOV/UNODC, Call for Proposals: Guidelines for Grant Applicants (2020) (providing for grants not exceeding \$10,000).

<sup>143</sup> Judicial institutions that currently maintain (or have the capacity to maintain) escrow accounts include the International Criminal Court; the Extraordinary African Chambers; International Chamber of Commerce International Court of Arbitration; International Centre for Settlement of Investment Disputes; and the Iran-United States Claims Tribunal.

<sup>144</sup> See, e.g., International Oil Pollution Compensation Funds; German Forced Labour Compensation Programme Fund; Claims Resolution Tribunal for Dormant Accounts in Switzerland.

<sup>145</sup> See, e.g., Sara Hellmüller & Martin Wählisch, *Reflecting About the Past, Present, and Future of UN Mediation*, 27 INT'L NEGOTIATION 1 (2022); B. G. Ramcharan, *The Good Offices of the United Nations Secretary-General in the Field of Human Rights*, 76 AJIL 130 (1982).

A very different pathway would involve a soft law or ad hoc arrangement. The recent turn to non-binding norms and softer institutions, discussed in Part III, underscores the advantages of informality and flexibility for a policy domain, such as the international anti-corruption regime, that is already comprised of several formal international organizations and binding multilateral treaties.<sup>146</sup> The Financial Action Task Force (FATF) is a prominent example.<sup>147</sup> The FATF was established in 1989 by the Group of Seven (G7) on the basis of a succession of temporary mandates that have a political rather than a legal character.<sup>148</sup> It has since become a global standard setter of anti-money laundering norms. The FATF's most recent mandate, adopted in 2019, provides that it is not intended to create any rights or obligations, unlike the constitutive instruments of formal international organizations.<sup>149</sup>

When choosing the legal basis for a transnational asset recovery mechanism, time is an important consideration. Negotiating a new multilateral treaty or a protocol to UNCAC is likely to require several years at least, which would be followed by a slow and uncertain state-by-state ratification process.<sup>150</sup> It may also be difficult for states to agree on the mechanism's substantive functions and services, especially given the controversies involved in negotiating UNCAC's asset recovery chapter. Agreement might be easier to achieve in regional anti-corruption treaties due to their smaller number of states parties. However, the parties to those conventions consist mainly of either states of origin or destination countries (but not both), and the treaties lack significant provisions on asset recovery. These issues would likely complicate and extend the negotiations.

A non-binding, ad hoc approach, in contrast, could enable a group of like-minded states to create a transnational mechanism more quickly to provide "proof of concept" to countries that are skeptical of its benefits. Such a body would ideally be supported by a few key destination countries as well as several states of origin, even if their governments did not select any of the mechanism's services in the short term. Backing from both groups of countries would be easier to achieve if the mechanism were given a limited temporal and subject matter mandate,<sup>151</sup> or if the assistance it provides were limited to the less novel functions analyzed above. If the mechanism were to achieve a few early and well-publicized successes in these areas, this might provide additional support among states for expanding its competences or establishing the body on a permanent basis.

<sup>146</sup> According to some scholars, the anti-corruption treaties, organizations, and institutions together comprise a "regime complex." James Horner, *Mapping and Evaluating the Regime Complex for Bribery* (Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 44/2017), available at <https://ssrn.com/abstract=3020638>; see also Makiko Nishitani, *Collaborative Orchestration in Polycentric Global Governance for the Fight Against Corruption*, 26 J. INT'L COOPERATION STUD. 41 (2018).

<sup>147</sup> The OECD has also recently adopted recommendations and guidance to supplement and update the 1997 Anti-Bribery Convention. See, e.g., OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, esp. XVI, XIX (Nov. 26, 2021) (concerning recovering the proceeds of foreign bribery).

<sup>148</sup> ROSE, *supra* note 119, at 183–86.

<sup>149</sup> Financial Action Task Force, Mandate, para. 48 (Apr. 12, 2019), at <https://www.fatf-gafi.org/media/fatf/content/images/FATF-Ministerial-Declaration-Mandate.pdf>.

<sup>150</sup> The negotiation of UNCAC lasted three years, which many consider to be a quite rapid timetable. Whether the same speed could be achieved for a treaty establishing a transnational asset recovery mechanism is unknown.

<sup>151</sup> The body could, for example, be created for a specified term of years, after which its continuation would require an affirmative vote of some or all supporting states. Alternatively, renewal could be made automatic unless supporting states decided to discontinue the mechanism.

## 2. Affiliation

Our proposal also raises issues about the mechanism's affiliation. If, for example, the body were established by states parties to UNCAC, it would logically be housed within the UNODC, whose Secretariat also serves UNCAC. The mechanism could instead be located within other multilateral organizations that include an anti-corruption mandate, such as the OECD. Alternatively, the institution could be created as a freestanding body with no formal connection to any existing organization or treaty. We consider these options below, exploring their respective benefits and disadvantages.<sup>152</sup>

UNCAC provides the authority for establishing the institution we propose. The convention's Conference of States Parties can create "any appropriate mechanism or body to assist in the effective implementation of" the treaty and "acquir[e] the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so . . ."<sup>153</sup> This text, which provided the legal basis for the UNCAC Review Mechanism,<sup>154</sup> could support either creating a new transnational asset recovery institution or expanding or transforming the Review Mechanism's mandate to encompass the asset recovery functions and services described above.<sup>155</sup>

Whether the political will exists for these alternatives is uncertain. Treaty monitoring is common in other areas of international law but relatively unusual for transnational criminal law conventions. The UNCAC Review Mechanism is "the exception rather than the norm" for such treaties.<sup>156</sup> On the other hand, the mechanism's selectability feature means that its functions and services would be available to states as desired, unlike existing peer review processes.

A key advantage of formally associating the new mechanism with UNCAC would be coordination with existing UNCAC bodies working on asset return issues. These include, most notably, the Open-Ended Intergovernmental Working Group on Asset Recovery. Since its creation by the Conference of States Parties in 2006 shortly after UNCAC's entry into force, the Working Group has emphasized three tasks: "(a) developing cumulative knowledge; (b) building confidence and trust between requesting and requested States; and (c) technical assistance, training and capacity-building."<sup>157</sup> However, a 2022 report suggests that the Working Group has made slow progress during the last fifteen years, focusing on awareness

<sup>152</sup> The mechanism could be separate from UNCAC but housed within UNODC's Corruption and Economic Crimes Branch, though this is unlikely in practice. The proposed mechanism could also be connected to StAR, a joint initiative of UNODC and the World Bank.

<sup>153</sup> UNCAC, *supra* note 1, Arts. 63(5), (7).

<sup>154</sup> The UNCAC Review Mechanism also served as a template for the substantially weaker peer review process created by states parties to UNTOC. Cecily Rose, *The Creation of a Review Mechanism for the UN Convention Against Transnational Organized Crime and Its Protocols*, 114 AJIL 51, 66 (2020).

<sup>155</sup> The future mandate of the UNCAC Review Mechanism, after it completes its current review cycle in 2025, is currently being discussed by states parties. Implementation Review Group, Performance of the Mechanism for the Review of Implementation of the United Nations Convention Against Corruption, and the Measures Required for the Completion of Its First Phase, as Well as Initial Considerations Regarding the Next Phase of the Mechanism, UN Doc. CAC/COSP/IRG/2022/CRP.2 (Aug. 12, 2022).

<sup>156</sup> Rose, *supra* note 154, at 65.

<sup>157</sup> Conference of the States Parties to UNCAC, Progress in Implementing the Mandates of the Open-Ended Intergovernmental Working Group on Asset Recovery, para. 5, UN Doc. CAC/COSP/WG.2/2022/2 (Aug. 18, 2022), at <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2022-November-7-11/CAC-COSP-WG.2-2002-2/2211040E.pdf>.



raising, promotional efforts, and generalized calls for cooperation and dialogue. The report does not refer to any concrete examples of asset returns, nor does it mention any of the MoUs referenced in this Article. The Working Group's normative development efforts have also been limited, resulting in a brief set of non-binding guidelines on the management of seized, frozen, and confiscated assets in a domestic rather than a transnational context.<sup>158</sup>

The Working Group's cautious approach could be a benefit or an impediment to linking the mechanism to UNCAC. On the one hand, it could ground the new body in political reality, reflecting states parties' limited appetite for bolder asset recovery efforts. Yet, circumspection is already built into the mechanism's task-specific design. Situating the mechanism in a milieu that is overly restrained may inhibit the new body from offering creative solutions to more challenging or contentious issues—such as monitoring of returned assets—even where governments seek out such assistance.

The OECD provides a second potential institutional home for the mechanism. The OECD serves as the forum for the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention)—a significant and influential anti-bribery treaty aimed at individuals and firms engaged in cross-border commerce.<sup>159</sup> The convention has entered into force for all thirty-eight OECD members as well as six non-members. The organization is also home to the OECD Working Group on Bribery, which monitors and reviews implementation and enforcement of the convention. Unlike the UNCAC Review Mechanism, the Working Group's reports can be quite critical of states parties. The Working Group also develops recommendations and guidance that complement and further develop the convention.

An advantage of locating the mechanism within the OECD is that the organization has a relatively small membership that includes most major destination states that might use the mechanism to return assets. This could help build support among destination countries. The OECD could also be useful in ensuring that the mechanism's procedures are aligned with destination states' national asset confiscation and return laws. In addition, the organization's relatively small size might allow negotiations to proceed more rapidly than in the context of UNCAC and UNODC. Over time, the OECD Working Group on Bribery might use its influence to encourage states parties to the OECD Anti-Bribery Convention to work with the mechanism to return more assets to states of origin, which might include not only the proceeds of embezzlement and but also funds received from foreign bribery prosecutions in national courts.

The primary disadvantages of the OECD as a venue are its lack of expertise in asset recovery and its potential to favor the interests of destination countries. The OECD Anti-Bribery Convention does not address asset recovery. In addition, because many prominent destination states are OECD members, there may be a concern that the proposed mechanism would be biased against states of origin. However, the OECD's membership also includes states that might seek the return of assets, and their participation could mitigate this concern. For example, several government officials in Colombia engaged in corrupt dealings with Odebrecht, a

<sup>158</sup> Working Group on Asset Recovery, Revised Draft Non-binding Guidelines on the Management of Frozen, Seized and Confiscated Assets, UN Doc. CAC/COSP/WG.2/2019/3 (Mar. 21, 2019). The 2019 revised version of the guidelines appears to remain in draft form.

<sup>159</sup> See Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1658–67 (2017).

Brazilian construction firm, which later resolved bribery charges through a non-trial resolution with the United States, Brazil, and Switzerland.<sup>160</sup> If similar cases arose in the future, then an injured OECD member could seek the return of assets associated with foreign bribery prosecutions.

A third approach would be to create a freestanding transnational mechanism not formally linked to any existing treaty or international organization in the anti-corruption regime. Such detached bodies have arisen in at least two circumstances. The first is when a group of like-minded countries seeks to jumpstart cooperation in a particular issue area, especially when earlier initiatives in the same policy space have fizzled. The decision of twenty-three states to move forward with the General Agreement on Tariffs and Trade (GATT) following the failure to establish the International Trade Organization is among the most well-known examples.<sup>161</sup>

Freestanding international bodies also arise when existing organizations respond poorly to new challenges. For instance, trenchant criticisms of the World Health Organization's slow and inadequate efforts to combat HIV/AIDS, the Ebola outbreak in West Africa, and the COVID-19 pandemic led to the creation of new and more flexible multi-stakeholder initiatives, such as the Joint United Nations Programme on HIV/AIDS and the Global Alliance for Vaccines and Immunization.<sup>162</sup> The climate change regime has similarly seen the rapid growth of new "organizational forms—from informal intergovernmental institutions to transgovernmental networks and private transnational regulatory organizations. . . ."<sup>163</sup> As discussed in Part III, such bodies benefit from "flexibility and low entry costs, which allow them to enter 'niches' with limited resource competition."<sup>164</sup> They are also more open to participation and influence by non-state actors. However, a freestanding body would lack the advantages of a formal organization, including privileges and immunities for itself and its staff as well as recognition and observer status in other intergovernmental organizations.<sup>165</sup>

These examples suggest several reasons to create a freestanding transborder asset recovery mechanism. Decoupling the mechanism from existing anti-corruption treaties and organizations may be appealing if the main proponents are a subset of UNCAC members whose preferences for a more robust approach to asset recovery exceed those of states parties as a whole. A freestanding body could also be attractive if a small number of countries (likely destination states) provide the lion's share of financing for the body—a possibility we consider below. Lastly, a bespoke mechanism would likely be preferable if the body were to give a prominent role to civil society. As explained above, states parties to UNCAC have been wary of expanding the role of civil society organizations in treaty monitoring.

To be sure, a freestanding body would not operate in isolation. As a new addition to an already dense policy space, there would be important benefits to learning from and

<sup>160</sup> Nicolás Campos, Eduardo Engel, Ronald D. Fischer & Alexander Galetovic, *The Ways of Corruption in Infrastructure: Lessons from the Odebrecht Case*, 35 J. ECON. PERSP. 171, 174–81 (2021).

<sup>161</sup> See, e.g., ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* 51 (1975).

<sup>162</sup> See, e.g., Ilona Kickbusch, *Global Health Governance Challenges 2016: Are We Ready?*, 5 INT'L J. HEALTH POL'Y & MGMT. 349 (2016); MICHAEL MERSON & STEPHEN INRIG, *THE AIDS PANDEMIC: SEARCHING FOR A GLOBAL RESPONSE* (2018).

<sup>163</sup> See, e.g., Kenneth W. Abbott, Jessica F. Green & Robert O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, 70 INT'L ORG. 247, 271 (2016).

<sup>164</sup> *Id.* at 247.

<sup>165</sup> Daugirdas & Linos, *supra* note 77, at 227–33.

cooperating with existing anti-corruption institutions. Such interactions would also help to avoid unnecessary duplication of effort and fragmentation of international norms. Yet, a body that is formally decoupled from these institutions may be able to chart a more independent course, enhancing interstate cooperation relating to asset returns beyond what existing bodies have accomplished.

### 3. *Funding and Staffing*

Customizability and selectability are also relevant to the funding and staffing of the transnational asset recovery mechanism. We anticipate that the institution would begin modestly in response to requests from states for specific types of assistance and (hopefully) prove its value over time. The mechanism would therefore need sufficient funds to carry out the functions and services that states initially delegate to it, and to hire or contract with individuals who have the requisite legal and technical expertise to respond to their requests. Yet, funding and staffing choices should also allow sufficient flexibility for the body to shift focus if circumstances require.

Most international organizations are funded from three sources: assessed contributions (dues paid by member states); self-funding (such as fees for services or interest on loans); and donations (from member and non-member states and the private sector).<sup>166</sup> The precise mix of financing varies considerably across organizations. The individuals who carry out the institutions' activities are also highly diverse. They include permanent staff, outside consultants, employees seconded from governments, and gratis personnel provided "for free" by member states, international organizations or NGOs.<sup>167</sup>

Customizing the funding and staffing of the asset recovery mechanism from among these options raises a number of challenges. For example, financing the body from a special contribution from UNCAC states parties may face opposition. The UNCAC Review Mechanism and Secretariat are funded by the regular UN budget,<sup>168</sup> and governments may be skeptical of allocating additional resources to a new and untested body that some of them may never use. For similar reasons, there would likely be resistance to hiring a large staff, especially on a permanent basis. Yet, it would be equally problematic to expect states seeking assistance from the mechanism to pay for all of the costs of its services, especially less well-resourced countries in the Global South. Nor would it make sense to defer hiring any personnel or contracting with outside experts until after the mechanism receives its first request for assistance.

One way to address these challenges would be for a core group of founding donor states—likely industrialized countries that include key destination states—to make voluntary financial contributions to provide a "startup fund" for the mechanism to begin operations. These funds would enable the body to hire a small cadre of permanent staff whose initial tasks could include canvassing states and civil society organizations about the types of services that are

<sup>166</sup> Jacob Katz Cogan, *Financing and Budgets*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS* 904 (Jacob Katz Cogan, Ian Hurd & Ian Johnstone eds., 2016); Thordis Ingadóttir, *Financing International Institutions*, in *RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS* 609, 634–44 (Jan Klabbers, Erik Castrén & Åsa Wallendahl eds., 2012).

<sup>167</sup> HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 374 (6th ed. 2018).

<sup>168</sup> Terms of Reference of the Mechanism for the Review of Implementation of the United Nations Convention Against Corruption, para. 54 (2009). However, country visits are funded through voluntary contributions. *Id.*, para. 55.

needed and identifying lawyers, financial analysts, and other anti-corruption experts to provide those services. Additional funding could be provided by modest annual dues from members (if states must become members of the mechanism to access its services) or fees from states that seek its assistance (if the mechanism is open to all UNCAC states parties, for example). Both charges could be scaled to a country's level of economic development or capacity to pay. The permanent staff could remain quite small, even if the mechanism were to expand its functions, if the body were to rely primarily on consultants or outside experts to provide the services that states request.

The funding and staffing of the Advisory Centre on WTO Law (ACWL)—an international institution introduced in the discussion of selectability in Part III—offers a potential model for the asset recovery mechanism. As previously noted, the Centre has a tripartite mandate: to assist least developed countries in WTO dispute settlement proceedings; to provide legal advice when requested; and to train government lawyers on WTO law. Since its creation in 2001, the ACWL has provided legal support to developing and least developed countries in sixty-eight different WTO disputes. It has issued more than 3,100 advisory opinions on global trade law and conducted numerous seminars and training sessions.<sup>169</sup> The Centre is viewed highly favorably by client states, according to annual surveys,<sup>170</sup> and its achievements have been cited as a model for creating a similar legal assistance mechanism for investment treaties and investor-state dispute settlement.<sup>171</sup>

The bulk of the funding for the ACWL comes from its twelve developed country members, each of which has contributed at least U.S. \$1 million toward its operations.<sup>172</sup> The Centre's annual budget is comprised of “revenues from the Centre's endowment fund, the fees for services rendered by the Centre and any voluntary contributions made by governments, international organisations or private sponsors.”<sup>173</sup> Both developed and developing country members (but not least developed states) contribute to the endowment fund, the latter contributions varying with each country's share of world trade and income per capita.<sup>174</sup> The ACWL also charges hourly fees to governments that utilize its services. These fees are significantly lower than those of commercial law firms and are set on a sliding scale depending on a state's development status.

The Centre's organizational structure is comprised of a General Assembly of member state representatives, a six-person Management Board, and an executive director. A small permanent staff consists of a dozen full-time lawyers, three office administrators, and four lawyers temporarily seconded from developing country governments.<sup>175</sup> The Centre hires external experts for complex WTO disputes and legal opinions, paying for their services from a

<sup>169</sup> ACWL, *The ACWL at 20 (2001–2021)*, at 8 (Nov. 5, 2021), at <https://www.acwl.ch/report-on-the-acwl-at-20-2001-2021-available>.

<sup>170</sup> *Id.* at 19.

<sup>171</sup> Robert W. Schwieder, *Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO Law and Investment Experiences*, 19 J. WORLD INV. & TRADE 628, 630 (2017).

<sup>172</sup> ACWL, *Organisational Structure*, at [www.acwl.ch/organisational-structure](https://www.acwl.ch/organisational-structure). Three states—the Netherlands, Norway, and the United Kingdom—provided early pledges of financial support.

<sup>173</sup> Agreement Establishing the Advisory Centre on WTO Law, Art. 5.3, 2299 UNTS 249 (*adopted* Nov. 13, 1999). Currently, thirty-nine developing and a dozen developed nations are parties to the treaty.

<sup>174</sup> ACWL, *supra* note 172 (section on “financial matters”).

<sup>175</sup> ACWL, *supra* note 169, at 7.

Technical Expertise Trust Fund financed by voluntary contributions from developed country members.<sup>176</sup>

The ACWL assists only certain states—developing and least developed WTO members—and provides a relatively limited set of services—legal assistance relating to international trade law and WTO dispute settlement. The transnational asset recovery mechanism would be more capacious, both in terms of its client states and the functions it would perform. It would thus be necessary to adapt the ACWL’s funding and staffing choices to the mechanism’s distinctive activities and institutional structure.

For example, the sliding scale of fees charged to client states could reflect the fact that the mechanism would be available to (and hopefully used by) both industrialized and developing countries, and that some of its services would require more time, expense, or expertise than others. The mechanism might also seek to avoid the financial challenges that the ACWL has faced.<sup>177</sup> For example, if wealthier destination states regularly seek the mechanism’s services, their fees could provide a steady source of funds. An additional source of revenue might be generated from the interest on funds deposited by destination countries in the mechanism’s escrow account (if one is created) pending the negotiation of a return agreement with the state of origin.<sup>178</sup> Although developing countries have strongly resisted imposing conditions on the repatriation of embezzled funds, such opposition may diminish if the interest on those funds is paid to an international body that facilitates asset returns to those same countries. This is especially true if the interest would otherwise be retained by destination states.

#### *D. Assessing the Advantages of Flexibility for a Transnational Asset Recovery Mechanism*

We have reviewed the major issues—scope, functions and services, and institutional features—that would be relevant to creating a new transnational mechanism to facilitate the return of embezzled public assets from destination states to states of origin. As we have explained, the mechanism would be characterized by customizability (including identifying *ex ante* the substantive services and functions that the mechanism could provide and its relationship to existing institutions in the international anti-corruption regime) and selectability (meaning that states would be free to pick and choose from among the range of functions and services that the mechanism offers). The mechanism’s effectiveness in facilitating asset returns—and in developing international norms and practices relating to such returns—would thus depend on its legal and technical expertise, neutrality, and the quality of the assistance that it provides.

Part II explained that origin and destination states share a common goal of returning purloined assets, yet their interests often diverge over the manner and modalities of return. The

<sup>176</sup> ACWL, *Technical Expertise Fund*, at <https://www.acwl.ch/technical-expertise-fund>.

<sup>177</sup> The founding states envisioned that the ACWL would become financially self-sustaining after five years, drawing on income from the Endowment Fund and legal fees. This has not occurred, however, “largely because the ACWL was much more successful than anticipated” and hired additional trade lawyers to meet the demand for its services. Niall Meagher, *Representing Developing Countries Before the WTO: The Role of the Advisory Centre on WTO Law (ACWL)*, at 5–6 (2015), at <https://cadmus.eui.eu/handle/1814/35747>. The Centre thus continues to rely on voluntary donations from a small number of developed countries. Otto Genee, *Funding a Global Public Good*, 16 *GLOB. TRADE & CUSTOMS J.* 501, 503–05 (2021).

<sup>178</sup> In the United States, lawyers holding small amounts of clients’ funds deposit the funds in pooled trust accounts. The interest from the accounts pays for civil legal aid or other charitable causes. See Margaret Y.K. Woo, Connor Cox & Sarah Rosen, *Access to Civil Justice*, 70 *AM. J. COMP. L.* 1, 12–19 (2022).

nature and scope of that divergence is likely to vary, with individual countries or pairings of states seeking different types of assistance in different contexts. A related problem is uncertainty. Officials in destination states may have limited experience working with government agencies in states of origin over asset returns. This creates trust and knowledge gaps relating to a variety of country-specific issues, such as whether a particular agency is a reliable partner or whether a non-governmental recipient of funds is both politically acceptable to the origin state and a low risk for re-corruption. A flexible institution would be well positioned to address both of these issues, helping to overcome the impediments that have hampered asset repatriation efforts in the past.

We recognize that the mechanism's flexibility entails potential tradeoffs. For example, some states may ratify an instrument establishing the mechanism or otherwise support its creation, but then refrain from using its services, limiting its effectiveness.<sup>179</sup> The mechanism would also be unable to generate binding international norms to close gaps in existing asset recovery rules, even after it has identified best practices that would support such normative development. Nor could the body mandate government cooperation relating to anti-corruption prosecutions, such as evidence sharing or the arrest and transfer of suspects.

On balance, however, we believe that a flexible mechanism will be more effective in facilitating asset returns than a formal one. It can better respond to the variable preferences of origin and destination states and address the country-specific uncertainties and obstacles common to asset recovery. Precisely because states can select the functions and services that meet their needs, whether individually or bilaterally, they may be more willing to use the mechanism, including its mediation of asset return negotiations.<sup>180</sup>

## V. POTENTIAL OBJECTIONS AND CONCERNS

This Part addresses three potential counterarguments to the creation of a transnational asset recovery mechanism. The first objection is that the proposed mechanism would favor the preferences of more politically and economically powerful destination states over states of origin, most of which are developing countries. A second concern relates to the legitimacy of norm development by the proposed mechanism. The third objection is that the mechanism's modest goals would not justify the political capital or resources needed to create it.

We provide a preliminary rather than a definitive response to these counter-arguments, consistent with our goal of beginning a conversation about building more robust international institutions to promote transnational asset recovery. As we explain, some potential concerns may be addressed in the mechanism's design or its relationship to other institutions in the international anti-corruption regime. We also recognize that there may be other objections to our proposal; these too should inform the mechanism's structure and the services that it would provide.

<sup>179</sup> See Guzman, *supra* note 72, at 591–92.

<sup>180</sup> Flexibility also permits adaptation through trial-and-error experimentation. For instance, if experience reveals that states are not complying with the terms of MoUs facilitated by the mechanism, it may be appropriate to create more formal procedures, such as binding dispute settlement.

### *A. Favoring the Preferences of Destination States*

Negotiations between destination states and states of origin often involve a power imbalance. In the asset recovery context, this imbalance is reinforced by Article 57 of UNCAC, which, as discussed above, distinguishes between mandatory and discretionary returns. Article 57's conditions for mandatory returns are sufficiently rigorous that there appear to be vanishingly few cases of mandatory repatriation of embezzled public funds.

In the vast majority of cases, the destination state is required only to give "priority consideration" to the origin state's request.<sup>181</sup> This gives the officials of those states significant bargaining power. It would be legally impermissible and politically unacceptable for destination states to flatly refuse to cooperate with states of origin or unilaterally to impose conditions on return. However, destination states are not required to repatriate assets, nor are they precluded from seeking such conditions. In the absence of an agreement, destination states retain control over the confiscated funds, while states of origin have few practical means to bring about the return of those funds.

The mechanism's mediation function would be most effective if both requested and requesting countries seek its assistance with negotiating return agreements. However, because these services are merely on offer, destination states retain the option of direct bilateral negotiations. This may create a concern among states of origin that the mechanism would cater to the preferences of destination states to encourage them to use its mediation services. This risk would be exacerbated if key destination countries (such as Switzerland, the United Kingdom, and the United States) become repeat players in asset return negotiations mediated by the mechanism.<sup>182</sup> The perception of bias could arise regardless of actual motivations or behavior. For example, in the case of a government with weak internal financial controls, the mechanism might recommend a significant role for a civil society organization that has a track record of monitoring and deterring re-corruption of returned assets. Even if the recommendation in this instance accords with best practices, it may be viewed with suspicion by the requesting state.

While a perception of bias is a potential concern for any new international body utilized by states with divergent preferences, this risk is limited in the asset recovery context. For example, when the mechanism provides mediation services to encourage states to adopt a return agreement, either party would be free to reject its recommendations. This creates an incentive for the body to use its expertise in an evenhanded way that both parties will accept. In addition, the mechanism could also provide helpful legal and technical assistance to states of origin outside of the mediation context. Since they too are its potential clients, the body would not have an incentive to cater to the preferences of either group of countries. In this respect, the diversity of functions and services that the mechanism offers would help to counterbalance the greater bargaining power of destination countries and reduce perceptions of bias by states of origin.

<sup>181</sup> The concept of "priority consideration" could itself benefit from greater normative development by the mechanism that we propose.

<sup>182</sup> For a discussion of how repeat players interact with international institutions, see Joseph A. Conti, *Learning to Dispute: Repeat Participation, Expertise, and Reputation at the World Trade Organization*, 35 L. & SOC. INQUIRY 625 (2010).

### B. *The Legitimacy of Norm Development*

The transnational mechanism's benefits to all states will be closely linked to perceptions of its legitimacy, neutrality, and expertise. This is true for all of the functions and services that the body provides. However, there may be particular concerns raised about the institution's legitimacy if a small group of states requests its assistance with developing new asset recovery norms.

At least at the outset, the mechanism would likely attract participation from a subset of the 189 states parties to UNCAC. This group might seek to develop international norms outside of the UNCAC framework, but with a view toward their eventual application to all states parties. There is precedent for this approach in the anti-money laundering context: the FATF, which has a limited membership, formulated anti-money laundering standards intended for world-wide adoption and implementation.<sup>183</sup>

Any effort to impose norms on states that have not contributed to their development would, however, raise significant legitimacy concerns, in particular relating to input legitimacy.<sup>184</sup> The proposed mechanism could avoid these concerns by inviting all UNCAC states parties, as well as civil society groups active in the anti-corruption field, to participate in norm development processes. As we have explained, informal and flexible institutions are more open to participation by non-state actors than formal international organizations. In addition, the mechanism should emphasize that any norms it endorses are recommendations that may be adopted by interested states. This would avoid the legitimacy concerns raised by the contrary approach of the FATF, which demands compliance with its forty recommendations even though they are formulated in hortatory language.<sup>185</sup>

Yet, legitimacy concerns could persist even if the mechanism broadens the number and types of actors that participate in developing new asset recovery norms. In this respect, the body's informal and flexible working methods, as well as its interventions on an ad hoc basis, could be disadvantages. In particular, they could provide an opening for powerful destination states to dominate the norm development process. In contrast, in plenary bodies such as the UNCAC Conference of States Parties and subsidiary bodies like the Working Group on Asset Recovery, the inclusion of all states parties and more formal working methods prevent such domination.<sup>186</sup>

These concerns could be addressed in a number of ways. First, when customizing the functions and services of a future asset recovery mechanism, founding states could opt to exclude norm development from the body's purview, either permanently or for a specified time period. Second, even if the mechanism's initial mandate includes norm development, its officials and staff could informally discourage destination states from seeking its assistance as a forum for generating new asset recovery norms until after it acquires more experience carrying out its other functions and services. Third, the body could adopt working methods for norm

<sup>183</sup> ROSE, *supra* note 119, ch. 5.

<sup>184</sup> For a discussion of the importance of inclusive, informed deliberation, see Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 4 (2006).

<sup>185</sup> ROSE, *supra* note 119, at 191–96.

<sup>186</sup> See, e.g., Conference of the States Parties to the United Nations Convention Against Corruption, Final List of Participants, UN Doc. CAC/COSP/IRG/2021/INF/2-CAC/COSP/WG.2/2021/INF/1-CAC/COSP/EG.1/2021/INF/1\* (Apr. 8, 2022).



development that allow a wide range of voices and perspectives to be raised and considered. All of these suggestions would slow the pace of norm development and provide a check against potential bias.

Lastly, the mechanism would not be the exclusive forum for norm development. As noted above, international bodies such as the Working Group on Asset Recovery have a mandate to propose revisions of existing standards. Any norms generated by the mechanism would arise in the shadow of potential future competition with these bodies. The possibility of competition thus operates as a constraint on norm development that favors one group of states over another.<sup>187</sup>

### C. *Justifying Political Capital and Financial Resources*

The transnational asset recovery mechanism that we propose would be modest, both in its flexible structure and its provision of information, expertise, and recommendations rather than binding substantive rules or mandatory dispute settlement. This modesty may lead some observers to view the mechanism as a distraction from more ambitious international anti-corruption goals, such as an IACC, or simply a poor use of political capital and financial resources.

We contend that the mechanism's benefits outweigh these concerns. In particular, the new body would require relatively few resources to get off the ground, it would provide concrete and substantial benefits in an important and underdeveloped area of international anti-corruption law, and it would not preclude more ambitious initiatives in the future.

First, the mechanism would not require significant outlays of political capital. While the body's precise structure would depend on its substantive functions, services, and institutional affiliation, it would not require fresh treaty negotiations or national legislation to come into existence. As Part IV explains, the backing of a small group of founding states may be sufficient to generate a critical mass of support for creating the mechanism, at least on a trial basis.

Second, the mechanism could begin with a small budget. It could start performing core functions—such as gathering and publishing information, technical assistance, capacity building, and mediation—with a modest financial outlay. After gauging states' interest in one or more of these functions, the body could scale up the provision of those services and/or shift to the other functions described in Part IV. The mechanism's budget would thus track state usage and its requests for greater financial commitments would be tailored to the services that it provides.

Third, the proposed mechanism has the potential to make a significant impact in the asset return field. The mechanism could advance UNCAC's asset recovery goals on a practical level, by facilitating the return of embezzled public funds, and on a normative level, by building consensus around best practices to fill gaps in existing law and practice. States have a demonstrated and unmet need for greater assistance in this area. The thousands of outstanding requests for technical assistance, discussed above, indicate a strong demand for a mechanism

<sup>187</sup> Cf. Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 412, 416 (2008) (arguing that "competition among international courts . . . effectively constrain[s] international judicial power . . ." and "benefits . . . norm-development," increasing the likelihood that states will consent to international adjudication).

that could be more proactive in providing such assistance and building legal and institutional capacity.

Lastly, the proposed mechanism need not draw attention away from more ambitious proposals to combat corruption. By demonstrating that a flexible institution can provide a wide range of practical services to states, the mechanism could be a building block for future reforms. Its achievements could thus help to generate a critical mass of state support for other anti-corruption projects, either on a grand scale (such as an IACC) or more limited endeavors (such as proposals to strengthen existing international instruments or institutions such as UNCAC or UNODC).

## VI. CONCLUSION

When the international anti-corruption regime was established in the 1990s and early 2000s, institution building was not high on the agenda. The anti-corruption conventions adopted during that era focus on the domestic criminalization of corrupt conduct and on facilitating interstate cooperation, but they stop well short of creating robust international institutions. The treaties created supervisory bodies that play valuable but limited roles in monitoring compliance by states parties. In the case of UNCAC, this function is fulfilled by the UNCAC Review Mechanism, which has assembled extensive data about domestic implementation. However, the Review Mechanism's work has proceeded at a slow pace, and it has not engaged in norm development in any significant way.

While the international anti-corruption regime has been aging, corruption has continued unabated around the globe, and domestic authorities tasked with enforcing anti-corruption norms often face tremendous obstacles. In this context, it is unsurprising that scholars, practitioners, and activists are beginning to explore the need for new international anti-corruption institutions, such as an IACC. The focus on a new international court is understandable. Domestic anti-corruption prosecutions often struggle under the weight of domestic politics, and the ICC provides a potentially relevant model for international prosecutions.

Some states and commentators, however, do not regard an IACC as an appropriate or effective response to the need for institution building in the anti-corruption field—at least in the near term. Beyond the political challenges associated with this initiative, skeptics consider that many of the legal and practical problems that have plagued the ICC would also likely hobble an international anti-corruption tribunal, including obstacles to evidence gathering and gaining custody over accused persons. Moreover, an IACC would be ill-positioned to address an important topic in the anti-corruption field: transnational asset recovery.

The recovery of stolen assets is a fundamental principle of UNCAC. It requires states of origin and destination states to cooperate with each other for the purpose of returning the proceeds of corruption, in particular embezzled public funds. Without asset recovery, the financial damage caused by corruption cannot be repaired. Yet, asset recovery cases are often difficult and time-consuming, and UNCAC does not adequately govern the process or provide much-needed technical or institutional support. A recent wave of studies analyzing the rise of informal and flexible international institutions suggests a promising response to this impasse: a transnational asset recovery mechanism that can be customized to provide a wide range of functions and services that states select on an as needed basis.

This Article's primary aim is to put a proposal for a flexible transnational asset recovery mechanism on the agenda for future discussion by states, international organizations, and civil society. We are under no illusion that such discussions will be easy. Some of the issues we have raised are legally complex; others are politically fraught or raise institutional and practical challenges. Nevertheless, we hope to begin a conversation about how such a mechanism could play an important role in facilitating the return of stolen public assets, closing normative gaps, and advancing the international anti-corruption agenda more generally.

The mechanism's more traditional functions could include convening bilateral and multilateral meetings and conferences, gathering and publishing information about asset recovery, and providing much-needed technical assistance and capacity building. While many of these activities have been or are currently being performed to an extent by existing international bodies, the mechanism we propose could fulfill these functions in a more robust and coherent manner. The mechanism could also provide more novel functions, such as providing mediation services to states that seek to conclude agreements on asset return, facilitating the monitoring of returned funds, developing new legal norms, and maintaining an escrow account to hold confiscated funds while return agreements are being negotiated. These novel functions have few or no parallels in the anti-corruption field. They would advance the international anti-corruption regime in ways that have not yet been explored by states, international organizations or civil society. Criminal investigations and prosecutions would not be functions of the mechanism, although the cooperation it will hopefully engender may facilitate national enforcement actions.

Our proposal deliberately leaves open the question of how such a mechanism would be situated within the existing international anti-corruption regime. It could be created by treaty (perhaps a protocol to an existing convention) or a non-binding instrument. The mechanism could be housed within an existing international organization, but it could also be freestanding. Finally, the mechanism's funding could be based on a mix of assessed dues, self-funding, and/or voluntary contributions, while its staff could consist of a small cadre of permanent employees supplemented by consultants or other outside experts. The international legal field provides a rich body of practice with respect to each of these options.

Stepping back from these details, this Article contributes to the ongoing debate about institution building and norm development in the international anti-corruption regime and to the increasing theoretical interest in informal and flexible international institutions. Although attention has recently focused on the advantages and risks of an IACC, we offer what we hope is a more viable and impactful alternative: a transnational asset recovery mechanism that would be flexible in its design and capable of offering a range of functions and services. This would, in short, be an institution of modest ambitions, but great promise.