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"APUNCAC: An International Convention to Fight Corruption, Money Laundering, and Terrorist Financing"

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APUNCAC: An International Convention to Fight Corruption, Money Laundering, and Terrorist Financing

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This article explains how corruption, money laundering, and terrorist financing could be addressed through an Anticorruption Protocol to the United Nations Convention against Corruption (APUNCAC). APUNCAC seeks to establish United Nations inspectors, dedicated anticorruption courts, and aggressive measures to fight corruption, including requirements to obtain and report accurate beneficial owner information when funds are transmitted internationally. This information is needed to deter money laundering. APUNCAC would allow private litigants to commence a Racketeer Influenced and Corrupt Organizations (RICO) civil action and recover three times the amount of their damages. These provisions create financial incentives for private litigants to fight corruption through civil actions. The provisions leverage private interests and align these interests in the fight against corruption. APUNCAC also includes treaty provisions designed to ensure that APUNCAC is implemented as intended. This article addresses the issue of complementarity. APUNCAC is designed to complement, rather than replace, existing domestic institutions

Keywords: corruption, money laundering, terrorist financing, international public law, international governance, rule of law

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1. Introduction

Corruption undermines democracy and the rule of law. It facilitates violations of human rights, organized crime, and terrorism. The United Nations Convention against Corruption (UNCAC) has achieved wide acceptance,[1] but corruption persists, suggesting the need for new measures to fight corruption.

An Anticorruption Protocol to the United Nations Convention against Corruption (APUNCAC) has been drafted that seeks to establish United Nations inspectors, dedicated anticorruption courts, and aggressive measures to fight corruption and impunity.[2] Numerous articles have described APUNCAC's provisions and rationale.[3] However, successful implementation of APUNCAC would involve complex issues. This article explains how APUNCAC would address four specific issues.

One issue involves the details of APUNCAC's strategy to obtain and report accurate beneficial owner information when funds are transmitted internationally. In general, the existing regulatory regime, based on Financial Action Task Force (FATF) recommendations, requires financial institution personnel to request, from each customer, information regarding the identity of the beneficial owner, i.e., the person who controls the movement of funds into and out of the accounts in question. Under the existing regime, however, it is difficult for prosecutors to convict customers who choose to supply false information. Customers who supply false information are rarely prosecuted because the existing regime contains a loophole that permits customers to escape by asserting that the information was correct "to the best of" the customers' knowledge. As a consequence, global banks continue to serve oligarchs, criminals and terrorists. According to documents obtained by the International Consortium of Investigative Journalists, trillions in tainted dollars flow freely through major banks, swamping a broken enforcement system.[4]

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[1] United Nations Convention against Corruption (opened for signature 31 October 2003, 2349 UNTS 41) (entered into force 14 December 2005) [hereinafter UNCAC].

[2] Anticorruption Protocol to the United Nations Convention against Corruption (hereinafter APUNCAC), available at: https://tinyurl.com/y6bkpott.

[3] S. S. Yeh, *Corruption and the Rule of Law in Sub-Saharan Africa*, 4 African Journal of Legal Studies 2 (2011), 187-208; S. S. Yeh, *Ending Corruption in Africa through United Nations Inspections*, 87 International Affairs 3 (2011), 629-650; S. S. Yeh, *Anti-Corruption Inspections: A Missing Element of the IMF/World Bank Agenda?*, 18 Journal of African Policy Studies 1 (2012), 1-41; S. S. Yeh, *Is an International Treaty Needed to Fight Corruption and the Narco-Insurgency in Mexico?*, 22 International Criminal Justice Review 3 (2012), 233 - 257; S. S. Yeh, *Why UN Inspections? The Accountability Gap in Sub-Saharan Africa*, 7 International Public Policy Review 2 (2013), 1-29; S. S. Yeh, *Building a Global Institution to Fight Corruption and Address the Roots of Insurgency*, 8 International Public Policy Review 1 (2014), 7-24; S. S. Yeh, *Poverty and the Rule of Law in Africa: A Missing International Actor?*, 6 Poverty and Public Policy 4 (2014), 354-379; S. S. Yeh, *Why UN Inspections? Corruption, Accountability, and the Rule of Law*, 11 South Carolina Journal of International Law and Business 2 (2015), 227-260; Stuart S. Yeh, *An International Law Approach to End Money Laundering*, 35 Journal of International Banking Law and Regulation 4 (2020), 148-163; Stuart S. Yeh, *An International Treaty to Fight Money Laundering*, 35 Journal of International Banking Law and Regulation 5 (2020), 190-207; Stuart S. Yeh, *Application of a Model International Treaty to Money Laundering*, 35 Journal of International Banking Law and Regulation 11 (2020).

[4] International Consortium of Investigative Journalists, *Global Banks Defy U.S. Crackdowns by Serving Oligarchs, Criminals and Terrorists: The FinCEN Files Show Trillions in Tainted Dollars Flow Freely*

This article compares and contrasts the APUNCAC strategy for obtaining accurate beneficial owner information with the existing FATF strategy. APUNCAC seeks to deter the submission of false information by criminalizing behavior that is currently not criminalized. APUNCAC's innovative strategy for obtaining accurate beneficial owner information would permit investigators to trace international flows of funds into and out of bank secrecy havens such as the British Virgin Islands, the Cayman Islands, and Panama, and would permit investigators to follow illicit funds related to terrorism, transnational criminal organizations, and activities of corrupt individuals that currently go unpunished.

This article also describes APUNCAC provisions that would allow private litigants to commence a Racketeer Influenced and Corrupt Organizations (RICO) civil action and recover three times the amount of their damages.[5] These provisions create financial incentives for private litigants to fight corruption through civil actions. The provisions leverage private interests and align these interests in the fight against corruption.

This article describes treaty provisions designed to ensure that APUNCAC is implemented as intended. These provisions are needed to forestall efforts by corrupt parties to sabotage implementation of the treaty.

This article addresses the tricky issue of complementarity. APUNCAC is designed to complement--rather than replace--existing domestic institutions, reinforce domestic will and capacity, and ensure productive outcomes.

2. Beneficial Owner Information

Money laundering permits criminals to escape with the proceeds of their crimes. It serves to convert "dirty" money, involving illicit funds, into funds that appear to derive from legitimate sources. Money laundering typically involves a series of complicated financial transactions engineered to hide the illicit nature of the funds. To solve a crime that involves money laundering, investigators typically need to unravel the transactions, identify the beneficial owners who controlled the movement of the funds, and trace the funds to their source.

2.1 Front Men

Money laundering typically involves the use of front men who conduct transactions secretly controlled by criminals. The use of front men serves to hide the identities of the criminals who control the illicit funds. To trace the path of illicit funds, investigators need the

through Major Banks, Swamping a Broken Enforcement System, available at: <https://www.icij.org/investigations/fincen-files/global-banks-defy-u-s-crackdowns-by-serving-oligarchs-criminals-and-terrorists/>.

[5] Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, s.901(a), 84 Stat. 922-3 (1970) (codified at 18 U.S.C. ss.1961–1968 (2018)) (hereinafter RICO); Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

cooperation of the front men to identify the individuals who actually control the transactions conducted by the front men.

In many cases, however, the front men are uncooperative because it is extremely difficult for a prosecutor to prove that the front men had knowledge of the illicit nature of the funds. Under the current legal regime, a prosecutor must prove that the front men *knew* that the funds they handled were illicit. This is extremely difficult. Front men typically disclaim any knowledge of the illicit nature of the funds that pass through their hands. They typically assert that they were hired as agents to perform necessary services, such as opening accounts at financial institutions, receiving funds, and transmitting funds, for a fee or commission. There is nothing illegal about this activity, as long as the funds involved derive from licit sources. Principals who control funds that are transmitted worldwide typically need the assistance of agents to perform this type of service. The use of agents by legitimate persons for legitimate reasons is routine.

Front men may suspect that the funds they handle are illicit, but criminals are unlikely to volunteer this information and may present a plausible explanation that is readily accepted by the front men. The front men have little incentive to inquire. Excessive curiosity means that customers go elsewhere. Fees and commissions decline.

Prosecutors are unable to pressure front men to provide useful information because their activities are not illegal. When questioned, the front men typically say that they act as agents to open accounts and accept and deliver funds, on commission, but are unable to provide detailed information about their clientele because they have promised confidentiality and their business depends on the promise of confidentiality. Prosecutors who are unable to prove the illicit nature of the funds handled by the front men find that they are unable to obtain the cooperation of the front men, unable to obtain useful information, and unable to follow the money trail. Consequently, prosecutors struggle to bring criminals to account for their crimes. Terrorism, drug trafficking, sex trafficking, violations of human rights, and all of the other crimes that involve money laundering persist.

2.2 Reporting Requirement

This suggests a need for a new type of law. Prosecutors need information about the true beneficial owners who control the movement of illicit funds. The law must be designed so that the true beneficial owners are identified or, if false information is provided, the submission of false information is punished with criminal penalties.

The type of law that is required is a reporting requirement that requires that the true beneficial owner self-certify that he or she is, in fact, the true beneficial owner, when funds are transmitted. This type of requirement would close the loophole that currently permits a bank customer to assert that the beneficial owner information supplied at the point when the account was opened was true "to the best" of the customer's knowledge, despite subsequent evidence that the information was indeed false.

If, instead, the true beneficial owner is required to self-certify beneficial ownership, there can be no doubt that he (or she) knows for certain that the information is correct. There can be no doubt that a person who poses as the beneficial owner and falsely self-certifies that he

or she is the beneficial owner knows for certain that the information is false. The fake beneficial owner has been caught in a lie. A prosecutor can prove that the statement is a lie by submitting evidence that a different person—the true beneficial owner—actually controls the movement of the funds in question. This evidence typically involves instructions sent by the true beneficial owner to the fake beneficial owner directing the latter to open a bank account, receive funds, and transmit funds from the account. Under the current legal regime, this type of evidence is insufficient to convict a front man of a crime because it is not illegal to serve as an agent who receives and executes instructions to open bank accounts, receive funds, and transmit funds.

Under the new reporting requirement, the agent would not be permitted to make dubious assertions about the identity of the beneficial owner. Instead, the true beneficial owner must be contacted and must self-certify that he (or she) is in fact the true beneficial owner. This requirement closes the loophole in the existing regime that permits front men to escape prosecution, prevents prosecutors from applying the type of pressure that would cause the front men to cooperate with prosecutors, and prevents prosecutors from tracing illicit funds to the criminals who control those funds.

In practice, there may be two beneficial owners: the person who *sends* the money, and the person who *receives* the money. In some cases, the sender is also the recipient, for example, when funds are moved from one personal account to a second personal account under the control of the same person. In other cases, the sender transmits payment to a recipient who is not the same person as the sender.

Therefore, the reporting requirement must involve certification by the beneficial sender, and certification by the beneficial recipient, that they are the true beneficial owners involved in the transaction, regardless of the involvement of agents representing the beneficial owners. However, since criminals are unlikely to voluntarily submit this type of certification, financial institution personnel, and any other type of personnel involved in transactions that may be used for money laundering, must be required to demand certification from the beneficial senders and beneficial recipients of covered financial transactions.

2.3 APUNCAC

The details about how this would work are described in three companion articles.[6] By necessity, the requirements would be established by international treaty. The Anticorruption Protocol to the United Nations Convention against Corruption (APUNCAC) would apply to all States Parties that sign and ratify the protocol. APUNCAC would require that certain financial institution personnel, and other personnel involved in transactions that may be used for money laundering, demand certification from the beneficial senders and beneficial recipients of covered financial transactions. The certifications would identify the beneficial

[6] Stuart S. Yeh, *An International Law Approach to End Money Laundering,* 35 Journal of International Banking Law and Regulation 4 (2020), 148-163; Stuart S. Yeh, *An International Treaty to Fight Money Laundering,* 35 Journal of International Banking Law and Regulation 5 (2020), 190-207.; Stuart S. Yeh, *Application of a Model International Treaty to Money Laundering*, 35 Journal of International Banking Law and Regulation 11 (2020).

senders and recipients, certify that the funds derive from licit sources, and acknowledge that criminal penalties apply if false or misleading information is provided. The information would be collected by financial institution and other retail personnel and electronically submitted to a centralized database maintained by a Financial Crimes Enforcement Network (FINCEN) modeled on the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN). The database would serve as a central repository of beneficial owner information for each covered financial transaction, and would facilitate the investigation and prosecution of financial crime and associated crime.

The details about who would be covered, the transactions that would be covered, and the responsibilities of each party are described in the three companion articles.[7] The basic principle is that the reporting requirement would be inserted at the point when funds are transmitted, deposited, or paid. In general, the requirement would apply to transactions with a value totaling $3,000 or more, involving a national of a State Party to APUNCAC, or funds transmitted to or from the territory or jurisdiction of an APUNCAC State Party.

The companion articles explain how jurisdiction would be asserted over distant offshore financial service personnel, how the law would be enforced, and why Member States of the Organisation for Economic Co-operation and Development (OECD) may be expected to sign and ratify APUNCAC. In general, OECD Member States may be attracted to APUNCAC because it would provide a potent means of controlling money laundering in distant offshore bank secrecy havens that are used by criminals to hide illicit funds. APUNCAC would leverage the existing extradition provisions of the United Nations Convention against Transnational Organized Crime (UNTOC) to extradite and prosecute individuals who violate APUNCAC's beneficial ownership reporting requirement.[8] UNTOC criminalizes "the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime" as well as "participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating" such concealment.[9] UNTOC makes these offenses "an extraditable offence in any extradition treaty existing between States Parties."[10] Furthermore, "States Parties undertake to include such offences as extraditable

[7] Stuart S. Yeh, *An International Law Approach to End Money Laundering*, 35 Journal of International Banking Law and Regulation 4 (2020), 148-163; Stuart S. Yeh, *An International Treaty to Fight Money Laundering*, 35 Journal of International Banking Law and Regulation 5 (2020), 190-207.; Stuart S. Yeh, *Application of a Model International Treaty to Money Laundering*, 35 Journal of International Banking Law and Regulation 11 (2020).

[8] United Nations Convention against Transnational Organized Crime December 12, 2000, 2225 UNTS 277.

[9] United Nations Convention against Transnational Organized Crime, December 12, 2000, art. 6, para. 1, 2225 UNTS 277.

[10] United Nations Convention against Transnational Organized Crime, December 12, 2000, art. 16, para. 3, 2225 UNTS 284. Significantly, 189 nations are parties to UNTOC. United Nations, "United Nations Convention against Transnational Organized Crime Signature and Ratification Status as of November 18, 2017", (2017), https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en. The only United Nations members who are not parties are Bhutan, Republic of the Congo, Palau, Papua New Guinea, the Solomon Islands, Somalia, South Sudan, and Tuvalu. This implies that extradition for crimes covered by UNTOC is available to all nations except these eight states.

offences in every extradition treaty to be concluded between them."[11] UNTOC requires states parties to implement requirements for customer identification and record-keeping to deter and detect money laundering:

> Each State Party: (a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;[12]

These provisions apply to nationals and residents of all States Parties. They apply to bank clerks in the British Virgin Islands, the Cayman Islands, or Panama who aid, abet and facilitate the concealment of the true ownership of illicit funds, because Panama, the United Kingdom, and its possessions are parties to UNTOC. A bank clerk who is required to perform, but chooses to willfully, intentionally, and knowingly ignore basic steps designed to identify customers and promote transparency in the ownership, disposition and movement of property and permit verification of the legitimacy of such property could be found guilty under UNTOC of aiding, abetting and facilitating the concealment of the true nature, source and ownership of that property.

APUNCAC's beneficial owner identification and recordation provisions are *precisely* "requirements for customer identification [and] record-keeping" with the *exact* intention of deterring and detecting money-laundering.[13] The beneficial owner identification and recordation provisions would plug holes in existing customer identification requirements by requiring each banking customer to identify the beneficial owner of funds that are deposited in currency, deposited in any form in a high-risk jurisdiction, or transmitted internationally by wire to or from the territory of a State Party.[14] APUNCAC serves to translate the existing legal commitment of UNTOC parties to identify banking customers for the purpose of revealing the true "ownership of or rights with respect to property" into specific procedures for identifying beneficial owners, for that exact purpose.[15] APUNCAC seeks to achieve UNTOC's goal of establishing the identities of true owners by specifying that beneficial owners must self-certify their identities under penalty of perjury.[16]

Failure to submit beneficial ownership information, or submission of false beneficial ownership information, would be punishable by debarment, fines, and criminal penalties. APUNCAC limits the activities of debarred individuals and entities and imposes

[11] United Nations Convention against Transnational Organized Crime, December 12, 2000, art. 16, para. 3, 2225 UNTS 284.
[12] Ibid., art. 7, para. 1, 2225 UNTS 278.
[13] United Nations Convention against Transnational Organized Crime, December 12, 2000, art. 7, para. 1, 2225 UNTS 278.
[14] APUNCAC, art. 21, para. 2, art. 22, para. 1, art. 30.
[15] United Nations Convention against Transnational Organized Crime, December 12, 2000, art. 6, para. 1, 2225 UNTS 277.
[16] APUNCAC, art. 21, para. 2, art. 22, para. 1, art. 30.

requirements intended to protect society. Issues of extraterritorial jurisdiction and enforcement are addressed in the companion articles.[17] APUNCAC requires State Parties to cooperate, and to seek the cooperation of states with extradition agreements with States Parties, to arrest, extradite and prosecute violators, notwithstanding preexisting limitations on extradition. Penalties would apply to distant offshore financial service personnel even when such individuals are not nationals of States Parties to APUNCAC, if they fail to observe the APUNCAC reporting requirement regarding transactions involving nationals of APUNCAC States Parties or funds transmitted to or from the territory or jurisdiction of an APUNCAC State Party. In that case, arrests would not occur unless and until such individuals travel to a jurisdiction that is a State Party to APUNCAC, or to a jurisdiction with an extradition treaty with a State Party to APUNCAC. While this would blunt the threat of punishment, the deterrent effect would not be insignificant.

As a consequence, APUNCAC would create a powerful mechanism for controlling money laundering in distant offshore locations that is currently absent from all other existing and proposed strategies for controlling corruption and impunity. Ratification and implementation of APUNCAC would fall within the power of potential States Parties. States Parties would not need to wait for distant offshore jurisdictions to implement reforms. States Parties would apply the provisions of APUNCAC requiring documentation of the beneficial owner and source of funds transmitted by bank wire, and would apply UNTOC to extradite individuals who violate this rule in distant offshore locations such as the British Virgin Islands, the Cayman Islands, or Panama. This suggests why APUNCAC would likely be more effective than the strategy of implementing a global registry of companies, which would require the cooperation of offshore locations such as the British Virgin Islands, the Cayman Islands, and Panama.

3. RICO

The treble damages provision of RICO has been described as "the litigation equivalent of a thermonuclear device."[18] This provision allows private litigants to institute a RICO action and recover three times the amount of their damages. APUNCAC retains this provision. Significantly, APUNCAC inserts four bases for instituting a RICO action that are not included in the original RICO language:[19]

> 1. It is unlawful for any person or entity to handle, receive, hold, transfer or convey assets that the accused knew, or should have known, were obtained through a pattern of corruption, misappropriation of assets or any other form of racketeering activity.

[17] Stuart S. Yeh, *An International Law Approach to End Money Laundering,* 35 Journal of International Banking Law and Regulation 4 (2020), 148-163; Stuart S. Yeh, *An International Treaty to Fight Money Laundering,* 35 Journal of International Banking Law and Regulation 5 (2020), 190-207.; Stuart S. Yeh, *Application of a Model International Treaty to Money Laundering*, 35 Journal of International Banking Law and Regulation 11 (2020).

[18] *Katzman v. Victoria's Secret Catalogue,* 167 FRD 649, 655 (SDNY 1996).

[19] APUNCAC, art. 60, paras. 4-7.

> 2. It is unlawful for any person or entity to provide banking, accounting, legal, financial or consulting services to an individual or entity that the accused knew, or should have known, was involved in a pattern of corruption, misappropriation of assets or any other form of racketeering activity.
>
> 3. It is unlawful for any person or entity to initiate, facilitate, or benefit from a pattern of corruption, misappropriation of assets or any other form of racketeering activity, if the accused knew or should have known of the corruption, the asset misappropriation or other form of racketeering activity.
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> 4. It is unlawful for any person or entity to directly or indirectly extend, guarantee, or receive a loan, if the accused knew, or should have known, that the proceeds would likely be misappropriated.

The key phrase is "knew or should have known." APUNCAC defines the standard for ascertaining whether an accused person "knew or should have known":

> The standard for ascertaining whether an accused person "knew or should have known" is that a reasonable person would infer from the available objective circumstances that the accused "knew or should have known."[20]

A plaintiff would have the burden of establishing that a reasonable person would infer from the available objective circumstances that the accused "knew or should have known." A court would decide whether the plaintiff had met that burden.

3.1 Examples

APUNCAC would permit a private litigant to pursue treble damages with regard to a bank clerk in the Cayman Islands who handled, received, held, transferred, or conveyed assets that the bank clerk knew, or should have known, were obtained through a pattern of corruption, misappropriation of assets or any other form of racketeering activity. For example, suppose that Kenya ratifies APUNCAC and is therefore a party to APUNCAC. Suppose that the Cayman Islands bank clerk handles receipt of a $10 million transfer by a Kenyan minister to a bank account in the Cayman Islands. However, the bank clerk fails to record beneficial ownership, as required by APUNCAC, in the FINCEN database. APUNCAC would permit an NGO such as International Justice Mission to file a class action lawsuit on behalf of Kenyan citizens asserting that the $10 million was obtained through

[20] This standard is consistent with the definition codified in the U.S. Code of Federal Regulations regarding the term "knows or has reason to know." The definition relies on what "a reasonable person . . . would conclude . . . based on all the facts reasonably available" at the time a financial transaction was approved, or at the time financial services were obtained or delivered. 26 CFR § 53.4965-6(b)(1).

corruption, the Kenyan minister defrauded Kenyan citizens, and the bank clerk aided and abetted money laundering by failing to record the beneficial ownership information as required by APUNCAC. APUNCAC would permit the plaintiffs to seek $30 million in damages. If a court found that the bank clerk's comparative responsibility was 10 percent (because the act of failing to record beneficial ownership information served to aid and abet laundering of illicit funds), the court might allocate 10 percent of the responsibility for damages to the bank clerk. This prospect would have a powerful deterrent effect on any bank clerk who contemplates deliberate, willful violations of APUNCAC's recordation requirement.

APUNCAC's provisions would permit a private litigant to pursue treble damages with regard to a nominee director of a shell company who opened a bank account in the Cayman Islands to receive assets that the nominee director knew, or should have known, were obtained through a pattern of corruption, misappropriation of assets or any other form of racketeering activity. For example, suppose that Kenya ratifies APUNCAC and is therefore a party to APUNCAC. Suppose that a nominee director in the Cayman Islands opens a bank account. The nominee director transfers $10 million from a Kenyan minister to the bank account. The nominee director supplies his name, instead of the name of the minister, as beneficial owner, in violation of APUNCAC. APUNCAC would permit an NGO such as International Justice Mission to file a class action lawsuit on behalf of Kenyan citizens asserting that the $10 million was obtained through corruption, the Kenyan minister defrauded Kenyan citizens, and the nominee director aided and abetted money laundering by supplying false beneficial owner information, in violation of APUNCAC. APUNCAC would permit the plaintiffs to seek $30 million in damages. If a court found that the nominee director's comparative responsibility was 10 percent (because the act of supplying false beneficial owner information served to aid and abet laundering of illicit funds), the court might allocate 10 percent of the responsibility for damages to the nominee director. This prospect would have a powerful deterrent effect on any nominee director who contemplates deliberate, willful violations of APUNCAC's beneficial ownership reporting requirement.

APUNCAC's language would permit a private litigant to pursue treble damages with regard to an attorney who opened a bank account in the Cayman Islands to receive assets that the attorney knew, or should have known, were obtained through a pattern of corruption, misappropriation of assets or any other form of racketeering activity. For example, suppose that Kenya ratifies APUNCAC and is therefore a party to APUNCAC. Suppose that an attorney in the Cayman Islands opens a bank account. The attorney transfers $10 million from a Kenyan minister to the bank account. The attorney supplies his name, instead of the name of the minister, as beneficial owner, in violation of APUNCAC. APUNCAC would permit an NGO such as International Justice Mission to file a class action lawsuit on behalf of Kenyan citizens asserting that the $10 million was obtained through corruption, the Kenyan minister defrauded Kenyan citizens, and the attorney aided and abetted money laundering by supplying false beneficial owner information, in violation of APUNCAC. APUNCAC would permit the plaintiffs to seek $30 million in damages. If a court found that the attorney's comparative responsibility was 10 percent (because the act of supplying false beneficial owner information served to aid and abet laundering of illicit funds), the court might allocate 10 percent of the responsibility for damages to the attorney. This prospect

would have a powerful deterrent effect on any attorney who contemplates deliberate, willful violations of APUNCAC's beneficial ownership reporting requirement.

APUNCAC would permit a private litigant to pursue treble damages with regard to a bank that extended a loan to a developing country if bank personnel knew, or should have known, that the proceeds would likely be misappropriated. For example, suppose that Armenia ratifies APUNCAC and is therefore a party to APUNCAC. Suppose that the World Bank extends a $30 million loan to Armenia to replace water pipes but, according to a government commission, the funds are misappropriated through a scheme involving corrupt government officials. The World Bank conducts an investigation but finds no proof of misappropriation in official documents. The World Bank declares the project was "satisfactory," despite evidence that water pipes continue to rupture and drinking water remains contaminated. Despite the evidence of misappropriation, the World Bank extends a second loan of $20 million. A French company assumes responsibility for repairing the water pipes but inhabitants report that the repair work is sloppy. Despite the expenditure of $50 million, a water supply expert appointed by Armenia's parliament reports that the water supply remains polluted and inhabitants continue to suffer water-borne diseases. The director of Armenia's Regional Studies Center charges that the project was a failure, Armenian citizens were defrauded, and corrupt Armenian government officials were responsible. However, the World Bank continues to extend loans to Armenia that are involved in corruption scandals. The World Bank extends a loan to promote transparency and efficacy in the judicial system, but the public tendering process to select a contractor succumbs to fraud. The World Bank extends a second loan to pay for new hospital equipment, but the equipment that is delivered is worn-out. Despite the evidence of misappropriation, the World Bank's rules specify that the loans must be repaid by the beneficiary nation. Instead of establishing monitoring and accountability procedures to prevent misappropriation, World Bank staff based in the capital at the time of the project are simply transferred elsewhere in Central Asia.[21]

APUNCAC would permit an NGO such as International Justice Mission to file a class action lawsuit on behalf of Armenian citizens asserting that the $50 million was misappropriated, the Armenian government defrauded Armenian citizens, and the World Bank aided and abetted the corruption by continuing to extend loans that the World Bank should have known would likely be misappropriated. APUNCAC would permit the plaintiffs to seek $150 million in damages. If a court found that the World Bank's comparative responsibility was 10 percent (because the Bank continued to extend loans that it should have known would likely be misappropriated), the court might allocate 10 percent of the responsibility for damages to the World Bank. This prospect would create a powerful incentive for the World Bank to implement the type of rigorous project monitoring and accountability that is necessary to check misappropriation.

In sum, APUNCAC provisions would permit an international human rights organization, in the role of a private litigant, to file a class action lawsuit on behalf of a group of citizens

[21] The hypothetical scenario outlined in this paragraph is based on an investigation of the World Bank's Yerevan water project. *See* Laurence Soustras et al., *World Bank: Tales of the Missing Millions*, available at: <http://webdoc.france24.com/world-bank-corruption-development-armenia-kenya-somalia-transparency/>.

who are injured as a consequence of a pattern of corruption, misappropriation of assets or any other form of racketeering activity, and recover treble damages.

3.2 Advantages

What would be the advantage? First, it may be the case that domestic criminal justice systems in many jurisdictions are dysfunctional and prosecutors and judges are corrupt. APUNCAC would permit an NGO such as International Justice Mission to step forward and seek redress on behalf of, for example, Kenyan citizens. To seek redress, International Justice Mission might choose a venue, perhaps a British, French, or U.S. court, that is perceived to be competent. Numerous individuals have been successfully targeted through British, French, and U.S. courts.[22]

Second, NGO staff may have a stronger level of commitment and engagement regarding anticorruption than domestic prosecutors and judges.

Third, NGOs may have the resources to hire attorneys whose capacity and level of legal expertise exceeds the level of expertise possessed by domestic prosecutors with regard to anticorruption laws. Attorneys employed by NGOs may be especially knowledgeable and competent regarding the use of discovery procedures to obtain documentary evidence and the use of the court system to impose liens, freeze assets, and prevent corrupt parties from absconding with illicit proceeds. This expertise may be especially significant with regard to courts in the UK, U.S. or France, if actions are initiated in those courts.

Fourth, the prospect of ruinous civil actions might have a powerful deterrent effect on corrupt parties. They would no longer be able to rely on corrupt control of domestic prosecutors and court systems. The threat of treble damages, pursued by highly-competent attorneys under the auspices of highly-motivated NGO staff, would introduce a threat to corrupt parties that does not currently exist.

Fifth, civil actions could be implemented that would punish bank clerks, nominee directors, attorneys and any other party who currently profits by quietly aiding and abetting

[22] Britain has targeted more than 20 of the world's most corrupt politicians laundering millions of pounds through the City of London. Paul Peachey, *'Britain's FBI' Target More Than 20 of the World's Most Corrupt Politicians Laundering Millions of Pounds through City of London*, available at: <https://www.independent.co.uk/news/uk/crime/britains-fbi-target-more-than-20-of-the-worlds-most-corrupt-politicians-laundering-millions-of-10487589.html>. See also the case of Teodorin Nguema Obiang, who was tried in a French court on corruption charges. Adam Withnall, *The Brutal Central African Dictator Whose Playboy Son Faces French Corruption Trial*, available at: <https://www.independent.co.uk/news/world/africa/teodoro-obiang-nguema-mbasogo-equatorial-guinea-french-corruption-trial-a7238501.html>. A former government minister in Guinea, Mahmoud Thiam, was tried in a U.S. court on corruption charges. Brendan Pierson, *Ex-Guinea Minister Charged with Laundering Bribes Goes to Trial*, available at: <https://www.reuters.com/article/us-usa-guinea-corruption/ex-guinea-minister-charged-with-laundering-bribes-goes-to-trial-idUSKBN17Q2DF>. U.S. prosecutors seized $144 million in assets amassed through bribery of Diezani Alison-Madueke, Nigeria's minister for petroleum resources. David J. Lynch, *Nigeria's Former Oil Minister Named in US Bribery Complaint*, available at: <https://www.ft.com/content/88a4b26a-68d7-11e7-8526-7b38dcaef614>.

money laundering, permitting corrupt parties to hide illicit funds, thwarting prosecution, and facilitating criminal activity.

Sixth, the standard of proof for a civil action may be lower than the standard required in a criminal action. Therefore, it may be easier to obtain a judgment in a civil action.

These advantages strengthen the deterrent effect of APUNCAC.

3.3 A "Pattern"

Article 60 of APUNCAC stipulates that: "It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt." The "racketeering activity" must consist of two or more federal criminal offenses, known as "predicate acts," committed within a 10-year period.

Since the language is borrowed from the American RICO Act, one might be tempted to draw upon interpretations of the Act by American courts. However, American courts have interpreted the phrase "pattern of racketeering activity" in a way that significantly narrows the application of the Act, and does so in a way that is inconsistent with a plain reading of the language of the Act. The Act defines a "pattern of racketeering activity" as follows:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.[23]

This definition specifies that a "pattern" may be established through two predicate acts of "racketeering" activity. The definition does not specify a minimum period of time between these predicate acts. Nor does the definition specify a minimum number of victims or a minimum number of racketeering schemes. In contrast with this plain reading of the language, American courts have effectively imposed additional conditions that are not written into this definition. These conditions serve to narrow the definition in a way that narrows the scope of the Act.

An American prosecutor who alleges a "pattern" of racketeering activity must establish two elements: *continuity* plus *relationship* between predicate acts. "Closed-ended" continuity may be established through a series of related predicates extending over a substantial period of time. American courts consider three principal factors: 1.) the number and duration of the alleged predicate acts; 2.) the number of alleged victims; and 3.) the number of alleged schemes.[24] American federal courts held: a.) predicate acts extending over

[23] Racketeer Influenced and Corrupt Organizations Act, Pub. L. 91-452, 84 Stat. 922-3 (1970) (codified at 18 USC §§ 1961-1968, 1961 (2016)).

[24] Karen D. Walker and Michael G. Tanner, *RICO Claims: The Challenge of Alleging the "Pattern" Element*, 76 *The Florida Bar Journal* 5 (2002), available at: <https://www.hklaw.com/files/Publication/5961c979-3acb-4d63-bd95-2e36b1450c50/Presentation/PublicationAttachment/4387711b-c615-4247-bdd5-6b37b9bccb4c/46193.PDF>.

a period of six months, in the absence of a threat of future criminal conduct, is "too short a period of time . . . in order to qualify as a pattern of racketeering activity;" b.) three predicate acts allegedly committed over a 15-month period of time are insufficient to establish continuity; c.) one victim or one "set" of victims allegedly injured as the result of a single fraudulent scheme is insufficient to establish continuity; d.) a single racketeering scheme is insufficient to establish continuity.[25]

"Open-ended" continuity may be established by demonstrating that predicate acts involve a threat of continued racketeering activity. American courts consider both the nature of the predicate acts and the nature of the alleged enterprise. If the alleged enterprise is a long-term association that exists primarily for criminal purposes, the threat of repetition is presumed.[26] This prong of the continuity analysis includes activity traditionally labeled as "organized crime."[27] Where the alleged enterprise is not a criminal organization, but conducts a legitimate business, open-ended continuity may be established by demonstrating that alleged predicate acts threaten continued criminal activity or are the way that an enterprise regularly conducts its business.[28] Courts are cautious about basing a RICO claim on predicate acts of mail and wire fraud unless they are related to ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.

For the purpose of APUNCAC, however, it should be noted that American case law regarding "closed-ended" continuity inserts conditions that are inconsistent with the stated definition of a pattern of racketeering activity. APUNCAC borrows the American definition of a "pattern of racketeering activity":

> "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this Protocol and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.[29]

This definition specifies that a "pattern" may be established through two predicate acts of "racketeering" activity. The definition does not specify a minimum period of time between these predicate acts. Nor does the definition specify a minimum number of victims or a minimum number of racketeering schemes. *For the purpose of APUNCAC, parties to APUNCAC should not insert conditions that are not stated in the plain language of APUNCAC.* The reason is simple. The insertion of additional conditions would narrow the application of APUNCAC in a way that would potentially exclude its application with regard to the types of criminal behavior described as examples in this article. For example, the receipt by a Cayman Islands bank clerk of a $10 million transfer by a Kenyan minister to a

[25] Ibid.
[26] Ibid.
[27] *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 US 229, 243 (1989).
[28] Karen D. Walker and Michael G. Tanner, *RICO Claims: The Challenge of Alleging the "Pattern" Element*, 76 *The Florida Bar Journal* 5 (2002), available at: <https://www.hklaw.com/files/Publication/5961c979-3acb-4d63-bd95-2e36b1450c50/Presentation/PublicationAttachment/4387711b-c615-4247-bdd5-6b37b9bccb4c/46193.PDF>.
[29] APUNCAC, art. 69, para. xxxx.

bank account in the Cayman Islands may involve two predicate acts of racketeering activity that occur within a relatively short period of time. The number of victims of this crime is unclear, but since APUNCAC's language is not conditioned on the number of victims, a prosecutor should not have the burden of establishing the number of victims. It should be sufficient to establish that public funds were misused and, therefore, the people of Kenya were victims of this crime. Nor should a prosecutor have the burden of establishing that more than one criminal scheme was utilized. It should be sufficient to establish that one criminal scheme was used.

Instead of imposing conditions that are not written into APUNCAC, the desire to narrow the application of RICO to crimes whose scope and persistence pose a special threat to social well-being is best implemented through existing prosecutorial policies that prioritize major crimes and patterns of unlawful activity whose scope and persistence pose a special threat to social well-being. A prosecutor should weigh the scope and persistence of alleged crimes and formulate a judgment about the degree to which they pose a special threat to social well-being, without imposing artificially-restrictive conditions that would potentially exclude the application of APUNCAC to the types of crimes described as examples in this article. APUNCAC is intended to apply, and is written to apply, to those examples. APUNCAC's purpose is to end the type of impunity and corruption that currently permits government ministers and other public officials to profit from their positions of trust and perpetuate the type of crime, corruption, and mismanagement of public resources that promotes and facilitates poverty and violations of basic human rights.

4. Treaty Management

APUNCAC includes provisions to ensure that APUNCAC is implemented as intended. APUNCAC establishes United Nations inspectors recruited, selected, and paid by the UN who would conduct investigations into allegations of corruption and refer charges to dedicated anticorruption courts. Article 8 creates dedicated anticorruption courts, with special procedures designed to ensure an independent, untainted process for selecting, retaining, and ensuring the accountability of competent justices to serve those courts. Article 10 makes obstruction of justice an offense that may be investigated by a UN inspector. Article 14 provides a mechanism where a UN inspector may, when obstruction of justice has occurred or when cooperation is inadequate, file a request for censure. Article 15 provides a mechanism where the World Bank and IMF would reduce aid and credits in response to the magnitude and frequency of acts of noncooperation with UN inspectors. Article 11 empowers the United Nations Commission on Crime Prevention and Criminal Justice to appoint entities to monitor domestic compliance with the terms of APUNCAC. Article 16 makes the Commission on Crime Prevention and Criminal Justice the final arbiter of disputes with regard to the actions of the Commission, ICAC, the Anti-Money Laundering Debarment Office, FINCEN, and each State Party Conflicts of Interest Board and Fair Political Practices Commission. Article 70 establishes a system where the institutional bodies established by APUNCAC may promulgate rules, regulations, and procedures to implement APUNCAC, adapt APUNCAC as needed, and resolve conflicts.

4.1 Dedicated Courts

Article 8 creates dedicated anticorruption courts, with special procedures designed to ensure an independent, untainted process for selecting, retaining, and ensuring the accountability of competent justices to serve those courts.

> Nominations of individuals to serve on national judicial councils pursuant to paragraph five, and nominations of justices and prosecutors to serve dedicated courts pursuant to paragraph one, shall be submitted to the Commission on Crime Prevention and Criminal Justice. The Commission may, upon a majority vote, veto the nomination of any individual to serve on a national judicial council, veto the nomination of any justice or prosecutor to serve a dedicated court, or request the censure or removal of any individual serving a national judicial council or any justice or prosecutor serving a dedicated court whose performance is alleged to be substandard.[30]

Article 8 creates a mechanism whereby the Commission on Crime Prevention and Criminal Justice would ensure accountability and discipline corrupt prosecutors and judges:

> Failure of a dedicated anticorruption court or prosecutor to observe the highest standards of judicial or prosecutorial conduct shall warrant disciplinary action by the Commission on Crime Prevention and Criminal Justice. Such action may include a letter of reprimand, redirection of funding to higher performing courts or prosecutors, or a recommendation to a national judicial council to suspend, demote, or remove a justice or prosecutor whose conduct contributes to unnecessary delays or falls below the highest standards of judicial or prosecutorial conduct.[31]

4.2 Compliance

APUNCAC includes provisions designed to promote compliance. Article 11 empowers the United Nations Commission on Crime Prevention and Criminal Justice to appoint entities to monitor domestic compliance with the terms of APUNCAC:

> The Commission on Crime Prevention and Criminal Justice shall appoint one or more entities to monitor domestic compliance with the terms of this protocol, with special reference but not limited to Article 9 regarding Cooperation, Article 10

[30] APUNCAC, art. 8, para. 6.
[31] APUNCAC, art. 8, para. 9.

> regarding Obstruction of Justice, Article 12 regarding the privileges and immunities of inspectors, staff and surrogates, and Article 13 regarding Protection.[32]
>
> Monitors pursuant to paragraph one of this Article may include national or international human rights institutions or any other entities deemed by the Commission on Crime Prevention and Criminal Justice to be duly qualified for the purpose of monitoring domestic compliance with APUNCAC.[33]
>
> The Commission on Crime Prevention and Criminal Justice shall ensure that designated monitors have regular and adequate funding to perform the responsibilities described in this Article, shall conduct periodic reviews to evaluate the performance of designated monitors, and may redirect funding based upon these evaluations.[34]

Article 11 specifies that designated monitors "shall not seek nor act on instructions from any source."[35] Article 11 specifies that States Parties would provide access to all reports and information requested by designated monitors for the purpose of formulating an opinion regarding domestic compliance with the terms of APUNCAC, including materials deemed relevant by UN inspectors.[36] Failure to comply with this requirement constitutes a failure of cooperation and obstruction of justice.[37] APUNCAC establishes standing of designated monitors to bring suit in domestic courts to compel the production of reports and information.[38] Monitors are required to publish regular reports regarding domestic compliance with the terms of APUNCAC.[39] The reports would be published online by Transparency International.[40] Article 11 makes the reports admissible as evidence in administrative or judicial proceedings of the State Party "in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors . . . subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors," and "shall be of identical value to such reports."[41]

[32] APUNCAC, art. 11, para. 1.
[33] APUNCAC, art. 11, para. 2.
[34] APUNCAC, art. 11, para. 3.
[35] APUNCAC, art. 11, para. 4.
[36] APUNCAC, art. 11, para. 5.
[37] APUNCAC, art. 11, para. 6.
[38] APUNCAC, art. 11, para. 7.
[39] APUNCAC, art. 11, para. 8.
[40] APUNCAC, art. 11, para. 8.
[41] APUNCAC, art. 11, para. 9.

4.3 Obstruction of Justice

Article 10 makes obstruction of justice an offense that may be investigated by a UN inspector. Significantly, a UN inspector may seek a judicial opinion from a justice in the state where the investigation is conducted regarding any alleged act involving obstruction of justice.[42] The UN inspector may recommend charges or disciplinary actions to the appropriate prosecuting authorities or disciplinary bodies.[43] UN inspectors would file reports that would be published online by Transparency International.[44] The report would be submitted to the appropriate prosecutorial, disciplinary, or oversight bodies.[45] Prosecution, disciplinary actions and oversight would follow the relevant statutory, regulatory, disciplinary or oversight agency procedures, practices and consequences entailed when an individual is accused of obstruction of justice in the state where the investigation is conducted.[46] If a UN inspector subsequently determines that prosecution, discipline or oversight of an individual accused of obstruction of justice has been perverted, the inspector would prepare and submit a report to the appropriate prosecuting authorities, disciplinary bodies, parliamentary institutions or other institutions exercising oversight.[47] The inspector would submit a report to be published online by Transparency International.[48] UN inspectors would certify the accuracy and integrity of the information presented in their reports.[49]

Article 10 inserts five bases for asserting obstruction of justice: 1.) "Any attempt to arrest or interfere with UN inspectors, staff, witnesses, victims or individuals who assist with ICAC investigations, contrary to the wishes of UN inspectors;"[50] 2.) "Any attempt to delay or thwart the effort of a UN inspector or surrogate to obtain or execute a warrant for arrest, in excess of the discretionary authority of the judge who receives the request for a warrant;"[51] 3.) "Any attempt to delay or thwart the execution of a lawful warrant for arrest presented by a UN inspector or surrogate, contrary to the wishes of the inspector or surrogate;"[52] 4.) "Any attempt to delay or thwart the lawful prosecution, trial, disciplinary hearing or oversight hearing of an individual accused of corruption or obstruction of justice, in excess of the discretionary authority of the prosecutor, judge, disciplinary body or oversight agency exercising jurisdiction over the relevant case;"[53] and 5.) "A prosecution, trial, disciplinary hearing or oversight hearing regarding an individual accused of corruption or obstruction of justice under this Protocol that is substantially irregular, violates accepted prosecutorial, judicial, disciplinary or oversight norms and practices, and perverts the course of justice."[54]

[42] APUNCAC, art. 10, para. 7.
[43] APUNCAC, art. 10, para. 1.
[44] APUNCAC, art. 10, para. 1.
[45] APUNCAC, art. 10, para. 1.
[46] APUNCAC, art. 10, para. 1.
[47] APUNCAC, art. 10, para. 1.
[48] APUNCAC, art. 10, para. 1.
[49] APUNCAC, art. 10, para. 1.
[50] APUNCAC, art. 10, para. 2.
[51] APUNCAC, art. 10, para. 3.
[52] APUNCAC, art. 10, para. 4.
[53] APUNCAC, art. 10, para. 5.
[54] APUNCAC, art. 10, para. 6.

4.4 Enforcement

Article 14 provides a mechanism where a UN inspector may, when obstruction of justice has occurred or when cooperation is inadequate, file a request for censure:

> In cases where an inspector believes that obstruction of justice has occurred, or adequate and timely cooperation, assistance or protection have not been provided by the requisite police, law enforcement, judicial, anti-corruption or government units, the inspector may file a request for censure by the Commission on Crime Prevention and Criminal Justice. The Commission shall review the request and may subpoena evidence and/or interview witnesses. The Commission shall make a determination, by a majority vote, to approve or disapprove the motion for censure no later than 21 days after receiving a request for censure.[55]

Article 15 directs the World Bank and IMF to develop and implement a system of reducing aid and credits in response to the magnitude and frequency of acts of noncooperation with UN inspectors and their surrogates.[56] This provision would become effective if the World Bank and IMF sign APUNCAC.

Article 16 makes the Commission on Crime Prevention and Criminal Justice the final arbiter of disputes with regard to the actions of the Commission, ICAC, the Anti-Money Laundering Debarment Office, FINCEN, and each State Party Conflicts of Interest Board and Fair Political Practices Commission.[57]

The provisions of Articles 8, 10, 11, 14, 15, and 16 would ensure that failure to cooperate and obstruction of justice would be investigated, would become public knowledge, would be censured, and would result in reductions in international aid and credits. Individuals who are responsible would be exposed. Corrupt prosecutors and judges would be exposed. Dedicated anticorruption courts would expedite the efficient prosecution of corrupt individuals. The experience of the Commission against Impunity and Corruption in Guatemala (CICIG) offers examples demonstrating how and why public exposure of corrupt individuals, prosecutors and judges would be expected to cause their resignation or removal from office.[58] While the provisions of APUNCAC could not ensure that every corrupt prosecutor, judge, or public official is removed from office, they would support and reinforce the efforts of honest, competent prosecutors, judges, and anticorruption investigators to expose corruption, force corrupt officials to resign, and tilt the balance in favor of honest, competent prosecutors and investigators. CICIG, until the end of its mandate, had been surprisingly successful. The persistent application of APUNCAC's provisions may be expected to have the same salutary effect.

[55] APUNCAC, art. 14.
[56] APUNCAC, art. 15.
[57] APUNCAC, art. 16.
[58] S. S. Yeh, *Why UN Inspections? Corruption, Accountability, and the Rule of Law*, 11 South Carolina Journal of International Law and Business 2 (2015), 227-260, 233, 234, 247, 250.

4.5 Article 70

Article 70 inserts a legal mechanism to adapt APUNCAC as needed and resolve conflicts. Article 70 establishes a system where the institutional bodies established by APUNCAC may promulgate rules, regulations, and procedures to implement APUNCAC. Article 70 also establishes a system of administrative law judges to adjudicate disputes about those rules, regulations, and procedures.

Article 70 draws upon the American Administrative Procedure Act,[59] the South Carolina Administrative Procedure Act, [60] the Rules of Procedure for the South Carolina Administrative Law Court,[61] U.S. Equal Employment Opportunity Commission Complaint Processing Procedures,[62] U.S. Code of Federal Regulations (CFR) section 1614.109(d) regarding discovery, [63] the U.S. Office of Personnel Management rule regarding the Qualification Standard For Administrative Law Judge Positions,[64] U.S. Code sections 5372 and 5303 regarding the compensation of administrative law judges,[65] and recommendations by the Administrative Conference of the United States (ACUS) regarding the federal administrative judiciary.[66] ACUS is an independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure.

To improve the independence of the administrative judiciary, ACUS recommended conversion of administrative judge (AJ) positions to administrative law judge (ALJ) positions. The American Administrative Procedure Act (APA) spells out protections designed to shield administrative law judges from improper agency influence--protections that are not available with regard to administrative judges. The APA requires the separation of certain functions to protect ALJs from improper influence by agency investigators and prosecutors. ALJs are selected through a special process overseen by the federal Office of Personnel Management (OPM). Their pay is set by statute and OPM regulations. Any attempt by an agency to discipline or remove an ALJ requires a formal hearing at the Merit Systems Protection Board. ALJs are also exempt from the performance appraisal

[59] 5 USC §§ 551-559 (2016).
[60] SC Code Ann. §§ 1-23-310 to 1-23-400 (2018).
[61] South Carolina Administrative Law Court, *Rules of Procedure for the Administrative Law Court*, available at: <http://www.scalc.net/pub/pubOfficialrules2011.pdf>, accessed December 19, 2018.
[62] U.S. Equal Employment Opportunity Commission, *Federal EEO Complaint Processing Procedures*, available at: <https://www.eeoc.gov/eeoc/publications/fedprocess.cfm>, accessed December 19, 2018.
[63] 29 CFR § 1614.109(d) (2017).
[64] Office of Personnel Management, *Qualification Standard for Administrative Law Judge Positions*, available at: <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/>, accessed December 19, 2018.
[65] 5 USC §§ 5303, 5372 (2016).
[66] Administrative Conference of the United States, *Recommendation 92-7: The Federal Administrative Judiciary*, available at: <https://www.acus.gov/sites/default/files/documents/92-7.pdf>, accessed December 19, 2018.

requirements applicable to almost all other federal employees under the Civil Service Reform Act.

The APA is complicated because the language seeks to accommodate a complicated federal system of adjudication that combines the employment of administrative law judges with the employment of administrative judges. The South Carolina Administrative Procedure Act dispenses with administrative judges and, instead, offers a simpler, more streamlined model of adjudication that relies entirely on administrative law judges operating through the South Carolina Administrative Law Court. Article 70 adopts South Carolina's approach of relying entirely on administrative law judges operating through an administrative law court. Article 70 incorporates language drawn from the Rules of Procedure for the South Carolina Administrative Law Court. These rules simplify and streamline court procedures to facilitate and promote efficiency while maintaining and elaborating APA protections to ensure that adjudication is fair and impartial.

Unlike either the American Administrative Procedure Act or the South Carolina Administrative Procedure Act, Article 70 inserts an optional expedited procedure that may be elected by either party to a dispute. The expedited procedure then becomes mandatory. The expedited procedure sets deadlines for the submission of briefs, reply briefs, a proposed decision by the presiding ALJ, objections if any to the proposed decision, and a final decision and order that is not subject to review. The parties may mutually agree to substitute deadlines in lieu of the deadlines specified in Article 70. The ALJ may pose written questions served on both parties, and may receive written responses, served on both parties. The expedited procedure is designed to expedite decisions in cases where a party believes that the facts are well-established and a decision may be reached by applying the law to the facts of the case. Article 70 specifies that in matters involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof.[67]

Article 70 inserts provisions designed to promote the accountability of administrative law judges:

> The Commission on Crime Prevention and Criminal Justice shall conduct an annual review of the performance of each administrative law judge and shall issue a letter of reprimand, suspension, or an order to retire for a decision or pattern of decisions by such judge that is arbitrary, capricious, manifestly contrary to properly articulated and disseminated rules, procedures, precedents, or policies, is not based on a consideration of relevant factors, or involves a clear error of judgment or a failure to articulate a legally sound conclusion. [68]

Article 70 also includes provisions designed to ensure the independence of the judiciary:

> No administrative law judge shall be disciplined or removed except through a formal hearing before a three-judge panel of administrative law judges drawn by rotation

[67] APUNCAC, art. 70, para. 16(e).
[68] APUNCAC, art. 70, para. 13(i).

> from the pool of such judges ranked in the top quintile by OPM and appointed by the Commission on Crime Prevention and Criminal Justice.[69]

Article 70 seeks to balance the need for an efficient mechanism to resolve disputes with the need to ensure fair and impartial adjudication. It does so by incorporating provisions designed to expedite decision-making together with provisions designed to promote fairness and impartiality.

5. Complementarity

The Rome Statute establishing the International Criminal Court (ICC) includes complicated provisions intended to avoid situations where the ICC usurps genuine proceedings conducted by domestic criminal justice systems.[70] These provisions are based on the principle of "complementarity," meaning that the ICC is intended to complement, rather than replace, existing domestic systems. The provisions seek to ensure that the independent prosecutor only proceeds when a State Party's domestic system is *unable* to prosecute an accused person, manifestly takes *no action*, is *unwilling*, or the proceedings are *not genuine*. If this condition is fulfilled and prosecution is in the interest of justice, then a case is *admissible*, meaning that the independent prosecutor may proceed with an investigation and prosecution. However, the evaluation of this condition is fraught with difficulty. Evaluation of the degree to which a domestic criminal justice system is truly unable to prosecute, determination of whether in fact no action has been taken, and assessment of a state's willingness to prosecute or the degree to which proceedings are genuine is a complicated undertaking involving multiple points where knowledgeable observers may disagree.

5.1 Complex Issues

Jo Stigen, who represented Norway's Ministry of Justice on the United Nations Preparatory Committee on the Establishment of an International Criminal Court and at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, authored a 533 page volume explicating the issues surrounding complementarity. The length of the text indicates that the issues are not simple. For example, Article 17(2) of the Rome Statute lists three factors relevant to the determination of a state's "willingness" to prosecute. Regarding the first factor, Article 17(2) states:

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether . . . [t]he proceedings were or are being undertaken or the national decision

[69] APUNCAC, art. 70, para. 13(i).

[70] Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 UNTS 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

> was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5.[71]

Stigen writes that "[This] Factor . . . reflects the core of the 'unwillingness' criterion . . . [but] demonstrating a purpose of shielding will be . . . challenging . . . Indeed, it may turn out to be just as difficult as proving a perpetrator's *mens rea*."[72] "Unlike a physical thing or a conduct, the purpose behind a conduct cannot be observed."[73] Stigen continues: "A subtle way of shielding the perpetrator is to assign the case to inexperienced investigators, prosecutors and/or judges. This strategy might be difficult to reveal, as the participants in the judicial process might be acting in good faith but still be bound to fail due to their inexperience."[74] However, Stigen notes that "the fact that the investigators merely are doing a sloppy job will not, for instance, indicate unwillingness."[75] To assess whether a case is admissible, the independent prosecutor and the pretrial chamber of the ICC are forced to judge not only whether sloppiness is due to inexperience *but whether that was the intended result of a state's deliberate strategy to shield a perpetrator.* This is only one of numerous thorny judgments that are shouldered by the independent prosecutor when addressing the issue of admissibility. The issues arise because the ICC was created as a court that complements, but does not replace, domestic courts. In sum, there is tremendous potential for confusion and disagreement regarding the conditions under which a case is admissible before the independent prosecutor of the ICC.

5.2 APUNCAC Strategy

APUNCAC dispenses with all of these issues because it establishes a clear division of labor. Under APUNCAC, a UN inspector may only investigate a case. Upon completion of an investigation, the case is handed over to an appropriate prosecuting authority. There is no duplication of prosecutorial or judicial functions. The model anticorruption protocol obligates each State Party to create a system of dedicated anticorruption courts that are operated domestically. Under APUNCAC, the UN is responsible for funding the courts. APUNCAC requires States Parties to establish national judicial councils for the purpose of

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[71] Rome Statute, art. 17(2).

[72] Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2008). *Mens Rea* refers to criminal intent. The literal translation from Latin is "guilty mind." A *mens rea* refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime. See, e.g. Staples v. United States, 511 US 600 (1994). Establishing the *mens rea* of an offender is usually necessary to prove guilt in a criminal trial. The prosecution typically must prove beyond reasonable doubt that the defendant committed the offense with a culpable state of mind. The *mens rea* requirement is premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct; however, a defendant need not know that his conduct is illegal to be guilty of a crime. Rather, the defendant must be conscious of the facts that make his conduct fit the definition of the offense.

[73] Ibid., 261.

[74] Ibid., 270-271.

[75] Ibid., 273.

selecting, evaluating, and maintaining discipline among judges who are appointed to serve the dedicated anticorruption courts. APUNCAC gives the UN Commission on Crime and Criminal Justice the responsibility to vet, and the power to veto, the selection of individuals who serve on national judicial councils, as well as the selection of prosecutors and justices who serve dedicated anticorruption courts, thereby ensuring the competence and integrity of the councils and the competence and integrity of the prosecutors and judges who are appointed to serve dedicated anticorruption courts.

Under APUNCAC, a UN inspector may begin an investigation immediately upon receiving a request to open an investigation. In contrast, the independent prosecutor of the ICC is hamstrung by the lengthy, time-consuming task of assessing admissibility, involving difficult judgments and issues that require a lengthy period of evaluation. Valuable time may be lost, permitting suspects to destroy evidence, witnesses to disappear, and the investigative trail to grow cold. In contrast, a UN inspector can move swiftly to obtain court orders for wiretaps and other necessary investigative steps without alerting criminal targets that an investigation has begun.

The creation of a single international anticorruption court modeled on the ICC would be inadequate to handle the hundreds--perhaps thousands--of cases that could be expected each year among UN Member States. To handle the volume of cases involving corruption, it is necessary to create a system of dedicated anticorruption courts operated by every State Party. Such courts would necessarily be aligned with local norms, tailored to domestic laws, and more efficient than a single court that cannot be aligned or tailored to local norms and laws.

5.3 Obstruction of Justice

APUNCAC maintains discipline among prosecutors and judges by defining the crime of obstruction of justice. APUNCAC explicitly states that actions by prosecutors and judges that are substantially irregular and fall outside the norms of prosecutorial and judicial behavior may be investigated as acts constituting obstruction of justice. Since opinions may differ about acts that rise to the level of obstruction of justice, APUNCAC includes a provision whereby a UN inspector may seek an opinion from a domestic court. An opinion that obstruction of justice has occurred would necessarily reflect domestic norms regarding acts that fall outside acceptable behavior. That opinion would not be rendered lightly because it would necessarily be rendered by a court that could, in principle, find itself under investigation for similar acts. APUNCAC makes that opinion admissible evidence in any case that is handed over to domestic prosecutors. It would be powerful evidence. Once published online by Transparency International, it would shame the culpable party and would be difficult to ignore by a national judicial council vested with the responsibility of evaluating the performance of the judiciary and maintaining the integrity and discipline of the judiciary. These provisions obligate prosecutors and judges to adhere to accepted norms of prosecutorial and judicial behavior, enforcing discipline, promoting competence, and rewarding diligent, ethical, prosecutors and judges. APUNCAC serves, in this way, to strengthen domestic criminal justice systems. In contrast, the ICC intervenes when a state is

unable or unwilling to genuinely prosecute, but it does not enforce discipline or otherwise promote the competence of domestic criminal justice systems.

A concern is that a domestic anticorruption court may be corrupted in the same way that other domestic courts may be corrupted. APUNCAC includes provisions designed to deter such corruption, involving procedures to vet the selection of competent justices and enforce accountability. Article 10 defines the crime of obstruction of justice in a way that targets corruption in the judiciary and among prosecutors:

> A prosecution, trial, disciplinary hearing or oversight hearing regarding an individual accused of corruption or obstruction of justice under this Protocol that is substantially irregular, violates accepted prosecutorial, judicial, disciplinary or oversight norms and practices, and perverts the course of justice shall constitute obstruction of justice.[76]

UN inspectors employed by the UN, paid by the UN, and insulated from undue influence from domestic authorities, are specifically authorized and empowered to conduct investigations into charges of obstruction of justice, with special priority given to prosecutors, judges, and other elements of the judicial system. In the course of an investigation, a UN inspector may seek a judicial opinion from a justice in the state where the investigation is conducted regarding any alleged act involving obstruction of justice.[77] This opinion would constitute an independent judgment, reflecting local judicial norms, about whether the behavior in question constitutes obstruction of justice.

APUNCAC includes provisions designed to ensure that appropriate authorities act upon the information regarding obstruction of justice.

> Upon the conclusion of each investigation, the supervising UN Inspector shall file a report to be published online by Transparency International.[78]

> The report shall include witness statements, a statement of evidence, judicial opinions (if available), rebuttal statements (if available), and a description of the relevant statutory, disciplinary agency or oversight institution procedures and consequences entailed when an individual is accused of obstruction of justice in the state where the investigation is conducted.[79]

This provision is designed to ensure that a corrupt prosecutor cannot hide evidence of obstruction of justice. It is analogous to the unsealing of a criminal indictment in a U.S. district court by a U.S. attorney.[80] The provision is designed to expose corrupt individuals in the court of public opinion and to prod relevant disciplinary and oversight institutions to

[76] APUNCAC, art. 10, para. 6.
[77] APUNCAC, art. 10, para. 7.
[78] APUNCAC, art. 10, para. 1.
[79] APUNCAC, art. 10, para. 1.
[80] A difference is that a typical indictment does not include witness statements. However, there is a heightened need for transparency with regard to allegations of corruption involving prosecutors and judges.

act. While it might be argued that publication by Transparency International of charges of corruption would be inflammatory, the alternative is the status quo, i.e., a continuation of the rampant corruption, impunity, and indifference that characterizes certain judicial systems and is described by Gary Haugen and others.[81] To avoid the continuation of corruption and impunity, APUNCAC increases public exposure.

This is especially important in cases where prosecutors or judges are involved in obstruction of justice. Provisions of domestic laws designed to insulate prosecutors and judicial officials from undue influence create barriers to the removal of corrupt prosecutors and judges. Corrupt officials use these barriers to fend off institutions that might exert discipline. This creates a need to promote transparency.

Transparency supports and reinforces APUNCAC's disciplinary mechanisms by promoting engagement and oversight by bodies designed by APUNCAC to be insulated from corrupt domestic influences: the UN Commission on Crime and Criminal Justice and national judicial councils composed of individuals vetted by the Commission on Crime and Criminal Justice. Transparency exposes corrupt actors within the justice system to the court of public opinion and pressure to behave ethically and responsibly.

6. Conclusion

One might argue that APUNCAC's success depends on the selection of experienced, competent UN inspectors to write balanced, reasoned reports supported by adequate evidence. However, the U.S. justice system also relies upon the selection of experienced, competent U.S. attorneys to write balanced, reasoned indictments supported by adequate evidence. The U.S. justice system offers a model suggesting that it is feasible for experienced, competent UN inspectors to write balanced, reasoned indictments supported by adequate evidence. In either case, a persistent failure to write balanced, reasoned indictments supported by adequate evidence is likely to end an investigator's career. UN inspectors would operate under intense scrutiny by the media, the public, and the accused. This scrutiny would reward competence and punish incompetence in the same way that U.S. attorneys are rewarded for competence and punished for incompetence.

UN inspectors are required by APUNCAC to submit their reports to the appropriate prosecutorial, disciplinary, or oversight bodies:

> The report shall be submitted to the appropriate prosecutorial, disciplinary, or oversight bodies. Prosecution, disciplinary actions and oversight shall follow the relevant statutory, regulatory, disciplinary or oversight agency procedures, practices and consequences entailed when an individual is accused of obstruction of justice in the state where the investigation is conducted but those procedures and practices shall not be abused in a way that would pervert the course of justice. If a UN Inspector subsequently determines that prosecution, discipline or oversight of an individual

[81] Gary A. Haugen and Victor Boutros, *The Locust Effect: Why the End of Poverty Requires the End of Violence* (New York: Oxford University Press, 2014).

> accused of obstruction of justice has been perverted, the Inspector shall prepare and submit a report to the appropriate prosecuting authorities, disciplinary bodies, parliamentary institutions or other institutions exercising oversight. The Inspector shall submit the report to be published online by Transparency International.[82]

This provision ensures that the appropriate prosecutorial, disciplinary, or oversight bodies would act on reports by UN inspectors regarding obstruction of justice, or risk investigation and public exposure for corruption and obstruction of justice. This provision ensures that corrupt prosecutors and judges would no longer be able to hide their corrupt acts from public view. UN inspectors would name corrupt individuals. Details of their corruption and obstruction of justice would become public knowledge. The experience of the Commission against Impunity and Corruption in Guatemala suggests that public exposure would force the resignation or removal of corrupt prosecutors and judges who previously enjoyed impunity.

The consequences of rampant corruption in domestic justice systems have been described elsewhere.[83] When justice fails, the poor suffer. Violations of human rights occur. Corruption and impunity endure.

APUNCAC establishes mechanisms designed to fight corruption and impunity in the institutions that normally fight corruption and impunity. Exposure and punishment of corrupt individuals serves to reinforce and multiply the efforts of honest, competent members of the justice system. Over time, as the proportion of corrupt individuals is reduced, their influence is reduced. The resources of anticorruption investigators and prosecutors can be targeted toward the remaining criminals, increasing the probability of exposure, raising the costs of crime, reducing the benefits, and drastically altering calculations of the benefits and costs of crime. This formula has worked in Hong Kong, Singapore, and Georgia, and there is no reason why it should not also work in any other jurisdiction.

[82] APUNCAC, art. 10, para. 1.

[83] Gary A. Haugen and Victor Boutros, *The Locust Effect: Why the End of Poverty Requires the End of Violence* (New York: Oxford University Press, 2014).

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