The Importance and Efficacy of an Assets Division of the International Anti-Corruption Court

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Good Governance Academy Colloquium

May 20, 2026

The International Anti-Corruption Court will be an institution with two divisions.

- The *Criminal Division* will initiate and pursue prosecutions for alleged offences.

- The *Assets Division* will have authority over property, including cash, land and chattels that are alleged to be proceeds of corruption. That includes the power to freeze, seize, and redistribute those assets.

Whenever a prosecution in the Court's Criminal Division involves property, the Court's Assets Division will be asked to exercise its authority to deal with that property in an appropriate manner. The determination of what is "appropriate" will depend on the circumstances of the case, including how far the prosecution has advanced. And "dealing with" the property may include a freezing order, or directing that the property be preserved, managed or disposed of as the interests of justice may require, and especially in the interim until the prosecution has concluded[1].

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[1] As between them, the Criminal Division will have primacy over the Assets Division in situations where a criminal investigation or prosecution is underway and the possibility of conflict between the two Divisions might arise. The rights of the accused persons in the Criminal Division would have to remain paramount, and both the treaty provisions and the court's procedure would have to be designed so as to ensure that proceedings in the Assets Division do not prejudice those in the Criminal Division. In some instances, for example, that may mean that the civil proceedings would be stayed until the disposition of the criminal proceedings.

The Assets Division will also have an important role to play after a conviction in the Criminal Division. It will be available to answer the question: "What to do now with the purloined property?"

But perhaps the most innovative function of the Assets Division will arise when it is called upon to act independently, to deal with "asset recovery".

Let me explain.

It is important to remember that not every act of grand corruption will result in a prosecution. After all, there will be a finite number of investigators, prosecutors and courtrooms. Given the scale and frequency of corrupt takings, there will be many billions stolen in situations where prosecutions do not occur. Yet it will still be important, when the looted assets are found and frozen, to see them returned to the "victim state" so they can be invested as they should have been --in infrastructure and in social services for the benefit of the population.

The Assets Division will have the authority, when requested to do so by states, to order the return of the billions of dollars in looted assets identified as corruptly taken and frozen by governments around the world—but not connected to crimes being prosecuted in the IACC.

Ordering the return of that stolen money means that it will be put back into the hands of the "victim state" from which it was corruptly taken. So it will be available to invest in health care, education and other social services so crucial for that state's citizens, including the women, children and families that rely on such services.

Empowering the Assets Division of the IACC to engage in "asset recovery" will fill a crucial gap in global governance. Because at present, there is much criticism of the way governments deal with looted assets and the sometimes-competing claims for their return. In such matters, outcomes can be unpredictable, inconsistent and slow. While UNCAC provides for the submission of asset recovery claims to the Permanent Court of Arbitration with an appeal to the International Court of Justice, such a process can be lengthy and expensive.

So in most cases, governments and their officials are left to do the best they can, working with often improvised procedures and criteria and providing "*rough justice*". They reach the best outcome available in the circumstances, often hoping that returned assets are not re-stolen.

To address this gap, the Assets Division will have authority, when requested by a state to do so, to step in and adjudicate claims for asset recovery even when there are no criminal proceedings pending. It will receive competing claims, clarify contested facts and assist the states involved by providing clear, consistent and authoritative rulings on the disposition of the assets in question.

The Assets Division will be available for this purpose both to States Parties to the treaty that establishes the IACC and to any other state that chooses to "opt in" to the court's authority for the adjudication of a specific case, accepting the jurisdiction of the court for the purpose of that case's disposition. The request for the Assets Division's ruling can be made either by the "victim state" or the "holding state".

In this way, the Assets Division will allow the IACC *to go beyond* criminal prosecution—to focus on the proceeds of corruption, not just the perpetrators, on civil remedies as well as criminal sanctions, and on restitution as well as punishment. It will provide independent, impartial and enforceable decisions when the ownership or entitlement to the return of looted assets is in question.

In deciding matters put before it, the Assets Division will adjudicate based on the (lower) civil standard of proof, namely the balance of probabilities, rather than the more exacting "beyond a reasonable doubt" standard that applies in criminal proceedings.

The Assets Division will be tasked with:

- Assessing the legal and factual basis of a request for liquidation, forfeiture, and return, including potential requests by intervenors or third parties with claims on the assets, and making a binding determination in respect thereof.

- Ordering the transfer of financial assets, the liquidation of physical assets, and holding funds in escrow pending resolution of a request for restitution.

- Making orders of confiscation and forfeiture if a requested or requesting state lacks the capacity or willingness to do so.

- Receiving submissions on the proposed disposal of assets and identifying trustworthy, and equitable channels for their return.

- Resolving disputes between and among parties concerning the recovery of assets.

- Making orders, including on equitable and lawful distribution of assets, that are binding on all parties.

So, in summary:

The Assets Division of the IACC, when acting independently of the Criminal Division, will have the mandate and authority to assist in the resolution of disputes between states concerning the return of looted assets.

Any state will be able to invoke its jurisdiction.

Its proceedings will be based on principles of accessibility, impartiality, procedural simplicity, fairness and efficiency.

The Assets Division will be empowered to

- Declare and determine the rights and entitlement of the parties in relation to the matters in issue.

- Order the return of the looted assets to the applicant state.

- In the alternative, direct the disposition of the assets in a manner deemed fair and reasonable in the circumstances, including the transfer of the assets to a third party on such terms as the court directs, including the disbursement of the assets to a humanitarian or non-governmental organization in furtherance of public policy goals.

The Assets Division of the IACC will serve a purpose that is not otherwise being fulfilled and meet a need that is not otherwise being met. It will, once fully functioning, allow for direct access by aggrieved states to a simplified process that will, with independence and impartiality, fairly settle disputes about the return of assets so they can be used for the benefit of the population that was unjustly and corruptly deprived of them.