10 Guiding Principles and Parameters on the Notion of Independence of Anti-Corruption Bodies[1, 2]

by Martin Kreutner

There is now a common and undisputed consensus within academia, practitioners, and other experts alike that institutions working in the field of preventing and combating corruption shall be independent from those that fall under their remit. The major international conventions and instruments in the anti-corruption field, both on a global and a regional level, have taken up this notion and contain – in most cases – mandatory provisions that urge and require (States) Parties or member countries to establish and maintain the "necessary independence" of their anti-corruption body or bodies[3, 4] (ACAs).

Art. 20 on *Specialised authorities* of the Council of Europe's Criminal Law Convention on Corruption[5] (CoE's CrimLCoC) stipulates: "*Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure.*" In addition to that, Resolution (97) 24 of the Committee of Ministers of the Council of Europe on *Twenty Guiding Principles for the Fight against Corruption*[6] (CoE's 20 GPs) in its Principle 3 states: "*[The Committee agrees] to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations.*"

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[1] The subject article is a brief abstract of the lecture given at the 3rd International Anti-Corruption Summer School, IACSS 2009, in Hernstein, Austria, 9-18 July 2009.
[2] Opinions contained in this article are those of the author only and not necessarily those of the Austrian Federal Ministry of the Interior, the author's employer, or any organisation/institution the author holds functions in.
[3] The UNCAC uses the term anti-corruption (AC) "body or bodies". In this article I shall use the terms "AC agency", "AC organisation" and "AC institution" synonymously.
[4] In this paper the abbreviation "ACA" stands for "AC body", "AC agency", "AC organisation" or "AC institution", respectively.
[5] The Convention entered into force on 1 July 2002.
[6] The Resolution was adopted by the Committee of the Council of Europe on 6 November 1997.

The most comprehensive global instrument to this date, the United Nations Convention against Corruption (UNCAC)[7], also called "Mérida Convention"[8], in its Art. 6 on *Preventive anti-corruption body or bodies*, Chapter II on *Preventive measures*, as well as in Art. 36 on *Specialized authorities*, Chapter III on *Criminalization and law enforcement*, follows similar lines. It requires States Parties not only to ensure - in accordance with the fundamental principles of its (i.e. the State Party's) legal system - the existence of a body or bodies that prevent corruption and a body, bodies or persons specialized in combating corruption through law enforcement, but also to ensure that "*such body or bodies (or persons) shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to enable the body or bodies (be able)*[9] *to carry out their functions effectively and without any undue influence.*"

The UNCAC does not mandate the establishment or maintenance of more than one body or organisation for the a/m tasks but recognises that, given the range of responsibilities and functions, these may already be assigned to different existing agencies. In a similar vein, the Convention deals with preventive and law enforcement functions and corresponding bodies under two different Articles (i.e. Arts. 6 and 36, respectively), yet, the States Parties may decide to entrust one body with a combination of preventive and law enforcement functions.[10] However, both types of functions (bodies) shall be granted the necessary independence to ensure that they (their activities) are carried out unimpeded and without undue and improper influence.

(Global) international instruments are routinely based on a broad consensus and thus have to follow a pattern of common denominators. At he same time, they have to observe, *inter alia*, issues of socio-cultural diversity, national sovereignty, (hidden) (national and international) political agendas as well as different legal systems and backgrounds. It is also for these reasons that they regularly refrain from engaging into in-depth definitional issues[11] or from "legal micro-managing".

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[7] by General Assembly resolution 58/4 of October 2003.
[8] The UNCAC was signed at the High-level Political Conference for the Purpose of Signing the United Nations Convention against Corruption, organised by the United Nations Office on Drugs and Crime (UNODC) in Mérida, Mexico, from 9 to 11 December 2003, and entered into force on 14 December 2005. As of 9 November 2009, the UNCAC has 140 signatories and 141 parties.
[9] Art. 36 UNCAC.
[10] United Nations Office on Drugs and Crime (2006), *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, New York: United Nations, 21, 22.
[11] The most prominent example in this regard is the high number of international conventions and instruments on terrorism. Not a single one took over the responsibility to strive defining the conception of "terrorism", taking account of the common notion of "*One man's freedom fighter is another man's terrorist.*"

They rather leave it to the parties of the instrument how to comply with the more general or "macro-"expectations, requirements and provisions of such (legal) frameworks.

It is therefore no wonder that while on the one hand the notion and requirement of independence for anti-corruption bodies and institutions *prima facie* goes widely undisputed, it is on the other hand hardly ever discussed in detail or translated into daily life. As a matter of fact, only very few of the national (and international) ACAs can be regarded as comprehensively independent[12] by the end of the day. In practice, it is rather a broad range of institutional, organisational, legal, political and factual set-ups for ACAs that we are dealing with. This spectrum basically goes from the extreme of nomenklatura-controlled agencies for political oppression via window dressing institutions functioning as "governmental anti-corruption discourse mechanisms"[13] to vociferous, blatant and scandal-mongering interest groups on the other end of the spectrum (the latter often featuring an end in themselves rather than a solution to a problem).

As an overall consequence, it is the intention of this paper to come forward with and propose 10 guiding principles and parameters that can be used as thresholds and indicators in regard to the subject matter of independence. They may serve as compasses and torches in murky water; however, for obvious reasons they do not and cannot act as easy fixes or silver bullets.

At the same time, it is also clearly understood that as these guiding principles and parameters are complex and interacting, they have to be contextualised in the cultural and socio-historical framework of a given *gemeinschaft* (community) or *gesellschaft* (society)[14]. It goes without saying that the outlined 10 guiding principles are to be seen in accordance with the fundamental principles of the legal system of a country (State Party)[15] as well as with other national and international legal obligations.[16]

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[12] I will refrain from discussing the notion of "complete independence" from a philosophical perspective, but would rather like to stay with hard facts as far as possible.
[13] Robert Schuman Centre for Advanced Studies (2009), *Anti-Corruption Agencies: Between Empowerment and Irrelevance*, San Domenico di Fiesole, Italy: European University Institute, 7.
[14] Compare, e.g., Arts. 5/1, 13 UNCAC, Art. 3 of the African Union Convention on Preventing and Combating Corruption.
[15] Compare Arts. 4, 6, 36 UNCAC.
[16] E.g. the Charta of Human Rights, data protection legislation, *et cetera*.

All that said, let us plunge *in medias res*. To be technically (and rightfully) called independent and to meet the *ratio legis* of "necessary independence" as laid down, e.g., in Art. 20 on *Specialised authorities* of the CoE's CrimLCoC, as well as in Art. 6 on *Preventive anti-corruption body or bodies* and Art. 36 on *Specialized authorities* of the UNCAC, anti-corruption agencies, ACAs, shall be granted[17]:

1. The backbone of an appropriate, comprehensive and stable statutory/constitutional legal framework.

Modern societies – and their relations to other entities – are (normally) based upon the rule of law. Also following the more formal constitutional principle of legality[18], the legislative power sets up the (legal) frameworks and, concomitantly, the basis of the public sector's institutions (including rights and obligations, powers and mandates, etc.). In doing so, constitutional legislation requires higher (parliamentary) majorities[19] and quorums than ordinary laws. It is thus important to establish and maintain an ACA on the basis of comprehensive constitutional legislation.[20] This will help to keep the ACA out of day-to-day politics and (politically motivated) ad hoc legislation. Furthermore, it will strengthen the ACA's legal and factual validity and thus substantially extend its (political) "half-life".[21] To put it in the words of the President of GRECO[22], Drago Kos, reflecting on political turbulences of the ACAs in Austria, Latvia and Rumania in 2008: "Some European agencies have an outstanding international reputation and therefore they have difficulties in their own countries. They share the same fate as many (other) anti-corruption agencies which, for some people, are becoming too successful internally."

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[17] Comments and explanations to the individual guiding principles and parameters will be kept concise and brief, as most of them are self-explanatory.
[18] The general constitutional principle of legality is broader than the synonymous criminal justice principle in the common law system. In a nutshell, the former requires all (three) powers in the modern state to base their actions (and omissions) strictly on the rule of law.
[19] In most countries 2/3 majority votes *versus* simple majority votes for ordinary laws.
[20] Legislation will also be required to, *inter alia*, set up rules of procedure and provide for implementation, enforcement, sanction, communication and coordination mechanisms as well as advisory/supervisory/auditing mechanisms. At the same time, it is understood that not all such regulations necessarily need to be of a constitutional nature.
[21] Interestingly, ACAs get regularly "evaluated and improved" after elections and political change. In more candid language, and avoiding such euphemisms, one may also say they get adjusted to a new set of political realities and expectations. Some players are even more straightforward: as an example, in the summer of 2008, the Italian High Commission for the Prevention of and the Fight Against Corruption was abolished for good only a few days after a new government had come into power. It was only due to clear and outspoken signals by the international community (such as the UN, the OECD, the Council of Europe *et altera*) that the new government finally established a new AC institution, yet with limited powers and a limited mandate [q.e.d.?].
[22] *Le Groupe d'Etats contre la Corruption* of the Council of Europe. As of October 2009, GRECO comprises 46 Member States (45 European states and the United States of America).

2. Appropriate allocation of highly qualified personnel, adequate (public) funds and resources (including remunerations and incentives), effective and efficient institutional and organisational frameworks free from any inappropriate and undue influence, as well as appropriate professional training possibilities; in addition to that, the ability to decide upon these resources (including personnel) and to use these capabilities at their own discretion without prior consultation or approval.

To function properly, i.e. to fulfil its mandate effectively and efficiently, an ACA needs agents and means. It should thus be reasonably staffed and given adequate remuneration and incentive systems[23]. These systems[24] should be competitive to other similar institutions, take into account the level of economic development of a country[25], allow living decent lives and thus help to avoid potential brain drain from the ACA.

Corruption is a cross-cutting issue involving numerous and multifaceted aspects and phenomena of social interaction. As a consequence, corruption needs to be addressed and tackled holistically and comprehensively.[26] In addition, *"in investigating corruption allegations you regularly have to stir in murky waters, you have to deal with the intelligent, the most resourceful and the real powerful. The burden of proof lies with the investigators, and the investigational and judicial chain is only as strong as its weakest link. Even if the chain stays solid, your day may end still missing the final but necessary piece of evidence in the obvious corruptive mosaic. Subsequently, you are nolens volens instrumentalized in supposedly proofing the "innocence" of the corrupt."*[27] For all the outlined reasons, constant and consistent training - based upon practical experience and academic research alike - is considered crucial for personnel in the anti-corruption arena.[28]

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[23] In an environment where corruption becomes a matter of survival or overwhelming temptation (for whatever reason), personnel of an ACA will hardly be the exemption of such de-facto rules or *usus*.
[24] Compare Art. 7/1/c UNCAC.
[25] Art. 7/1/c UNCAC.
[26] I favour and promote a four-pronged approach to combat corruption: (1) prevention, (2) education, (3) law enforcement (i.e. investigation/prosecution etc.), and (4) (international) cooperation.
[27] Kreutner, M. (ed.) (2006), *The Corruption Monster - Ethik, Politik und Korruption*, Vienna: Czernin Verlag.
[28] Compare Arts. 6/2, 7/1, 36 UNCAC; Art. 20 CoE's CrimLCoC; and Art. 20/5 of the African Union Convention on Preventing and Combating Corruption.

Finances and general resources need to be adequate to enable an ACA fulfil its mandate[29]. As the prevention of and the fight against corruption are ultimately to be seen as safeguards for social and economic prosperity and the rule of law, they also constitute core tasks of the state as such.[30] It is therefore reasonably fair to argue that funding and resources should come from public sources[31].

Institutional and organisational frameworks should permit and ensure effective and efficient work and be free from any - even potential - inappropriate and undue influence. This would, e.g., include multi-year budget planning and allocation[32], long-term rental agreements for facilities, the absence of political party based/focused works councils and employee representation[33], etc.

Having resources at hand is one side of the coin, being allowed to use them effectively and efficiently is the other. It is imperative, therefore, that ACAs be given the mandate to decide upon these resources (including personnel)[34] and to use these capabilities at their own discretion without prior consultation or approval. It goes without saying, though, that in doing so, ACAs shall follow the principles of transparency and accountability[35] and obey clear rules of procedure within the fundamental principles of a given legal system.

3. **Transparent and objective recruitment (dismissal)[36] procedures/ mechanisms for the head of the ACA and all other (key) personnel that are based on principles of efficiency and transparency and on objective criteria**

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[29] Compare Arts. 6/2, 36 UNCAC; Art. 20 CoE's CrimLCoC; and Principles relating to the Status of National Institutions for Protection and Promotion of Human Rights (The Paris Principles), Office of the United Nations High Commissioner for Human Rights.

[30] Compare, e.g., Fukuyama, F. (2004), *State Building - Governance and World Order in the Twenty-First Century,* London: Profile Books Ltd.:, 9, 13, 20, 25, 163; Lambsdorff, J.G. (2007), *The Institutional Economics of Corruption and Reform,* Cambridge: University Press, 39ff.

[31] Compare *Opinion of the Commissioner for Human Rights [of the Council of Europe] Concerning Independent and Effective Determination of Complaints against the Police* as of 12 March 2009.

[32] Compare United Nations Office on Drugs and Crime (2009), *Technical Guide to the United Nations Convention against Corruption,* New York: United Nations, 12, 116.

[33] E.g. the law for the new Austrian ACA (*Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung, BAK*) in its Art. 10 stipulates that legitimate matters of employee representation are entirely dealt with by the central works council of the Ministry of the Interior, thus safeguarding that, on the one hand, constitutional requirements of such representation are observed and provided for but, on the other hand, the ACA is kept free from political party driven presence in its own frameworks.

[34] In practice, this may include, for instance, the right of the (head figure of an) ACA to recruit personnel or to veto the allocation of personnel from outside sources. It definitely includes disciplinary powers.

[35] This may comprise, e.g., *ex post* auditing and controlling. Ultimately, the ACA is to be held accountable for the proper and adequate handling of its resources (including personnel).

[36] Also included are hiring, retention, promotion and retirement activities.

and that focus on a proven record of the individual's integrity, skills, education and training, experience and professionalism only; including provisions and factual safeguards against appointments (dismissals)[37] motivated by undue considerations.

The UNCAC, in its Art. 7, highlights the importance of a public sector recruitment, hiring, retention, promotion and retirement system that is, *inter alia*, based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude. This holds true even more so for the sensitive area of recruitment (and management) of human resources for an ACA.[38]

There is no such a thing as a broadly recognised best practice example or standard model, but there is a variety of different approaches and procedures. Observing the principle of checks and balances, a combination of different proceedings, mechanisms and safeguards may ultimately suffice for the outlined requirements. Such procedures and instruments may include: clear and transparent job descriptions; a clear and transparent set of objective criteria in regard to a person's qualifications and requirements, at the same time allowing for less measurable criteria such as social competence and empathy, leadership skills, etc. as long as they are addressed and argued on in a transparent and comprehensible way; an open, transparent and reasonably timed advertising process without loopholes; independent recruitment commissions; recruitment in accordance with a procedure affording all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society)[39]; additional (obligatory/non-obligatory) advisory/ consultancy boards[40] with a right to remand or veto a decision; systems of internationally recognised benchmarks[41]; systems of complaints, appeals and remedies; systems of legal[42] and political liability in case of non-compliance.

4. **Terms of office of a minimum of two (parliamentary) legislative periods[43] plus one year each (i.e. in total preferably twelve years or more)**

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[37] Also included are hiring, retention, promotion and retirement activities.
[38] Also compare Art. 11 UNCAC.
[39] Principles relating to the Status of National Institutions for Protection and Promotion of Human Rights (The Paris Principles), Office of the United Nations High Commissioner for Human Rights.
[40] Composed of, e.g., (a combination of) (retired) heads of supreme courts, supreme judges, international experts, senior academics, (other) highly reputed dignitaries, etc.
[41] Compare, e.g., the so-called Bologna process regarding the recognition of academic qualifications and accreditation.
[42] Including criminal liability and liability for compensation.
[43] Legislative periods in most countries last four or five years, respectively.

for the head of the ACA and all other (key) personnel without the possibility to be reappointed for a second term of office, including a transparent system of reasonable and just follow-up careers for those who leave the ACA.

In some countries and regions it has become a routine pattern after elections (or major investigations) to dismiss personnel of ACAs. This serves various goals: to get rid of (politically) inconvenient and (too) successful individuals, to set the political agenda anew and to serve clientelism and favouritism by installing (in most cases less qualified) political appointees with dependent loyalties[44].

It is basically for these obvious reasons that (key) personnel of an ACA shall be granted terms of office extending beyond legislative periods, preferably beyond two of these. For each legislative period one additional year should be added to cover times of *interregnum*, i.e. of party negotiations and government building. As in most countries legislative periods last four or five years, respectively, a total term of office of twelve years for (key) personnel seems appropriate and recommendable.

Second terms of office should not be provided for as they would likely heighten the following risks concerning a possible reappointment: pressure and undue influence on the office holder by the decision-makers on the one hand, and unprofessional and improper adaptiveness by the office holder towards the decision-makers on the other hand.

ACA employment is rarely a lifetime service. Additional safeguards are thus needed to provide transparent, reasonable and just follow-up careers for those who leave the ACA. These may include, *inter alia*: systems and instruments of job guarantee to return to former jobs (without any disadvantages on [scales of] promotion, remuneration and other incentives), of broad professional recognition of terms of service in and promotions while serving in the ACA, clear and comparable systems of permeability (compared) to equivalent posts, systems of protection against (undue) dismissal and (undue) relocation, *et altera*.

[44] Legend has it that such scenarios only take place in non-democratic countries or – even better – on the dark side of the moon [in a wider context, I call this the monodirectional-distal perception of corruption]. Reality has it, though, that they are matter-of-factly daily practice in almost all of our countries.

5. Terms of office/employment of ACA personnel on a voluntary basis by the respective individual.

Employment in an ACA *nolens volens* often goes along with high levels of visibility, internal and external exposure and sometimes even broad and direct hostility.[45] At the same time, it requires above-average levels of personal honesty, integrity, resilience, stamina, steadfastness, as well as professional commitment and dedication. Fighting corruption without heart and mind will not work. It is therefore only fair enough and appropriate that such employment is rather based upon voluntary assignment than - in the worst case - a perception of being conscripted into a *Strafkompanie* (punishment battalion).

6. The ability (of the ACA) to engage in its activities and carry out its functions - especially to investigate and/or prosecute concrete allegations - effectively and efficiently, without fear or favour[46], and without undue influence or undue reporting obligations at its own discretion without prior consultation or approval.

The freedom of decision-making and the freedom of action are imperative for an ACA. This holds true especially for investigating and prosecuting concrete cases of corruption. It ensures - if and where necessary - the applicability of an element of surprise and the sustainability of the momentum of action and, ultimately, of success. This is also why it is self-explanatory that any premature, untimely, undue, excessive, unjustified and illegitimate reporting and/or consultation obligation by the ACA is technically counterproductive and perceptionally spoils its independence and, consequently, its legitimacy and credibility. Similarly, it is obvious and does not need to be repeated that the principle of separation of powers needs to be strictly and accurately observed in this context. Especially the political sphere is prone to a tendency to interfere - under whatever labels, titles, arguments and excuses[47] - in the activities of an ACA, in particular once the performance of the ACA gets (too) successful.

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[45] Unfortunately, such phenomena are likely to remain an integral part in the life of AC fighters. Their spectrum is extensive and broad, ranging from "offering good advice" to intimidation and outright threat, from physical harm to calumny and reputational slander.

[46] Motto of the Independent Commission Against Corruption, Hong Kong.

[47] An example would be the prominent BAE scandal where the UK government for "reasons of national security" had the Serious Fraud Office halt investigations into claims that BAE, Britain's biggest arms company, bribed Saudi royals to secure contracts worth billions of pounds.

As regards the engagement in its activities without undue influence, the ACA and its staff should be protected from civil law litigation for actions performed within their mandate as long as those actions have been carried out under the authority of the agency and *bona fide*, in good faith. For obvious reasons, this protection should not inhibit proper judicial review.[48]

As has already been clearly outlined, it is manifest that ACAs in all their activities shall follow the principles of transparency and accountability[49], shall operate in a clear and transparent governance system, and shall obey comprehensible rules of procedure within the fundamental principles of a given legal system.

7. Unrestricted access to necessary information, at the same time mechanisms and means to protect persons helping the ACA in preventing and combating corruption and also those preserving the confidentiality of investigations.

ACAs need to have unrestricted access to necessary information subject only to limitations or restrictions which are necessary in a democratic society[50, 51]. It is self-evident that such access to and processing of information shall follow clear rules of procedure and shall be in accordance with the fundamental principles of a given legal system.

Yet, there is also a common understanding in the AC community that people are often hesitant to openly inform competent bodies on their knowledge of corrupt activities. It is for this very reason that national and international legislation and guidelines call for the protection of witnesses, experts, victims and reporting persons.[52] States the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* by UNODC: "*Unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives [of the UNCAC] could be undermined. Consequently, States Parties are mandated to take appropriate measures [...] against potential retaliation or intimidation of witnesses, victims and experts. States are also encouraged to provide procedural and evidentiary rules strengthening those protections as well as extending some protections to persons reporting in good faith to competent*

[48] Compare United Nations Office on Drugs and Crime (2009), *Technical Guide to the United Nations Convention against Corruption,* New York: United Nations, 11, 116.
[49] This may include, e.g., *ex post* auditing and controlling. Ultimately, the ACA is to be held accountable for its actions (and omissions).
[50] Principle 16 of the CoE's 20 GPs.
[51] Compare Art. 9 of the African Union Convention on Preventing and Combating Corruption.
[52] Compare Arts. 32, 33, 35, 37 UNCAC.

authorities about corrupt acts."[53] Means and mechanisms for the protection of witnesses, experts, victims and reporting persons – including public servants and private citizens[54] as well as employees[55] - may include whistleblower protection and witness protection legislation[56], effective regret instruments, leniency programmes, offering anonymous channels of communication[57], data protection regulations *et altera*.[58]

8. The ability and responsibility to cooperate with and address civil society, the media, academia and other stakeholders of society at all times at its own discretion without prior consultation or approval, and to be addressed by those, all to safeguard the ACA's overall transparency, accountability and legitimacy; in a similar vein, the accessibility by the general public at all times, including by offering channels of anonymous communication.

Corruption as a cross-cutting issue is embedded in the matrix of society's institutions[59] and involves both actively as well as passively all sectors of the *res publica*. Hence, it is rather a sociological than a purely criminological phenomenon.[60] Furthermore, it is obvious and irrefutable that approaches to address and tackle corruption need to be holistic and comprehensive. Concomitantly, all actors, players and stakeholders, including those of civil society, the media, academia and others, need to be approached and involved.[61] Such direct dialogue and communication helps to build a critical mass, form alliances and gain synergies, but also safeguards the ACA's overall transparency, accountability and legitimacy by, eventually, means of public scrutiny.[62] On the part of the ACA, this discourse requires direct accessibility by the general public, including by offering channels of anonymous

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[53] United Nations Office on Drugs and Crime (2006), *Legislative Guide for the Implementation of the United Nations Convention against Corruption,* New York: United Nations, 141.
[54] Compare Art. III/8 of the Organization of American States' Inter-American Convention against Corruption.
[55] Compare Art. 9 CoE's CivLCoC.
[56] In all relevant laws such as, e.g., administrative law, criminal procedure code, employment law.
[57] Also see Art. 13/2 UNCAC.
[58] Also see Arts. 8, 9 of the Economic Community of West African States Protocol on the Fight against Corruption.
[59] Alam, M.S. (2002), *'A Theory on Limits on Corruption and Some Applications'* in: Heidenheimer, A.J. & Johnston, M. (eds) (2002), *Political Corruption – Concepts & Contexts,* New Brunswick [U.S.A.] & London [U.K.]: Transaction Publishers, 819-834.
[60] See, e.g., Höffling, Ch. (2002), *Korruption als soziale Beziehung,* Opladen/Germany: Leske + Budrich.
[61] Compare Arts. 5/1, 13 UNCAC.
[62] Compare Art. 10 UNCAC; also see United Nations Office on Drugs and Crime (2009), *Technical Guide to the United Nations Convention against Corruption,* New York: United Nations, 12, 116.

communication[63] for the reporting of any incident that may be considered to constitute a corruption offence. It is – again - self-explanatory that the processing of information shall follow clear rules of procedure and shall be in accordance with the fundamental principles of a given legal system and subject only to limitations or restrictions which are necessary in a democratic society. The dissemination of such information also must not adversely affect investigations and the right to a fair trial.[64, 65]

The media are often referred to as the fourth branch – beside the legislative, the executive and the judiciary – in the set-up of a modern state. According to the European Court of Human Rights in Strasbourg, the media in a democratic society shall act as a "public watchdog". It goes without saying that in fulfilling this role, the media need to be free and independent from those they report on and shall broadly receive and impart information on corruption matters, subject only to limitations or restrictions which are necessary in a democratic society[66]. It is perfectly true as well that the media in the past, at present and (hopefully) also in the future play a crucial and important role in acting as this watchdog and, thus, in fighting corruption. However, as there are always two sides of a coin and we are not living in an ideal world, it must not go unnoticed that (some of) the media in some countries have become part of the problem rather than of the solution. In this context, research of the journalism department of Cardiff University on the basis of four quality daily newspapers in the UK (The Times, The Guardian, The Independent and The Daily Telegraph) found out: "*Taken together, these data portray a picture of journalism in which meaningful independent journalistic activity by the press is the exception rather than the rule. We are not talking about investigative journalism here, but the everyday practices of news judgement, fact-finding, balance, criticising and interrogating sources, etc., that are, in theory, central to routine, day-to-day journalism.*"[67] John Wilson, former controller of editorial policy at the BBC, is quoted even more bluntly in stating: "*News is a way of making money. No one believes that news and journalism are simply a service to democracy.*"[68] The amalgamation into personal unity of key political decision-makers or powerful business entrepreneurs

[63] Also see Art. 13/2 UNCAC.
[64] See, e.g., Art. 6 of the European Convention on Human Rights.
[65] Compare Art. 12/4 of the African Union Convention on Preventing and Combating Corruption.
[66] Principle 16 of the CoE's 20 GPs.
[67] Quoted in Davies, N. (2008), *Flat Earth News – An Award-winning Reporter exposes Falsehood, Distortion and Propaganda in the Global Media*, London: Vintage Books, 53.
[68] Davies, N. (2008) *Flat Earth News – An Award-winning Reporter exposes Falsehood, Distortion and Propaganda in the Global Media* London: Vintage Books, 135.

and media moguls, respectively, in some societies tends to reduce the notion of checks and balances and the role of the neutral watchdog to absurdity.[69]
In a nutshell, ACAs may perceive the media as a valuable "brother in arms" in the fight against corruption and in safeguarding the ACAs' independence, but at the same time, and for no good/factual reason, may find themselves easily at the receiving end of a dreadful media campaign.

9. The ability and obligation to cooperate and liaise with similar organisations, networks and other stakeholders, nationally, trans-nationally as well as internationally, at their own discretion without prior consultation or approval.

It has already been outlined that (national and international) cooperation needs to be addressed and promoted as the fourth pillar in a holistic and comprehensive notion of tackling corruption. The UNCAC and the Council of Europe's Criminal Law Convention on Corruption devote an entire chapter each to this requirement; other international instruments call on parties to work along the same lines.[70, 71]
States Parties shall thus cooperate in criminal law and shall consider assisting each other in investigations of and proceedings in civil and administrative matters.[72] Areas of cooperation may include extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, law enforcement cooperation, joint investigations, and special investigative techniques[73]; they may also comprise instruments of spontaneous information and direct communication[74], enforcement of sentences[75] as well as asset recovery[76].

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[69] Compare Kreutner, M. (ed.) (2006), *The Corruption Monster – Ethik, Politik und Korruption*, Vienna: Czernin Verlag, 216.
[70] Also see Arts. 5/4, 37, 38, 39, 54 UNCAC; Art. 13 CoE's CivLCoC; Art. 21 CoE's CrimLCoC; Principle 20 of the CoE's 20 GPs; Arts. 9, 10 of the OECD Convention on Combating Bribery of Foreign Public Officals in International Business Transactions; Arts. 18, 19 of the African Union Convention on Preventing and Combating Corruption; Art. 9 Council of the European Union: Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union; Art. XIV of the Organization of American States' Inter-American Convention against Corruption.
[71] The importance of international cooperation was also stressed by numerous conferences such as, e.g., the EPAC Conferences 2004-2009 or the Sixth Global Forum on Fighting Corruption and Safeguarding Integrity, Doha/Qatar, 07-08 November 2009, in its Doha Statement, *"Strength in Unity: Public-Private Partnerships to Fight Corruption" et altera.*
[72] Art. 43 UNCAC.
[73] Arts. 44-50 UNCAC.
[74] Arts. 28, 30 CoE's CrimLCoC.
[75] Art. 6/1 Council of the European Union: Convention on the Protection of the European Communities' Financial Interests.
[76] Chapter V of the UNCAC.

However, this call for cooperation is not only about working together in the context of criminal and other law matters, about exchanging staff, best practices and standards, about sharing knowledge and expertise or working together in joint investigation teams, but it is also about building alliances and coalitions of like-minded experts and professionals. As the saying "A prophet has no honour in his own country" is matter-of-factly true for ACAs in particular, cooperating and liaising is especially about offering and safeguarding international visibility and professional backup in times of national turmoil, crisis and undue criticism. Consequently, it is about contributing to maintaining operational autonomy and independence.[77]

10. An independent advisory/oversight instrument or mechanism to monitor and provide "air cover", to investigate alleged misconduct of the body, to further proceed against it or those responsible via appropriate channels if reasonably grounded, and – on the other hand – to provide credible and swift exoneration in cases of unjustified accusations against the body and/or its employees by politics, the media, those under investigation or others.

Justice Barry O'Keefe (ret.), Commissioner of the Independent Commission Against Corruption in Australia from 1994 to 1999, rightfully stated at a recent international conference: "*The biggest problem for an anti-corruption body is its success*". And Franz-Hermann Brüner, Director General of the Office européen de lutte anti-fraude, the Anti-Fraud Office (OLAF) of the European Union, added: "*As a corruption fighter, you are regularly on the brink of a personal and institutional trap. And you have to continuously and constantly defend yourself for doing what you are supposed to do from the start.*"[78]

A most common way of attacking an ACA and thus paralysing it or spoiling its reputation is to accuse the body and/or its (key) personnel and functionaries of wrongdoings. However absurd, fictitious, farcical, unrelated or insignificant they are, they often serve the purpose by deflecting general attention from the real thing, i.e. a corruption offence at stake. Recent discussions and cases, e.g. in Rumania, Slovenia, Austria, Italy, Latvia and other countries, exemplify this unfortunate "wag-the-dog phenomenon".

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[77] What has been said in other paragraphs on matters of accountability and transparency applies *mutatis mutandis*.

[78] Stated at the 1st Conference of the States Parties to the UNCAC, Jordan, 10-14 December 2006.

Conversely, one may also ask: *„Quis custodiet ipsos custodes?* Who will guard the guards themselves?" So there is ample argumentation for the establishment of an independent instrument, preferably an independent commission, to advice, oversee and, subsequently, provide "air cover" for the ACA. This instrument/mechanism may be composed of highly reputed personalities such as, e.g., retired supreme judges, senior academics, etc. Its mandate and rules of procedure should be clear and transparent and should not *ipso facto* substitute regular disciplinary or criminal procedures, but rather provide a first line of evaluation and defence and serve as an instrument of accountability and legitimacy.

It is frequently argued that such advisory/oversight function should be executed by parliament, a (special) board of parliamentarians, members of government or other (boards of) politicians. I would strongly and robustly oppose such a setting as – without pushing the foray into too deep an epistemological water – at least three caveats/contradicting factors would *nolens volens* come along[79]: (1) There is regularly a clear conflict of interest for politics, at least as (widespread) political corruption is concerned; (2) investigations into corrupt practices are - ultimately – of law enforcement and judicial nature. Observing the principle of separation of powers, one branch overseeing and monitoring the other – in our case the legislative or executive keeping a check on the judiciary - would substantially violate this key principle and building block of the concept of the modern state; (3) anti-corruption measures and individual corruption cases would unavoidably and inescapably be instrumentalised for day-to-day political scandal-mongering and for specific party-political ends.[80] In a similar vein, it has proven unrealistic that sensitive data and (other) details of investigations can be kept in confidence once they reach the political arena.[81]

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[79] Different opinion: United Nations Office on Drugs and Crime (2009), *Technical Guide to the United Nations Convention against Corruption,* New York: United Nations, 11, 12, 116.

[80] States Blankenburg, E. (2002), 'From Political Clientelism to Outright Corruption – The Rise of the Scandal Industry', in: Kotkin, St. & Sajó, A., *Political Corruption in Transition – A Sceptic's Handbook,* Budapest - New York: Central European University Press: 149-166: *"If ever you want to damage a competitor in politics, if you think that a generation of politicians has been in office too long, or if you want to set the agenda for politics anew, look for corruption as an instrument of political scandal."*

[81] For general deliberations on corruption and politics see, e.g., Heidenheimer, A.J. & Johnston, M. (eds) (2002), *Political Corruption – Concepts & Contexts,* New Brunswick [U.S.A.] & London [U.K.]: Transaction Publishers; Rose-Ackerman, S. (1999), *Corruption and Government – Causes, Consequences, and Reform* Cambridge: University Press; Lambsdorff, J.G. (2007), *The Institutional Economics of Corruption and Reform,* Cambridge: University Press.

The outlined ten guiding principles and parameters on the notion of independence of AC bodies are far from claiming exclusiveness for all circumstances in all jurisdictions. They shall rather serve as food for thought and as directives for the realization of one of the key principles and prerequisites for thriving ACAs. Yet, by the end of the day and as the fight against corruption will remain an uphill battle, ACAs will primarily be driven by political will, by straightforward leadership and by lasting public support. In addition, true independence will give the necessary framework for success.

In summarising and concluding, anti-corruption bodies shall be granted (the 10 guiding principles):

1. The backbone of an appropriate, comprehensive and stable statutory/ constitutional legal framework.

2. Appropriate allocation of highly qualified personnel, adequate (public) funds and resources (including remunerations and incentives), effective and efficient institutional and organisational frameworks free from any inappropriate and undue influence, as well as appropriate professional training possibilities; in addition to that, the ability to decide upon these resources (including personnel) and to use these capabilities at their own discretion without prior consultation or approval.

3. Transparent and objective recruitment (dismissal) procedures/ mechanisms for the head of the ACA and all other (key) personnel that are based on principles of efficiency and transparency and on objective criteria and that focus on a proven record of the individual's integrity, skills, education and training, experience and professionalism only; including provisions and factual safeguards against appointments (dismissals) motivated by undue considerations.

4. Terms of office of a minimum of two (parliamentary) legislative periods plus one year each (i.e. in total preferably twelve years or more) for the head of the ACA and all other (key) personnel without the possibility to be reappointed for a second term of office, including a transparent system of reasonable and just follow-up careers for those who leave the ACA.

5. Terms of office/employment of ACA personnel on a voluntary basis by the respective individual.

6. The ability (of the ACA) to engage in its activities and carry out its functions – especially to investigate and/or prosecute concrete allegations – effectively and efficiently, without fear or favour, and without undue influence or undue reporting obligations at its own discretion without prior consultation or approval.

7. Unrestricted access to necessary information, at the same time mechanisms and means to protect the persons helping the ACA in preventing and combating corruption and also those preserving the confidentiality of investigations.

8. The ability and responsibility to cooperate with and address civil society, the media, academia and other stakeholders of society at all times at its own discretion without prior consultation or approval, and to be addressed by those, all to safeguard the ACA's overall transparency, accountability and legitimacy; in a similar vein, the accessibility by the general public at all times, including by offering channels of anonymous communication.

9. The ability and obligation to cooperate and liaise with similar organisations, networks and other stakeholders, nationally, trans-nationally as well as internationally, at their own discretion without prior consultation or approval.

10. An independent advisory/oversight instrument or mechanism to monitor and provide "air cover", to investigate alleged misconduct of the body, to further proceed against it or those responsible via appropriate channels if reasonably grounded, and – on the other hand – to provide credible and swift exoneration in cases of unjustified accusations against the body and/or its employees by politics, the media, those under investigation or others.