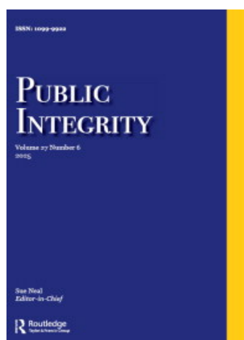

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Prosecuting Strategic Corruption: Impact on the Integrity of Criminal Justice and Potential Risks of Non-Trial Resolutions in Sub-Saharan African States

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ABSTRACT
The concept of strategic corruption, though not entirely new in practice, has recently gained attention as a distinct phenomenon that blurs the lines between state and corporate interests, setting it apart from ordinary transnational corruption. Defined as the use of financial or other incentives by state agents to abuse their power for the strategic benefit of the foreign corrupting state, strategic corruption is particularly challenging to address within existing legal frameworks. This paper examines the complexities of legally defining and addressing strategic corruption. It highlights the key value of the concept by re-examining the evolution of Anti-Corruption Criminal Law (ACCL), emphasizing the influence of geopolitical considerations. The paper then critically assesses the role that Non-Trial Resolutions (NTRs), one of the latest innovations in ACCL, could play in addressing strategic corruption and its possible risks. Building on these findings, the paper explores the potential implications of expanding NTRs to Sub-Saharan African states, where existing institutional weaknesses could amplify the associated risks.

PLAIN LANGUAGE SUMMARY
The idea of "strategic corruption" is not entirely new, but it has recently drawn attention as a unique type of corruption that mixes state and business interests in a way that stands out from usual cross-border corruption. Strategic corruption happens when officials in one country misuse their authority to help a foreign country gain an advantage, often through money or other rewards. This type of corruption is hard to tackle under current laws. This paper looks at the challenges of legally defining and handling strategic corruption. It discusses why this concept is valuable by revisiting the development of Anti-Corruption Criminal Law (ACCL), showing how global politics have shaped it. The paper also examines whether Non-Trial Resolutions (NTRs) – a recent tool in ACCL – could help combat strategic corruption, while also pointing out potential risks. Finally, it considers what might happen if NTRs are expanded to Sub-Saharan African countries, where weaknesses in institutions could make these risks even greater.

KEYWORDS
Non-trial resolutions; Sub-Saharan African states; prosecuting strategic corruption; anti-corruption criminal law

Strategic corruption represents a sophisticated and elusive form of corruption that often intertwines state and corporate interests for geopolitical gain. Unlike conventional transnational corruption, where the primary objective is personal or business profit, strategic corruption is driven

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by a state's desire to achieve long-term strategic advantages over another country (Lang, 2024). The concept has gained prominence as scholars and practitioners alike grapple with its implications for global governance and the rule of law.

In this paper, we start with the complexities of defining strategic corruption (2.). Despite its growing recognition, strategic corruption remains difficult to define and address from a legal standpoint. Nevertheless, the concept is of great importance when it comes to analyzing Anti-Corruption Criminal Law (ACCL), that is, criminal law measures in international and domestic legal frameworks for addressing corruption (3.). We demonstrate that strategic corruption framings contribute to the dismantling of the overly simplistic notion that corruption is either solely a problem of *bad government* or of *bad business* (Jakobi, 2013, p. 245; Katzarova, 2019, p. 133).

This brief review of the proliferation of strategic anti-corruption initiatives (Hogic, 2024, p. 5; Katzarova, 2018, p. 300) sets the stage for a deeper exploration of the challenges and complexities involved in combating strategic corruption in today's criminal law landscape. In fact, the prosecution of transnational corruption incidents puts prosecutorial authorities under the dual pressure to successfully penalize notably corporate transnational corruption while minimizing economic harm. This pressure has compelled many countries to integrate non-trial resolution (NTR) mechanisms into their criminal justice systems through formal legislative enactments or bottom-up approaches without statutory amendments (to get a deeper understanding of the perspective of representatives of French, Swiss, and UK prosecutorial authorities, see Bohnert, 2024, pp. 34– 36; Blättler & Schnebli, 2024, pp. 161–163; MacManus & Conroy, 2024, pp. 49–51). The paper critically assesses the potential role of NTRs in combating strategic corruption (4.) and concludes that several factors might perpetuate and introduce the very dynamics of geostrategic politics into criminal justice when using NTRs.

However, today, NTRs are promoted and expanded in all regions of the world. Many states have already adapted their criminal laws to embrace NTRs. Sub-Saharan Africa States are also at the point of making corresponding changes. Sub-Saharan Africa is a particularly relevant case study for assessing the potential of NTRs due to a combination of economic, political, and legal factors. First, countries in this region are experiencing growing pressure – driven by transnational institutions, foreign policy initiatives, and domestic demands for more effective governance – to strengthen their anti-corruption frameworks. Second, several states in the region – such as Nigeria, Kenya, Malawi, and South Africa – are already experimenting with NTRs, particularly plea bargains and Deferred Prosecution Agreements (DPAs). However, their implementation largely occurs in contexts where legal institutions often face capacity constraints, power asymmetries, and risks of regulatory capture, raising concerns about whether NTRs might enhance resilience against corruption or, conversely, exacerbate vulnerabilities to strategic corruption.

Examining Sub-Saharan Africa (5.) thus provides an important opportunity to engage with broader theoretical debates on the function of NTRs in legal systems with weaker institutional safeguards, varied rule-of-law trajectories, and high exposure to transnational corruption networks. This focus not only allows for a serious re-think regarding whether and how NTRs might be adapted to different legal and political environments but also addresses a significant gap in the literature, which has primarily centered on their application in Western legal traditions. By situating Sub-Saharan Africa within this global discourse, this analysis contributes to a more comprehensive evaluation of NTRs as a governance tool and their potential role in shaping the region's evolving legal frameworks.

We conclude (6.) that while NTRs present a practical approach for the criminal justice system to address the challenges related to intricate international legal cooperation and significant evidence collection difficulties in prosecuting corporations for corruption of transnational in nature, their inherent secrecy, informality and flexibility may compromise public interests (Lord, 2023; Lord, 2024, p. 311) and inadvertently fulfil the very objectives of strategic corruption. The ease with which state interests can be preserved over legal integrity through NTRs highlights their

potential complicity in enabling strategic corruption, as states can negotiate outcomes that prioritize political and economic stability over genuine accountability.

Overall, this exploration is crucial for understanding how strategic corruption can be effectively addressed within the global legal framework and for ensuring that ACCL evolves in a manner that promotes justice, accountability, and the rule of law, rather than becoming a tool for geopolitical maneuvering.

Strategic corruption: An emerging but still elusive concept

Though incidents that fit the definition of strategic corruption are themselves not new (Dolan, 2024), the term strategic corruption is relatively new. According to Lang (2024), strategic corruption "refers to a state agent's use of financial or other means to incentivize a public power-holder in another country or international organization to abuse their entrusted power for the strategic gain of the corrupting state". Typically, therefore, strategic corruption is politically motivated, primarily confers benefits on the corrupting state rather than exclusively benefitting individuals or private entities, and consists of long-term benefits rather than short-term economic gains (Lang, 2024, p. 313).

However, the distribution of benefits points to an important aspect that contributes to the elusiveness of the concept of strategic corruption. While strategic corruption's major aim is the realization of geopolitical objectives, it often conflates such goals with personal or business gains (Haneberg, 2022). This conflation makes it challenging to accurately determine whether certain cases constitute strategic or ordinary transnational corruption, or both (cf. Leenders et al., 2022, n-d, p. 28). Moreover, states determined to use strategic corruption as a geopolitical tool usually go at length to hide their involvement in strategic corruption (Lang, 2024, p. 313), and rely on proxy actors to bribe officials in another state. Among the most used proxies are corporations, including state-owned or state-friendly companies. Finally, strategic corruption can manifest in various forms, such as the bribery of kleptocratic elites who, though not formally foreign public officials, hold de facto power, or the bribery of foreign public officials through companies, whether public or private.

Consequently, it is extremely challenging to effectively conceptualize and address strategic corruption from a legal point of view. In our view, it is difficult to sustain strategic corruption as a distinct legal concept that is clearly distinguishable from transnational corruption, despite its desirability from a fair labeling perspective. The concept of fair labelling is traceable to 1981 when Ashworth argued that "the label applied to an offence ought fairly to represent the offender's wrongdoing" (Ashworth, 1981, p. 53; Chalmers & Leverick, 2008).

Fair labeling ensures that the description of an offense accurately reflects what the offender has done (Horder, 1994, p. 339). In the context of strategic corruption, this approach would not only highlight the state's involvement in the wrongdoing of individual acts but also emphasize the geopolitical implications of corruption when it is strategically deployed. However, given the factors previously mentioned, which make it difficult to spot strategic corruption and clearly demarcate it from transnational corruption, we consider strategic corruption, legally speaking, to be a specific type of transnational corruption.

This understanding becomes particularly relevant when considering the impact of the strategic context on how transnational corruption cases are handled by the criminal justice system. In some instances, this context can lead to a mitigation of the perceived wrongdoing or even result in a full acquittal. A notable example of this occurred in a UK court ruling where a jury acquitted a former UK Ministry of Defence official and a former accountant of the involved corporation in a case of uncontested corruption in Saudi Arabia (SFO, Press Release, 2021; FP, March 6, 2024). The defendants successfully argued that the British government had approved and facilitated payments to members of the Saudi Royal family and other senior Saudis involved in military

contracts (Pegg & Evans, 2024), doing so "in order to maintain Britain's commercial, diplomatic, and security relationship with Saudi Arabia, the UK's key partner in the Middle East" (Tobin, 2024). The significance of this case also stems from the fact that it is one of the rare instances where the state's involvement in a corporation's corrupt activities was brought to light. Generally, however, incidents of state involvement in corrupt activities conducted on its behalf by proxy actors remain mute, and therefore criminal justice systems address such cases as they would with any ordinary transnational corruption case.

In our view, the key value of the concept of strategic corruption lies not only in bringing attention to a specific problem (Pozsgai-Alvarez, 2024). It also lies in its ability to highlight the public-private collusion involved in such activities (Pozsgai-Alvarez & Huss, 2025, p. 16), and in its potential to promote a critical examination of how ACCL is developed and might be influenced by the geopolitical nature of corrosive capital, which includes opaque financial flows from states seeking to gain influence in targeted countries, ultimately advancing their strategic geopolitical interests (Stefanov and Vladimirov, 2020; Huss & Pozsgai-Alvarez, 2022).

This focus on the geopolitical dimension is crucial, especially since common corruption barometers tend to illuminate only one side of a two-sided corruption act by omitting information about the geographical origins of bribes. For instance, surveys like the 2019 Global Corruption Barometer (Pring & Vrushi, 2019), the 2023 Afrobarometer (Dulani et al., 2023), and the Transparency International Corruption Perception Index of 2023 (2024) consistently reveal alarming levels of corruption in Africa's public service – implicating even judicial officers and law enforcement agencies – and consistently rank Sub-Saharan Africa as the lowest, but fail to mention the supply side and to address the role of states in fostering strategic corruption. Apparently, these barometers often operate on the assumption that the issue lies solely with those receiving the bribes (bad governments), thereby contributing to a blind spot regarding the potential for strategic corruption. In contrast, the concept of strategic corruption challenges the traditional, simplistic view of corruption as merely a problem of bad governments in the target state or bad business practices in the state pursuing strategic interests. As we will demonstrate in the next section, this nuanced understanding is crucial with regard to the evolution of ACCL.

From strategic corruption to strategic anti-corruption criminal law

Several academic contributions analyzing the historical evolution of ACCL underscore the geostrategic dimension of ACCL, where legal frameworks have been shaped by geopolitical considerations as much as by ethical or legal principles. Pieth (2007), Koehler (2012), and Katzarova (2019), for example, comprehensively illustrate that the creation of the Foreign Corrupt Practices Act (FCPA) in the United States (U.S.), the very first legislation criminalizing transnational bribery, was significantly influenced by acts that were, strictly speaking, of a strategic corruption in nature.

The development of the FCPA is closely tied to the Watergate scandal and its subsequent revelations, which also shed light on the broader concept of strategic corruption (Koehler 2010, p. 911). The Watergate scandal, primarily involving the break-in at the Democratic National Committee headquarters and the subsequent cover-up by President Nixon's administration, revealed extensive corporate misconduct with significant geopolitical implications. The investigations that followed revealed that many U.S. corporations had been engaging in widespread bribery of foreign officials to secure business deals abroad. This discovery was part of a broader investigation into corporate slush funds, which were used not only for domestic political purposes but also to make illegal payments to foreign government officials. These actions exemplified strategic corruption, where corporate interests aligned with state objectives, manipulating foreign policy and economic relations. As Koehler (2012, p. 934) writes, an alarmingly systemic pattern was discovered where corporate interests manipulated political environments to serve their own ends – and this, sometimes, in close exchange with U.S. officials such as CIA agents (*ibid.*). The

findings about American intelligence services' involvement in these activities, that may be considered as strategic corruption, were so staggering that one observer at the time concluded: "We shall probably never know how many of the electoral campaigns of pro-West political parties were financed by secret contributions from the C.I.A." (Gwirtzman, New York Times Magazine, Oct. 5, 1975).

Shocked by the extent of these practices and recognizing the need for a legislative response to address them, the U.S. Congress enacted the FCPA in 1977 during the Carter Administration. According to Spalding (2011, p. 18), the Act became a critical tool in the Carter Administration's broader effort to use business conduct as a means of promoting liberal-democratic values globally. Spalding emphasizes that initially, the FCPA was more symbolic than practical and was scarcely enforced during the first twenty years of its existence.

However, while the Watergate scandal highlighted the necessity of addressing corporate bribery as a form of strategic corruption and directly influenced the creation of the FCPA as a legislative measure for addressing such malpractices, the creation of the FCPA and the subsequent internationalization of strategic ACCL cannot be attributed solely to the Watergate scandal. Numerous other incidents of overseas corruption also played a significant role in shaping this legislative development (Koehler 2010, p. 911).

One significant case that illustrates this dynamic involved the U.S.-headquartered International Telephone and Telegraph (ITT) Corporation in Chile. In this instance, U.S. interests were focused on undermining President Salvador Allende's socialist government, thereby highlighting the strategic aspect of corruption that goes beyond mere financial transactions (Memorandum n° 104, n° 299, n° 324). This example of strategic corruption played a crucial role in shaping the way ACCL was internationalized. The U.S., under scrutiny for the involvement of its corporations, such as ITT and Lockheed (Koehler 2010, p. 912), in acts of strategic corruption, sought to promote an international legal framework that predominantly defined corruption as bribery. In contrast, developing countries, notably Chile under President Allende, advocated for a broader understanding of corruption that included undue corporate influence over politics (Katzarova 2019, pp. 98 ff.). This broader understanding of corruption would indeed have better reflected the complex interplay between multinational corporations and political entities, and therefore strategic corruption. Regrettably, it emerged unsuccessful.

Moreover, it is important to recognize the widespread use of strategic corruption by many states after decolonization as a means to maintain or establish their power bases abroad, often through the bribery of emerging elites in the southern hemisphere (Pieth, 2007, p. 5). It was only with the end of the Cold War and the rise of neoliberalism that the issue of corruption became central to the neoliberal agenda (Hogic, 2024, p. 5). This shift led to the proliferation of a strategic anti-corruption movement, which significantly contributed to the creation of international ACCL in the 1990s (cf. Katzarova, 2018, p. 300).

Consequently, the perspective of strategic corruption has allowed us to recognize that not only can corruption itself be motivated by economic and geopolitical factors, but the development of ACCL is also significantly influenced by these dynamics. The preceding analysis clearly demonstrates how geopolitical considerations have played a crucial role in ACCL's development. Overall, it also underscores the necessity of critically reflecting on and questioning the underlying economic and geopolitical dynamics and interests that shape and drive ACCL in order to ensure that it serves its intended purpose of promoting accountability and justice.

Non-trial resolutions: One of the latest innovations in strategic anti-corruption criminal law

Maintaining the perspective of strategic ACCL, we now turn our attention to one of the recent innovations in this area: Non-Trial Resolutions (NTRs). While a comprehensive analysis of the

origins of NTRs falls beyond the scope of this paper, it is important to briefly sketch the underlying concept.

Traditionally, criminal justice systems have addressed corruption cases through formal criminal trials. This mode of resolving corruption cases is losing popularity with preference shifting towards the use of NTRs (Lord, 2023), a relatively new but growing phenomenon (Makinwa, 2020). The OECD defines NTRs as "any agreement between a legal or natural person and an enforcement authority to resolve foreign bribery cases without a full trial on the merits of the allegations either before or after indictment, with sanctions and/or confiscation, irrespective of whether it is a conviction (e.g., plea deals) or a non-conviction mechanism (e.g., non-prosecution or deferred prosecution agreements)" (OECD, 2019, p.11). As the OECD definition shows, NTRs include deferred prosecution agreements (DPAs) as well as non-prosecution agreements (NPAs) that originally emerged in the USA in the early 1990s, initially aimed at dealing with minor offenses and protecting vulnerable members of society, especially juveniles (Fouladvand, 2020, p. 80; Lüth, 2021, p. 317). Over time, however, their applicability extended to corporate offenders, maintaining their original purpose of preventing reputational damage that could result from undergoing all stages of a criminal trial (Mazzacuva, 2014, p. 255). DPAs have become the most prominent example of NTRs, particularly in handling corruption matters (Lord, 2023, p. 849). Since around 2003, the use of NTRs, such as DPAs against corporate offenders, has increased considerably, mostly in relation to serious economic crimes like money laundering and corruption (King & Lord, 2018, p. 70). For instance, an OECD study into NTRs (including both conviction and non-conviction NTRs) found that from 1999 to 2019, 695 of 890 (78 percent) foreign bribery cases were concluded through NTRs between law enforcers and accused persons, natural or legal (OECD, 2019, pp. 19–20).

Today, NTRs have been adopted in jurisdictions with diverse criminal justice systems and under varying arrangements. Drawing on the International Bar Association's survey of 66 countries, Makinwa (2020) demonstrates that NTRs exist not only in jurisdictions where prosecutorial discretion is permitted, but also in those where settlements are generally prohibited, such as in jurisdictions adhering to the principles of legality or mandatory prosecution. Makinwa further shows that while NTRs are legally sanctioned in some jurisdictions, in others, they are applied without a statutory basis. Their endorsement at the international level (Ivory & Søreide, 2020) will likely encourage more states to adopt them, making NTRs even more prevalent globally. The ubiquity of NTRs across jurisdictions with varying criminal justice principles demonstrates that their adoption is driven not by doctrinal considerations but by pragmatic reasons (Makinwa, 2020). However, regarding the prosecution of strategic corruption, the utility of NTR mechanisms requires a critical assessment, as we will demonstrate.

NTRs have largely emerged due to the dual pressure that prosecutorial authorities face to successfully penalize corporate transnational corruption while minimizing economic harm (Lord, 2023). Fighting corruption through a traditional criminal trial often led to prolonged investigations with uncertain outcomes, which in turn triggered the so-called collateral economic damage, potentially affecting national economic interests. NTRs aim to mitigate the time, financial, and related costs typically incurred in successfully prosecuting a multinational corporation through a traditional criminal trial (Makinwa, 2015, p. 9). Instead of prosecutorial authorities expending resources to investigate and prosecute a corporation, NTRs are viewed as necessary to persuade corporations to admit wrongdoing, pay a fine, take remedial measures to prevent future misconduct, and provide information that may enable the prosecution of individuals involved in the corruption. Additionally, NTRs are preferred over criminal prosecutions to counter the risk of corporations relocating to other jurisdictions, which could result in a loss of revenue and employment opportunities for the country (Fouladvand, 2020, p. 72). Thus, states adapting their criminal justice to integrate NTRs aim to strike a balance between preserving the economic contributions of corporations and holding them accountable for their actions.

Consequently, in our view, NTRs align with neoliberal principles, which principally focus on efficiency, economic growth, and the minimization of disruptions to business operations over traditional criminal law principles. By inherently considering the interests of corporations and the economic objectives of states, these legal frameworks may be shaped by a desire to shield national businesses from excessively harsh judicial proceedings. Such proceedings might otherwise be viewed as too damaging, potentially leading to risks like bankruptcy, relocation, and the consequent loss of jobs and tax revenue. We esteem that the neoliberal emphasis on protecting economic stability thus creates an environment where strategic corruption could be indirectly facilitated, as states may leverage NTRs to further their geopolitical goals under the guise of legal settlements.

Additionally, NTRs are often justified not only as a means of preventing the relocation of key companies but also as a tool to restore what some political and judicial actors have described as a loss of judicial sovereignty. This rationale was particularly evident in France, where the establishment of the Parquet National Financier (PNF) in 2014 and the introduction of the Sapin 2 law in 2016 empowered the PNF to conclude NTRs. These initiatives were framed as efforts to reinforce the legal authority of French institutions in combating international corruption (cf. Bonifassi, 2018, p. 17). However, this modification in the French criminal justice system was largely also justified by the need to protect French businesses from the extraterritorial actions of U.S. authorities, which were perceived as a form of economic aggression through judicial proceedings against French companies (Bonifassi, 2018, p. 16). It was intended to strengthen French legal authority to prevent French corporations from being economically weakened by U.S. law enforcement actions (Gauvain et al., 2019).

Overall, while NTRs can be efficient tools for resolving corruption cases without lengthy court proceedings, it is inevitable that the necessary adaptions of criminal law to make NTRs fit weaken traditional features of criminal trials, such as the right against self-incrimination, evidence-gathering until reaching the jurisdiction-specific standard of proof, the intervention of courts, the publicity of court trials, and the public pronouncement that communicates the judgement (Langer, 2021, pp. 378, 385; Langer, 2022, p. 84; Capus & Hohl Zürcher, 2024, p. 3). Capus and Bozinova (2023, pp. 3 ff.) consider this kind of criminal law practice as *backstage criminal justice* as there is practically no possibility of public perception, rendering the originally underlying facts and the negotiations opaque. Additionally, the negotiation process inherent in NTRs often involves a significant power imbalance. This may be the case, for example, where there is a multinational enterprise backed by a powerful foreign state or a corporation threatening to move business abroad. Under these circumstances, resolving corrupt behavior behind closed doors through NTRs may result in corporations dictating the outcomes of negotiations, thereby entrenching corporate influence. This, in turn, would exacerbate existing inequalities within the legal system, where wealth and power are afforded greater protection from legal accountability (King & Lord, 2018, p. 30; Ivory & Søreide 2020, p. 950). Such disparities can erode the democratic ideals of equality before the law, as corporations navigate legal challenges in ways that are unavailable to less powerful entities or individuals.

The lack of transparency and public scrutiny that characterize NTRs also contrasts sharply with the principles of openness and accountability that underpin democratic governance. When cases of corruption – especially those involving transnational elements in a strategic corruption context – are settled without trial, it deprives the public of the opportunity to witness the extent of corporate malfeasance and the government's implication and response to it. Hence, the opacity of NTR negotiations can erode public trust in the criminal justice system (Søreide, 2024, p. 276). This risk is even further exacerbated by the paradoxical situations that NTRs can create, where the commission of the same bribery offense is criminally sanctioned in one instance but not in another. The UK case previously mentioned illustrates this point. In that case, a jury, taking into account the context of strategic corruption by the British government, acquitted a former UK

Ministry of Defence official and a former accountant in a case of uncontested corruption in Saudi Arabia. In contrast, the strategic corruption was not considered in the NTR proceedings conducted against the involved corporation since one condition for resolving a case by a NTR is precisely that the corporation pleads guilty (SFO, Press Release, 2021; FP, March 6, 2024).

Expanding non-trial resolutions to Sub-Saharan African states: Enhancing resilience or exacerbating vulnerability to strategic corruption?

Mirroring the global trend, Sub-Saharan African countries are increasingly willing to adopt NTRs for resolving corruption cases. Plea bargains, for example, are already being utilized in countries such as Nigeria (Ernest et al., 2021), Malawi, and Kenya in addressing corruption-related matters. Regarding non-conviction based NTRs, Kenya has already adopted the DPA system (Marais et al., 2021). Similarly, the Commission of Inquiry into Allegations of State Capture in South Africa has proposed the adoption of DPAs for resolving corruption-related cases involving corporations (Zondo, 2022, pp. 23–24; Keetsi, 2023). The increased adoption of NTRs may be due to growing international pressure to combat corruption, coupled with the economic and political benefits associated with NTRs, which make them appealing to Sub-Saharan African governments. This trend may also be further encouraged by the United States' announcement of a political initiative in 2022 regarding Sub-Saharan Africa, which includes proposing judicial reforms (Fact-Sheet, 7). These developments create the potential for NTRs to play a critical role in addressing incidents of strategic corruption, especially where a proxy actor is a corporation, in Sub-Saharan African countries.

To thoroughly assess whether NTRs can enhance resilience or exacerbate vulnerability to strategic corruption in Sub-Saharan African states, it is crucial to understand the broader context of NTRs in relation to the specific challenges faced by these countries. This discussion will therefore examine the potential risks associated with the expansion of NTRs into this region, drawing on the findings previously outlined (cf. 4.), and considering how the unique political and economic landscapes of Sub-Saharan Africa could interact with these risks.

Our analysis suggests that the expansion of NTRs to Sub-Saharan Africa poses a significant risk of further eroding the already fragile integrity of public institutions, including judicial bodies. This risk arises primarily because states utilizing NTRs may, at times, prioritize economic interests over genuine accountability and justice, thereby creating opportunities for power imbalances and a lack of transparency to flourish (Lord, 2024, p. 293, 302; Hawley et al., 2020, 325). In fact, in connection with NTRs, state prosecutors regularly emphasize the importance of taking national economic interests into account (i.e. Bohnert, 2024, pp. 18–19). The potential for national economic interests to influence corruption enforcement has been a significant concern, prompting the OECD to adopt Article 5 of the OECD Anti-Bribery Convention, which explicitly mandates that such considerations should not affect prosecutorial decisions (OECD, 2019, p. 168). While these overarching risks are troubling, they are further exacerbated by specific challenges prevalent in Sub-Saharan Africa, which we now examine in detail.

First, the effective resolution of corporate criminality through NTRs necessitates robust law enforcement institutions capable of withstanding external influence. NTRs are most appropriate in contexts where law enforcement systems are immune to political manipulation and where an independent judiciary exercises at least minimal oversight (Pieth, 2020, p. 22). To prevent NTRs from undermining deterrence (for such a critic in the U.S. and the UK context, see Uhlmann, 2013 and Campbell, 2019 respectively) and weakening public trust in the criminal justice system, they must be designed to strengthen "the public's faith in the criminal justice system" (Arlen, 2020, p. 158) and pose a credible threat of substantial punishment to corporations if they fail to cooperate. This requires states to adequately fund and empower law enforcement institutions tasked with handling corporate criminality, ensuring they can detect and act upon wrongdoing, even in the absence of corporate self-reporting (Arlen, 2020, p. 159).

However, in Sub-Saharan Africa, law enforcement institutions responsible for investigating and prosecuting corruption, including that involving corporations, face numerous challenges. Studies of Anti-Corruption Agencies (ACAs) in Southern Africa, for example, reveal that many are inadequately funded, understaffed, and lack sufficient autonomy and stability (Open Society Initiative for Southern Africa, 2017). Additionally, these agencies often conduct investigations in isolation, with little to no coordination with other law enforcement bodies, leading to overlap, rivalries, and overall inefficiency (Anders, 2019). For example, the Commission of Inquiry report in Malawi on the arrest of the Director of the Anti-Corruption Bureau found that there were "serious mistrust issues among the different offices that are mandated to fight corruption" in Malawi. It further found that the Director failed to establish good relationships with other crucial offices that she needed to effectively fight corruption, resulting in her appearing to be working in isolation (Republic of Malawi, 2023, pp. 59–61). These systemic issues severely limit the ability of ACAs to effectively investigate and expose corruption, including cases of strategic corruption. As a result, the threat of enforcement that might compel corporations to self-report is significantly diminished, thereby undermining the efficacy of NTRs as a tool for corporate accountability.

Moreover, the high prevalence of corruption in Sub-Saharan Africa (Liedong, 2017), coupled with the weakness of public institutions (Munyai & Agbor, 2020; Transparency International, 2019) and the influence of kleptocratic networks (Gudzowska, 2022), creates an environment where legal frameworks allowing for secret negotiations and settlements may even further entrench corruption. In such contexts, where institutions entrusted with fighting corruption remain "vulnerable to undue political influence" (Hatchard, 2014, pp. 193–194), NTRs risk perpetuating corruption by enabling it to occur behind closed doors, away from public scrutiny, and with minimal accountability. The example of Nigeria's Economic and Financial Crimes Commission (EFCC) is illustrative here. Despite being established with a mandate to tackle financial crimes, including corruption (Obuah, 2010), the EFCC's use of plea bargains has been criticized for favoring political elites, thereby reinforcing perceptions that the agency serves the interests of the incumbent government rather than pursuing independent justice (Roy et al., 2019; Aniche et al., 2021, p. 7).

The issue of transparency is further compounded by the limited access to information held by state agencies in many African countries, despite the existence of access-to-information laws (Adu, 2018). The use of NTRs in strategic corruption cases involving corporations in Sub-Saharan Africa is likely to exacerbate this problem, depriving the public of crucial information regarding the terms of settlements. This lack of transparency can create opportunities for corruption between public officials and corporations. Further, it creates opportunities for public officials to embezzle assets recovered through NTRs. Nigeria's experience with plea bargains, where assets are often not properly publicized or accounted for, provides a cautionary example of how secrecy can facilitate the misappropriation of the recovered public resources (Aniche et al., 2021, p. 8).

Additionally, many Sub-Saharan African countries face unique challenges due to their extraordinary dependency on a few powerful states, which often involves the use of contractors from donor countries (Gerrard, 2023) leading to market monopolies (Cherif et al., 2020, p. 4). The relationship between China and Kenya exemplifies this type of imbalanced relationship. China, as Kenya's largest bilateral creditor, holds about 67% of Kenya's foreign debt and dominates trade relations with Kenya, creating a significant dependency (Nguébong-Ngatat, 2024). Reports of bribery involving Chinese companies operating in Kenya highlight the potential for NTRs to be used to prioritize economic interests over legal accountability, allowing corrupt practices to go unpunished in the interest of maintaining vital economic ties (Nation, March 18, 2024; Nation, January 16, 2015/2020; VoA, November 26, 2018). Where a corporation involved in strategic corruption is also a crucial economic player in a Sub-Saharan African country, there is a risk that NTRs may not result in fair and just settlements. The fear of losing a critical economic partner could lead to settlements that are overly favorable to the corporation, thereby perpetuating strategic corruption and undermining the rule of law.

In conclusion, while NTRs offer a practical mechanism for resolving corporate corruption cases, their expansion into Sub-Saharan Africa must be approached with caution. The unique challenges faced by these countries, including weak institutions, high levels of corruption, and dependency on powerful foreign states, suggest that NTRs may exacerbate existing vulnerabilities rather than enhance resilience against strategic corruption. Ensuring that NTRs do not inadvertently perpetuate corruption will require careful consideration of these complex interdependencies and the development of robust legal frameworks that prioritize genuine accountability and justice over economic expediency. The developed legal frameworks, therefore, must at the minimum aim for enhancement of oversight mechanisms, ensuring that there is transparency in NTR negotiations. This could involve, for instance, incorporating robust judicial review mechanisms and integrating civil society input in NTR processes. However, for these mechanisms to succeed, civil society actors need to be adequately supported, and judicial organs must address internal corruption in addition to being guaranteed independence. This only highlights the complexity of incorporating an effective NTR regime in countries with unique challenges such as those present in Sub-Saharan Africa. Ultimately, it must be understood that a rushed adoption of NTRs in Sub-Saharan Africa risks creating the irony that while strategic corruption influenced the development of ACCL, one of ACCL's latest invention, namely NTRs, may serve to promote the very same strategic corruption.

Summary and conclusion

First, we have illustrated the complexities and challenges of addressing strategic corruption in the context of criminal law, highlighting the inherent difficulty in defining and conceptualizing strategic corruption, given its multifaceted nature and its ability to intertwine state and corporate interests (2.). This complexity makes it challenging to distinguish strategic corruption from more conventional forms of transnational corruption, despite the potential benefits of doing so from a fair labeling perspective. However, the key value of the concept of strategic corruption lies in its potential to promote a critical examination of how ACCL is developed. To demonstrate this ability, we explored the historical evolution of ACCL, emphasizing that ACCL has often been shaped by the geopolitical interests of powerful states, rather than purely by legal principles or ethical considerations (3.). In particular, the concept of strategic corruption helps to challenge the traditional, simplistic view of corruption as merely a problem of bad governments in the target state or bad business practices in the state pursuing strategic interests.

Focusing on one of the newest innovations of ACCL, the NTRs, our critical examination reveals several risks associated with the use of NTRs in combating strategic corruption (4.): (i) NTRs, by aligning with neoliberal principles, prioritize efficiency and economic stability over traditional criminal law principles. This emphasis on protecting economic interests could indirectly facilitate strategic corruption, as states may leverage NTRs to further their geopolitical goals under the guise of legal settlements. The focus on shielding national businesses from harsh judicial proceedings can create an environment where strategic corruption is more likely to occur and go unchallenged; (ii) NTRs necessitate adaptations in criminal law that weaken the traditional features of criminal trials, such as the right against self-incrimination, thorough evidence-gathering, judicial intervention, trial publicity, and the public pronouncement of judgments. These weakened features make it more difficult to hold corporations accountable and ensure that justice is served, particularly in cases involving strategic corruption; (iii) The negotiation process inherent in NTRs often involves significant power imbalances, especially when dealing with multinational enterprises backed by powerful foreign states. These corporations may dictate the outcomes of negotiations, leading to settlements that favor corporate interests over legal accountability. This would exacerbate existing inequalities within the legal system and afford greater protection to wealth and power, undermining the principle of equality before the law; (iv) NTRs are conducted behind closed doors, which contrasts sharply with the principles of openness and accountability that underpin democratic governance. The lack of transparency in NTR negotiations

deprives the public of the opportunity to witness the extent of corporate wrongdoing and the government's response. This opacity erodes public trust in the criminal justice system, particularly when strategic corruption is involved; (v) NTRs can create paradoxical situations where the same bribery offense is criminally sanctioned in one instance but not in another. This inconsistency is particularly problematic in cases of strategic corruption, where the involvement of state interests might lead to differing and inconsistent legal outcomes. These risks illustrate how NTRs, while efficient in resolving corruption cases, can undermine efforts to combat strategic corruption effectively. By prioritizing economic interests and reducing transparency, NTRs may inadvertently enable strategic corruption, weakening the integrity of the criminal justice system and eroding public trust.

Anticipating an expansion of NTRs into Sub-Saharan African states, we finally examine the potential impact (5.). The expectation of an expansion of NTRs into Sub-Saharan African states is driven by several factors. Firstly, the global trend toward adopting NTRs as a tool for efficiently resolving corruption cases has gained significant momentum, with various countries increasingly incorporating these mechanisms into their legal frameworks. Additionally, the growing international pressure to combat corruption, coupled with the economic and political benefits associated with NTRs make these mechanisms appealing to Sub-Saharan African governments. Furthermore, international initiatives, like the United States' political push for judicial reforms in the region, might further incentivize the adoption of NTRs, positioning them as a viable solution to the complex corruption challenges these states face.

Based on our findings, we consider that NTRs may not be an ideal mode for fighting strategic corruption. Quite the opposite – the application of NTRs may pave the way for perpetuating strategic corruption. It is crucial to ensure that ACCL, particularly in regions like Sub-Saharan Africa, is designed to promote genuine accountability and justice, rather than becoming another tool for geopolitical maneuvering. Understanding and addressing the complex interdependencies between states, corporations, and the legal system is essential for developing an ACCL that is both effective and equitable, ensuring that NTRs do not inadvertently perpetuate strategic corruption and undermine the rule of law.

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