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An International Anti-Corruption Court? A synopsis of the debate

Authors
Matthew C. Stephenson
Sofie Arjon Schütte

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www.U4.no
U4@cmi.no

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Impunity and the transnational nature of corruption have led to calls for an international anti-corruption court that could hold kleptocrats accountable and spur governments to improve national justice systems. But there are concerns that such a court is not politically feasible, that pressuring countries to join it would do more harm than good, and that the court would not be sufficiently effective in combating grand corruption to justify its costs.

Main points

- In many countries, corrupt elites have de facto impunity from prosecution because the justice systems in those countries are unwilling or unable to hold powerful senior figures and their associates criminally accountable. One proposed remedy is the creation of an International Anti-Corruption Court (IACC), similar to the International Criminal Court (ICC).
- An IACC might help address grand corruption by strengthening deterrence, by motivating countries to improve their domestic justice systems (so as to avoid falling under the IACC's jurisdiction), and by communicating international disapproval of grand corruption.
- However, there are obstacles to the IACC project. Leaders who enjoy de facto impunity for grand corruption in domestic courts may be unwilling to submit their countries to the jurisdiction of an IACC, and methods to compel countries to join such a court may be ineffective or counterproductive. An IACC might not be able to effectively prosecute grand corruption due to the prosecutors' limited toolkit and the likely non-cooperation of the countries whose leaders are under investigation.
- There are also questions about cost-effectiveness. Operation of the court might cost hundreds of millions of dollars per year, money that could be used to strengthen other efforts to reduce grand corruption and impunity.
- Whatever one thinks of the specific proposal, the international community should continue to pursue efforts to address the impunity problem. A number of approaches are already underway, and others have been proposed. Some combination of these measures might provide either an effective alternative or a complement to the IACC project.

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About the authors

Matthew C. Stephenson

Matthew C. Stephenson is Eli Goldston Professor of Law at Harvard Law School. He is an expert in anti-corruption law, legislation, administrative law, and the application of political economy to public institutional design. He has served as a consultant, advisor, and lecturer on topics related to anti-corruption, judicial reform, and administrative procedure for the World Bank, the International Monetary Fund, the United Nations, and national governments and academic institutions in Europe, Asia, the Middle East, and North America. He is the founder and editor-in-chief of the Global Anticorruption Blog (www.globalanticorruptionblog.com), with more than 10,000 followers.

Sofie Arjon Schütte

Dr. Sofie Arjon Schütte leads U4's thematic work on the justice sector, including specialised institutions like anti-corruption agencies and courts. Previously, she worked for the Partnership for Governance Reform in Indonesia and the Indonesian Corruption Eradication Commission and has conducted workshops and short-term assignments on corruption in more than 15 countries. She is editor of the series of U4 publications on anti-corruption courts around the world.

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Grand corruption is a serious worldwide problem. Even though the most egregious forms of corruption are illegal in every jurisdiction, powerful elites in many countries are able to plunder their societies with impunity. This is in part because the justice systems in those countries have themselves been captured, corrupted, or crippled by the kleptocrats and their allies. The corruption-impunity nexus is self-perpetuating: the wealth and power procured through corruption can be used to buy impunity, and that impunity allows the further corrupt accumulation of wealth and power.[1] How can this vicious cycle be broken?

One proposed solution is to create an international court, modelled on but distinct from the International Criminal Court (ICC) (see Box 1). The proposed International Anti-Corruption Court (IACC)—which, like the ICC, would have an associated prosecutor—would have extraterritorial jurisdiction over corruption offences committed by current and former senior political figures, including heads of state or government, their appointees, and their co-conspirators. These offences would be defined in accordance with the activities that states must criminalise pursuant to the United Nations Convention Against Corruption (UNCAC). The court would be empowered to impose criminal sanctions, including imprisonment, on convicted defendants. The IACC, like the ICC, would operate on the principle of 'complementarity,' meaning that the court would only have jurisdiction in those cases where the national government of the suspects is unwilling or unable to engage in good-faith investigations, prosecutions, and fair trials of these figures.[2]

The proposal to create an IACC has attracted endorsements from some well-known political figures and activists; moreover, several countries, notably Colombia and Peru, have called for the creation of such a court.[3] National governments, international institutions, and civil society groups are considering whether to devote more resources, both material support and political capital, to this project. This process will require addressing various criticisms and challenges, because if they cannot be satisfactorily addressed, it might be a mistake for the international community to push for an IACC rather than devoting scarce resources to other innovative responses to the grand corruption problem.[4]

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1. Stephenson 2019.
2. Wolf 2014, 2018.
3. Alsema 2019; UNODC 2019.
4. Stephenson 2014a, 2016; Whiting 2018.

Box 1: An Overview of the International Criminal Court

- The International Criminal Court (ICC) was created in 1998 pursuant to an international treaty known as the Rome Statute. The Rome Statute came into force in July 2002, and the ICC began operations shortly afterwards.
- As of December 2019, 122 countries are States Parties to the Rome Statute, meaning that they have acceded to the jurisdiction of the ICC. Notable countries that have not joined the ICC include the United States, Russia, China, India, Indonesia, and Saudi Arabia.
- The ICC is a permanent body based in The Hague, funded by contributions from member states. Its budget for 2019 was a little over 148 million euros.
- The ICC comprises four organs: the Chambers, consisting of 18 judges elected by the States Parties to nine-year terms; the Presidency, consisting of three of those judges, selected by their peers; the Office of the Prosecutor, an independent organ responsible for investigating and prosecuting cases; and the Registry, which provides administrative support.
- Under the Rome Statute, the ICC has subject matter jurisdiction over genocide, war crimes, and other crimes against humanity. The latter category includes offences such as murder, rape, enslavement, torture, and 'other inhumane acts,' when knowingly committed as part of a 'widespread or systematic attack' against a civilian population.
- The ICC has personal jurisdiction over individuals who commit a crime in the territory of a State Party or who are nationals of a State Party, as well as in cases where the United Nations Security Council has referred the case to the ICC. The ICC can issue arrest warrants but does not have its own police force, meaning that States Parties are obligated to execute arrest warrants issued by the ICC.
- The ICC's jurisdiction is based on the principle of complementary, meaning that the ICC may prosecute only when the national government with jurisdiction is unwilling or unable to do so.
- The ICC can impose prison sentences, as well as fines and forfeiture of assets.
- In its 17-plus years of operations, the ICC has handled 27 cases, some involving multiple defendants, with nine convictions and four acquittals. Some cases have been closed due to the deaths of defendants, while others are ongoing.

Sources: About the ICC and Understanding the International Criminal Court on the ICC website.

The case for an International Anti-Corruption Court

According to proponents, the proposed IACC promises to break the corruption-impunity cycle by empowering an external body—an international court, with an associated prosecutor's office—to hold senior government leaders and their associates criminally accountable for corruption offences when the justice systems in those leaders' countries are not willing or able to do so. Creating an IACC with this authority has the potential to significantly reduce grand corruption, for three reasons.[5]

The first reason is the *deterrent effect* that such a court would have. At present, kleptocrats in countries with weak, politicised, or corrupted justice systems need not worry about punishment. The existence of an international body with the authority to arrest, try, convict, and imprison even heads of state or government would deter potential wrongdoers from committing these crimes. In addition, insofar as kleptocrats could only avoid the possibility of arrest by staying in their home countries, the existence of an IACC would impose a de facto travel ban on them, which is itself a sanction that might discourage corrupt behaviour.

Second, because the proposed IACC would operate on the principle of complementarity, the existence of such a court would give countries an *incentive to improve their domestic justice systems* so as to demonstrate to the international community that IACC jurisdiction is unnecessary. Thus the creation of an IACC might catalyse domestic reforms that would make prosecutions and convictions for grand corruption more feasible.

> *If an international court had authority to arrest, kleptocrats would face a de facto travel ban.*

The third way in which an IACC could help combat grand corruption is through its *political symbolism*. Much as the creation of the ICC signalled the global community's intolerance of genocide and war crimes, the creation of an IACC could send a powerful statement of the international community's intolerance of grand corruption. This might inspire reformers and activists to press for other

5. Wolf 2014, 2018.

steps to end impunity. The very existence of the IACC, by this view, would serve as a beacon of hope to anti-corruption fighters around the world.[6]

There are two main lines of criticism regarding the proposal for an IACC. The first concerns feasibility, and the second concerns effectiveness.

Concerns about political feasibility

For the IACC to have jurisdiction over a country's leaders, that country would need to voluntarily agree to join the IACC. But the rationale for establishing an IACC in the first place is precisely that the leaders of some countries refuse to allow themselves to be held criminally accountable. Why would a leader who refuses to be held accountable domestically nonetheless agree to submit to the jurisdiction of an international court capable of imposing similar forms of criminal liability? Any country willing to sign onto an (effective) IACC would presumably also be willing to reform its domestic justice system so that even top leaders could be held accountable.[7]

IACC proponents have suggested a variety of methods by which countries (including countries ruled by kleptocrats) might be induced to join an IACC. These suggestions include making membership in the IACC a condition for membership in UNCAC and the World Trade Organization (WTO), and a prerequisite for receiving bilateral foreign aid and assistance from international development banks.[8] But there are several potential problems with this coercive strategy.[9]

First, many of the countries that might be reluctant to join the IACC have a voice, and often a veto, in these existing international institutions. UNCAC cannot amend itself; its States Parties must agree to an amendment. It is hard to envision UNCAC members making IACC membership an UNCAC prerequisite if this would be unacceptable to a large number of the current members, including key players like the United States, China, and Russia. Similarly, the WTO and the World Bank cannot simply impose new conditions over the objections of their member states.

6. Goldstone and Rotberg 2018.
7. Stephenson 2014a, 2016.
8. Wolf 2014, 2018.
9. Stephenson 2014a, 2016.

Corrupt leaders would likely refuse to have their countries join the court.

The second problem is that these coercive measures, even if applied, would probably not be sufficient. Consider the decision of a kleptocratic leader in a developing country who must choose between the country losing its access to development assistance and international markets, on one hand, and his personal exposure to arrest and imprisonment, on the other. The latter concern is likely to predominate, at least in the kleptocracies that the IACC is designed to target. Moreover, if the institutions making the threats follow through—cutting off countries that refuse to join the IACC from international development aid and from access to the international economy—this would harm the innocent citizens of these countries. And cutting off aid and trade might well make the corruption problem even worse.[10]

A third concern is that if wealthy jurisdictions, like the United States and countries of the European Union (EU), do not themselves submit to IACC jurisdiction but do use these forms of pressure to coerce other countries to join, this will revive the idea that the anti-corruption agenda is a form of Western neo-imperialism. This might actually strengthen the political position of kleptocratic leaders.[11]

Some IACC proponents have suggested that IACC jurisdiction might extend even to the leaders of countries that have not joined the court.[12] They contend that because grand corruption poses a threat to global peace and security, the United Nations Security Council (UNSC) should be able to refer the leader of any country for prosecution before the IACC, much as the UNSC can refer officials for prosecution before the ICC pursuant to Chapter VII of the UN Charter, which authorises the UNSC to take action to address 'any threat to the peace, or act of aggression.' But as a legal matter, it is not clear that Chapter VII would apply to an anti-corruption court.[13] Even putting the legal concern aside, the UNSC permanent members (the United States, Russia, China, the United Kingdom, and France) would all have to be willing to refer individual leaders of non-member countries to the IACC, or at least not block such a referral. That seems unlikely in most cases.[14] Leaders allied with any of the permanent

10. Badinger and Nindl 2014; Calderwood 2018.
11. Stephenson 2014a, 2014b.
12. Wolf 2018.
13. Whiting 2018.
14. Schaefer, Groves, and Roberts 2014.

members could safely assume that they would not be hauled before the IACC involuntarily. It seems likely that only the leaders of marginalised countries would be at risk.[15]

Concerns about effectiveness

The case for an IACC, as noted above, is premised mainly on the notion that such a court would create an effective deterrent to kleptocrats who currently enjoy de facto impunity. But there are reasons for *scepticism about whether the IACC would actually have a significant deterrent effect*.

The principal problem is the limited set of tools that prosecutors at international tribunals have at their disposal to investigate crimes. They cannot subpoena financial or telephone records, authorise wiretaps, conduct searches, or compel witnesses to appear and testify. To gather evidence, prosecutors at international tribunals depend almost entirely on cooperation from domestic law enforcement authorities.[16] This constraint applies to existing tribunals, like the ICC and the tribunals established in individual countries, that investigate war crimes and genocide. In the cases these tribunals handle, the investigation and prosecutions usually take place after the fact, often under a new government that has an interest in supporting, or at least not obstructing, the inquiry.

As noted above, in some cases of grand corruption the investigation and prosecution may also take place after a regime change, but the principal justifications for an IACC have emphasised the impunity of *sitting* heads of state and other senior government officials. The IACC's prosecutors—presuming they were modelled on prosecutors at existing tribunals like the ICC—would not have the investigative toolkit that domestic prosecutors have at hand to investigate complex financial crimes. But it can be assumed that, in the cases that the IACC is meant to address, domestic law enforcement authorities have been corrupted or otherwise compromised and would not be willing or able to render effective collaboration. In practice, it is impossible for an international tribunal to function effectively without the cooperation of the jurisdiction under investigation.[17]

A court would face high operating costs.

15. See, e.g., Clifford 2019 on allegations of bias in cases pursued by the ICC.
16. Whiting 2018.
17. Cassese 2009.

Moreover, even if the IACC were able to get convictions in a few cases, it is not clear that the number would be high enough to justify the *opportunity costs of creating and maintaining the court*. There are no current cost estimates for the IACC, but one can look to existing international tribunals, especially the ICC, as precedents. The ICC's operating costs have averaged roughly US$100 million per year; the amount has gone up over time and is now around US$160 million (ICC 2019). If the international community was going to spend $100 million per year to fight grand corruption, that money could possibly be put to more effective use than on an international court, especially if that court only managed to secure one or two convictions per decade. It might be possible to defray some operating costs of the IACC by using the funds recovered in grand corruption cases.[18] However, this would only be possible after a conviction, and only when the stolen money could be recovered; moreover, such an approach is in tension with the widely held view that recovered assets should be used to help victims in the countries from which the assets were stolen.[19]

Taking the discussion forward

The motivation behind the push for an IACC is the recognition of the need to break the self-reinforcing corruption-impunity cycle that persists in many countries. But a substantive plan to address the practical obstacles regarding political feasibility and effectiveness has yet to be articulated.

> *A plan to address obstacles around feasibility and effectiveness is lacking.*

In the absence (for now) of such a plan, the international community might continue to work with and within existing structures and programmes to pursue a range of alternatives for fighting corruption and impunity.[20] Some of the possibilities are listed below. All of them have their pros and cons, just as the IACC proposal does. Moreover, these options are neither exhaustive nor mutually exclusive with the IACC; the international community could support the IACC as well as some or all of these other proposals as part of a comprehensive strategy to attack grand corruption.

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18. Wolf 2018.
19. Global Forum on Asset Recovery 2017.
20. Stephenson 2018.

Expand ICC jurisdiction to include grand corruption

Instead of creating a new tribunal that is separate from the ICC, some have suggested that it may be possible to (re)interpret the existing provisions on ICC jurisdiction in the Rome Statute, which cover 'other inhumane acts,' as including grand corruption.[21] Roht-Arriaza and Martinez[22] advocate such an approach for the (preliminary) investigation by the ICC prosecutor in the case of Venezuela.

Empower and encourage regional human rights courts to exercise jurisdiction over corruption

Several regional human rights courts already exist, and because grand corruption so often implicates human rights issues—and, according to some experts, is itself a violation of human rights—it might be possible for regional human rights courts to assume jurisdiction over certain forms of grand corruption.[23]

Push for international investigative bodies that target corruption and impunity

The UN-backed anti-impunity commission in Guatemala, known by its Spanish acronym CICIG, was an autonomous body led by a non-Guatemalan commissioner, and had the power to investigate high-level wrongdoing. Though CICIG was eventually shut down, it achieved remarkable success in investigating powerful figures, including the president and vice president.[24] Other countries are experimenting with variants on the CICIG model.[25] The international community might push for more such bodies in countries where impunity is a major problem.

Support the creation of domestic anti-corruption institutions, including specialised anti-corruption courts

While IACC proponents want the international community to use its leverage to push countries to accept the jurisdiction of an international anti-corruption tribunal, the international community can also press individual countries to

21. PILPG 2019; GOPAC 2013; Starr 2007.
22. 2019.
23. Beach 2016; Clifford 2019.
24. Kuris 2019.
25. Messick 2019.

reform their domestic institutions to address the impunity problem, including by creating specialised anti-corruption courts and prosecutors. More than 20 countries already have such courts.[26] Moreover, where there are concerns about the independence and integrity of these bodies, international donors might push for foreign experts to take a greater role in the selection process, as in Ukraine.[27] The international community can also use its leverage to discourage countries from shuttering or undermining these institutions when they threaten the interests of powerful figures.

Build capacity for asset seizure, forfeiture, and return

Giventhe difficulties in holding kleptocrats criminally accountable for wrongdoing in their home countries, many anti-corruption experts have argued that the best approach, at least in the short term, is to focus on the officials' stolen assets, which are often held abroad. Countries that lack personal jurisdiction over the kleptocrats might nonetheless have jurisdiction over these stolen assets. The international community can work to strengthen the institutions devoted to asset seizure and improve the laws to make this process more efficient. As the ultimate goal is to return the stolen assets to victims in the home country, improving the asset return framework is another possible area for further work. The Stolen Asset Recovery Initiative (StAR) has been spearheading efforts in this area since 2007. At a Global Forum on Asset Recovery in 2017, Nigeria, Ukraine, Tunisia, and Sri Lanka developed and adopted the Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases. The further adoption of the Principles and the monitoring of their implementation should be supported by the international community, as in the case of the return of former president Abacha's assets to Nigeria.

Strengthen the international anti-money laundering (AML) framework

Strengthening the international AML system can make it harder for corrupt actors to hide their assets, and raises their costs of doing so. An improved AML framework might provide greater transparency regarding the true beneficial owners of legal entities, crackdowns on intermediaries (lawyers, accountants, registration agents, and others who facilitate money laundering), and greater international cooperation/coordination. Several initiatives exist, the most senior being the Financial Action Task Force (FATF), which has for 30 years monitored international compliance with its recommendations.

26. Stephenson and Schütte 2016.
27. Kuz and Stephenson, forthcoming.

Expand jurisdiction of domestic courts over private suits against kleptocrats

In addition to state-led asset forfeiture actions, some jurisdictions allow private parties to sue kleptocrats, and these suits can produce judgments that are unthinkable in the kleptocrat's home country. For example, a coalition of civil society groups brought a suit in France against the vice president of Equatorial Guinea on behalf of that country's citizens, and won a substantial judgment.[28] While such suits are not feasible in all countries, given different jurisdictional and procedural rules, expanding the availability of such suits and building the capacity to bring them could be another way for the international community to undermine the impunity that kleptocrats enjoy in their own countries.

Make greater use of targeted individual sanctions and travel bans

In addition to going after stolen loot, the international community can impose costs on kleptocrats by making greater use of targeted individual sanctions, including measures like restricting access to the financial system and imposing travel bans that include the officials' families. The United States Global Magnitsky Act is an example of this approach. There are controversies over the use of such targeted measures, especially when the target has not been convicted of a crime, but the argument in favour of these measures emphasises their efficacy in holding accountable high-level officials and others who would not be accountable in their home countries.

Expand and strengthen regional and international peer review mechanisms

UNCAC and various other international anti-corruption conventions have peer review mechanisms to assess compliance by member states. However, many of the existing mechanisms, including UNCAC's, could be made more robust in order to put pressure on countries whose leaders enjoy de facto impunity. Such 'naming and shaming' can help motivate countries to reform their institutions, and encourage or stimulate domestic efforts to bring about significant political or institutional change.

28. Pouget and Hurwitz 2017.

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