Symposium on IFFs: An International Anti-Corruption Court: A Win Against IFFs, A Win for Africa

By:

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May 16, 2024

The relationship between IFFs and corrupt conduct of various stripes is, perhaps, intuitive. Bribery and embezzlement; money laundering; concealment of taxable business profits; even obstruction of justice around enforcement. All of these are tools in the apron of those who would facilitate and profit from IFFs, whether their misappropriated millions are enjoyed at home or, as is increasingly the case, sheltered and laundered abroad. It has been estimated that the amount of money lost to developing states via IFFs outstrips the amount received in foreign aid by a factor of ten. As the United Nations Office on Drugs and Crime tells us, corruption is particularly corrosive because it undermines the proper functioning of governmental entities and institutions, discourages foreign direct investment and perverts the rule of law.

Particularly pernicious is conduct that is increasingly being labelled “grand corruption.” Powerful kleptocrats—presidents, ministers, generals—abuse their political power to drain developing states of monies that belong in the tax base and ultimately should be used for the benefit of the people, but instead go into their pockets and offshore bank accounts. Resources and aid intended for decarbonization instead fund luxury cars and lavish lifestyles, further intensifying global warming. When these states and their economy threaten to fail, refugees and migrants stream out and overwhelm neighbouring states. Africa is no stranger to grand corruption.

Ideally these kleptocrats would be prosecuted and their ill-gotten gains repatriated, yet they operate with impunity, controlling the police and justice apparatus of the state. Journalists who seek to expose them are brutally repressed. While there are international legal mechanisms that seek to suppress grand corruption, such as the United Nations Convention Against Corruption (UNCAC), the kleptocrats are powerful enough to ensure that local versions of the norms are toothless and they, themselves, immune.

An idea gaining steam of late, however, is the founding of an International Anti-Corruption Court (IACC), a standing international court that could hold kleptocrats criminally accountable and, perhaps more important, confiscate and return the money looted from their suffering home states. Originally proposed by Judge Mark Wolf of the U.S., the proposal is now being energetically promoted by an international coalition of lawyers, judges, NGOs, human rights advocates and allied organizations. The campaign is led by Integrity Initiatives International, an organization founded by Judge Wolf to combat grand corruption in all its manifestations.

The idea behind the IACC is simple, but powerful. Since the kleptocrats can effectively immunize themselves from facing domestic accountability, the international community has the opportunity to come together and found a court—like the Nuremburg Tribunal and the International Criminal Court—where both legal and practical immunities would be stripped away. By signing on to the treaty that founds the Court, states would agree that public officials would be liable to prosecution and not provided “impunity via immunity”—i.e., escaping prosecution on the basis that their activities could be considered state conduct because they were carried out while the perpetrators were in

government office.

Since we now have some decades of experience with international criminal tribunals, there is a sense of practicality that pervades the campaign to establish the IACC, an eye towards avoiding the need to re-invent the wheel. The subject matter jurisdiction of the Court would include crimes that are familiar and reasonably uncontroversial, based around the offences included in the UNCAC—bribery, embezzlement, misappropriation of public funds, and so on. This is a pragmatic choice in that the UNCAC has 190 state parties, and therefore all of these offences are not only familiar to virtually every state on the globe, but are already the subject of specific obligations for those states to insert the offences into their respective domestic criminal laws. As three prominent advocates of the IACC note, the Court could have "jurisdiction, with the consent of the state party concerned, to enforce existing domestic laws, a uniform version of them included in the treaty creating the court, or both."

The plan for the Court's functional jurisdiction to prosecute is strongly redolent of that set out in the Rome Statute of the International Criminal Court. States signing on to the founding treaty would agree on a set of jurisdictional principles. First, the Court would have jurisdiction over offences committed by nationals of party states, as with the ICC itself. Second, it would also have jurisdiction over offences that take place on party states' territories. This is the most solid and uncontroversial ground for criminal jurisdiction in international law, but it would also encompass "extended territorial jurisdiction," under which the Court (like states themselves) would be able to prosecute crimes that happened only in part on a party state's territory. This principle has solid legal grounding in both state practice and in the case law of the ICC itself.

The workings of this jurisdictional scheme, while seemingly technical in nature, are of utmost importance to the IACC's potential success. Corruption offences, chiefly because they involve money and liquid assets, are almost never confined to the territory of a single state. Bribes, and the communications facilitating them, cross borders. Moreover, as the International Consortium of Investigative Journalists has documented in the "Panama Papers" and "Pandora Papers," kleptocrats collaborate with enablers operating within the global financial system, both legally and unlawfully, to move, hide, obscure and launder the proceeds of their corrupt conduct. The only effective way in which

these crimes of grand corruption can be combatted is a flexible jurisdictional scheme that extends the legal net over the global path of the offences and their tainted gains. Under the proposed scheme, even a kleptocrat who was a national of a non-party state could be prosecuted by the IACC for flowing his embezzled proceeds into the banking system of a party state, either as a continuing offence or at the very least as an act of money laundering.

Naturally, the IACC will not have the capacity to take on the prosecution of every kleptocrat who might potentially fall within its jurisdiction, but this is where the principle of “complementarity” comes in. As with the same legal tool that is part of the ICC’s operation, the IACC would only have jurisdiction over an offence if there were no party state that was willing or able to prosecute. The idea is that something as extraordinary as an international court should only be brought into play where the existing, functional criminal justice systems of states are unable to step in, for some bona fide reason.

On the one hand, then, where a particular state lacked the legal or prosecutorial capacity to mount a trial of a particular perpetrator—or there were political obstacles to so doing—the IACC could step in and prosecute. On the other hand, however, states could, as they should, do the bulk of the work. Moreover, there is a strong potential for the IACC to serve as a catalyzer of “positive complementarity” as well. It is anticipated that the Court would be able to employ, harness and work with networks of skilled investigators and experts with experience in cases of grand corruption, in partnership with national and multinational entities such as the International Anti-Corruption Coordination Centre. It would employ both prosecutors and judges with substantial experience in anti-corruption cases and these individuals would be able to work with their state-level counterparts, creating a synergistic energy within a global network of anti-corruption work.

A unique aspect of corruption offences is, of course, their proceeds, which must be the focus of suppression efforts in a manner less central to other kinds of transnational crimes. As noted, kleptocrats ransack the economies of states that can scarcely handle losing valuable resources, and thus the plan for the IACC is to be an effective forum for their recovery and repatriation. It is envisioned that this will occur in two ways; first, through the familiar mechanisms of criminal forfeiture of stolen monies, whereby the Court would

issue orders under which state authorities could seize assets derived from proven crimes, which could then be repatriated to their state of origin. This is, in fact, one of the features that could make the IACC uniquely effective. It is entirely possible that states where kleptocrats enjoy power will not sign on to the Court or give it any legal authority, thus making physical custody over them (let alone a trial) a remote prospect. However, it is anticipated that those states which are the financial centres in which ill-gotten gains are poked will be likely supporters of the IACC, and thus the Court will have the power to issue orders that hit the kleptocrats where it hurts—their pocketbooks.

The second proposal regarding proceeds is that the IACC could serve as a clearing-house for monies that are not implicated in completed grand corruption prosecutions, but are nonetheless provably derived from corrupt conduct. This would be implemented by the Court having, alongside its criminal machinery, a "civil chamber" that could deal in a lawful and procedurally sound manner with these assets. Potential uses could include the facilitation of civil forfeiture and like mechanisms (e.g., unexplained wealth orders) on the part of states, as well as serving as a forum where state parties seek direction as to the disposal of corruption-tainted assets, to which there might be multiple claims. This chamber, too, could serve as a centre of excellence in the complex endeavour of dealing with proceeds of corruption, providing a platform of cooperation and the exchange of technical information and skills.

Over the course of a decade the proposal for the IACC has gone from being an idealistic glint in the eye of Judge Wolf to serious and fully-fledged campaign to create a new international institution. At this very moment, work is proceeding on the production of a full draft of a treaty that would provide the foundation of the court, co-led by Justice Richard Goldstone of South Africa and Canadian international lawyer, Maja Groff, and featuring an international group of lawyers, judges, diplomats, analysts and civil society advocates; this author has the honour of being among their number, along with my colleague and Afronomicslaw luminary, Professor Olabisi Akinkugbe. A recent *issue of the journal Transnational Criminal Law Review* featured a series of articles digging into issues around the Court's operation.

Importantly, the drafting team is not singing its song to an uncaring world; support for the proposal is rapidly coalescing. Its current supporters include

states such as Canada, the Netherlands and Ecuador, which will be instrumental in getting the proposal meaningfully onto the international community's legal agenda. It is being studied by the European Parliament. Given the importance that the voices of the Global South be heard, and in particular those of the African Continent, it is a great victory that Nigeria—already a regional leader in anti-corruption—is seeing a groundswell of support, including from the Centre for Anti-Corruption and Open Leadership (CACOL) and the HEDA Resource Centre.

In a recent speech to the South African government, Lord Peter Hain highlighted that Africa is a particular victim of IFFs, "with annual permanent outflows exceeding $100-billion a year — making Africa a net creditor to the rest of the world: not the rich supporting the poor, but the poor supporting the rich." He urged the government to take a lead in establishing the IACC. In the face of such obvious inequity and victimization of African people and economies by corrupt leaders and kleptocrats, such a strike at the heart of this criminality is well worth consideration.

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