

THE ESTABLISHMENT OF AN ANTI-CORRUPTION COURT

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I. INTRODUCTION

It has been my privilege and pleasure to have worked with Leila Sadat on several projects for over two decades. Since 2014, I have served on the Steering Committee for the project on the Convention for the Prevention and Punishment of Crimes Against Humanity. The project is Leila's brainchild, and she has devoted all her considerable skills into its development. The convention was taken up by the International Law Commission and a draft convention is now before the Sixth Committee of the United Nations General Assembly. Without Leila Sadat's legal and political skills and persistence this progress would not have been possible. It was with alacrity that I accepted the invitation to contribute an essay for this anthology in celebration of Leila Sadat and recognising her outstanding contribution to her law school, her students, and to international humanitarian law.

II. CORRUPTION AND THE NECESSITY FOR GLOBAL STEPS TO DETER GLOBAL CORRUPTION

Corruption at all levels of society—both public and private—has become a global scourge. It manifests itself at many levels. At the leadership level, there is kleptocracy or grand corruption.¹ Below that there is the bribery and corruption at the executive level—including the police and prosecution authorities. Then there is the further manifestation of corruption at the provincial and local level. There are few countries, if any, that are not grappling with the consequences of this disease at some or all of those levels.

Many domestic systems are not equipped to investigate and prosecute the perpetrators of crimes of corruption. In the case of grand corruption, the criminal leader or leaders and their criminal partners control the police and prosecution authorities, and in some cases, the courts.

It has been estimated that trillions of dollars are paid in bribes annually and that the cost of all forms of corruption is more than five percent of global GDP.² Developing regions lose ten times more to corruption than they

¹ In this essay I will refer to kleptocracy as ["grand corruption."]

² Int'l Chamber of Comm. et al., *Clean Business is Good Business: The Business Cases Against Corruption* (2008), <https://iccwbo.org/content/uploads/sites/3/2008/07/The-business-Case-against-Corruption.pdf> (last visited Nov. 18, 2021) (this estimate has recently been questioned, see Cecilie Wathne & Matthew C. Stephenson, *The Credibility of Corruption Statistics*, U4 ANTI-CORRUPTION RES. CTR., <https://www.u4.no/publications/the-credibility-of-corruption-statistics> (last visited Oct. 22, 2021)).

receive in foreign aid.³ Illicit outflows of funds that developing countries desperately need total more than \$1 trillion per year.⁴ In an op-ed published in April 2020, Judge Mark L. Wolf and I anticipated that huge sums of money would likely be stolen from the significant funds then already being devoted to fighting the COVID-19 pandemic.⁵ Even then, we could hardly have anticipated the vast sums that would be diverted for the personal gain of those officials who did not hesitate to steal from the most in need of preventive and medical treatment.

In 2014, Judge Wolf took the initiative in establishing Integrity Initiatives International (III), a civil society organisation designed to bring attention to and find effective tools for the prevention and punishment of grand corruption.⁶ One of its principal goals is to galvanise support for an International Anti-Corruption Court (IACC).

There are 188 States Parties to the United Nations Convention Against Corruption (UNCAC).⁷ That Convention obliges them to promulgate appropriate domestic legislation aimed at prohibiting and preventing corruption.⁸ The vast majority of those States have such legislation. However, it has not significantly curbed corruption in States that are victim to grand corruption. The reason is not difficult to find—those laws are not implemented and there is wide impunity for the corrupt, and especially for kleptocrats. The solution can only be found at the global level by establishing effective tools to prosecute and punish these evil thieves.

The global steps that might be considered are:

- Using the International Criminal Court (ICC);
- Creating an ad hoc international tribunal;
- Appointing a Special Rapporteur; and
- Creating an International Anti-Corruption Court.

³ Dev Kar & Sarah Freitas, *Illicit Financial Flows from Developing Countries 2003-2012*, GLOB. FIN. INTEGRITY 12 (Dec. 2014), <https://www.gfintegrity.org/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf>.

⁴ Dev Kar & Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2004–2013*, GLOB. FIN. INTEGRITY (Dec. 8, 2015), <http://www.gfintegrity.org/report/ illicit-financial-flows-from-developing-countries-2004-2013/>.

⁵ Richard Goldstone & Mark Wolf, *Coronavirus Presents Bonanza for Kleptocrats*, BOSTON GLOBE (Apr. 4, 2020), <https://static1.squarespace.com/static/5728d314b6aa60d865f7840e/t/5e887380c8efd76b477de0c8/1586000768577/Coronavirus+presents+bonanza+for+kleptocrats+-+The+Boston+Globe.pdf>.

⁶ I am a founding member of the Board of III.

⁷ See G.A. Res. 58/4, Convention Against Corruption (Oct. 31, 2003); *see also*, U.N. OFFICE ON DRUG AND CRIME, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (last visited Nov. 8, 2021).

⁸ *Id.* at art. 5.

Using the ICC poses insuperable practical problems. The crimes that fall within the jurisdiction of the ICC are defined in Articles 5 - 8 of the Rome Statute. The only crime that might be relevant to grand corruption is crimes against humanity.⁹ Some egregious acts of grand corruption that might victimise a civilian population could theoretically constitute such a crime. It would be exceedingly difficult to establish and would require evidence to prove the intentional perpetration of this crime beyond a reasonable doubt. Nothing short of intending to harm the civilian population of the nation would suffice to achieve a conviction. There is also the problem that with the limited resources of the ICC, its Prosecutor would be hard put to give priority to grand corruption in the face of crimes such as genocide and the murder or persecution of large numbers of innocent civilians. It has been suggested that the Rome Statute should be amended to explicitly recognise grand corruption as a crime falling within the jurisdiction of the ICC.¹⁰ Such an amendment would require the agreement of two-thirds of the members of the Assembly of States Parties in either a meeting of the Assembly or a review conference called by it. Then, an amendment comes into force for all States Parties one year after it is ratified by seven-eighths of the States Parties.¹¹ This is a laborious and long procedure and is by no means assured of success. The ICC is clearly not an appropriate venue for the prosecution of grand corruption.

An ad hoc international tribunal would be a very costly endeavor to investigate and prosecute grand corruption in only one country. This was certainly the case with regard to the International Criminal Tribunals, respectively for the former Yugoslavia (ICTY) and Rwanda (ICTR). Such a tribunal would require the appointment of specialist judges, prosecutors and investigators and substantial staff. It could be established by the Security Council or by a group of States that might jointly confer their jurisdiction in such a tribunal. It is extremely unlikely that States that are governed by kleptocrats would agree to be bound by such a treaty or to cooperate even with a tribunal established by the Security Council. If the kleptocrat loses office, there is no reason for the courts of that State not then

⁹ Rome Statute of the International Criminal Court, July 17, 1998, art. 7, U.N. Doc. A/CONF.183/9.

¹⁰ *ASP18 Side Event: The Prosecution of Economic and Financial Crimes: Towards an Extension of the ICC's Jurisdiction?*, PUB. INT'L L. AND POL'Y GRP. (Dec. 4, 2019), <https://www.publicinternationallawandpolicygroup.org/lawvering-justice-blog/2019/12/4/asp18-side-event-the-prosecution-of-economic-and-financial-crimes-towards-an-extension-of-the-iccs-jurisdiction>; Naomi Roht-Arriaza & Santiago Martinez, *Venezuela, Grand Corruption, and the International Criminal Court*, in U.C. HASTINGS COLLEGE OF THE LAW LEGAL STUDIES RESEARCH PAPER SERIES (Rsch. Paper No. 340, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381986.

¹¹ *Id.* at art. 121(3)-(4), (6).

to prosecute their erstwhile kleptocratic leader. Grand corruption is not a problem that is confined to one or two countries. It therefore requires a broader judicial mechanism than an ad hoc tribunal similar to the ICTY/ICTR or a hybrid tribunal such as that for Sierra Leone or Cambodia. Ad hoc tribunals are thus also not appropriate for the prosecution of grand corruption.

A Special Rapporteur appointed to investigate grand corruption within a State would create even more problems. Who would establish such an office and appoint a rapporteur? A rapporteur, to be effective, would require the cooperation of the State ruled by the kleptocrat. That is a highly unlikely scenario. Even if such a rapporteur could collect relevant evidence outside the relevant State, it would be unlikely that any State would possess jurisdiction to act against the kleptocrat. Certainly, a rapporteur who does succeed in assembling sufficient material could bring public attention to a situation of grand corruption. That might, in some cases, act as a deterrent. This solution is a difficult one and its success is open to doubt. It is not a useful or efficient way to prevent and punish grand corruption on a global scale.

III. ESTABLISHING THE IACC

It is against that background that III is throwing its support behind an IACC. Such a court would be governed by its own statute in which the crime of grand corruption would be defined. Jurisdiction would be conferred on the courts of the country in which grand corruption is committed if that State has ratified the statute. Importantly, grand corruption would also be committed by laundering ill-gotten monies in a state other than that of the kleptocrat. If that State has ratified the Statute, it too would have jurisdiction over the kleptocrat.

It is only in unusual circumstances that the ICC has jurisdiction based upon acts performed outside the borders of a State Party or by nationals of States Parties. An example is provided by the Myanmar situation presently before the ICC where jurisdiction is based upon forcing nationals of Myanmar (the Rohingya) to seek refuge in Bangladesh which is a State Party to the Rome Statute. But the more egregious crimes that have been committed by the regime in Myanmar itself are not cognisable by the ICC as Myanmar is not a State Party.

III is presently working in a draft statute for the IACC. There are certainly lessons to be learned from the experience of present and former international criminal courts and tribunals. The ICC has been the subject of allegations of errors and mistakes. They led to the Assembly of States

Parties (ASP) establishing an Independent Expert Review (IER).¹² The IER published its report at the end of September 2020.¹³ It contains over 380 recommendations calculated to improve the efficiency of the Court. The report was welcomed by the Assembly of States Parties, and, in December 2020, it established a Review Mechanism to consider and advise the Court and the ASP on how most efficiently to implement the recommendations. The experiences of the ad hoc tribunals,¹⁴ the hybrid tribunals,¹⁵ and the ICC, especially considering the IER report, are valuable in drafting a statute and establishing the procedures of the IACC.

IV. UNGASS

During the first week of June, the UN General Assembly held the first ever Special Session against Corruption (UNGASS). The result is disappointing. In essence, it called on States Parties to implement their domestic legislative provisions aimed at deterring and punishing corruption. The importance of doing so cannot be doubted. However, as pointed out above, it is action at the global level that is required to deter grand corruption. III, joined by ninety-six international and national civil society organisations, signed a letter addressed to UN member States to call for UNGASS to create an intergovernmental working group “to develop technical proposals for new frameworks and mechanisms that would address weaknesses in the current international legal framework and infrastructure.”¹⁶ It is highly regrettable that the proposal was not included in the final *UNGASS* political declaration.

¹² There were nine members of the IER from nine countries around the world. This author chaired it.

¹³ See *Indep. Expert Rev. of the Int’l Crim. Ct. and the Rome Statute Sys. Final Rep.*, ICC-ASP/19/16 (2020).

¹⁴ *International Criminal Tribunal for the former Yugoslavia*, U.N. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org> (last visited Nov. 15, 2021); *Legacy Website of the International Criminal Tribunal for Rwanda*, U.N. INT’L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, <https://unictr.irmct.org> (last visited Nov. 15, 2021).

¹⁵ These were set up for Sierra Leone, Cambodia and Lebanon. *International and Hybrid Criminal Courts and Tribunals*, U.N. AND THE RULE OF L., <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/> (last visited Nov. 15, 2021). See OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: MAXIMIZING THE LEGACY OF HYBRID COURTS* (2008), <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf>. See also Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245 (2003).

¹⁶ Letter from Access Info Europe et al. to U.N. Member States (Apr. 13, 2021), <https://images.transparencycdn.org/images/Letter-on-UNGASS-2021-political-declaration-from-nearly-100-NGOs-April-2021.pdf>.

It hardly requires the limited outcome of UNGASS to demonstrate that the UN is not in the foreseeable future likely to establish the IACC. Powerful and large States are opposed to their nationals being judged by international criminal courts. This is the position of China, India, Russia, and the United States.

V. ESTABLISHING THE IACC

There are several ways to establish an international criminal court. The Nuremberg Tribunal was set up in 1945 by the four victorious powers, France, the UK, the US, and the USSR. It was set up by treaty—the London Agreement. The so-called ad hoc tribunals for the former Yugoslavia and Rwanda were established by the Security Council respectively in 1993 and 1994. The hybrid tribunals were set up by agreement between the governments of the countries concerned and UN Secretariat with the approval of the Security Council. In 1992, Jody Williams, together with a coalition of civil society organisations outside the UN, negotiated the Mine Ban Treaty. It was signed by 122 countries in Ottawa in 1997.¹⁷

In 1998, UN Secretary-General, Kofi Annan, called a diplomatic conference in Rome to consider establishing the ICC. That conference was not called within the UN system, and the ICC was not set up as an organ of the UN. It was 120 of the States present at that diplomatic conference that agreed to the terms of the Rome Statute. The United States joined China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries voting in opposition to the Statute. Twenty-one countries abstained.¹⁸ A very high threshold was established for the coming into force of the Rome Statute – no less than 60 ratifications. It was anticipated that it would take a decade or more to reach that goal. To the surprise of most optimistic observers, it took only four years.

Considering the disappointing outcome of UNGASS, III has realised that there is scant prospect of the IACC being established by the UN. Even the less controversial Convention for the Prevention and Punishment of Crimes Against Humanity, appears to be languishing in the Sixth Committee of the UN General Assembly. (The project on the Convention, referred to above,

¹⁷ *Chapter XXVI Disarmament*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&clang=_en (last visited Feb. 19, 2022).

¹⁸ Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, AM. SOC'Y OF INT'L L. (Aug. 11, 1998), <https://www.asil.org/insights/volume/3/issue/10/results-rome-conference-international-criminal-court>.

was launched by Professor Sadat in 2014 and was fast-tracked by the International Law Commission). In the face of the proliferation of corruption in 2021, III has a sense of urgency in establishing the IACC and is convinced that even a group of 20-25 relevant nations could establish a functioning IACC. It would then be up to other nations to join it.

By relevant nations, I refer to nations representing the different geographic regions of the world and, importantly, nations in which kleptocrats launder or are likely to launder their ill-gotten gains. Under a statute establishing the IACC, the Court would certainly have jurisdiction over the crimes of grand corruption committed in such countries—either directly or by laundering their ill-gotten monies. Thus, if a kleptocrat launders monies in Panama, the IACC would have jurisdiction to investigate and prosecute the kleptocrat if Panama is a member of the IACC. Even if the kleptocrat is shielded by her or his own country, the IACC would have power to launch an investigation and, in the process, freeze the laundered monies. They would be held under the control of the IACC until the guilt of the kleptocrat has been established. In the event of a conviction, the funds could be held until the country of origin has been restored to a democratic form of government. Those funds could then be repatriated for the benefit of the true victims of the crime—usually the neediest people in that country.

VI. STEPS FORWARD

Support for the IACC has been growing. During May 2021, over one hundred former heads of State, cabinet members, Nobel laureates, religious and business leaders, and other eminent people from around the world signed a Declaration expressing support for the IACC. They declared that:

1. We know that Grand Corruption – the abuse of public office for private gain by a nation’s leaders (“kleptocrats”) – thrives in many countries and has devastating consequences. Kleptocrats corruptly enrich themselves from the trillions of dollars being spent to promote global public health and counter climate change. Kleptocrats are robbing their countries of funds needed to meet the 2030 Sustainable Development Goals. Grand Corruption undermines democracy as kleptocrats use their power to suppress the media and civil society, and subvert honest elections. Refugees fleeing failed States led by kleptocrats constitute international crises. Uprisings in opposition to Grand Corruption destabilize many countries and endanger international peace and security.
2. We know that Grand Corruption is not flourishing because of a lack of laws. The 187 countries that are party to the United Nations

Convention Against Corruption (“UNCAC”) each have laws criminalizing corrupt conduct. Yet kleptocrats enjoy impunity because they control the administration of justice in the countries that they rule.

3. Because Grand Corruption has global consequences and often cannot be combated by the countries most immediately victimized by kleptocrats, a new international institution – an International Anti-Corruption Court – is necessary and justified. Through its agreed mandate, IACC should have jurisdiction to prosecute violations of existing domestic anti-corruption laws, or a new international counterpart of them, by kleptocrats and their collaborators, if the country the kleptocrat rules is unwilling or unable to prosecute a case itself. The IACC should have the authority to prosecute crimes committed by nationals of Member States, and by nationals of other States who commit crimes in the territory of a Member State. The IACC should be a court of last resort with the capacity to prosecute and imprison kleptocrats, and thus create opportunities for the democratic process to replace them with honest leaders. The IACC should have in civil as well as criminal cases the authority to recover, repatriate, and repurpose illicit assets for the victims of Grand Corruption.

4. As an International Anti-Corruption Court is urgently needed to promote democracy and human rights, protect human life and health, and enhance international peace and security, we hereby DECLARE our support for the creation of the Court and CALL ON others to join us in this crucial common cause.¹⁹

VII. CONCLUSION

To date, the global community has failed miserably to deter, let alone prevent, grand corruption. The problem is growing rather than contracting. The laws designed to combat kleptocracy and grand corruption are not being implemented. I cannot suggest another relevant way forward other than the establishment of the IACC. It would not only investigate and prosecute

¹⁹ Carl Bildt et al., *Declaration in Support of the Creation of an International Anti-Corruption Court*, INTEGRITY INITIATIVES INT’L, <http://www.integrityinitiatives.org/declaration> (last visited Oct. 22, 2021).

kleptocrats but induce domestic courts to do so themselves and deter would-be kleptocrats by shining a global judicial bright light on their nefarious activities. Its time has come.