

The World Needs an International Anti-Corruption Court

Abstract: In War and Peace, Leo Tolstoy wrote that “the thoughts that have enormous consequences are always simple.”¹ This essay explains an ambitious idea with enormous consequences that is simple: an International Anti-Corruption Court is needed to diminish the devastating consequences of grand corruption, the abuse of public office for private gain by a nation’s leaders. Grand corruption depends on a culture of impunity in countries whose leaders will not permit the enforcement of existing criminal laws against their close colleagues and themselves. An International Anti-Corruption Court would provide a forum to enforce those laws, punish corrupt leaders, and deter and thus diminish grand corruption. The successful prosecution and imprisonment of corrupt leaders would create opportunities for the democratic process to produce successors dedicated to serving their people rather than to enriching themselves.

As the contents of this volume of *Dædalus* demonstrate, there is a growing international understanding that more effective means are needed to combat corruption, particularly what is coming to be called “grand corruption” or “kleptocracy.” Grand corruption is the abuse of public office for private gain by a nation’s leaders. It flourishes in many countries because of a failure to enforce existing criminal statutes prohibiting bribery, money laundering, and the misappropriation of national resources. Impunity exists because corrupt leaders control the police, the prosecutors, and the courts.

In 2016, leaders from more than forty countries met in London for the Anti-Corruption Summit. They endorsed a Global Declaration Against Corruption, committing each represented nation to the proposition that “the corrupt should be pursued and punished.”² The Declaration emphasized the “centrality” of the United Nations Convention Against Corruption (uncac), in which 183 countries pledged to enact laws criminalizing corruption and to enforce

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them even against their nation's leaders.³ Implicitly recognizing that existing institutions and efforts have not been adequate, the participating governments committed themselves to "exploring innovative solutions" to combat corruption.⁴ An International Anti-Corruption Court (iacc) would be an invaluable innovation.

It is a fundamental premise of criminal law that the prospect of punishment will deter crime. Research has validated this premise, including with regard to violations of human rights.⁵ The absence of risk of punishment, particularly imprisonment, contributes greatly to the pervasiveness and persistence of grand corruption.

The United States provides a model for a new international approach to creating the crucial, credible threat that corrupt leaders will be punished for their crimes. Public corruption exists in the United States. Officials—most often state and local officials—sometimes abuse their public offices for personal gain. However, in contrast to many other nations, the United States has been serious about investigating, prosecuting, and punishing powerful, corrupt public officials.

As a federal judge, in 2011, I sentenced former Speaker of the Massachusetts House of Representatives Salvatore DiMasi to eight years in prison for demanding bribes in connection with computer contracts worth \$17 million. The state inspector general, in a public decision, invalidated the contracts because of flaws in the bidding process. A subsequent *Boston Globe* investigation revealed that the successful bidder had been paying the Speaker's law partner \$5,000 per month, most of which was flowing to the Speaker. Federal—not state—prosecutors and the Federal Bureau of Investigation then continued the investigation. They found hundreds of thousands of dollars had also been paid to a friend of the Speaker. When DiMasi was charged in fed-

eral court, the case was randomly assigned to me. A jury found DiMasi guilty and I decided the sentence.

As the DiMasi case illustrates, the United States does not rely on elected state district attorneys to investigate and prosecute corrupt state and local officials because they are often part of the political establishment that must be challenged and, in any event, typically lack the necessary legal authority, expertise, and resources. In the United States, independent media often expose corruption. Federal investigators are authorized to conduct undercover operations and secretly record conversations, and are adept at unraveling complicated financial transactions. Federal prosecutors are capable of trying complex cases successfully before impartial judges and juries. As a result, public officials convicted of corruption regularly receive serious sentences, which have the potential to deter others and to create a political climate in which candidates dedicated to governing honestly are elected.

However, in countries in which grand corruption flourishes, leaders control the media and do not permit their own crim-

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from but similar to the International Criminal Court (icc).

It is estimated that trillions of dollars are paid in bribes annually and that the cost of all forms of corruption is more than 5 percent of global gdp.⁶ Developing regions lose ten times more to corruption than they receive in foreign aid.⁷ Illicit outflows of funds that developing countries desperately need total more than \$1 trillion per year.⁸

The cost of corruption is not limited to poorer countries. For example, in 2011, the third-largest outflow of illicit capital in the world came from Russia. Bribery, theft, kickbacks, and corruption cost the country \$427 billion from 2000 to 2008.⁹ Russia's leaders evidently contribute a great deal to the illicit capital that leaves the country. In 2016, a massive leak of documents known as the Panama Papers revealed that close associates of President Vladimir Putin moved \$2 billion, in transactions involving as much as \$200 million at a time, through international banks and companies created to mask their true beneficial owners.¹⁰ Putin's closest friend, a cellist who had long claimed he was not wealthy, was revealed to have almost £19 million in a Swiss bank, as well as investments in numerous Russian and offshore entities, including a 3.9 percent share of a Russian bank with assets of almost \$11 billion.¹¹ In 2017, it was revealed that Russian Prime Minister Dimitri Medvedev had accumulated more than \$1 billion worth of property, including vast estates in Tuscany and Russia, and owned two yachts.¹²

The costs of grand corruption are not exclusively economic. Grand corruption also breeds constituents for terrorists. Many supporters of the Taliban in Afghanistan and of Boko Haram in Nigeria are not religious fanatics. Rather, they are angry people attracted to organizations that have positioned themselves as prime opponents

of their nation's corrupt leaders.¹³ At the same time, corruption—especially grand corruption—makes it difficult for governments to combat terrorism because funds intended for that purpose are regularly embezzled or misspent. For example, according to the former “anticorruption czar” of Kenya, John Githongo, corruption has “opened the door to al-Shabab” in that country because bribes were paid to high officials to obtain contracts for vital security equipment, which was substandard and delivered at inflated prices or, in some cases, not delivered at all.¹⁴

In addition, grand corruption is closely correlated with the worst abuses of human rights. As then–United Nations High Commissioner for Human Rights Navi Pillay explained in 2013:

Corruption kills. . . . The money stolen through corruption every year is enough to feed the world's hungry 80 times over. . . . Corruption denies them their right to food, and, in some cases, their right to life.¹⁵

Grand corruption also has other fatal consequences. In Sierra Leone, one-third of the funds allocated to combat Ebola in 2014 could not be accounted for; some of those funds, however, were eventually found in the bank accounts of health officials responsible for administering the relief effort.¹⁶ Angola claims the highest mortality rate in the world for children below age five, while Isobel DosSantos, the daughter of its president for thirty-eight years until 2017, is reportedly worth \$3 billion.¹⁷

Moreover, indignation at grand corruption is destabilizing many countries and in the process creating grave threats to international peace and security. People around the world, particularly young people, no longer accept grand corruption as an inevitable fact of life. The ostentatious corruption of President of Ukraine Viktor Yanukovich was a major cause of the 2014 Maidan protests that drove him out

of office and to Russia. The flagrant illic-

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claims to have bribed are evading prosecution, while being protected by Erdoğan in Turkey.²⁹ One of the prosecution's witnesses in the New York case was a former Turkish police officer who had been jailed in Turkey in retaliation for leading its investigation of Zarrab and who eventually fled to the United States with evidence he had obtained.³⁰

International treaties, including *uncac* itself, require the good-faith enforcement of criminal laws enacted pursuant to the Convention against a nation's leaders. However, those laws have been widely ignored. *uncac*'s monitoring mechanism is weak, and the international community has focused excessively on whether the statutes required by *uncac* have been enacted and insufficiently on whether they are actually enforced.³¹

I myself experienced a vivid example of this in St. Petersburg in 2014. I was on a panel with diplomats from the United Nations and the European Union who praised Russia because it had enacted the statutes required by *uncac*. Citing substantial evidence of continuing grand corruption, I questioned whether the "progress" being praised was real or rather, like the proverbial "Potemkin village," all façade and no substance. The positive reaction to my remarks by the many Russians in the audience confirmed that they were not fooled by the official charade that we had witnessed.

While criminal laws that could punish and deter corrupt leaders are not being enforced, there are other efforts being made to combat grand corruption. However, the fact that grand corruption continues to flourish demonstrates that the current means alone are inadequate and something new is needed.

The United States enacted the *fcpa* in the aftermath of Watergate, and the statute has been energetically enforced in the past decade. However, the *fcpa* only applies to

companies that do business in the United States. Forty countries in the Organisation for Economic Co-operation and Development (oecd) Convention Against Bribery have undertaken to enact counterparts to the *fcpa*, but those statutes are rarely enforced.³² Moreover, as explained earlier, the *fcpa*, and its counterparts as well, permit only the prosecution of individuals and organizations that pay bribes, but not the public officials who often demand them.³³

Another approach to attacking grand corruption is civil litigation to recover and repatriate illicitly obtained assets from the former rulers of many countries. However, asset recovery is legally complex, forensically difficult, and ponderously slow. For example, funds unlawfully obtained by former President Ferdinand Marcos were frozen in 1986 but not returned to the Philippine government until 2004.³⁴ Efforts to recover illicitly obtained assets from Marcos's wife are still ongoing.³⁵

In any event, even expedited asset recovery would not be effective in deterring high officials from engaging in criminal corruption. At best, only a fraction of looted assets and bribes are ever recovered. For example, in a highly publicized case, the United States alleged that Teodorin Obiang, son of the president and himself the second vice president of Equatorial Guinea, had corruptly received \$100 million and laundered it in the United States by, among other things, buying a mansion, sports cars, and Michael Jackson memorabilia. After several years, the Department of Justice settled the case for \$30 million and never recovered a coveted crystal studded glove worn by Jackson that Obiang was supposed to forfeit.³⁶

As the Obiang case indicates, corrupt leaders can correctly calculate that they are unlikely to be caught and, at worst, risk being forced to return only a fraction of what they have illegally acquired. This is not sufficient to alter their corrupt conduct.

The Obiang case also illustrates how the enormous wealth corruptly obtained by high officials is typically laundered through a series of complex financial transactions and invested abroad. Some of the loot is used to buy lavish properties in the names of shell companies or straw owners in appealing places such as London, Paris, New York City, and Palm Springs. The sources of corruptly obtained funds are difficult to trace, and the true beneficial owners of assets acquired with that money are difficult to identify.

The countries that participated in the 2016 Anti-Corruption Summit in London pledged to improve the transparency of beneficial ownership and the international community's capacity to cooperate in investigating the flow of the fruits of corruption.³⁷ These are worthy endeavors. However, it should be recognized that greater transparency of beneficial ownership and improved ability to follow the money are not ends in themselves. Rather, they are only means to discover evidence of criminal activity. There must be a forum in which evidence of corruption by a nation's leaders can be honestly and effectively presented to an impartial tribunal capable of imposing prison sentences on powerful people.

In 2002, the evils of genocide and other intolerable abuses of human rights led to the creation of the *icc*. The comparable consequences of grand corruption now justify the creation of an *iacc*. As indicated earlier, the proposed *iacc* should be similar to but separate from the *icc*. There are principled reasons for not diffusing the *icc*'s singular focus on genocide, crimes against humanity, and war crimes. In addition, the statute that created the *icc* cannot be properly interpreted to give the *icc*

last resort, to be relied upon only in cases in which national enforcement of existing domestic criminal laws against a country's leaders is not possible.

By operating on the principle of complementarity, the iacc would give countries a significant incentive to improve their capacity to enforce their criminal laws, and to punish and deter corruption, especially grand corruption. Study of abuses of human rights provides evidence "that pressure from the outside, including the exercise of extraterritorial jurisdiction by other states under universal . . . jurisdiction, inspires domestic trials in response."³⁸ The Spanish prosecution of former dictator Augusto Pinochet, his arrest in London, and his subsequent trial in Chile is a prominent example of this phenomenon. The iacc would have the potential to catalyze comparable national responses to grand corruption.

The iacc should have jurisdiction to prosecute any head of state or of government, anyone appointed by a head of state or government, and anyone who conspires with one of those officials, if they violate a statute required by uncac. The iacc would therefore not require the creation of any new legal obligations. Rather, it would only provide a venue for the enforcement of existing norms that are codified in the laws of virtually every country.

The iacc's jurisdiction should include cases concerning corrupt leaders of countries that join the Court but prove to be unwilling or unable to enforce their domestic anticorruption laws against them. The iacc should also have jurisdiction concerning leaders of countries that do not join the Court in certain circumstances. For example, a leader of any state who used the financial system of an iacc member to launder the proceeds of a bribe should be subject to prosecution in the iacc if the member state is unwilling or unable to prosecute. In addition, the United Nations Security Council should be authorized to

refer the leader of any country for prosecution in the iacc, as it can refer for prosecution in the icc citizens of states that have not joined the court.

Since I first proposed the iacc in two articles published in 2014, the concept has been questioned and criticized, and also gained significant support.³⁹ A common criticism of the iacc is that it would violate the sanctity of national sovereignty.⁴⁰ However, any country that agreed to join the iacc would delegate to the court the authority to enforce its domestic laws if necessary. Therefore, prosecution of its leaders in the iacc would not be a violation of national sovereignty, but rather a vindication of the will of its people. In any event, as grand corruption has substantial international consequences, there is a compelling justification for an iacc to enforce a nation's laws against its corrupt leaders when they themselves are the obstacle to domestic enforcement.

It is sometimes said that creating another court comparable to the icc, which costs about \$160 million a year, would be too expensive. However, corruption is estimated to cost trillions of dollars annually, and grand corruption contributes greatly to that cost. The iacc would reduce corruption and thus save many nations enormous sums of money. Moreover, a conviction in the iacc could result not only in a prison sentence, but in an order of restitution to the victimized country as well. Fines imposed by the iacc could be used to defray, if not cover, the costs of its operation. Therefore, an iacc would be cost-effective.

Some argue that the icc is weak, unfair in its prosecutorial policies, and not a model worthy of emulation. Although 124 nations have joined the icc, its jurisdiction is not universal. Major powers— including China, Russia, India, and the United States— have refused to join, largely immunizing themselves from prosecution in the icc.

It is, however, premature to declare the *icc* a failure. The federal courts in the United States were also weak at a similar stage in their development. In 1832, the Supreme Court issued an order that irritated President Andrew Jackson, who ignored it and famously (but probably apocryphally) is said to have responded, “[Chief Justice] John Marshall has made his decision, now let him enforce it.”⁴¹ However, by 1974, Richard Nixon knew that the American people and Congress would not tolerate a president who defied a Supreme Court order. Therefore, he turned over the tapes of conversations in the Oval Office concerning crimes and cover-ups, and resigned in disgrace instead.⁴²

It is true that major powers on the United Nations Security Council have at times blocked investigations of their allies, such as China’s protection of North Korea. It is also true that the *icc* has achieved only five convictions, and all have been of Africans. However, the *icc* has focused on Africa for legitimate reasons. Thirty-three African states joined the Court—the most from any region; crimes against humanity have occurred repeatedly in Africa since the *icc* was established; and most of the *icc* investigations in Africa were opened at the request of the African governments themselves.⁴³

In addition, the *icc* has been broadening its focus. In 2017, it conducted ten preliminary examinations, only four of which involved African countries. Ukraine, Colombia, Iraq, and Afghanistan are among the nations still being investigated.⁴⁴ The preliminary examination of *icc* member Afghanistan could actually generate prosecutions of United States and British nationals if there is sufficient evidence that they committed war crimes in Afghanistan, and their governments are shown to have been unwilling to conduct genuine investigations and make good-faith decisions concerning whether to prosecute.

Some objections to the *icc* actually indicate that the Court is developing credibility and having an impact. President Rodrigo Duterte of the Philippines objected to the *icc* after a warning that his country might be investigated for the extrajudicial killings of drug dealers and addicts. Similarly, Russia denounced the *icc* after the United States and the United Kingdom urged the court to investigate Russian bombings in Syria.⁴⁵

Perhaps one of the most significant arguments in favor of the *icc* is that there is increasing evidence that prosecutions of human rights abuses in that court, as well as in domestic courts, are deterring violations of human rights.⁴⁶ As explained earlier, the principle of complementarity provides an incentive to states to improve their own institutions and efforts. *icc* investigations have already catalyzed reforms in the Democratic Republic of the Congo, Sudan, Guinea, Georgia, and Colombia.⁴⁷ In addition, there is evidence that both the former president of Colombia and the Revolutionary Armed Forces of Colombia (*farc*) rebels factored the possibility of *icc* prosecution into their negotiations to end a fifty-year civil war.⁴⁸ Such examples have prompted some scholars to conclude that

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because the official controls all power to prosecute and punish, there is nothing to inhibit an avaricious leader from enriching himself corruptly. However, when the credible threat of extraterritorial prosecution and imprisonment is established, the calculation—and the conduct—should change.

Finally, the most common criticism of the proposed iacc is that it represents an impossible ideal. Some argue that if China, Russia, India, and the United States refused to join the icc, corrupt leaders of other countries are even less likely to allow their nations to join an iacc in which they could be prosecuted. However, submitting to the jurisdiction of the iacc could be made a requirement of being a party to uncac and a member of the World Trade Organization. It could also be made a prerequisite for receiving bilateral foreign aid and loans from the World Bank and other development organizations.

Trade agreements are another means of promoting membership in the iacc. For example, the recent Trans-Pacific Partnership (tpp) has the “strongest anti-corruption and transparency standards of any trade agreement,” according to the Office of the U.S. Trade Representative.⁵⁰ Among other conditions, the tpp requires signatories to become parties to uncac, and to enact and enforce anticorruption laws.⁵¹ It also creates a mechanism to sanction violations of those requirements.⁵² Unfortunately, missing from the tpp sanctions is accountability for failure to enforce the tpp’s required anticorruption laws. However, joining the iacc could be a condition for becoming party to major trade agreements such as the tpp.

There are several models for a process to create the iacc. One is the icc, which was founded in 2002 as a result of efforts that began after World War II. The victorious allies created courts to try Germans and Japanese for alleged war crimes. Those courts

were intended to establish the principle of individual accountability under the law, and to deter future wars and war crimes. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide declared genocide to be a crime. However, for fifty years there was no forum for the prosecution of individuals who committed genocide.

About twenty-five years ago, this deficiency became obvious and urgent. In the wake of atrocities in the former Yugoslavia and Rwanda, the United Nations Security Council established ad hoc tribunals to try perpetrators of genocide. A coalition of 2,500 civil-society organizations from 150 countries then led a successful campaign to create the icc.⁵³ In 1998, a conference was convened in Rome to explore the creation of a permanent international criminal court. A treaty was endorsed by 120 countries. The required sixty countries ratified the treaty much sooner than expected and, only four years later, the icc was established.⁵⁴

The 1997 Mine Ban Treaty provides another model for how to establish the iacc. This treaty emerged from the International Campaign to Ban Landmines (icbl), which was launched by six nongovernmental organizations (ngos) in 1992. The ngos partnered with a core group of countries, including Canada, Norway, Austria, and South Africa, to conduct the campaign. By 1997, a treaty had been signed by 122 nations, becoming binding law with unprecedented speed.⁵⁵

As the leader of the icbl, Nobel Peace Prize recipient Jody Williams, explained:

[I]t is possible for ngos to put an issue . . . on the international agenda, [and] provoke urgent actions by governments and others. . . . It is [also] possible to work outside of traditional diplomatic forums, practices, and methods and still achieve success multi-laterally.⁵⁶

Williams’s view has been validated by the International Campaign to Abolish Nu-

clear Weapons (ican). ican was formed in Australia in 2007 to work for the adoption of a convention to eliminate nuclear weapons after decades of unsuccessful efforts to regulate them. Emulating the icbl, ican involved 468 organizations in 101 countries, led by a few medium-sized nations, including Austria and Canada. In 2017, a Treaty on the Prohibition of Nuclear Weapons was adopted at the United Nations by a vote of 122 to 1. While the treaty is not supported by any of the states that now have nuclear weapons, it reflects a significant evolution of international norms and is a meaningful milestone. Although viewed by many in 2007 as a quixotic quest, ican was awarded the Nobel Peace Prize in 2017.⁵⁷

The iacc is still only a concept, and does not yet constitute an organized campaign. However, it is a concept that many people around the world find clear and compelling. They now know that grand corruption is extremely expensive, creates con-

stituents for terrorists, is closely correlated with the worst abuses of human rights, and is destabilizing many countries and the world. They understand that something new is needed to hold kleptocrats accountable for their crimes.

Therefore, conditions comparable to those that led to the creation of the icc are emerging for the iacc. The proposed Court is supported by: prominent officials, including the United Nations High Commissioner for Human Rights and Nobel Peace Prize recipient President Juan Manuel Santos, who made Colombia the first country to endorse the iacc; leading ngos, such as Transparency International, Global Witness, and Human Rights Watch; and courageous young people, including leaders of the Maidan uprising in Ukraine.

In short, there is a growing legion of advocates for a simple idea with enormous consequences: the iacc is urgently needed to end impunity for corrupt leaders, and

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