Integrity Initiatives International Submission to the UNGASS against Corruption 2021

Proposal on the establishment of an International Anti-Corruption Court to address impunity for grand corruption

31 August 2020

Integrity Initiatives International (“III”) was established in 2016 by United States District Judge Mark Wolf, Justice Richard Goldstone of South Africa, and colleagues to advocate for stronger enforcement of criminal laws against corrupt leaders, also known as “kleptocrats.” We thank the United Nations Convention Against Corruption (“UNCAC”) Conference of State Parties and the United Nations Office on Drugs and Crime for the opportunity to participate in the consultation process in preparation for the UN General Assembly Special Session against Corruption 2021 (“UNGASS 2021”).

The UNGASS 2021 was convened at the request of Belize, Colombia, Nigeria, Norway, Peru, and Saudi Arabia. It is a response to widespread “concern[s] about the seriousness of the problems and threats to the stability and security of societies posed by corruption, which undermine the institutions and values of democracy, ethics and justice, and jeopardize sustainable development and the rule of law.” The mandate of the UNGASS 2021 is to “address challenges and measures to prevent and combat corruption and [to strengthen] international cooperation for that purpose… .” The Conference of State Parties (“CoSP”) has been reminded of the importance of promoting the implementation of the UNCAC and, in preparation for the UNGASS 2021, asked to “address [...] all organizational and substantive matters in an open-ended manner.”

In January 2019, Colombia announced that it would call on the United Nations to establish an International Anti-Corruption Court (“IACC”) at the UNGASS 2021. III joins Colombia, among others, in this request.

Interest in and support for the IACC is growing at an accelerating rate. The IACC was identified as an “innovative idea to end impunity [that] should be explored” in the 2019 Oslo Statement on Corruption Involving Vast Quantities of Assets (“VQA”) adopted by the UN Expert Group Meeting on VQA, which was attended by over 140 experts from more than 50 countries. Colombia and Peru co-hosted a side session at the 74th United Nations General Assembly to discuss innovative ways to combat grand corruption generally and the IACC specifically, which included expressions of positive interest in the IACC by officials from Malaysia and Norway. The IACC was also discussed at virtual sessions of the UN Financial Accountability, Transparency, and Integrity Panel (“FACTI”), and in written submissions by Colombia and III.

In its 10 March 2020 submission to the UNGASS 2021, Transparency International recognized the need to reform international justice institutions, identified the IACC as a particularly “notable proposal,” and stated that it “deserves careful study.” Similarly, in its submission to the UNGASS 2021, the UNCAC Civil Society Coalition stated that, “new and stronger mechanisms for international cooperation are needed to successfully investigate and prosecute grand corruption cases and member states should use the UNGASS to discuss and evaluate options or new international infrastructure to do so.” Norwegian diplomat Mats Benestad also recently wrote about the importance of addressing the IACC as a means of combatting grand corruption at the UNGASS 2021.

As Lloyd Axworthy and Allan Rock, among others, have written, the COVID-19 pandemic has magnified the need for the creation of the IACC. The pandemic is becoming a bonanza for kleptocrats.

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as trillions of dollars in relief funds are being disbursed without even the usual, often ineffective, safeguards. Evidence is emerging that funds intended to combat the pandemic are being misappropriated and misused by high officials in many countries. Therefore, it is increasingly evident that something more is needed to deter them.

I. The IACC would greatly strengthen the implementation of the UNCAC

The UNCAC was a significant achievement with promising potential when it was adopted in 2005. However, despite the best efforts of many, as then Foreign Minister of Colombia Carlos Holmes Trujillo said in 2019, “it has not been enough.” Corruption, particularly grand corruption, continues to thrive in many of the 187 countries that are parties to the UNCAC, creating the devastating consequences and recognized need to strengthen implementation of the UNCAC that prompted the convening of the UNGASS 2021.

More specifically, grand corruption does not endure and indeed grow because of a lack of laws. 187 countries are party to the UNCAC. Almost all have the laws it requires criminalizing corrupt conduct, such as extortion, bribery, money laundering and the misappropriation of national resources. However, kleptocrats enjoy impunity in their own countries because they control the administration of justice.

There are various, potentially complementary means by which impunity for kleptocrats could be addressed. These include the creation of national special anti-corruption courts, regional anti-corruption courts, and hybrid efforts such as the International Commission against Impunity in Guatemala (“CICIG”). III supports such efforts. However, their potential is limited because kleptocrats regularly launder illicit assets through the international financial system, and hide them in countries throughout the world. Therefore, an institution with international scope is needed to address this global challenge.

The IACC would fill a crucial gap in the international framework for combatting grand corruption. It would constitute a fair and effective forum for the prosecution and punishment of kleptocrats and their collaborators, deter others tempted to emulate their example, and recover and repatriate ill-gotten gains for the victims of grand corruption.

More specifically, the IACC would be a forum to enforce existing national anti-corruption laws, or possibly a new international counterpart to them, against kleptocrats and their conspirators. The IACC would be a court of last resort. Operating on the principle of complementarity, it would only prosecute if a member state were unwilling or unable to prosecute a case itself.

The IACC could benefit from a new, internationally agreed-upon definition of grand corruption, as called for by Transparency International and the UNCAC Civil Society Coalition. Such a definition could serve as a threshold for the jurisdiction of the IACC concerning violations of existing national laws or as the basis for a new international criminal offense of grand corruption.

The IACC is a natural and necessary extension of the UNCAC. A fundamental premise of the criminal laws required by the UNCAC is that the genuine threat of criminal prosecution and punishment is essential to deterring corruption, and diminishing the human and economic harm it inflicts. There is evidence that the threat of investigations and prosecutions at the international level deters crimes by both state and non-state actors at the national level and incentivizes domestic prosecutions.

In addition, the IACC would have great potential to recover and repatriate stolen assets. A successful prosecution of a kleptocrat in the IACC would not only result in his or her incarceration, but could also result in an order of restitution or disgorgement of illicit assets or gains for the benefit of victims. The capacity of the IACC to recover and repatriate the proceeds of grand corruption would be magnified if the Court were empowered to decide civil corruption cases brought by private whistleblowers. The United States False Claims Act authorizes whistleblowers to bring such suits, which have resulted in the recovery of billions of dollars in the United States. Comparable cases in the IACC could do the same for countries throughout the world by providing a forum for evidence
developed by brave whistleblowers in the many nations with judiciaries that are dominated by kleptocrats and often themselves corrupt.

The capacity to track illicit assets is being enhanced by the efforts of new public institutions, such as the International Anti-Corruption Coordination Centre, private organizations, such as international investigative firms that are increasingly being employed by looted national banks, and journalists and civil society organizations courageously seeking to counter kleptocrats. The impact of all of them would be greatly enhanced by an IACC serving as a forum for the presentation of evidence that they develops.

II. The Feasibility and Effectiveness of the IACC

Questions may be raised concerning the feasibility of creating the IACC at a time when hostility to international institutions is at its apex. However, there is a powerful countercurrent of people throughout the world who are indignant about grand corruption and have replaced kleptocrats with evidently honest successors. The IACC would be an attractive way to implement and perpetuate their anti-corruption agendas while domestic institutions need to be strengthened and remain vulnerable to being weakened in the future. The IACC’s expert investigators, prosecutors, and judges would also be valuable resources for strengthening their counterparts in countries striving to improve their capacity.

In any event, the IACC would not represent a violation of national sovereignty. Rather, any country that joins the IACC will be deciding to share some of its authority to prosecute kleptocrats, in limited circumstances, in order to give integrity to the domestic laws it enacted as a party to the UNCAC.

It is foreseeable that some kleptocrats will not permit the countries that they rule to join a court that would be a threat to prosecute them. However, kleptocrats regularly launder their illicit assets through major financial centers and invest them in attractive foreign countries. The IACC would have jurisdiction over crimes committed by nationals of an IACC member state, and crimes committed in the territory of an IACC member state. Countries which are home to international financial centers polluted by the proceeds of corruption are promising candidates to join the IACC. If, for some reason, an IACC member state were unwilling or unable to prosecute a kleptocrat who has engaged in money laundering or another crime of corruption in its jurisdiction, the kleptocrat would be subject to prosecution in the IACC. Therefore, the IACC has significant potential to prosecute, punish, and recover illicit assets from kleptocrats who rule countries that have not joined the Court.

III. Conclusion

The UNGASS 2021 will be a cross-roads for the international effort to combat corruption generally and grand corruption particularly. It is being held because it is widely understood that the UNCAC must be more effectively implemented and doing so requires, among other things, addressing gaps in the international framework. Doing both requires a new international institution – the IACC – to strengthen the enforcement of the laws required by the UNCAC against kleptocrats and their collaborators.

The IACC is a bold proposal. However, bold action is essential if the UNGASS 2021 is to be looked back upon as a meaningful milestone in the war against corruption rather than a missed opportunity. Therefore, III urges the UNGASS 2021 to advance the creation of the IACC.