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## **Introduction to Symposium on the Proposal to Create an International Anti-Corruption Court**

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# SYMPOSIUM ON THE PROPOSAL TO CREATE AN INTERNATIONAL ANTI-CORRUPTION COURT

## INTRODUCTION

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The international prosecution of transnational crimes, such as corruption, has long sparked the interest of scholars.<sup>1</sup> Academic debate about international prosecutions has been fueled in part by the omission of transnational crimes from the Rome Statute of the International Criminal Court (ICC), which covers only the ‘core crimes’ of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>2</sup> Although the transnational phenomenon of drug trafficking prompted the revival of the subject of an international criminal court within the United Nations General Assembly in the late 1980s, drug trafficking and other transnational crimes were ultimately omitted from the Rome Statute.

As a consequence, the investigation and prosecution of transnational crimes remain the sole prerogative of domestic jurisdictions. Most transnational crimes simply cannot be ‘reframed’ as one of the core crimes over which the ICC has jurisdiction, and the prospect of amending the Rome Statute to include transnational crimes seems dim. While a wide range of transnational crimes were included in the 2014 Malabo Protocol for the establishment of an African Court of Justice and Human and Peoples’ Rights, the protocol is widely regarded as very unlikely to come into force in the foreseeable future.<sup>3</sup> Moreover, the many problematic provisions of the Malabo Protocol illustrate the perils involved in drafting a constitutive instrument without sufficient debate among not only negotiators, but also scholars.<sup>4</sup>

The proposal to create an international anti-corruption court (IACC), which first emerged nearly a decade ago, has given scholars new reasons to consider how states might create an international court with the power to try transnational crimes. This proposal was initially put forward in 2014 by a US district court judge, Mark Wolf, who has since been revising and refining it.<sup>5</sup> The proposal took time to gain traction, but in recent years it appears

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<sup>1</sup> See eg. Robert J. Currie and Jacob Leon, ‘COPLA: A Transnational Criminal Court for Latin America and the Caribbean’ (2019) 88 *Nordic Journal of International Law* 587; Mikkel Jarle Christensen, ‘Crafting and Promoting International Crimes: A Controversy among Professionals of Core-Crimes and Anti-Corruption’ (2017) 30 *Leiden Journal of International Law* 501; Harmen van der Wilt, ‘Slavery Prosecutions in International Jurisdictions’ (2016) 14 *Journal of International Criminal Justice* 269; Neil Boister, ‘International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?’ (2012) 23 *Criminal Law Forum* 295; Neil Boister, ‘Treaty Crimes, International Criminal Court?’ (2009) *New Criminal Law Review* 341; Sonja Staff, ‘Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations’ (2007) 1010 *Northwestern University Law Review* 1257; Andreas Schloenhardt, ‘Transnational Organised Crime and the International Court: Towards Global Criminal Justice’ (2005) 24 *University of Queensland Law Journal* 93.

<sup>2</sup> Patrick Robinson, ‘The Missing Crimes’ in Antonio Cassese et al (ed) *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (OUP 2002).

<sup>3</sup> African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

<sup>4</sup> See generally Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmeihelle, *The African Court of Justice and Human Rights and Peoples’ Rights in Context: Development and Challenges* (CUP 2019).

<sup>5</sup> Mark L. Wolf, Richard Goldstone, and Robert I. Rotberg, ‘The Progressing Proposal for An International Anti-Corruption Court’, *American Academy of Arts & Sciences* (2023); Mark L. Wolf, ‘The World Needs an International Anti-Corruption Court’ (2018) 147 *Daedalus* 144; Mark L. Wolf, ‘The Case for an International Anti-Corruption Court: Executive Summary’, *Brookings* (2014). Mark Wolf’s proposal was preceded by a proposal put forth by an academic: Martine Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Intersentia 2012).

to have benefited from the advocacy network built up by Judge Wolf.<sup>6</sup> The idea of an international anti-corruption court has enjoyed increased interest among policy makers, with Canada, Ecuador, and the Netherlands taking the lead in exploring this proposal.<sup>7</sup> At present, it remains to be seen where policy-makers and activists will take this idea.

The purpose of this journal symposium is to contribute objective scholarly analysis to the ongoing discussions about the creation of an international anti-corruption court. The contributors to this symposium offer activists and policy-makers valuable in-depth analysis of legal issues that are, or could be, key for the design of an IACC. The contributions focus respectively on questions of applicable law, evidence, immunity, asset recovery, and corporate liability. As a consequence of the symposium's focus on these core issues of (international/transnational) criminal law, it leaves aside questions of political feasibility and international institutional law (eg, the appointment of judges, funding, institutional home). The remainder of this introduction sketches the basic contours of the current proposal to create an IACC, and the corresponding contributions included in this symposium.

The proposal begins by emphasizing the need for an IACC, given the harms associated with grand corruption and the high levels of impunity enjoyed by perpetrators in domestic legal systems. Grand corruption, which the proposal defines as 'the abuse of public office for private gain by a nation's leaders', represents a 'major barrier' to sustainable development, 'fighting climate change, promoting democracy and human rights, establishing international peace and security, and securing a more just, rules-based global order'.<sup>8</sup> Despite almost universal participation in the 2003 United Nations Convention against Corruption and very widespread criminalization of corrupt conduct, such as bribery and embezzlement or misappropriation, a 'crucial enforcement gap' persists in states around the globe.<sup>9</sup> Heads of state or government and other high level officials regularly go unpunished for acts of grand corruption due to their control over state organs and/or a lack of domestic capacity to handle large-scale investigations and prosecutions of major figures.

Many aspects of the IACC would be modelled on the International Criminal Court, including its grounding in the principle of complementarity. Like the ICC, the IACC would only investigate and prosecute acts of corruption in situations where states proved 'unwilling or unable' to do so. An IACC would thereby be designed to incentivize domestic investigations and prosecutions by states seeking to retain control over such proceedings.

Some of the proposed jurisdictional features of an IACC would also resemble the International Criminal Court. According to the proposal, an IACC would exercise jurisdiction not only over individuals who are nationals of states parties to the instrument establishing an IACC, but also over individuals who engage in corrupt conduct on the territory of a state party. An IACC with jurisdiction based partly on territoriality would be able to pursue individuals who committed only part of the alleged conduct in a state party. This jurisdictional feature would, for example, allow an IACC to exercise jurisdiction over individuals who launder corrupt proceeds in foreign states that are parties to the IACC statute.

The proposal further suggests that an IACC's subject matter jurisdiction would be defined by reference to UNCAC, which requires states parties to criminalize bribery, embezzlement or misappropriation, money laundering, and obstruction of justice.<sup>10</sup> Because nearly all states are parties to UNCAC, these forms of conduct are (at least in theory)

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<sup>6</sup> Integrity Initiatives International, <<http://integrityinitiatives.org/>> accessed 25 August 2023.

<sup>7</sup> Government of the Netherlands, 'Netherlands says more funding needed for efforts to combat impunity worldwide', 11 April 2022, <<https://www.government.nl/latest/news/2022/04/11/netherlands-says-more-funding-needed-for-efforts-to-combat-impunity-worldwide/>>.

<sup>8</sup> Wolf, Goldstone, and Rotberg (n 5) 1.

<sup>9</sup> *ibid.*

<sup>10</sup> Wolf, Goldstone, Rotberg (n 5) 6; United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41, Arts. 15, 16(1), 17, 23, 25.

criminalized in nearly all states. This would leave an IACC with three potential options with respect to its applicable law: (1) it could apply the domestic laws of its states parties, which would presumably implement UNCAC; (2) it could apply the substantive law contained in its own constitutive instrument, which would be based on UNCAC's criminalization provisions; or (3) it could apply both domestic laws and its statute.<sup>11</sup> Each of these options raises interesting and difficult questions of applicable law. In his contribution to this symposium, Anton Moiseenko considers the risks potentially involved in an IACC applying domestic laws, some of which may not criminalize corruption in a manner that (fully) complies with UNCAC.<sup>12</sup> He also considers how the principle of legality would apply if the substantive law contained in an IACC statute differed from the anti-corruption law in force in the accused person's country of nationality at the time of the commission of the crime.

Like any court, an IACC would require satisfactory evidence before an accused person could be convicted of an act of corruption, or related criminal conduct, such as money laundering or obstruction of justice. Unlike nearly all of the international criminal courts and tribunals to date, an IACC would likely have to rely primarily on documentary evidence, as opposed to witness testimony. The proposal for an IACC implies that the prosecutor of an IACC could rely, in part, on cooperation by states parties, which would share (documentary) evidence with it.<sup>13</sup> In addition, the proposal suggests that an IACC prosecutor could draw on a number of other valuable sources of information, including evidence uncovered by whistleblowers and investigative journalists, as well as information gathered in the course of domestic foreign bribery prosecutions.<sup>14</sup> In her contribution to this symposium, Kathrin Betz explores the subject of evidentiary cooperation by states with an IACC.<sup>15</sup> She focuses on potential cooperation by Switzerland, which hosts major financial centers that greatly increase the likelihood that Swiss cooperation with a future IACC would be needed (and also required, if Switzerland were to become a state party to an IACC statute). Her contribution also explores the challenges that would be raised by stolen evidence, in particular whether such evidence would be admissible before an IACC.

Successful prosecutions by an IACC would also depend on the unavailability of the plea of immunity. Accused persons would have to be deprived of their personal and/or functional immunity from prosecution, as well as arrest and transfer to the court. The proposal suggests that states parties to an IACC statute would waive the immunity of their current and former officials.<sup>16</sup> Moreover, the proposal also claims that it would be consistent with customary international law and existing precedents for an IACC to deprive the officials of non-states parties of immunity.<sup>17</sup> In her contribution to this symposium, Rosanne van Alebeek questions the assertion that nationals of non-states parties would not benefit from immunities before an IACC.<sup>18</sup> She examines the controversial reasoning of the ICC's Appeals Chamber in its decision on immunities in the *Al-Bashir* case, and argues that the reasoning of the Appeals Chamber

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<sup>11</sup> Wolf, Goldstone, and Rotberg (n 5) 6.

<sup>12</sup> Anton Moiseenko, 'The Proposal for an International Anti-Corruption Court: What Law Should the Court Apply?' (2023) 2 Transnational Criminal Law Review 6.

<sup>13</sup> Wolf, Goldstone, and Rotberg (n 5) 12.

<sup>14</sup> *ibid.*

<sup>15</sup> Kathrin Betz, 'Evidentiary Aspects of an International Anti-Corruption Court' (2023) 2 Transnational Criminal Law Review 21.

<sup>16</sup> Wolf, Goldstone, and Rotberg (n 5) 5.

<sup>17</sup> *ibid.* 6.

<sup>18</sup> Rosanne van Alebeek, 'Prosecuting Corruption Crimes before an International Anti-Corruption Court: Whither Immunity Rules' (2023) 2 Transnational Criminal Law Review 38.

would not necessarily be transposable to an IACC.<sup>19</sup> On the basis of her detailed analysis, she cautions that the proposal may be too optimistic about the irrelevance of the law on immunity.

A successful prosecution would ideally result not just in the imprisonment of the accused, but also in the confiscation and return of the corrupt proceeds. The harm caused by grand corruption can only be repaired if assets are recovered and repurposed for the benefit of victims. While the current proposal foresees an IACC ordering restitution or disgorgement, it does not further elaborate on the issue of asset recovery.<sup>20</sup> Daley Birkett takes up this question in his contribution on the recovery of assets by an IACC.<sup>21</sup> He explores the lessons to be learned from the ICC's experiences with asset recovery, and argues that the drafters of an IACC statute ought to be aware of the importance of precisely delineating what sort of cooperation is required of states parties in the asset recovery process. This contribution also considers the human rights considerations that could arise in the context of asset recovery undertaken by the court.

While the proposal foresees the prosecution of private persons, it does not explicitly consider the possibility that legal, as opposed to natural, persons could be charged by the IACC prosecutor.<sup>22</sup> Although the proposal does not mention the possibility of corporate liability, it does acknowledge the key roles that corporations play in acts of grand corruption, whether as perpetrators or facilitators. In her contribution to this symposium, Hannah Harris considers this 'missing component' of the IACC proposal.<sup>23</sup> She argues that an IACC should provide for liability for legal persons, in keeping with an emerging trend towards holding corporations accountable for their contributions to a wide range of global harms; including not only corruption, but also human rights violations and environmental destruction. While the drafters of the Rome Statute opted not to provide for corporate liability, she argues such liability would be not only desirable, but also legally feasible.

Taken together, the contributions to this symposium show that an international anti-corruption court could learn many lessons from the ICC, but an IACC would also face a number of its own, unique legal challenges. As discussions about the creation of an IACC continue, this symposium represents a rich source of legal analysis about the lessons to be learned, and about how the unique challenges may be understood and approached. Whether or not an IACC ultimately takes shape, Judge Wolf's proposal has led to much-needed discussions about the state of the international anti-corruption field and the need for further institution and domestic capacity building.<sup>24</sup> While the existing web of international anti-corruption treaties represent a tremendous legal advancement compared to what existed approximately 25 years ago, our work is hardly done.

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<sup>19</sup> *Prosecutor v Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019.

<sup>20</sup> Wolf, Goldstone, and Rotberg (n 5) 9.

<sup>21</sup> Daley J. Birkett, 'Recovering Assets at an International Anti-Corruption Court: Cautionary Tales from Rome, The Hague, and the Field' (2023) 2 Transnational Criminal Law Review 63.

<sup>22</sup> Wolf, Goldstone, and Rotberg (n 5) 5.

<sup>23</sup> Hannah Harris, 'Corporate Liability within the IACC Framework: A Proposal for Enhanced Corporate Accountability' (2023) 2 Transnational Criminal Law Review 78.

<sup>24</sup> Laurence R. Helfer, Cecily Rose, Rachel Brewster, 'Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism' (2023) 117 American Journal of International Law (forthcoming).