

Establishing an International Financial Criminal Court

Introduction

Corruption is perhaps the greatest barrier to socio-economic development. The annual worldwide bribery is estimated at US \$1trillion dollars. This does not even cover every form of corruption like for example embezzlement of public funds or theft of public assets. Corruption impedes economic growth, distorts markets, worsens inequality and diverts urgently needed funds from education and health care. Additionally, it undermines democracy and the rule of law. In the current globalized world, corruption has a new transnational character; it facilitates several illicit activities like money laundering and drug-, human-, and weapon trafficking. Moreover, it facilitates the proliferation of weapons and assists the spread of terror. Now more than ever, corruption is becoming a threat to world order.

There are several anti-corruption conventions as well as self-regulatory private sector anti-corruption initiatives. Some of the most important conventions are:

United Nations Convention Against Corruption (2003)

This international agreement includes measures to tackle corrupt practices, including bribery, embezzlement and money laundering. For the first time it gives a global framework on asset recovery. However, resources for implementation are limited and there are no concrete provisions on monitoring mechanisms. Additionally, not all articles are binding.

Inter-American Convention against Corruption (1996)

This convention was adopted by the members of the Organization of the American States (OAS). It was the first international judicial instrument aimed at fighting corruption. States are obliged to implement certain measures aimed at preventing, detecting, prosecuting and eradicating corruption as well as increasing cooperation between states on these matters.

The Council of Europe Criminal Law Convention (1998) and Civil Law Convention (2003)

This convention was adopted by the governments that are members of the Council of Europe. A broad range of offences is included and provisions are mandatory. It provides for monitoring by GRECO, the Group of States against Corruption, which monitors compliance with the anti-corruption standards. However, there are few preventive measures. The Civil Convention (2003) includes civil law remedies to compensate the damage from corruption. Unfortunately, this convention does not include restrictions on the use of banking secrecy.

The OECD Convention on Combating the Bribery of Foreign Public Officials (1997)

This convention addresses bribery of public officials and aims at ensuring that corruption does not distort fair competition in international business transactions. The OECD Working Group on Bribery evaluates the adequacy of a signatory country's legislation to implement the Convention. It also assesses whether a country is

applying legislation effectively. However, until now there has been a lack of active enforcement by the majority of the parties. Also there is inadequate coverage of foreign subsidiaries and of foreign political parties and party officials. The convention does not cover private-to-private corruption and facilitation payments, also known as 'grease' payments.

The African Union Convention on Preventing and Combating Corruption and Related Offenses (2003):

This regional agreement covers a range of criminal offences; illicit enrichment, money laundering, bribery, diversion of property by public officials, trading in influence, and property concealment. It calls for measures on prevention, criminalization, regional cooperation, mutual legal assistance and asset recovery. Additionally, it provides mandatory provisions regarding private-to-private corruption and disclosure in political party funding. Even though the AU Convention provides a comprehensive framework with some unique features, it also has some weaknesses. There is no provision on sanctions, no peer review mechanisms and a lack of resources for follow-up mechanisms.¹

Despite the substantial number of conventions and self-regulatory private sector initiatives against corruption, there is no effective implementation. There is an urgent need for measures to increase effectiveness. Another problem is that corruption is often seen as a synonym for bribery when in reality it has other important aspects. It is essential to also pay attention to tax evasion and the role of the offshore financial system.²

International Financial Criminal Court

A way to reduce the lack of implementation in the fight against corruption is by creating a global supranational enforcement mechanism: an International Financial Criminal Court (IFCC). This court must be equipped with powers to take legal action when rules are not being followed. There are several reasons for focusing on this approach:

To end impunity

Many cases of corruption go unpunished. As it was stated during the Judgement at Nuremberg, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".

To act when national justice institutions are unable or unwilling to act

Too often, states lack political will or are otherwise incapable of properly prosecuting influential citizens, especially members of the regime. Moreover, corruption has a transnational character. There is only so much one country can do when borders are crossed. Crimes under international law should not only be prosecuted by national

¹ www.transparency.org

² http://www.taxjustice.net/cms/front_content.php?idcat=100

institutions; international institutions with the power to prosecute will also encourage national prosecution.

To discourage future corruption

Once it is clear that corruption will no longer go unpunished, those engaging in corrupt activities are warned that they have more to lose. As the expected gains from engaging in corrupt activities decreases, corruption will decrease too.

Effective asset recovery

An IFCC would remove the need for governments to take complex legal action in every country in which assets have been frozen, in order to reclaim assets. An international court would take the issue to the international level. With an independent staff of researchers and prosecutors it would be able to investigate cases independently.

The establishment of the ICC

After the Nuremberg trials the UN General assembly requested the establishment of an International Law Commission to create a Code of Crimes. In 1948 the Convention on the Punishment of the Crime of Genocide was adopted. Even though the laws were established and a treaty was ratified, there was no court to prosecute offenders.

Former president of Trinidad and Tobago put the establishment of a court back on the agenda in 1989, when the ILC was asked to continue its work on the ICC. In 1993 and 1994, two ad hoc courts were created for certain regions where crimes had been committed. The International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia laid the foundations for the Rome Statute and the establishment of the ICC.

The ILC submitted a draft statute on an ICC, which was considered by the Ad Hoc Committee on the Establishment of an International Court. After the General Assembly considered the Committee's report, a Preparatory Committee was established to prepare a draft text. The Preparatory Meetings were attended by NGO's, governments and experts in the field of international law. After 50 years of debate the International Criminal Court finally became a reality in 1998, when the Rome Statute was adopted. The ICC became the first international, treaty based court to prosecute international crimes; genocide, war crimes and crimes against humanity.

The ICC is a complementary institution; individual states maintain their jurisdiction to prosecute their own criminals. Only when a country is unable or unwilling to prosecute certain criminals will the ICC launch an investigation. For example, when the judicial system has been crippled, or if there is a bias for or against to a suspect who is being prosecuted. This is the way a potential IFCC should work; this way countries can still take the initiative to prosecute suspects.

Conclusion

Corruption is a scourge in the international community. It causes poverty and grave injustice, and increases other forms of criminal activities. It is also a threat to international security. The current legal anti-corruption regime is not effective enough when it comes to implementation. An International Financial Criminal Court would help to reduce corrupt activities, end the present impunity, deter people from engaging in these activities in the future, contribute to asset recovery, and would be able to act when national justice institutions cannot do so. Even though establishing an IFCC is something that will take a lot of time and effort from the international community, it is important to start soon. The successful establishment of the ICC can serve as an example for a potential IFCC.

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