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“No safe haven”: denying entry to the corrupt as a new anti-corruption policy

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Abstract

Purpose – This paper aims to provide an overview of the “no safe haven” anti-corruption commitment recently announced by the G20. The essence of this approach lies in denying entry to individuals reasonably believed to be complicit in massive corruption.

Design/methodology/approach – The paper is based on the analysis of international legal instruments and relevant domestic legislation (US statutes, in particular the Magnitsky Act 2012), as well as on scholarly discussions.

Findings – Proceeding from the analysis of deficiencies in the current anti-money laundering regime, this paper makes an argument in favour of adoption of the “no safe haven” policy as a legal standard in anti-corruption cooperation, rather than a voluntary initiative.

Practical implications – The adoption by states of the approach advocated in this paper will strengthen, or so it is submitted, the international anti-corruption regime. Importantly, it will help curb impunity of those who are shielded from investigation and prosecution in their home countries.

Originality/value – This paper considers basic legal and policy arguments that support the “no safe haven” anti-corruption policy. Due to the novelty of this approach and the dearth of academic literature on this topic, this may be a valuable contribution to the current anti-corruption discussions.

Keywords Human rights, Corruption, Money laundering, Denying entry

Paper type Conceptual paper

Introduction

As cross-border flow of finance and people becomes increasingly easy, politicians and executives from impoverished countries set the trends of luxurious lifestyle in major world capitals[1]. The veil of mystery that surrounds some of these new fortunes, especially those amassed by public officials whose declared income hardly matches their expenses, can raise suspicions. The issue acquires a legal dimension as international and domestic anti-money laundering regulations come into play (FATF, 2013). They aim at precluding transfers of “suspect funds”, i.e. alleged crime proceeds (De Willebois *et al.*, 2011).

There are, however, inadequacies in preventing the flow of “dirty” money. Individuals who benefit from organized crime, or even are complicit in massive human rights abuse in their home countries, manage to evade financial control (US Senate, 2010). They further reside in developed countries where they enjoy security and protection of law.

The impunity of corrupt officials is an essential aspect to this phenomenon. The link between corruption and other forms of crime, as well as the damaging effect of corruption on “the institutions and values of democracy, ethical values and justice”,



is highlighted in the preamble of the UN Convention against Corruption, thus reflecting the intrinsic connection between corruption and failed justice. Whenever the proceeds of crime originate from the “abuse of entrusted power for private gain”[2], it is probable that high-ranked offenders are shielded from investigation or prosecution in their home state, and are therefore able to exploit the opportunities available for cash abroad.

Against this background, within the past two years, the G20 has been vocal in its vow to “deny corrupt individuals and entities the benefits of their corruption”. Unsurprisingly, to do so, the G20 deems necessary “to deny entry and safe haven to corrupt officials”. Furthermore, the G20 is not willing to stop halfway and is ready to “consider [...] deny[ing] entry to family members or close associates who are considered to have derived personal benefit from corrupt behavior of the principal target”.

Despite the apparent rationale behind this step in anti-corruption policy, its enforcement is bound to spawn legal and political controversies. This was vividly demonstrated by the [US Magnitsky Act \(2012\)](#). The law explicitly links egregious human rights violations and massive corruption with prohibiting entry to the USA for those responsible. Ironically, those affected are prominent Russian officials, i.e. representatives of public authorities of another G20 country. In his attempt to portray this measure as tainted with politics, Prime Minister Medvedev condemned it as “an extrajudicial act, because you find them guilty without court and trial” ([Medvedev, 2013](#)).

The present article seeks to provide a brief overview of legal and policy questions pertinent to the “no safe haven” anti-corruption commitment. The following section (“Effectiveness of Denying Entry to the Corrupt”) describes why it is likely to be an effective way to counteract corruption, or at least curb impunity. The third section (“Legal Grounds for Denying Entry to the Corrupt”) considers what grounds may emerge overtime to regard “no safe haven” policy as a duty under international law rather than a voluntary undertaking. Finally, the fourth section (“Possible Objections”) responds to three major objections that might be raised to the brand new G20 anti-corruption approach. First, there are compelling legal and policy reasons for a state to counteract foreign corruption (inter alia, through denying entry to those involved), even though the corrupt act *per se* may not occur within this particular state’s jurisdiction. Second, reasonable suspicion is a sufficient ground for designating someone inadmissible to a state (and the practice suggests that there are plenty of cases where there is indeed credible evidence of corruption even in the absence of a court judgement to that effect). Third, state enforcement efforts would naturally be focused on high-ranked perpetrators and not middle-level accomplices.

Throughout the paper, I shall refer to the Magnitsky case as an illustration of circumstances that give rise to the application of the “no safe haven” policy. Sergei Magnitsky, a Russian lawyer, reported a £142,000,000 embezzlement of the Russian state funds by high-ranking police and tax officials. Shortly thereafter, he was detained on charges of tax fraud. He was investigated by the same officials on whom he had reported ([Council of Europe Draft Report, 2013](#)). Mr Magnitsky was allegedly beaten and denied medical care in jail. He died on 16 November 2009 and was posthumously found guilty by a Russian court ([Herszenhorn, 2013](#)), although only half a year before Prime Minister Medvedev, a lawyer himself, asserted that “[u]nder Russian criminal law

and under the criminal law of most civilized countries, it is impossible to prosecute a dead person” (Medvedev, 2013).

Mr Magnitsky’s demise has led the USA to adopt the Magnitsky Act (2012) that denies admission to the USA to approximately 60 Russian officials believed to be responsible for his death. Due to the obvious significance of the Magnitsky Act for development of the “no safe haven” anti-corruption policy and potential human rights implications (to be discussed below), there may be a grain of truth in the statement of an Australian barrister, Geoffrey Robertson QC, that “[the Magnitsky Act is] one of the most important new developments in human rights” (Australian Human Rights Commission, 2012).

Effectiveness of denying entry to the corrupt

A set of international and domestic regulations aim at preventing the transfer of so-called “suspect funds” (FATF, 2013). If these rules functioned efficiently, they would eliminate the problem in question, as “politically exposed persons”[3] would not be able to use their “dirty” money abroad.

These rules, however, oftentimes prove unworkable. Even the most elaborate anti-money laundering procedures are evaded. Sophisticated corporate arrangements are used to conceal beneficial owners of assets. The scope of the problem is sufficient for analysts from the World Bank to conclude that “in the end, any due diligence system can be beaten” (De Willebois *et al.*, 2011). The US Senate (2010) Subcommittee on Investigations documents how various individuals and institutions, ranging from lobbyists and prominent banks to a university, facilitated transfers of “tainted” money to the USA in circumvention of anti-money laundering rules. The beneficiary owners were notorious African rulers and an arms trader, which shows the global reach of the problem, as it is not limited to any set of particular countries.

Thus, anti-money laundering enforcement is too feeble to drive high-ranked perpetrators of corruption away from developed countries. The classical challenge to the effectiveness of current anti-money laundering regime remains directed at its dependence on good faith efforts of the institutions that profit from lucrative business relations with potential offenders (Financial Services Authority, 2011).

The Magnitsky affair provides yet another characteristic example of officials spending abroad the money that they could hardly earn. In the aftermath of Mr Magnitsky’s death, a Russian investigator filed a libel suit in London for allegations of torturing Mr Magnitsky. He retained top English barristers, even though his monthly salary was less than £350 per month (Taylor, 2013). Irrespective of the merits of the claim (later dismissed by Simon J for lack of jurisdiction), the situation had a streak of dark humour: a low-income public servant accused of money laundering throws mysterious money on defending his reputation.

The legislative practice of the USA is the first instance of a gradual shift from reliance on anti-money laundering to designating those apparently involved in corruption[4] inadmissible, even if the origins of their wealth cannot be traced back to any offences.

As early as 2010, the USA empowered the Secretary of State to:

[...] maintain a list of officials of foreign governments and their immediate family members who the Secretary has credible evidence have been involved in corruption relating to the extraction of natural resources in their countries so that these people “shall be ineligible for admission to the USA” (US Consolidated Appropriations Act, 2010).

Importantly, the [US Senate \(2010\)](#) Subcommittee on Investigations further recommended to the Congress to consider legislation that would:

[...]mak[e] significant acts of foreign corruption a legal basis for designating a PEP [politically exposed person] and any family member inadmissible to enter, and removable from, the USA.

Therefore, the Subcommittee recommended extending the already existing policy^[5] by requiring no nexus between the corruption in question and extraction of natural resources. The rationale behind this approach was averting “corrosive effects [of corruption] on the rule of law” and the need to prevent “[the] export [of] problems by spreading corruption internationally, undermining the rule of law, encouraging crime, and even opening the door to terrorism” ([US Senate, 2010](#)).

The well-documented account of penetration of the “tainted” cash flows to the USA (accompanied by migration of their beneficiaries) attests to the ultimate purpose behind circumventing anti-money laundering controls: in numerous instances, the eventual goal is to enjoy the illegally accumulated wealth in the USA (or in another developed state). Importantly, there are many facets to the problem. Not only enjoyment of their possessions is at stake for the well-off migrants, but also security and protection of the law.

The flood of foreign claims in the UK judicial system is an illustrious example of how high-net-worth individuals tend to exploit the superior legal and social standards available abroad. A string of multi-billion disputes between foreign nationals has in recent years been submitted to the UK courts, indicating an unwavering preference towards dispute settlement in more independent, although more loosely connected with the subject matter of the dispute, legal system. For example, after the recent *Berezovskiy v. Abramovich* case, Ukrainian oligarchs followed the lead of their Russian colleagues (*Pinchuk v. Bogolyubov and Kolomoisky*) ([Krasnolutska, 2013](#))^[6]. To be sure, there is nothing wrong with seeking recourse to justice in any proper jurisdiction. But this trend does clearly indicate that there are a number of reasons, both of economic and social nature, that prompt the super-rich from developing countries to move themselves and transfer their money. There is no reason to assume that individuals involved in corruption behave in a different fashion.

Simply put, laundering proceeds of massive corruption (which, by its very nature, is most common in developing countries with weak and dependent justice systems) seems to be associated, at least oftentimes, with an intent to reside (either temporarily or permanently) in another, usually more well-off state. Disregarding this factor would be equivalent to ignoring the realities underlying corruption in a modern world.

Therefore, “no safe haven” policy could be an efficient measure to complement anti-money laundering rules. Even though denying entry to a particular country does not directly prevent corruption, it would deprive high-ranked perpetrators of at least some comfort that they otherwise enjoy. Accordingly, this is a workable approach, albeit limited in its effect. Building on Transparency International’s slogan “crime doesn’t pay, and corruption shouldn’t either”, one could say that denying entry to the corrupt could definitely make corruption pay less.

Legal grounds for denying entry to the corrupt

In 2012, the USA enacted the Magnitsky Act that denied admission to the USA for over 60 Russian officials. A non-binding resolution to the same effect was adopted by the

OSCE Parliamentary Assembly (2012)[7]. While these are welcome developments of what started as an exclusively US policy, they are not sufficient.

The discussion of “no safe haven” policy has been rapidly progressing within the G20, but with no tangible results so far. The 1-page general principles on denial of entry endorsed in 2012 provide a general framework for common action, but are vague and need careful elaboration in more specific terms (G20, 2012). The responses to alleged instances of foreign corruption in individual countries diverge. The UK, for example, has not yet adopted any definite stance on individuals implicated in the US Magnitsky list (Stallard, 2013).

This uncertainty raises concerns over the future implementation of the denial of entry policy. Without resolute and well-coordinated states’ actions, it might remain an exceptional, politically motivated measure rather than a proper legal instrument. Partial solution could arguably be achieved through “elevation” of this voluntary initiative to a rank of legal obligation, as this may provide a stimulus towards resolute and well-coordinated states’ actions.

There are two possible ways through which “no safe haven” policy can, in the absence of a special agreement to that effect, be slowly but steadily incorporated into the canvas of international anti-corruption regime. First, the catch-all provisions of Article 5 of the UN Convention against Corruption. Second, human rights obligations of states. The latter approach, admittedly more unorthodox, requires linking corruption to human rights infringements.

Let us briefly review these two opportunities for bolstering anti-corruption efforts, starting with the analysis of possible interpretations of the UN Convention against Corruption. Article 5(2) stipulates:

Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

Further, Article 5(4) provides:

States Parties shall [...] collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

The wording of these provisions, in conjunction with other articles of the Convention[8], suggests that the words “effective practices” relate to the prevention of corruption *within the jurisdiction of a particular state* and do not imply an obligation to eradicate corruption wherever it occurs.

That said, the UN Convention against Corruption explicitly condemns and criminalizes money laundering. In doing so, the drafters apparently deemed counteracting money laundering crucial for prevention of corruption[9]. As submitted above, there is good reason to regard the “no safe haven” commitment as an extension of the ineffective anti-money laundering controls, contributing to the same – or a very closely related – purpose. The strict prohibition on cross-border laundering of the proceeds of crime does not waiver when the crime is committed outside of the state’s jurisdiction. In other words, there are solid grounds to believe that denying entry to those complicit in massive corruption is, together with the efficient prevention of money laundering, a valid “effective practice” in combating corruption within the meaning of the Convention.

Accordingly, there is a potential for the G20 states to place their new anti-corruption commitments within the framework of existing legal regime, substantiating the legal necessity for denying entry to the corrupt under the UN Convention against Corruption, rather than presenting it as a voluntary initiative. The adoption by states of appropriate measures within, or in cooperation with, the G20 is thus an obligation under Article 5(4) of the Convention.

The second approach to legal reinforcement of the “no safe haven” policy involves human rights rhetoric. Recently, the inherent nexus of corruption and human rights violations has been scrutinized (ICHRP & Transparency International, 2009). While international anti-corruption instruments do not explicitly address human rights implications of corruption, it has been argued that “endemic corruption destroys the fundamental values of human dignity and political equality, making it impossible to guarantee the rights to life, personal dignity and equality, and many other rights”. In that sense, perpetrators of large-scale corruption offences may be complicit in human rights violations.

The latest trends in international law attest to the importance of combating impunity of high-ranked perpetrators, as this is intertwined with effective promotion of human rights (Sands, 2003, p. 87). In other words, human rights observance and protection are sometimes seen to imply an obligation to impose sanctions upon persons involved in human rights infringements. The *raison d’être* for this robust approach is that human rights are an issue of paramount concern to the whole humankind, and the obligation to protect, respect and promote them transcends national borders (UN General Assembly, 1993; Meron, 2003). Thus, a state must take measures to counter human rights violations (inter alia, by adopting sanctions against perpetrators through denying entry to them) whenever it can do so, irrespective of where the offences were committed.

This line of reasoning is yet unconventional and is based on policy considerations rather than black-letter law. None of this, however, diminishes its value as a *de lege ferenda* suggestion that grasps the spirit of modern transformations in international law. A few past decades have shown how sophisticated legal instruments are being rapidly developed for fighting impunity and promoting human rights (e.g. Rome Statute of the International Criminal Court). It is only natural that this has led, in the context of corruption, to arguments that corruption can, in certain circumstances, amount to a crime against humanity (Bantekas, 2006).

It is safe to assume that denying entry to the corrupt foreign officials may soon occupy a decent place in the arsenal of anti-corruption measures and that particular reference will be made to human rights considerations. Combating impunity of those shielded within their domestic legal system is likely to be a principal argument in favour of the approach here advocated. So far, when jurists such as Sands or Roht-Ariazza (1995) speak of “rooting out impunity” (Sands, 2003, p. 103), they mean bringing criminal punishment upon those responsible. But there are still measures other than criminal sanctions which can, in fact, make crimes pay less. Restricting admission of those apparently responsible for massive corruption (and thus human rights violations) is one of these.

Accordingly, in the not-so-distant future, states may be *bound* to refuse admission to anyone complicit in large-scale corruption. It is irrelevant whether these states are themselves affected by such offences. States would, of course, possess virtually

unlimited discretion in enforcement of these obligations until uniformly accepted international standards emerge. *Realpolitik* considerations might tamper with good faith implementation of relevant international obligations, but this is an indispensable feature of international law (Higgins, 1991). This can hardly relieve international community from the need to attain high legal standards.

Possible objections

Enforcement by states of the “no safe haven” policy will undoubtedly spark controversies as well as raise significant legal questions. This section of the article intends to serve as a concise overview of the most pressing objections that could be advanced against denying entry to the corrupt.

First, can there ever be a duty – or even a right – for a state to interfere with alleged corruption that took place in the territory of another country? This challenge can be framed as either a legal (infringement of sovereignty) or a merely pragmatic objection (why would a state genuinely care?). Both of these have been dealt with above. These questions do not undermine the merits of “no safe haven” policy any more than they would dispel the need for counteracting money laundering. As well as enforcement of anti-money laundering rules, denying entry to the foreign corrupt officials may require a state to forego some of the economic benefits it would otherwise receive due to overriding interests of justice (plus, as already stated, anti-money laundering regime anyway relies heavily on cooperation of institutions that could benefit directly for a stream of “dirty” money). Further, denying entry to a foreign subject does not infringe on another state’s sovereignty and does not involve any exercise of jurisdiction over the individual involved. Rather, it poses the exercise of classic sovereign discretion in relation to admission to the state’s territory.

Essentially, the issue at hand (denying entry to the state’s territory) is *not* a criminal punishment. It is merely a way in which a state must react to substantiated allegations of corruption. This bears another implication: a state’s determination would not require proof of guilt beyond reasonable doubt. How high should then be the threshold for inferring that a person merits a permanent ban from a country’s territory? The tentative answer would be that credible evidence shall suffice to make a determination that a person should be refused admission to a particular country. This is precisely the language of the [US Consolidated Appropriations Act \(2010\)](#): the USA would not admit those “who the Secretary has credible evidence have been involved in corruption [...]”.

Identifying “credible evidence” would not pose much difficulty in instances of egregious abuse. Sometimes, publicly available information warrants a conclusion that a person is *prima facie* responsible for a particular violation (e.g. Russian investigators of Magnitsky’s tax evasion)[10].

The vital point is that no criminal punishment is involved. People get their visas refused every day. Therefore, producing “credible evidence” of an individual’s involvement in human rights offences is sufficient to discharge the burden of proof. An analogy with terrorism may come in useful[11]. For European states and the European Court of Human Rights, reasonable suspicion of involvement in terrorism is sufficient for taking precautionary measures (Schiff, 2003). Similarly, reasonable suspicion justifies putting into place safeguards which ensure that the state does not harbour perpetrators of corruption.

At last, there is a technical question to cover. Whom shall the discussed sanctions apply to? One might assume that, as a practical matter, states would focus upon enforcement against high-worth individuals *de facto* associated with state authorities (“politically exposed persons”). These are the people who most often possess capacities for participation in systematic corruption. Otherwise, the burden on state enforcement machinery would be too onerous. This is how international criminal law operates. The “most responsible” criminals are prosecuted: not because low-level accomplices do not deserve punishment, but due to natural prosecutorial priorities (Schabas, 2007).

Conclusion

Wealthy individuals complicit in corruption frequently leave their local communities to enjoy security and protection of law elsewhere. They benefit from the impunity guaranteed by failed judicial systems in their home countries, leading lives of luxury abroad. As this undermines the effectiveness of international anti-corruption regulations, the G20 has come up with an innovative strategy of “denying safe haven” to individuals reasonably believed to be complicit in massive corruption. It is now up to states to develop domestic legal procedures for doing so. As time passes by, detailed customary rules of international law will probably crystallize in this sphere.

This article outlines general policy arguments and does not delve on legal technicalities. This is, to a certain extent, a limitation of this paper, as legal technicalities will be of utmost importance for enforcement. There is, however, good reason to hope that denying entry to high-worth individuals complicit in corruption will develop into an efficient tool for discouraging those who ruin their own countries to thrive abroad.

Notes

1. For example, Teodoro “Teodorin” Obiang, the son of the President of Equatorial Guinea, is reported to have commissioned the construction of a \$380-million yacht ([The Telegraph, 2011](#)), in addition to his lavish mansions in the USA ([US Senate, 2010](#)).
2. The definition of corruption adopted by Transparency International ([ICHRP & Transparency International, 2009](#)) and, later, by the World Bank.
3. The World Bank’s term for rich persons closely affiliated with government, including relatives of high-ranked politicians ([Chatain et al., 2009](#)).
4. As I shall explain in the fourth section of this article, the appropriate evidentiary standard should be “credible evidence”, i.e. the sanctions should apply to those *reasonably believed* to be complicit in large-scale corruption.
5. This policy dates back at least to the [US Presidential \(2004\) Proclamation 7750](#).
6. Jurisdiction is argued on the basis that one of the defendants resides in London.
7. With no ostensible effect.
8. E.g. Article 4 of the UN Convention against Corruption: “States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. Nothing in this Convention shall entitle a State Party to undertake in the

territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”

9. This stress on importance of anti-money laundering in the context of corruption could explain why the drafters of the UN Convention against Corruption chose to duplicate the anti-money laundering provisions already found in the UN Convention against Transnational Organized Crime (Articles 6 and 7).
10. Naturally, these sanctions are not to be applied lightly. The “naming and shaming” component inherent to any public blacklists requires utmost care in weighing relevant facts, as recklessness could damage reputation of a person affected.
11. This is not an accidental analogy. Most probably, the very concept of “no safe haven” has been extrapolated from the field of anti-terrorism cooperation. As early as in 2005, the UK-initiated Commission for Africa employed the comparison between counteracting corruption and terrorism (*Commission for Africa Report, 2005*): “The same vigour as was exercised in developing controls against terrorist financing – which resulted in the preparation of international guidelines, model legislation, and technical assistance programmes – should be applied to tracking and returning stolen state assets. The theft of billions of dollars from an African country undermines standards and leads to a collapse of public services that can have as devastating an effect as a terrorist incident there.”

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