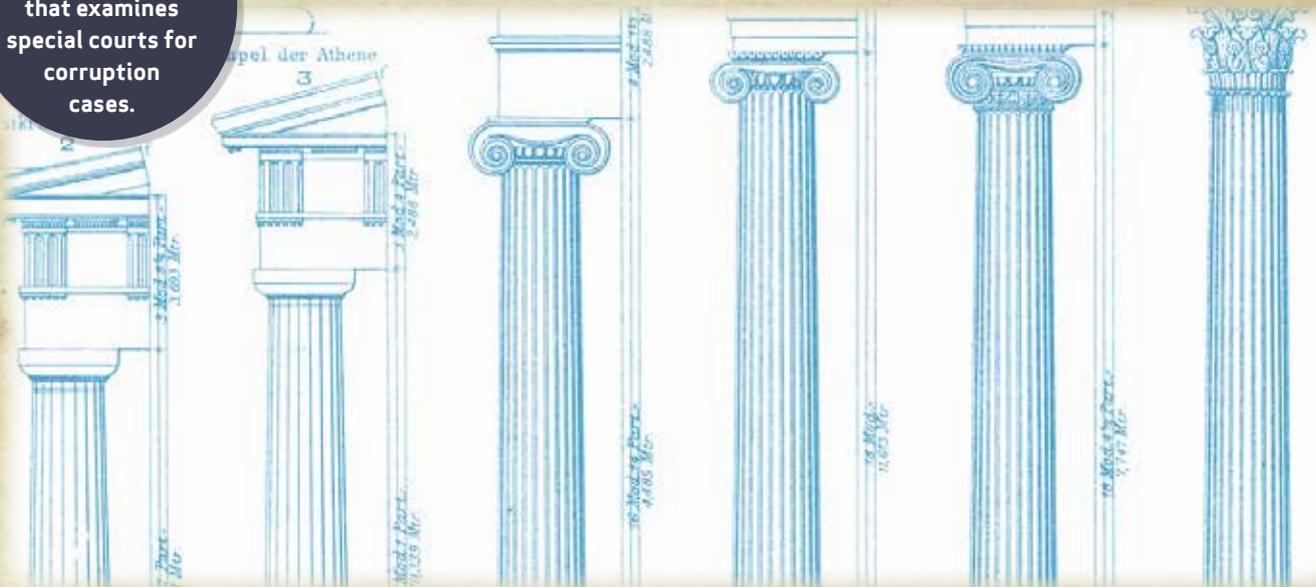


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U4 Issue is
part of a series
that examines
special courts for
corruption
cases.



Specialised anti-corruption courts A comparative mapping

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Abstract

Frustration with the capacity of the ordinary machinery of justice to deal adequately with corruption has prompted many countries to develop specialised anti-corruption institutions. While anti-corruption agencies with investigative and/or prosecutorial powers have attracted more attention, judicial specialisation is an increasingly common feature of national anti-corruption reform strategies. The most common argument for the creation of special anti-corruption courts is the need for greater efficiency in resolving corruption cases promptly and the associated need to signal to various domestic and international audiences that the country takes the fight against corruption seriously. In some countries, concerns about the ability of the ordinary courts to handle corruption cases impartially, and without being corrupted themselves, have also played an important role in the decision to create special anti-corruption courts. Existing specialised anti-corruption courts differ along a number of dimensions, including their size, their place in the judicial hierarchy, mechanisms for selection and removal of judges, the substantive scope of the courts' jurisdiction, trial and appellate procedures, and their relationship with anti-corruption prosecutors. These institutional design choices imply a number of difficult trade-offs: while there are no definitive "best practices" for specialised anti-corruption courts, existing models and experience may provide some guidance to reformers considering similar institutions. They must decide whether such a court should adopt procedures that are substantially different from those of other criminal courts, and/or special provisions for the selection, removal, or working conditions of the anti-corruption court judges.

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1. Introduction

In the ongoing struggle against corruption and related offences, many countries have established specialised anti-corruption institutions, distinct from the regular institutions of justice. The most familiar of these special bodies are the so-called anti-corruption agencies (ACAs), which typically wield some form of investigative and/or prosecutorial power. Scores of countries have ACAs of some kind, and there is already a great deal of research and commentary on ACA models (e.g., Kuris 2014; Johnson et al. 2011; Meagher 2004; OECD 2013; UNDP 2016). Considerably less attention has been paid to another form of anti-corruption specialisation, namely specialised anti-corruption courts. Though these are not as ubiquitous as ACAs, many countries have created a special judicial body, division, or set of judges to focus (exclusively or substantially) on corruption-related cases; many other countries are currently considering or debating whether to establish such special courts. Yet while there is a body of literature that discusses judicial specialisation more generally (e.g., Baum 2011; Gramckow and Walsh 2013; Zimmer 2009), there is no systematic, comparative analysis focused specifically on specialised anti-corruption courts.

This U4 Issue takes a first step towards filling that gap by presenting a comparative overview of existing specialised anti-corruption courts, with particular attention to the rationale for their creation and to basic design choices. This paper is based on a review of secondary sources for a broad range of countries and more focused field interviews with key stakeholders in five countries that have specialised anti-corruption courts of some kind: Indonesia, Kenya, the Philippines, Slovakia, and Uganda. Four country case studies based on this fieldwork were published in June 2016 (Schütte 2016a, 2016b; Stephenson 2016a, 2016b).¹

The paper is organised as follows. Section 2 provides a brief overview of our working definition of a “specialised anti-corruption court” and a list of the countries with such institutions that we reviewed in our research. Section 3 discusses the three principal rationales for establishing a specialised anti-corruption court—efficiency, integrity, and expertise—and offers some preliminary observations about each. Section 4 turns to questions of institutional design, highlighting the diversity of existing anti-corruption courts and identifying some of the key design questions that anyone thinking of setting up or reforming an anti-corruption court should consider. A brief conclusion summarises some of the main themes of the paper and provides a list of important questions and choices to be made when considering the creation or reform of an anti-corruption court.

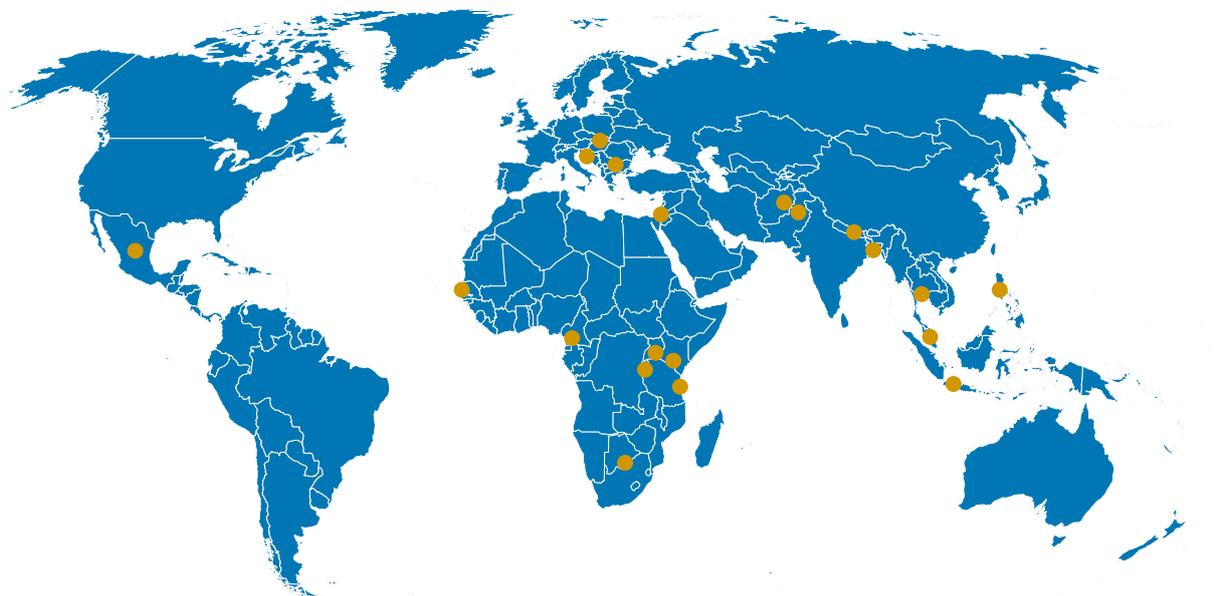
This U4 Issue does not attempt to put forward best practices or to systematically assess the performance of any existing court system. Such an analysis would be well beyond the scope of this paper, given time, space, and data limitations. In particular, the lack of any systematic baseline information precludes a general assessment of whether specialisation has been a good or a bad thing. The paper’s more modest goal is to provide a preliminary mapping of different types of specialised anti-corruption courts and to highlight some of the key challenges and trade-offs that must be considered when designing such institutions.

1 As the Kenyan system of gazetting magistrates was dysfunctional at the time of fieldwork and was overhauled a few months later, we have not published a separate case study on Kenya, but have included some of the key findings in this paper.

2. Overview: Specialised anti-corruption courts and judges around the world

For purposes of this paper, we define an “anti-corruption court” as a judge, court, division of a court, or tribunal that specialises substantially (though not necessarily exclusively) in corruption cases. Using this definition, our initial survey, conducted in 2015, identified 17 jurisdictions that had specialised anti-corruption courts at that time: Afghanistan, Bangladesh, Botswana, Bulgaria, Burundi, Cameroon, Croatia, Indonesia, Kenya, Malaysia, Nepal, Pakistan, Palestine, the Philippines, Senegal, Slovakia, and Uganda. Three countries—Mexico, Tanzania, and Thailand—established specialised anti-corruption courts subsequently, while we were researching and writing this paper. In Mexico, a 2015 constitutional amendment called for the creation of a specialised anti-corruption chamber in the Federal Administrative Court, but it is not scheduled to begin operations until July 2017 (Borda and Sanchez Alonso 2016). In Tanzania, a July 2016 bill established a new High Court division on Economic, Corruption and Organised Crime, which began operating in September 2016 (Kapama 2016). And in Thailand, the military government opened a new specialised corruption court in October 2016 (Heidler 2016). While we have included these three countries on our map (Figure 1) and in the list of existing specialised anti-corruption courts (Table 1), all three were too new to include in our more detailed comparisons of institutional design.

Figure 1. Anti-corruption courts in the world, 2016



In addition, there are two borderline cases that we did not include in our list, but which deserve brief mention. First, Papua New Guinea’s National Court has created a “Fraud and Corruption Track,” with streamlined procedures to expedite the processing of corruption cases. However, the judges presiding in these cases are regular National Court judges, and other than the special procedures, there is no meaningful institutional separation between this corruption track and the regular National Court. Thus, while the practice of creating special rules for corruption cases in the regular courts is itself interesting and worthy of study, Papua New Guinea’s approach does not really involve the creation of a special court

to hear corruption cases. Second, Brazil has created a set of federal-level special courts to deal with cases involving money laundering and related financial crimes. While money laundering is obviously closely intertwined with corruption, in the end we did not include the Brazilian special courts in our survey, in part because “core” corruption offences, such as bribery and embezzlement, are not adjudicated in these courts. By contrast, we did choose to include some countries, such as Bangladesh, Bulgaria, Croatia, and Slovakia, where the specialised judge or tribunal also has authority to adjudicate a substantial set of non-corruption cases. We took this decision on the grounds that these judicial bodies have a substantial focus on corruption cases, making it plausible to include them in comparative analysis with the other, more completely specialised anti-corruption courts that we consider.

In none of these cases do we claim to have made the “correct” decision regarding classification; as is virtually always true when trying to define the boundaries of any category, there are some tricky borderline cases and judgment calls. But our objective in this paper is not to provide a conclusive definition and definitive list of anti-corruption courts. Rather, we hope to illustrate some of the most significant institutional design choices involved in setting up judicial institutions that will focus on corruption cases.

In most countries that have specialised anti-corruption courts, these courts were created by statute, though there are exceptions.² Specialised anti-corruption courts are a relatively new phenomenon. Although the oldest such court, that of the Philippines, was established in the 1970s, none of the other specialised anti-corruption courts identified in this study began operation prior to 1999, and most of them were established within the last decade (often concurrently with, or following, the establishment of a specialised anti-corruption agency). The dates of the establishment of the 20 existing (or soon to be established) anti-corruption courts that we reviewed are listed in Table 1.

2 In the Philippines, the 1973 Constitution specifically mandated the creation of a specialised anti-corruption court, a provision that was retained in the 1987 Constitution. Likewise, in Mexico a 2015 constitutional amendment called for the creation of a specialised anti-corruption tribunal. In Senegal, the Court for Repression of Illicit Enrichment, though initially authorised by a 1981 statute, was (controversially) brought into operation by a 2012 presidential decree. In Botswana, senior judicial officials, purporting to act under existing legal authority, created special anti-corruption divisions within the existing court system without additional statutory authorisation. And in Afghanistan, where the anti-corruption courts were established quickly under international pressure, the legal authority for the courts was (and to some extent remains) somewhat unclear.

Table 1. Dates of establishment of specialised anti-corruption courts

Year	Country
1979	Philippines (pursuant to provisions in the 1973 Constitution)
1999	Pakistan
2002	Indonesia (substantially revised in 2009) Nepal
2003	Kenya
2004	Bangladesh
2006	Burundi
2008	Croatia Uganda
2009	Slovakia
2010	Afghanistan Palestine
2011	Cameroon Malaysia
2012	Bulgaria Senegal (pursuant to authorisation in a 1981 statute)
2013	Botswana
2015	Mexico (not yet established; mandated by a 2015 constitutional amendment, scheduled to begin operations in 2017)
2016	Tanzania Thailand

Although in many of the above countries the specialised anti-corruption courts have been entirely “home-grown,” in other cases the international donor community has played a significant role. Indeed, in a few cases the impetus to create a specialised anti-corruption court has been largely donor-driven. This was most evident in the case of Afghanistan, where the international community (particularly the United States and the United Kingdom) pressured the Afghan government to move rapidly to create anti-corruption courts—both because corruption was viewed as a serious obstacle to economic development and security in Afghanistan, and because international donors were frustrated by the extent to which the funds they provided to the Afghan government were misappropriated (BBC News 2009; Gutcher 2011; Mason 2011). Likewise, the creation of Nepal’s Special Court seems to have been at least partially a response to pressure from international donors concerned with substantial “leakage” in donor-funded programs (Dix 2011). In both of these cases, donors—principally the US and UK governments in the Afghanistan case, and principally the Asian Development Bank in the Nepal case—also provided extensive financial and technical support to the courts, both during and after their creation.

Even in many cases where direct donor pressure had relatively little to do with the decision to establish an anti-corruption court, international donors have been heavily involved in providing training, financial support, and other assistance for these institutions. Examples of such donor support include, but are certainly not limited to, technical training provided by the United States Agency for International Development (USAID) and the International Law Institute's African Centre for Legal Excellence to the Uganda High Court's Anti-Corruption Division (USAID Uganda 2010); training provided by the United Nations Office on Drugs and Crime (UNODC) for judges on Indonesia's Tipikor courts (UNODC 2014b); donor support for the Malaysian anti-corruption court (UNODC 2013); and both training and funding provided to Palestine's Corruption Crimes Court by the United Nations Development Programme (UNDP), the European Union Coordination Office for Palestinian Police Support, and several bilateral donors (Birzeit University 2013; UNDP 2012).

In addition to the 20 jurisdictions listed above, each of which has already adopted a specialised anti-corruption court of some kind, there are several other countries in which the creation of such courts has been proposed. In Nigeria, for example, following the 2015 election of President Muhammadu Buhari, who campaigned substantially on an anti-corruption platform, there has been growing support for the creation of such a court, including from President Buhari himself (Onyekwere, Dunia, and Ojo 2015; Salaudeen 2015). In Moldova, a proposal by the government to create specialised anti-corruption courts has generated significant debate (and criticism) in the civil society community (Eastern Partnership Civil Society Forum 2015a, 2015b). In Ukraine, a review by the Organisation for Economic Co-operation and Development specifically recommended that the country consider introducing specialised anti-corruption courts or judges (OECD 2015, 84–85). And in Albania, a package of justice sector reforms that includes the creation of a new anti-corruption court was pending in parliament as of this writing, and Prime Minister Edi Rama has already requested US technical assistance in setting up this court (Ikonimi 2016).

Clearly, although specialised anti-corruption courts are not as ubiquitous as ACAs, they are fast becoming an important part of the repertoire of anti-corruption reformers, and it is important to reflect critically on their potential justifications (and drawbacks), as well as on questions of how such courts should be designed. Section 3 focuses on the former issue—the “why”—while Section 4 turns to the latter question—the “how.”

3. Reasons for creating a specialised anti-corruption court

Court specialisation is a common phenomenon all over the world. Proponents typically emphasise that specialised courts can promote greater efficiency, often through streamlined procedures, as well as higher-quality and more consistent decisions in complex areas of law (Gramckow and Walsh 2013, 6). Consistent with this, Gramckow and Walsh find, in their review of international experiences with court specialisation, that specialisation can help the processing of complex cases that “require special expertise beyond the law, such as in bankruptcy, environmental, or mental health issues, or cases that must be handled differently to better reflect the needs of a particular court user group, such as business cases or family matters” (2013, 1). The arguments for specialised anti-corruption courts are similar, though these courts also have some distinctive features. While the reasons for the creation of specialised anti-corruption courts are varied, three stand out as particularly salient: efficiency, integrity, and expertise.

3.1 Efficiency

Perhaps the most common rationale for the creation of specialised anti-corruption courts is the desire to increase the efficiency with which the judicial system resolves corruption cases. Indeed, in most of the jurisdictions that have adopted a specialised anti-corruption court, the desire to speed up the processing of cases has been one of the main public justifications. This was true, for example, in Botswana (UNODC 2014a), Cameroon (Iliasu 2014), Croatia (Balkan Insight 2008), Malaysia (GTP 2010), Palestine (Miller 2010), the Philippines (Stephenson 2016a), and Uganda (Schütte 2016b). This is understandable: many countries—particularly, though not exclusively, developing or transition countries—face substantial backlogs and delays throughout the judicial system. And while judicial inefficiency is undesirable in all cases, it may be especially pernicious with respect to anti-corruption cases, for two reasons. First, the urgency of making progress in the fight against corruption means that extensive judicial delays in dealing with corruption cases are particularly problematic, especially since such delays threaten to undermine public confidence in the government’s commitment and capacity to combat corruption effectively. Second, substantial delays in processing cases increase the risk that defendants or their allies may exert undue influence on witnesses, tamper with evidence, or take other action to interfere with the ordinary and impartial operation of the justice system; while such concerns are not unique to corruption cases, they are especially acute with respect to such cases.

How, exactly, is the creation of a specialised anti-corruption court supposed to increase the efficiency with which the judicial system handles corruption cases? There are three main mechanisms.

First, part of the logic is simply that a specialised court, which handles only corruption cases or similar offences, will have a more favourable ratio of judges to cases and will therefore be able to process cases more quickly. Besides improving the judge-to-case ratio, a specialised anti-corruption court may enable those overseeing the judicial system to assign more capable judges to corruption cases, further promoting their efficient resolution. While these factors sometimes help specialised anti-corruption courts process cases more quickly than the ordinary courts, this is not always the case: many anti-corruption courts seem just as swamped as the regular court system, perhaps more so. And this advantage does not accrue at all in those countries that do not limit their special anti-corruption judges to hearing only anti-corruption cases. In Bangladesh, for example, although certain designated “special judges” may preside over corruption cases, these judges also have to deal with regular cases and other (non-corruption) special cases, which means—according to critics—that they remain overburdened and unable to ensure a timely trial for corruption cases (Chowdhury 2007). The same criticism has been made with respect to the

special “gazetted” magistrates in Kenya, described in more detail in Box 1. Furthermore, one should also keep in mind that the improvement in the judge-to-case ratio for corruption cases, or the allocation of more talented judges to such cases, can come at the cost of diverting judicial resources from other areas of pressing need.

Second, anti-corruption courts may streamline the procedures for handling corruption cases in various ways. For instance, as discussed in greater detail below, some anti-corruption courts are courts of first instance, with appeals going directly to the country’s supreme court, thus bypassing the usual intermediate appellate courts. Something like this structure is used, for example, in Burundi (Niyonkuru 2013), Cameroon (Fombad 2015), Croatia (Law on the Office for the Suppression of Corruption and Organised Crime; Martini 2014), Nepal (Poudel 2012), Pakistan (National Accountability Ordinance), and Slovakia (Stephenson 2016b). Botswana presents an interesting variant on this same theme: in Botswana, as in many other countries, the regular lower courts lack the jurisdiction to resolve constitutional questions. In an ordinary criminal trial, when a defendant raises a plausible constitutional objection, the trial must be temporarily suspended and the case transferred to the High Court, which will resolve the constitutional question and return the case to the lower court. Because defendants in corruption cases are especially likely to make constitutional arguments, this feature of the Botswanan system was a frequent source of delay in those cases. Botswana’s chief justice therefore created the specialised Corruption Court as a division of the High Court, giving it jurisdiction over constitutional issues (UNODC 2014a). However, in Botswana corruption cases still begin in the magistrate courts; the special anti-corruption division of the High Court remains an appellate tribunal. As a result, the creation of the specialised anti-corruption division has not sped up case processing as much as proponents hoped (Shapi 2015). We see something similar in Uganda, where the Anti-Corruption Division of the High Court has managed to keep the average time to decision at first instance at about one year, despite deliberate attempts by accused persons to delay their trials by every possible legal means. Prior to 2010, if the defendant raised a constitutional objection, the trial would be automatically suspended and the issue referred to the Constitutional Court. However, an appendix to a Constitutional Court ruling in 2010 ended this practice; now, before a purported constitutional objection is referred to the Constitutional Court, the Anti-Corruption Division must first decide whether the objection has sufficient merit (Schütte 2016b).

Third, in order to speed up the processing of corruption cases, many jurisdictions impose special deadlines on their anti-corruption courts. Examples include Cameroon (Iliasu 2014), Nepal (Dix 2011; Koirala, Khadka, and Timsina 2015), Palestine (Law by Decree No. 7, 2010), the Philippines (Re: Problem of Delays in Cases Before the Sandiganbayan 2001), and Indonesia (Schütte 2016a). The deadlines vary a great deal across countries, in part because of other differences in the structure, function, and organisation of the courts. The Corruption Crimes Court in Palestine is notable for its especially tight deadlines: at least as a matter of formal statutory law, this court is supposed to hear any case brought to it within 10 days and to issue a decision within 10 days after the hearing, with an allowable postponement of no more than 7 days (Law by Decree No. 7, 2010). Of course, some may question whether these requirements are too demanding, not only because of the difficulty of meeting such short deadlines in practice—an issue discussed further below—but also because 10 days may not be sufficient time to hear a case fairly and competently. Malaysia provides another prominent (and less extreme) example. At the time Malaysia established its specialised anti-corruption courts, the average time required for a corruption case to make its way to final resolution was about 8.5 years (GTP 2010). Malaysia therefore imposed a legal requirement that the anti-corruption courts process cases within one year (a requirement that does not apply to judges in the regular courts).

There seems to be quite a bit of variation in the degree to which the deadlines are observed in practice. In Malaysia, researchers found that roughly 75% of cases in 2012 were in fact completed within the one-year

time limit (GTP 2012; UNODC 2013). In contrast, anti-corruption courts in many other countries have struggled to adhere to the statutory deadlines. For instance, in the Philippines, the special anti-corruption court, known as the Sandiganbayan, is supposed to resolve each case within three months, but in practice cases can take close to a decade to resolve (Stephenson 2016a).³ The Philippines may be an extreme case, but it is not alone. Indeed, failure to comply with case-processing deadlines is more likely the norm than the exception. In Nepal, the Special Court is supposed to decide each case within six months of filing, and any appeal of a Special Court decision is supposed to be resolved by the Supreme Court within three months (Dix 2011); in practice, however, the cases take much longer, sometimes up to 11 years (Koirala, Khadka, and Timsina 2015). In Pakistan, the National Accountability Courts are supposed to resolve cases within 30 days, but have taken closer to 500 days on average (Dawn 2005).

In general, although many specialised anti-corruption courts were created to improve efficiency in the processing of corruption cases, complaints about excessive delay in these courts are common in many (though not all) of the jurisdictions that have created them. In addition to the Nepal, Pakistan, and Philippines examples noted above, other countries where complaints about excessive delay have been prominent in the public discussion include Bangladesh (Chowdhury 2007), Botswana (Piet 2014; Shapi 2015), Croatia (Balkan Insight 2008; Dorić 2016), and Kenya (Ringera 2009). That said, some of the reasons an anti-corruption court might fail to meet its targets for timely case processing lie outside of the court's direct control. A common culprit (or perhaps scapegoat) is the prosecutor's office. In some cases, delays in case processing (and failure of the specialised courts to comply with their deadlines) have been attributed to overworked, understaffed, or inefficient prosecutor's offices; examples include Botswana (Kuris 2014; Shapi 2015), the Philippines (Stephenson 2016a) and Nepal (Koirala, Khadka, and Timsina 2015). Some critics, however, have blamed the anti-corruption courts for being too indulgent with prosecutors who continually seek postponements—a criticism raised, for example, in Botswana (Shapi 2015) and the Philippines (Stephenson 2016a).

Taken together, experiences with anti-corruption courts around the world suggest that although there may well be efficiency gains associated with the creation of a specialised anti-corruption court, reformers must be cautious: they should not be overly optimistic about, and should not overpromise, the extent of such gains. The degree to which efficiency gains will be realised in practice depends on many things, including the resources devoted to the court, existing levels of judicial capacity, and several of the institutional design choices discussed further in Section 4.

3.2 Integrity

A second motivation for creating specialised anti-corruption courts is to ensure, to the extent feasible, that corruption cases are heard by an impartial and independent tribunal, free of both corruption and undue influence by politicians or other powerful actors. This rationale should be familiar, as it is one of the standard justifications for creating ACAs to investigate and/or prosecute corruption cases. While the integrity rationale has not featured as prominently as the efficiency rationale in public discussions regarding the creation of specialised anti-corruption courts, in a few instances the interest in ensuring judicial integrity was a central motivation for the creation of such courts.

3 These extraordinary delays have prompted proposals for reform, including a recently enacted bill that created two new divisions of the Sandiganbayan (bringing the total number of judges from 15 to 21), reduced the quorum requirements, and transferred cases involving smaller amounts of money to the regional trial courts (Stephenson 2016a).

Perhaps the best illustration of this is Indonesia, where post-Suharto reformers established the so-called Tipikor courts primarily because of concerns about widespread corruption in the regular judiciary, which made it very difficult to secure corruption convictions of well-connected public officials and their cronies (Schütte and Butt 2013; Butt and Schütte 2014). The designers of the Tipikor court system therefore enacted a number of specific measures to promote judicial integrity, including provisions requiring the participation of “ad hoc” judges who are not part of the regular judiciary (Schütte 2016a). And while Indonesia is the best-known example of a case where the promotion of judicial integrity was a principal rationale for the creation of specialised anti-corruption courts, this factor seems to have been significant in some other cases as well. For example, in Slovakia, one of the arguments for giving the Special Criminal Court (SCC) jurisdiction over serious corruption cases was the concern that local networks of elites (and criminal elements) could interfere with or otherwise distort judicial decision making in the regional courts; the SCC, as a national court located in the capital, was thought to be less susceptible to this problem (Stephenson 2016b). And in Afghanistan, much of the pressure from the US, UK, and international donor community to establish specialised corruption courts was motivated by the (accurate) perception that the Afghan judiciary was especially corrupt (BBC New 2009; Gutchter 2011; Mason 2011); the implicit assumption was that the new, specialised anti-corruption courts would be less corrupt.

The degree to which specialised anti-corruption courts are actually more willing and able than regular courts to convict high-level or well-connected defendants, however, appears uneven. Some courts have been praised for their independence. An example is the Indonesian Tipikor courts, although recent developments—including the expansion of these courts to all Indonesian provinces following a successful constitutional challenge to the courts’ original design—have raised concerns about an erosion of integrity in the Tipikor system (Schütte 2016a). In many other countries, however, the anti-corruption courts have been criticised for having done too little to eliminate the culture of impunity. Such criticisms have been voiced in, among other places, Afghanistan (Boone 2010; Gul 2015; Gutchter 2011; Ziems 2014), Burundi (Tate 2013), Cameroon (Timchia 2013), Croatia (*Guardian* 2010), and Nepal (Koirala, Khadka, and Timsina 2015). Moreover, although the usual worry raised with respect to political interference with the judiciary in corruption cases is that the courts will shield powerful wrongdoers from legal accountability, in some countries—including, for example, Burundi (Tate 2013) and Cameroon (Know Your Country 2016)—critics have alleged that the government is able to manipulate the anti-corruption courts, and anti-corruption prosecutions more generally, in order to harass political opponents.⁴

Of course, the creation of specialised anti-corruption courts is no guarantee that these courts will not themselves be corrupted. Even in Indonesia, where the role of the anti-corruption courts as a bulwark against corruption has been most explicit, several judges on these courts have themselves been indicted for corruption (Butt and Schütte 2014). And in the Philippines, the Supreme Court dismissed Sandiganbayan associate justice Gregory Ong due to his alleged links to a massive corruption scheme involving the Philippine legislature (Stephenson 2016a).

⁴ In Afghanistan, critics have made the related claim that the anti-corruption courts are biased against foreign nationals, who are treated as scapegoats for the country’s corruption problems while powerful domestic figures are not seriously penalised (Boone 2010; Gutchter 2011).

3.3 Expertise

A third justification for creating a specialised anti-corruption court, closely related to but distinct from the interest in increasing efficiency, is the desire to create a tribunal with greater expertise. After all, many corruption cases, especially those involving complex financial transactions or elaborate schemes, may be more complicated than the run-of-the-mill cases that make up many generalist judges' criminal dockets. Indeed, the desire for a more expert adjudicative body—to promote not just efficiency but also accuracy—is a common justification for the creation of specialised tribunals in other contexts (Gramckow and Walsh 2013). Perhaps surprisingly, though, the interest in fostering expertise has not been emphasised in most of the public discourse about the creation of specialised anti-corruption courts. True, this interest is sometimes invoked. For example, in Croatia, the creation of a specialised tribunal, to handle not only corruption cases but also other serious crimes, was in part an effort to build judicial capacity to handle the most complex and socially significant criminal cases, principally through the recruitment of more experienced judges to serve on these courts (Marijan 2008). But in most countries specialised expertise has been less prominent as a rationale for anti-corruption courts than for other sorts of specialised courts, such as those reviewed, for example, by Gramckow and Walsh (2013).

That said, the fact that corruption cases often call for special expertise has provoked some discussion of reforms to existing anti-corruption courts. First, and most straightforwardly, there have been increasing calls for, and some investment in, better training for judges on anti-corruption courts, particularly regarding financial matters, accounting, and anti-money laundering rules. The need for anti-corruption judges to receive more training in these and other technical issues has been raised, for example, in Bangladesh (Chowdhury 2007), Kenya (see Box 1), and Malaysia (UNODC 2013). Second, some jurisdictions that do not currently provide for exclusive specialisation by their anti-corruption judges may reconsider that choice. In Malaysia, for example, the judges of the anti-corruption trial courts rotate between these courts and other courts; critics have argued that having generalist judges sit on a specialised court is in tension with the very notion of having specialised courts in the first place, and they have pressed for more specialisation (World Bank 2011). And in Palestine, the 2012–2014 National Strategy on Anti-Corruption specifically called for judges of the Corruption Crimes Court to devote themselves exclusively to those cases so as to develop their expertise in the field (PACC 2012).

Table 2 summarises the main mechanisms and institutional design considerations that are currently used in anti-corruption courts to raise efficiency, integrity, and expertise. The institutional design considerations are extremely simplified here and are discussed in more depth in Section 4.

Table 2. Summary of motivations, mechanisms, and design considerations

Motivation	Mechanisms	Institutional design considerations
Efficiency	Favourable judge-to-case ratio Efficiency gains through expertise Streamlined procedures Deadlines	Number of judges Scope of jurisdiction: <ul style="list-style-type: none"> • type of offence • magnitude of offence • identity of defendants Specialisation only at some levels (first instance or appellate) or throughout, depending on where the bottlenecks are found Relationship to prosecutorial authorities
Integrity	Insulation from existing court system, e.g., location of court; special selection and recruitment mechanisms	Number of judges and recruitment pool Geographic expansion (the larger and more decentralised the court network, the more difficult it is to ensure integrity)
Expertise	Selection of judges with special expertise and capacity to understand complex financial cases (regular rotation can be an obstacle unless there is a pool of such specialists) Targeted training	Scope of jurisdiction Human resources Management: establishment and maintenance of expert pool

4. Institutional design choices

Although many countries have anti-corruption courts of some kind, there is a great deal of variation in the design of these institutions. Anyone considering the creation or reform of an anti-corruption court must pay attention to institutional design questions. There is no single “correct” model or “best practice” for the design of a specialised anti-corruption court; the appropriate design depends on many contextual factors and on the main objectives for the institution. In this section we discuss five of the most significant choices that institutional designers must make:

- The relationship of the special anti-corruption court to the regular judicial system
- The size of the anti-corruption court
- The procedures for appointing and removing special judges
- The substantive scope of the anti-corruption court’s jurisdiction
- The relationship to prosecutorial authorities

4.1 The relationship of the special anti-corruption court to the regular judicial system

Anti-corruption courts come in a variety of forms: some are established as special branches or divisions of existing courts, while others are established as separate, stand-alone units within the judicial hierarchy. In still other cases, individual judges are given special authorisation to hear corruption cases, but there is no distinct anti-corruption structure, unit, or division. Across these categories, designated judges may work exclusively on corruption cases, or they may continue to preside over other cases as well. For example, in Bangladesh and Kenya, the trial court judges or magistrates designated as special judges/magistrates do not hear corruption cases exclusively; rather, they continue to serve as regular trial judges for ordinary criminal matters or other special cases (on Bangladesh, see Chowdhury 2007; on Kenya, see Box 1). And in Senegal, the Court for the Repression of Illicit Enrichment (CREI) is an ad hoc tribunal whose members are appointed from the pool of senior judges, and these judges may continue to serve on their original courts even after appointment to the CREI (Loi No. 81–54).

Box 1. The Kenyan experience with gazetted magistrates for corruption cases

In Kenya, the 2003 Anti-Corruption and Economic Crimes Act (sec. 3) established a system for trying offences under that law, as well as other offences with which the defendant could be charged at the same trial. Under this system, the Judicial Service Commission can, through notice in the *Kenya Gazette*, appoint “as many special Magistrates as may be necessary.” The expectation was that these “gazetted” magistrates would deal with corruption cases in a more timely fashion by developing special expertise for complex economic crime cases that often rely on electronic evidence. Having been gazetted was like being licensed to hear corruption cases; but while that license was based on experience and seniority, no special training or other capacity building was provided to these magistrates. Despite these shortcomings, the system expanded from the capital city of Nairobi, the initial location of just two gazetted magistrates, to all the counties. By 2015, about 30 active magistrates were gazetted to hear corruption cases, but those outside Nairobi were still hearing other cases as well.

The effectiveness of this system has been undermined by the Kenyan practice of rotating magistrates every two years. Many corruption cases cannot be finalised within that time frame, due to capacity constraints as well as defendants’ ability to stall the process through all available legal means, such as by filing constitutional challenges that can take years to resolve. When a magistrate is rotated to a new post before the case is finished, either that magistrate has to travel back to finish the trial hearing or the case must be handed over to a new magistrate. Either alternative leads to additional delays (Director of Public Prosecutions 2014, 4).

Magistrate courts in Kenya are not courts of record (meaning that magistrate court decisions do not constitute precedent, as they do in other African Commonwealth countries). As a consequence, verdicts in corruption cases are difficult to access, as are case statistics. Informants interviewed for this study in August 2015 estimated that cases take at least two years to be resolved, and average about three to four years. As of August 2015, no high-profile case had yet resulted in a conviction. Since then the system has undergone substantial changes, including the creation of a special anti-corruption court at the High Court in Nairobi (*Daily Nation* 2015).⁵

5 The authors would like to thank the heads of the Corruption and Economics Crimes Division of the Director of Public Prosecutions, Transparency International Kenya, the Anti-Corruption Court in Nairobi, and GIZ Kenya for sharing their experiences and insights during semi-structured interviews in August 2015.

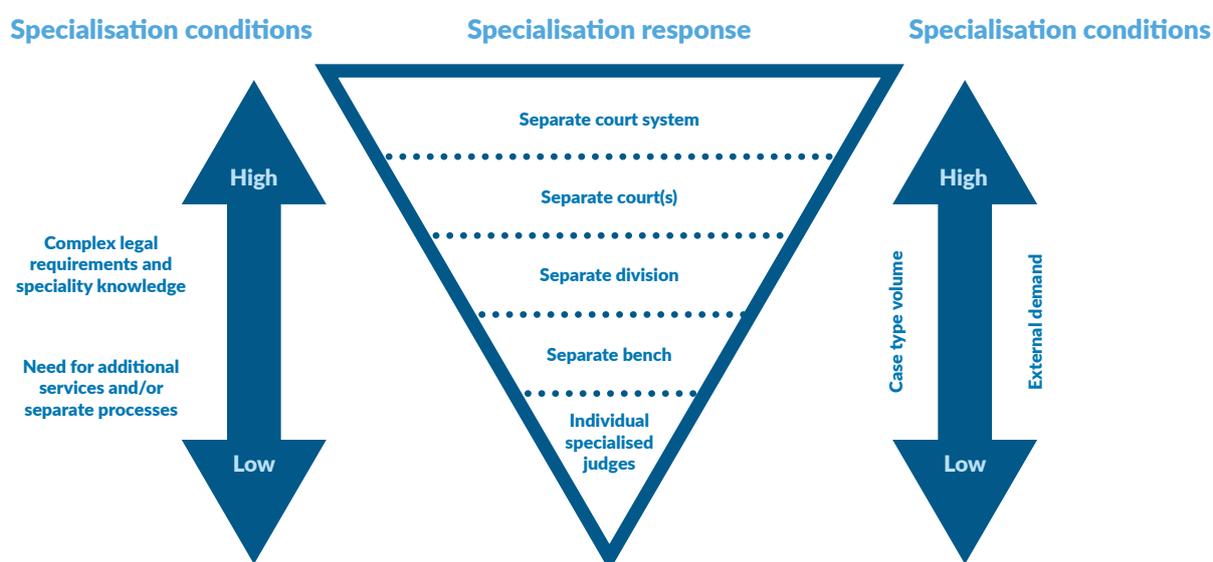
Different degrees of institutional separation and specialisation come with different costs and benefits. Gramckow and Walsh (2013) have set forth some basic considerations (see Figure 2). Generally speaking, a greater degree of institutional separation will typically be more appropriate when the caseload is higher, when the need for efficiency is greater, and when the need for specialised expertise is more acute.⁶ Another consideration that is particularly relevant with respect to corruption cases is the fact that defendants in such cases can often afford the best lawyers, and will use all available legal means to delay the legal process

6 Other factors that sometimes influence the optimal degree of specialisation—such as the need for special processes and services for litigants with special needs, for example, juveniles, veterans, the homeless, the mentally ill (Baum 2011, 106)—are less relevant in the context of anti-corruption courts.

and challenge a guilty verdict. In countries like Uganda, where only the first instance courts are specialised for corruption cases, the general appellate courts can struggle with the high volume of appeals (Schütte 2016b).

Institutional separation also comes with costs. The more elaborate and extensive the specialised system is, the more expensive it is likely to be. Other potential negative effects of specialisation may include overly close relationships between specialised judges and other actors (lawyers, experts); loss of perspective and failure to see the bigger picture; and the risk of counterproductive status differentials between specialist judges and generalist judges (Gramckow and Walsh 2013).

Figure 2. Gramckow and Walsh decision-making model for specialisation choice



Source: Adapted from Gramckow and Walsh 2013, 16.

While it is important to ask whether the anti-corruption court should be a separate body and whether the designated judges should specialise exclusively in anti-corruption cases, perhaps the most significant question with respect to the relationship between anti-corruption courts and the regular judicial system concerns the place of the special court in the judicial hierarchy. In particular, should the specialised anti-corruption court have original jurisdiction (that is, serve as a first instance trial court), or appellate jurisdiction, or some combination? And what court should have appellate jurisdiction over the anti-corruption court's rulings? The countries that have created specialised anti-corruption tribunals have made quite different choices with regard to these questions.

First, as noted above, some countries do not have separate anti-corruption courts or divisions, but merely designate certain judges as authorised to preside over corruption cases (the "solo judge" model in Table 3). In this arrangement, which prevails in Bangladesh and Kenya, appeals from the first instance anti-corruption judges go through one or more of the usual intermediate layers of appeals before any appeal to the country's supreme court.

Second, for those countries that have adopted a stand-alone specialised anti-corruption court, the most common approach is for this special body to serve as a first instance trial court, with appeals going directly from the anti-corruption court to the supreme court. Judges on the special court are often given a status equivalent to that of judges on an intermediate appellate court. Examples in this category include Burundi (Niyonkuru 2013), Cameroon (Fombad 2015), Croatia (Martini 2014), Nepal (Poudel 2012), Pakistan (National Accountability Ordinance), Senegal (LegiGlobe 2015), and Slovakia (Stephenson 2016b).⁷

Third, some countries have adopted a hybrid system in which the anti-corruption court can serve as a court of first instance in some cases (usually in more significant cases) and as an appellate court in other cases. The two notable examples in this category are the Philippines and Uganda. In the Philippines, the Sandiganbayan has exclusive original jurisdiction over corruption offences committed by sufficiently high-ranking public officials; when those offences are committed by lower-ranking officials, the regional trial courts have original jurisdiction and the Sandiganbayan has appellate jurisdiction (Stephenson 2016a). The Ugandan system is similar, in that the Anti-Corruption Division (ACD) of the High Court typically only serves as a court of first instance in high-value cases; in other cases the ACD hears appeals from magistrate judges. There are two important differences, however. First, in the Philippines, the Sandiganbayan's original jurisdiction is limited by law; while in Uganda, the ACD has original jurisdiction in all corruption cases, but as a matter of discretion it chooses only to serve as a court of first instance in more significant cases. Second, in the Philippines, Sandiganbayan decisions can be appealed directly to the Supreme Court (Stephenson 2016a); in Uganda, ACD decisions are appealed first to the Court of Appeal (which in the Ugandan judicial hierarchy is between the High Court and the Supreme Court), and only then to the Supreme Court (Schütte 2016b).

In Botswana all corruption cases are heard initially by regular magistrate courts, but appeals are taken to the Corruption Court (a division of Botswana's High Court), rather than to the ordinary appellate courts. Decisions of the Corruption Court can be appealed subsequently in the same way as any other High Court decision in Botswana—to the Court of Appeal, the highest court in the Botswana's judicial hierarchy (UNODC 2014a). As the Botswanan Corruption Court only has appellate functions, and never functions as a court of first instance, it could also be considered a separate category: a special appellate division.

Finally, at least four countries—Afghanistan (Ziems 2014), Bulgaria (Kuzmova 2014; Lawyers-Bulgaria 2016), Malaysia (NST 2011), and Indonesia (Schütte 2016a)—have created specialised anti-corruption court systems that include both courts of first instance and appellate courts. That is, in these comprehensive parallel systems there are a set of anti-corruption trial courts as well as a set of anti-corruption appellate courts to hear appeals from the anti-corruption trial courts.

Table 3 classifies the anti-corruption courts we surveyed based on their relationship to the regular judicial system, distinguishing four models or categories.

7 Senegal deserves special mention here, because while appeals from the CREI go directly to the Supreme Court, on appeal the Supreme Court may only review questions of law, not questions of fact (Loi No. 81-54). This means that there is no mechanism in Senegal's legal system to appeal the CREI's judgment on factual issues, a feature that has attracted criticism for its alleged incompatibility with the rule of law and with Senegal's obligations under various human rights treaties (Mansour 2014).

Table 3. Models of anti-corruption courts

Model	Countries
<p>Solo judge</p> <p>Judges are designated or appointed as special anti-corruption judges on general trial courts; the usual appeals process remains in place.</p>	<p>Bangladesh</p> <p>Kenya</p>
<p>First instance court</p> <p>Specialised anti-corruption court has original jurisdiction over anti-corruption cases, with appeals to the supreme court.</p>	<p>Burundi</p> <p>Cameroon</p> <p>Croatia</p> <p>Nepal</p> <p>Pakistan</p> <p>Senegal</p> <p>Slovakia</p>
<p>Hybrid court</p> <p>Anti-corruption court may serve as a court of first instance for some (more important) corruption cases, and serves as an intermediate appellate court for other corruption cases that are heard in the first instance by generalist trial courts. Appeals from the anti-corruption court go to the supreme court.</p>	<p>Botswana (only appellate function)</p> <p>Philippines</p> <p>Uganda</p>
<p>Comprehensive parallel court</p> <p>Anti-corruption court system includes both first instance trial courts and appellate courts.</p>	<p>Afghanistan</p> <p>Bulgaria</p> <p>Indonesia</p> <p>Malaysia</p>

Note: Information on Palestine obtained by the authors is insufficient to classify the court here.

4.2 Size of the court: How many judges?

A deceptively simple question that must be addressed when creating a special anti-corruption court is how large such a court should be. How many judges should sit on this court, or—if there is not a single body or division designated as a special anti-corruption court—how many special anti-corruption judges should there be? The answer to this question depends on answers to the questions posed in the previous subsection, in that the number of judges required depends in part on whether the specialised court is a court of first instance, an appellate court, or both. Even taking this factor into account, countries vary quite a bit in terms of the number of judges they designate as specialised anti-corruption judges.

The main advantage to appointing a large number of judges to the special anti-corruption court is straightforward: insofar as one of the objectives of such a court is to promote the speedy, efficient resolution of corruption cases, a higher judge-to-case ratio is desirable. This is especially true in countries that have a very large number of cases that could potentially come before the court, posing the risk of substantial backlogs. In the Philippines, for example, recent legislation attempted to address the persistent long delays in cases before the Sandiganbayan by increasing the number of judges from 15 to 21; some critics contended that this increase was not nearly large enough, and that the number of Sandiganbayan judges ought to have been tripled to 45 (Stephenson 2016a).

There are, however, at least three potential costs to increasing the number of judges on a specialised anti-corruption court.

First, and most obviously, there is a concern about finding enough qualified judges. If the objective in creating a specialised court is not simply to improve the judge-to-case ratio for corruption cases, but to ensure that highly qualified, experienced judges sit on these cases, it may be challenging to fill a significantly larger number of judicial positions, at least in countries with a limited judicial talent pool. Moreover, as the number of specialised anti-corruption judges increases, these positions may appear less elite and thus less attractive to potential applicants (Schütte 2016a).

A second concern about expanding the size of the specialised court is that recruiting highly qualified jurists to the specialised court may draw talent away from the regular courts, with an adverse impact on the rest of the judiciary. In many countries this will not be a significant problem, as the total number of well-qualified judges will be sufficiently large relative to the size of the special anti-corruption court. But in at least some circumstances, the judicial talent pool may be small enough that institutional designers will need to take seriously the question of how to allocate the most talented judges across courts.

A third problem is related but distinct: anti-corruption courts must be staffed only by judges of high integrity. For this reason, as discussed further below, some anti-corruption courts make use of special screening and selection procedures. But the more judges that need to be recruited for the special court, the harder it will be to rigorously apply those integrity criteria. Worrisome developments in the Indonesian Tipikor courts since 2010 illustrate the concern. Under the original design of that system, each judicial panel comprised two career judges and three ad hoc judges, selected according to a careful screening procedure. These ad hoc judges had a strong reputation for integrity and impartiality. After a Constitutional Court ruling required the expansion of the Tipikor system, there was a need to significantly increase the number of judges, including ad hoc judges; not only have there been substantial difficulties in staffing all these new positions, but there have been many more reports of malfeasance by the new judges, suggesting that the integrity screening and oversight have not been as effective as previously (Schütte and Butt 2013; Butt and Schütte 2014).

In sum, when deciding how many judges to assign to a specialised anti-corruption court, institutional designers need to carefully evaluate the trade-off involved in increasing the number of judges, weighing the favourable impact on the judge-to-case ratio against the potential adverse impact on judicial capacity and integrity. In countries that have a very large number of corruption cases but are blessed with a good supply of qualified judges, a larger anti-corruption court may make sense; by contrast, when the number of cases that require the attention of a specialised tribunal is more limited, and the number of qualified judges is more limited as well, a smaller court is probably advisable. The hardest situations—unfortunately perhaps also the most common—involve settings where the number of corruption cases is large, but there are also significant limits on the available judicial talent pool.

4.3 Selection and removal of judges

In most countries, anti-corruption judges have the status of regular judges, and so the procedures for appointing, removing, and overseeing them, as well as their terms and conditions of service, are the same as those for other judges at a comparable level of the judicial hierarchy. However, a few countries have special rules for judges on the anti-corruption court, most notably with respect to appointments. For example, there are sometimes special appointment rules or qualifications requirements for anti-corruption judges. These often take the form of requirements that the judge have sufficient rank and/or experience before being eligible for appointment as an anti-corruption court judge. In some countries, most notably Slovakia, judges are also required to pass a security clearance, designed to ensure that they do not have anything in their backgrounds that might make them susceptible to blackmail or other forms of improper influence. This requirement in Slovakia was initially limited to judges on the Special Criminal Court, but has since been extended to all judges (Stephenson 2016b).

The most far-reaching efforts to establish special rules for anti-corruption court judges have been in Indonesia. Judges who sit on the Tipikor courts include not only career judges but also so-called ad hoc judges (typically lawyers, law professors, retired judges, and other legal experts). Applicants for ad hoc judge positions must meet a strict set of selection criteria, with both civil society representatives and Supreme Court staff serving on the selection committee; Tipikor court judges are then appointed by the president for a term of five years, renewable one time only. Under the original 2002 legislation, the Tipikor courts decided cases in panels of five judges, three of whom had to be ad hoc judges; this system was designed to weaken the influence of the career judges, who were viewed as a greater corruption risk. However, pursuant to the 2009 revisions to the authorising legislation, enacted in the wake of the 2006 Constitutional Court ruling that invalidated the original Tipikor court system, the head of the Tipikor court in each judicial district (a career judge) can determine the combination of career and ad hoc judges on the panels (Schütte 2016a).

Special selection and removal procedures for anti-corruption court judges are most sensible when concerns about judicial integrity are strongest. In Slovakia, the main perceived threat was from criminal networks that might be able to blackmail or corrupt judges; in Indonesia, the concern was the pervasive influence of powerful elites over the regular courts, as well as systematic corruption in the court system. Special judicial appointment procedures, however, may not be necessary to ensure integrity, and most other countries with special anti-corruption courts have not adopted special appointment and removal procedures—though whether this is because policymakers in these countries have determined that special procedures are not necessary, or because of other political or practical complaints, is not always clear. It is also important to keep in mind that special judicial appointment procedures are not sufficient to ensure integrity; they are at most one potentially helpful component of a larger strategy to protect judicial integrity, which may or may not be worthwhile depending on the particular context. The case for special appointment procedures

or criteria is strongest when the ordinary judiciary would be particularly susceptible to undue pressure or influence in corruption cases, which an alternative method of judicial selection might avoid.

4.4. Substantive scope of anti-corruption court jurisdiction: What cases does the court hear?

Anti-corruption courts vary in the scope of their substantive jurisdiction. Simplifying somewhat, there are three main dimensions along which a specialised anti-corruption court's jurisdiction may vary (aside from the distinction between original and appellate jurisdiction, discussed previously). These are (a) the specific offences covered, (b) the magnitude of the offence (usually measured by the amount of money involved), and (c) the seniority of the government officials allegedly involved.

Type of offence: Most anti-corruption courts deal with a broad range of corruption and corruption-related crimes. Furthermore, some of the specialised courts that we have classified as anti-corruption courts in fact have broader jurisdiction that includes not only corruption and related economic crimes, but other serious crimes as well. For example, in Croatia the USKOK courts have jurisdiction not only over higher-level corruption offences, but also over various organised crime offences (RAI 2016; SELDI 2014; Balkan Insight 2008). Bulgaria's Specialised Criminal Court (and its corresponding appellate tribunal, the Specialised Criminal Court of Appeal) similarly has jurisdiction over organised crime as well as corruption (Kuzmova 2014; Lawyers-Bulgaria 2016). The Special Criminal Court in Slovakia has jurisdiction over organised crime and premeditated murder, as well as corruption and money laundering (Stephenson 2016b). Nepal's Special Court has jurisdiction not only over corruption and money laundering, but also over "treason against the state" (Parajuli 2010). Conversely, the jurisdiction of some other anti-corruption courts is more narrowly limited to a subset of specific corruption-related offences. For example, Senegal's Court for Repression of Illicit Enrichment, as its name implies, only has jurisdiction over the crime of illicit enrichment—the use of public office or a relationship with the government to misappropriate public funds—and closely related corruption or concealment offences (Loi No. 81–54). President Macky Sall and others have proposed expanding the CREI into a "court for suppression of economic and financial crimes," with broader jurisdiction (Djiba 2014).

Magnitude of the offence: While the jurisdiction of most anti-corruption courts is defined by the nature of the offence rather than its magnitude, in some countries the specialised anti-corruption court only hears cases involving sufficiently large sums. In Cameroon, for instance, the Special Criminal Court only has jurisdiction over embezzlement cases involving especially large amounts; other embezzlement cases are heard by the ordinary courts (Iliasu 2014). And the Philippines recently amended the law on the Sandiganbayan to restrict that court's original jurisdiction to cases involving amounts of money that exceed a specified threshold (Stephenson 2016a).

Identity of the defendant: Some anti-corruption courts' jurisdictions are limited not only to particular offences, but also to particular offenders. The Sandiganbayan, for example, only has original jurisdiction over cases brought against sufficiently senior public officials (Stephenson 2016a). Interestingly, Burundi limits the jurisdiction of its Anti-Corruption Court in the opposite direction: although this court has broad jurisdiction over a range of corruption offences, only Burundi's Supreme Court can rule on criminal charges brought against a range of high-level government officials, including ministers, deputies, senators, generals, provincial governors, and senior judges (Niyonkuru 2013).

As emphasised above, there is no single right answer to the question of the appropriate substantive jurisdiction for an anti-corruption court. That said, it is possible to summarise some of the main advantages

and drawbacks to imposing limits on the jurisdiction of such a court along one or more of the three dimensions noted above. The first advantage to imposing limits on an anti-corruption court's jurisdiction is straightforward: as discussed earlier, an important determinant of a court's efficiency is the judge-to-case ratio. While one way to improve that ratio is to increase the number of judges, another way is to decrease the number of cases, thereby enabling the court to focus its resources on those cases that are considered most important, or those for which adjudication by a specialised tribunal is otherwise most desirable. A second potential advantage to limiting the anti-corruption court's jurisdiction is political. One purpose of such courts is to increase public confidence that the legal system is able to tackle corruption effectively, countering the perception of impunity for high-level officials and their cronies. Also, because the specialised court may require considerable public resources, and its judges may sometimes be perceived as having more favourable terms of employment than other judges, the sustainability of the court may depend on the public's continuing belief that this body is necessary. Both of these perceptions can potentially be undermined if a large proportion of the court's docket appears to consist of cases that seem relatively unimportant. This line of criticism is not purely hypothetical. In Nepal, for example, critics have harped on the fact that a large number of cases heard by the Special Court involve forged university certificates (Parajuli 2010). Likewise, in Slovakia, critical media coverage has highlighted the fact that many of the cases resolved by the Special Criminal Court involve petty bribes—sometimes less than 20 euros—which has led some civil society activists to propose limiting the SCC's jurisdiction to more important cases (Stephenson 2016b).

This is not to say, however, that limiting an anti-corruption court's jurisdiction is a good idea in all (or even most) cases. After all, if the specialised court is indeed a better venue than the regular courts for adjudicating corruption cases, then giving the specialised court broader jurisdiction will mean that the specialised court's distinct advantages (greater efficiency, expertise, integrity, etc.) will be brought to bear on a larger number of cases. Moreover, even "minor" corruption cases may be important—either because they cumulatively have a large impact on the society, or because instances of seemingly low-level corruption can be important parts of larger corrupt networks. Furthermore, the claims that expansive jurisdiction over "petty" cases will undermine public confidence in the anti-corruption court, or the government's anti-corruption efforts more generally, are mostly speculative (Stephenson 2016b).

4.5 Relationship to prosecutorial authorities

Often, specialised anti-corruption courts are directly linked to specialised anti-corruption authorities or similar prosecutorial bodies, with the jurisdiction of the anti-corruption court limited to cases brought by the ACA. And sometimes the ACA has exclusive jurisdiction to file cases in the special anti-corruption court. For some anti-corruption courts, particularly those in countries influenced by the more inquisitorial French civil law tradition, special anti-corruption prosecutors and investigators are integrated into the institution of the anti-corruption court itself, with those prosecutors having exclusive jurisdiction to bring cases before the court—though they may also take cases referred by other entities. This is so, for example, in Burundi (IMF 2010; Tate 2013), Cameroon (Iliasu 2014), and Senegal (Loi No. 81–54). In contrast, some anti-corruption courts hear cases brought by the regular prosecutor's office, either because the country does not have an ACA or because the ACA lacks the power to bring prosecutions directly. In Malaysia and Kenya, for instance, the public prosecutor (not the ACA) has the power to file cases in the anti-corruption courts (Yusoff, Murniati, and Greyzilius 2012; UNODC 2013; EACC n.d.). Likewise, in Afghanistan the Attorney General's Office files cases with the anti-corruption courts (Civil-Military Fusion Centre 2012; Ziems 2014). And in some countries, the anti-corruption court may hear cases brought either by the ACA or by the regular prosecution service. In Uganda, for instance, the High Court Anti-Corruption Division hears cases brought both by the director general of public prosecutions and by

the inspector general of government (Uganda's ACA), as well as by Uganda's Revenue Authority (Schütte 2016b).

Indonesia is a particularly interesting example to consider here, because the authority to bring cases before the Tipikor courts was altered by a ruling of the Indonesian Constitutional Court. Under the original 2002 law, only Indonesia's ACA, known as the KPK, could bring cases before the Tipikor courts; equivalent cases brought by regular prosecutors were heard by the regular courts. In 2006 Indonesia's Constitutional Court held that this two-track system violated the constitutional guarantee of equality before the law. The court's logic was that two defendants charged with identical misconduct could be tried by different judicial institutions—with different compositions, procedures, and conviction rates—depending on whether the KPK or the regular prosecution service brought the case (Butt and Schütte 2014). The 2009 revisions to the law remedied this problem by requiring all corruption offences to go to the Tipikor courts, whether they are brought by the KPK or the regular prosecution service.

One of the issues that reformers should keep in mind is that the effectiveness of a specialised anti-corruption court depends in large measure on the effectiveness of the body or bodies that have the power to file cases in that court. When the latter body is ineffective, the entire process is hobbled: in other words, the chain is only as strong as its weakest link. In several countries, specialised anti-corruption courts seem to do a good job handling those cases that come before them, but the most significant cases—the ones for which a specialised court is arguably the most important—do not reach the court at all, because the ACA or prosecutor's office does not bring these cases. Indeed, corrupt elites may be content to allow a specialised anti-corruption court to operate without interference so long as they can exert enough influence over prosecutors or law enforcement to avoid any serious risk of prosecution. Several critics in Slovakia, for example, assert that this is the main reason for the lack of any convictions of high-level politicians in Slovakia's Special Criminal Court (Stephenson 2016b).

There is some debate about the extent to which the specialised court itself can influence the behaviour of prosecutors. Consider, for example, the Philippines, where many observers note that the Office of the Ombudsman is often responsible for the lengthy delays in cases heard by the Sandiganbayan, for example by not being adequately prepared on hearing dates and requesting frequent continuances. Some critics assert that the Sandiganbayan could improve the Ombudsman's performance by being less forgiving (for example, less willing to grant continuances); others, however, view that as unrealistic and say that reform needs to start at the Ombudsman's Office itself (Stephenson 2016a).

The larger point here is that institutional designers need to think about the anti-corruption justice system—including its component parts, the ACA (and/or regular prosecutors), special anti-corruption court, law enforcement, and so on—as a whole, and design the system so that the various parts work effectively in tandem.

5. Conclusion

Frustration with the capacity of the ordinary machinery of justice to deal adequately with corruption has prompted many countries to develop specialised anti-corruption courts. In many ways, the arguments for and against judicial specialisation in the anti-corruption context parallel similar considerations in other contexts, but corruption cases also present a number of distinct issues and challenges. The most commonly cited argument for the creation of special judicial bodies to address corruption is the need for greater efficiency in resolving corruption cases, and the associated need to signal to domestic and international audiences that the country takes the fight against corruption seriously. In some countries, concerns about the ability of the ordinary courts to handle corruption cases impartially, and without being corrupted themselves, have also played an important role in the decision to create special anti-corruption courts. The interest in fostering specialised technical expertise, which has been a significant factor in the push for other types of judicial specialisation, seems to have been at most a secondary consideration in most of the countries that have adopted specialised anti-corruption courts.

Although this paper has not attempted a systematic performance assessment of any of the anti-corruption courts surveyed, it nonetheless seems fair to characterise the track record of existing anti-corruption courts as mixed. In some countries, the special courts appear to have played a positive role, but in other countries the outcomes have been disappointing, and a few of the special courts that initially seemed like success stories have encountered significant challenges and setbacks.

For a more definitive assessment of the success or failure of specialised courts to date, and the suitability of particular models to address specific problems, more in-depth research is needed. Such an endeavour will require access to, and in some jurisdictions collection of, basic case data (number of cases, types of cases and defendants, duration of trials, sentences) and information on the courts and judges more generally. Where there are no baseline data, it will be very difficult to assess whether specialisation has made any systematic difference. For policymakers this means that before investing in the creation of a new court, a clear, evidence-based analysis of the existing system and its mechanisms is needed.

Only when the context is well understood does it make sense to carefully consider a range of institutional design choices. Box 2 provides a summary list of questions and basic choices to be made that may facilitate the decision-making process. One could choose to create a separate anti-corruption court, or simply designate certain judges for corruption cases. A specialised anti-corruption court could hear trials, appeals, or both. It could be large or small, with broad or narrow jurisdiction. There could be special provisions for appointment and removal of judges; there could also be special, perhaps streamlined, trial and appeal procedures. There are a number of different models for judicial specialisation in this area, and there is no one correct approach or set of clear best practices. When deciding whether to create a specialised court, and if so, how to design it, reformers must carefully consider the specific problems that specialisation is meant to redress, as well as other aspects of the political, legal, and institutional environment in the country that might impose constraints or otherwise affect how the court will operate.

Box 2. Anti-corruption courts: Basic choices

Why is specialisation needed or demanded? Is it because of efficiency and expertise needs, and/or integrity and independence issues in an environment where the regular courts are no longer trusted? Are there other reasons? And is setting up a special mechanism the best way to deal with these challenges? Are there alternatives?

The reasons for setting up a court in the first place should be kept in mind when considering the following important choices regarding the model of specialisation:

- **The place of the anti-corruption court in the judicial hierarchy**, most importantly, whether the specialised court will serve as a court of first instance or an appellate court, or both, as well as the question of which higher court (if any) has the authority to review the special anti-corruption court's rulings.
- **The size of the court**. How many judges will sit on the specialised anti-corruption court, or be designated as special anti-corruption judges? Specialisation can consume resources needed for broader reforms. Are there sufficient judges to draw on? If judges work inefficiently or lack expertise because of a lack of resources and training facilities, should this be addressed generally or should priority be given to special areas of law, such as corruption?
- **The substantive scope of the anti-corruption court's jurisdiction**, that is, what kinds of cases it resolves. Will the court's jurisdiction over corruption cases be expansive or strictly limited? If limited, in what way?
- **The relationship between the specialised anti-corruption court and the specialised anti-corruption prosecutor**, such as the country's ACA (if one exists). The effectiveness of a specialised anti-corruption court depends in large measure on the effectiveness of the body or bodies that have the power to file cases in that court.
- **Whether to make any special provision for the selection, removal, or working conditions of the anti-corruption court judges**, or whether they should be employed on the same terms as regular judges at a comparable level of the country's judicial system.
- **Whether to adopt substantially different procedures for the anti-corruption courts**, as compared to the procedures that would apply to similar criminal cases heard by the regular courts. If inadequate procedures in the general court system are part of the reason for specialisation, and if procedures cannot or should not be changed generally, then special procedures may need to be developed.

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Frustration with the capacity of the ordinary machinery of justice to deal adequately with corruption has prompted many countries to develop specialised anti-corruption institutions. While anti-corruption agencies with investigative and/or prosecutorial powers have attracted more attention, judicial specialisation is an increasingly common feature of national anti-corruption reform strategies. The most common argument for the creation of special anti-corruption courts is the need for greater efficiency in resolving corruption cases promptly and the associated need to signal to various domestic and international audiences that the country takes the fight against corruption seriously. In some countries, concerns about the ability of the ordinary courts to handle corruption cases impartially, and without being corrupted themselves, have also played an important role in the decision to create special anti-corruption courts. Existing specialised anti-corruption courts differ along a number of dimensions, including their size, their place in the judicial hierarchy, mechanisms for selection and removal of judges, the substantive scope of the courts' jurisdiction, trial and appellate procedures, and their relationship with anti-corruption prosecutors. These institutional design choices imply a number of difficult trade-offs: while there are no definitive "best practices" for specialised anti-corruption courts, existing models and experience may provide some guidance to reformers considering similar institutions. They must decide whether such a court should adopt procedures that are substantially different from those of other criminal courts, and/or special provisions for the selection, removal, or working conditions of the anti-corruption court judges.