



WORKING PAPER

TACKLING GRAND CORRUPTION IMPUNITY

**Proposals for a definition and special
measures**

Transparency International is a global movement with one vision: a world in which government, business, civil society and the daily lives of people are free of corruption. With more than 100 chapters worldwide and an international secretariat in Berlin, we are leading the fight against corruption to turn this vision into reality.

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Working paper

Tackling grand corruption impunity

Proposal for a definition and special measures

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EXECUTIVE SUMMARY

Grand corruption is the abuse of high-level power that benefits the few at the expense of the many. It involves high-level officials, is carried out on a large scale, and causes serious and widespread suffering in societies. Despite the gravity of the crimes, the power exercised by the perpetrators often enables them to escape accountability.

Some of the most infamous cases of grand corruption have featured outright embezzlement of vast amounts of public funds in countries ranging from Nigeria to Peru to the Philippines. The amounts misappropriated were stashed in foreign secrecy jurisdictions and used to consolidate political and economic power.¹

In other grand corruption schemes, multinational companies have bribed heads of state and ministers to win infrastructure, defence and other big-ticket public procurements or lucrative permits and mining concessions. In two recent schemes, major US and Swiss banks conspired with high-level officials in Malaysia and Mozambique respectively to misappropriate public funds raised through issuing government bonds.

The schemes characteristically involve transnational networks of enablers that assist with cross-border laundering of the crime proceeds, using opaque corporate structures to conceal the illicit funds. These networks include companies, financial institutions, lawyers, accountants, real estate agents, trust and company service providers, and company formation agents.²

Grand corruption is a blight with many names and forms from political corruption to state capture to kleptocracy.³ It flourishes where there are weak checks on the exercise of state executive power and on private undue influence on the branches of government.⁴ This makes it possible for the powerful to disable regulatory oversight and enforcement institutions, producing impunity for grand corruption offences. To protect their illicit income streams, the perpetrators also often

attempt to silence public inquiry and criticism, sometimes by violent means.

Grand corruption is an organised crime that separates the state from the people it should serve, causing massive harm. The preamble to the United Nations Convention against Corruption (UNCAC) refers to corruption involving vast quantities of assets that threatens the political stability and sustainable development of those states. By diverting state resources and undermining state functions, grand corruption schemes produce pervasive violations of civil, political, economic, social and cultural rights, including the collective rights of peoples to self-determination and development.⁵

The grave harm caused by grand corruption and the impunity often enjoyed by its perpetrators make it a matter of priority for the international community to identify effective countermeasures. The role of transnational networks in grand corruption schemes highlights the need for coordinated international action.

The international community has already established key obligations and recommendations for countering corruption and protecting human rights. However, these are contained in instruments directed at states. Where high-level officials control the state and work with powerful elites to illicitly abuse state power, the international prescriptions have little effect.

It therefore falls to the international community to devise additional measures to counter grand corruption impunity. This working paper focuses on the potential for jurisdictions with stronger rule of law to play a part in criminal enforcement against grand corruption and in the remediation of its harms, including through assisting weaker jurisdictions. It also emphasises the role of non-state actors and of collective action at the international level through agreements and structures.

Based on experience to date, the paper identifies special national and international measures that would increase accountability of grand corruption offenders and improve remedies for the harm they cause. Many of the special measures discussed would be most effective in combination, and they would together be most effective if anchored in an international legal framework. Some of the measures would also be suitable for international corruption cases that do not rise to the level of grand corruption.

MEASURES AT THE NATIONAL LEVEL

States should consider introducing national legislation and regulations which include the following:

- + Introduce Transparency International's definition of grand corruption into national legislation and designate grand corruption offences as serious and organised crimes, applying the strongest procedural measures and the highest priority for their investigation and prosecution.
- + Make penalties for grand corruption comparable to those for serious, organised and aggravated crimes. All those who participate in grand corruption should be subject to these penalties, including persons paying bribes and laundering the proceeds of grand corruption schemes.
- + Provide for the exercise of extensive jurisdiction over grand corruption crimes even if there is not a strong territorial or nationality nexus with the crimes and even if the alleged offender is not located in the territory. This should include the possible exercise of universal jurisdiction, applying a horizontal complementarity principle.
- + Countries with statutes of limitation for the initiation of criminal proceedings should provide that no limitation period applies for grand corruption offences. The statute of limitations should be 30 years or more for civil claims arising from grand corruption and for non-conviction-based confiscation.
- + Allow only minimal personal immunity and no functional immunity for public officials in criminal, civil and administrative proceedings in domestic and foreign jurisdictions.
- + Provide for private prosecutions in the public interest or criminal *actio popularis* and for extensive *partie civile* (civil party) procedural rights in corruption cases.
- + Establish frameworks for foreign states to make restitution and compensation claims in criminal, civil, or administrative proceedings, including settlement proceedings, in relation to grand corruption schemes involving their high-level public officials.
- + Allow standing for qualified public interest organisations representing victims to bring remediation and compensation claims against grand corruption offenders in criminal, civil, administrative and settlement proceedings in domestic and foreign jurisdictions, including through class actions and collective actions.
- + Provide for the remediation of human rights harms in grand corruption cases, including harms that are indirect and consequential, collective and diffuse. Compensation awards should cover moral, non-pecuniary and/or social damages.
- + Ensure the transparent, inclusive and accountable transfer of the amounts compensated to the state or to victims represented by public interest organisations, with adequate oversight mechanisms.
- + Introduce a rebuttable presumption of money laundering and of the illicit origin of assets, as well as criminal liability for financial institutions based on a duty to prevent money laundering.
- + Establish and use frameworks for rapid proactive preventive freezing with respect to assets suspected of being the proceeds of grand corruption as well as for non-conviction-based confiscation (civil and administrative), extended and value-based confiscation.
- + Require that the instrumentalities and proceeds of corruption must be confiscated or disgorged in grand corruption-related proceedings, including confiscation of the illicit profits in foreign bribery and international money laundering proceedings.
- + Ensure that confiscated and disgorged proceeds of international corruption are used for compensation of victims and for the benefit of victim populations.

MEASURES AT THE INTERNATIONAL LEVEL

States should consider that the following improvements to the international anti-corruption framework:

- + Through an international agreement, whether as a protocol to the UNCAC or a stand-alone instrument, establish a definition of grand corruption together with special national prevention and enforcement procedures.
- + The international agreement should clarify the “unwilling or unable” standard in grand corruption cases; align double criminality requirements; establish a basis for international cooperation in civil and administrative proceedings, including non-conviction-based confiscation proceedings; outline circumstances when the *ne bis in idem* principle applies; and provide guidance for asset returns.
- + Establish a body to build capacity, facilitate international cooperation, and provide coordination, operational, legal, and financial support to enforcement proceedings in grand corruption cases.
- + Establish mechanisms for mediation, arbitration and appeals to address disputes in relation to grand corruption proceedings.
- + Create international or regional funds for the management and disposition of confiscated assets.
- + Establish other international mechanisms, including a system for the exchange of data for the verification of asset declarations, a global register of the beneficial ownership of legal structures and assets and a repository of asset declarations of high-level public officials.

About this working paper

This working paper aims to enrich the current debate on ways to tackle grand corruption. It provides an extensive overview of measures that would be most effective, relying on expert opinion and available evidence. The anti-corruption community should carefully consider these recommendations, some of which are preliminary and to be debated in the years to come.

This paper first looks at the problem of impunity for grand corruption. It then reviews notions of grand corruption in national and international frameworks, and presents a proposed legal definition as a basis for special enforcement and remediation measures. Thereafter, it reviews emerging special measures, and a final section discusses potential international agreements and new international structures.

THE IMPUNITY PROBLEM

Impunity in grand corruption cases occurs where state justice systems are “unwilling or unable” to detect and take enforcement action against it.⁶ This may arise in both the home jurisdiction of the high-level officials involved and in other jurisdictions, including those where the proceeds of corruption are laundered or invested.

As stated in the UN Set of Principles to Combat Impunity,⁷

“[i]mpunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice [...]; to provide victims with effective remedies and ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

With grand corruption, impunity results from state institutions that are unwilling or unable to perform their detection and enforcement functions and from victims’ lack of access to remedies.⁸

STATE UNWILLING OR UNABLE TO DETECT

In grand corruption cases, high-level public officials and their associates may improperly exert control over or interfere with state oversight institutions responsible for detecting corruption, or weaken them via inadequate legal frameworks or failure to provide essential resources.⁹

A 2011 study of grand corruption cases by the Financial Action Task Force (FATF) noted the ability of politically exposed persons (PEPs) in some countries to control the machinery of the state to prevent detection and allow for the disguise and movement of funds.¹⁰

In countries where the proceeds of grand corruption are laundered, legal frameworks may be too weak and regulatory authorities may be unable or unwilling to carry out their detection functions. A lack of well-resourced public registers of the beneficial ownership of legal structures makes it easier for those involved to launder the proceeds of corruption.

Cross-country assessments by FATF indicate key weaknesses in anti-money laundering efforts across jurisdictions, including in some countries regarded as having strong rule of law.¹¹ Several “laundromat” scandals and investigations such as the FinCEN Files have exposed inadequate supervision of financial institutions, including in major financial centres.¹² It has been argued that in some or all of those jurisdictions, there is an unwillingness to prevent laundering of the proceeds of corruption.¹³

According to the 2011 FATF study, the cases demonstrate that anti-money laundering (AML) standards “are not always being implemented by financial institutions; nor are AML laws and regulations being enforced by regulatory authorities or supervisors.”¹⁴

STATE UNWILLING OR UNABLE TO ENFORCE

State enforcement and justice institutions may also be unwilling or unable to enforce against grand corruption perpetrators due to interference from high-level officials and their accomplices, as well as a lack of adequate powers, capacity and resources. Studies have found challenges to the functional independence and operation of the justice system in countries in all regions.¹⁵

Enforcement may also be stymied by procedural impediments, such as jurisdictional limits, immunities and statutes of limitation, as well as weaknesses in money laundering and asset recovery frameworks.¹⁶ Cross-border enforcement may also be thwarted by the costs, complexity and lack of cooperation from other jurisdictions.

The United Nations Office on Drugs and Crime (UNODC) noted in a 2017 global report that with regard to enforcement against money laundering, there were problems in some countries' legal frameworks, as well as major challenges of an operational nature. It found that¹⁷

“[e]ven in countries where the effectiveness of legislation against money laundering has been demonstrated in practice [...] prioritizing the investigation and prosecution of money laundering and financial aspects of criminal activity, particularly in corruption cases, remains challenging.

In the case of foreign bribery, which often qualifies as grand corruption, Transparency International's 2020 and 2022 *Exporting Corruption* reports found that most major exporting countries signatory to the OECD Anti-Bribery Convention are unwilling or unable to enforce against the supply side of international bribery.¹⁸ Our assessments identified a set of barriers ranging from the legal framework to capacity and resource constraints in the justice systems assessed.

On the demand side of foreign bribery – that is, where public officials receive cross-border bribes –

state institutions in those countries seldom bring cases against the companies and intermediaries involved in paying the bribes, or if they have, it has not been widely reported.¹⁹ An OECD study found that in cases where there had been enforcement against the bribe payers in supply-side countries, enforcement on the demand side was rare.²⁰

LACK OF REMEDY FOR VICTIMS

Another aspect of impunity relates to the lack of remedy for the harm to victims resulting from grand corruption, including widespread injury to human rights. Barriers to victims' remedies include jurisdictional limits, immunities and statutes of limitation for civil claims.

One category of victim is the state. States can claim compensation for damages against the perpetrators of corruption for harm suffered. However, where corrupt high-level officials are still in office, their state is unlikely to seek civil remedies against them or their associates, whether at home or abroad. If a state were to bring a claim in a foreign jurisdiction against multinational companies or banks involved in corruption of its public officials, it could be subject to disqualification or counterclaims on grounds of its alleged complicity, co-responsibility or contributory negligence.

Even where the high-level official has left office, states may still face obstacles to bringing claims, as in the Iraqi government's case against companies involved in the Oil-for-Food Programme (see case description in the Annex). There, the court held that corrupt high-level officials were acting “under colour of authority” and that the state was therefore disqualified from initiating civil proceedings.

State compensation claims may also be thwarted by foreign jurisdictions' lack of notification regarding criminal proceedings underway in foreign jurisdictions concerning bribery of their public officials, and in some cases, failure to share evidence. This is especially true where non-trial resolutions or settlements are reached, as in the majority of foreign bribery cases in major exporting countries.²¹

Apart from states, the populations, groups and individuals subjected to harm often lack remedy due to legal and procedural barriers in most countries. The voices and claims of grand corruption victims are seldom heard, be it in the context of criminal, civil or administrative proceedings.

SOVEREIGNTY AND OTHER INTERNATIONAL LEGAL NORMS

Corrupt high-level officials who have control over the machinery of the state will often seek to invoke traditional concepts of national sovereignty to protect themselves from legal pursuits in foreign jurisdictions.

However, grand corruption harms both the state and the sovereign population, and officials engaged in corruption do not act in the interests of the sovereign. Legal scholars have articulated a concept of international society as a “society of peoples” which sets limits on state sovereignty. According to this evolving concept,²²

“ the sovereign subjects behind international law are peoples within states, and no longer states only. And those peoples organize and constrain their popular sovereignty through both the international and domestic legal orders, and hence through both the international rule of law and the domestic rule of law.

There is a related evolution towards greater international accountability of perpetrators of both grave violations of human rights and serious corruption offences, including state officials.²³

These two trends warrant a shift in how grand corruption cases are handled, especially as regards the vesting of roles and responsibilities in foreign justice institutions and in non-state actors.

FEATURES OF GRAND CORRUPTION

The gravity of the most serious corruption crimes and related impunity has led to a range of descriptions and definitions of the phenomenon by a variety of institutions, practitioners and analysts.

The term “grand corruption” appears to have been coined in 1993 by a British businessman, George Moody-Stuart, in a book of the same name that described the damage to developing countries from bribery by multinational companies of high-level officials in relation to major capital projects.²⁴

Since then, a degree of consensus has developed on the most important elements of grand corruption, namely: (i) misuse or abuse of high-level power; (ii) large scale and/or large sums of money; and (iii) harmful consequences.²⁵

The harm referred to includes serious impacts on human rights, democratic institutions, sustainable development and political stability in the country of the high-level official involved, as well as impacts in neighbouring countries, on the financial system through which the illicit proceeds pass, and more generally on global peace and security.

REFERENCES IN INTERNATIONAL DOCUMENTS

A 1992 resolution of the UN Commission on Human Rights speaks of:²⁶

“the necessity for determined action to combat the fraudulent or illicit enrichment of top State officials and the transfer

abroad of the assets thus diverted, as well as to prevent those practices which undermine the democratic system in countries throughout the world and constitute an obstacle to the economies of the countries concerned...

The UNCAC preamble expresses concern about:

“cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States and that threaten the political stability and sustainable development of those States[.]”

This language provided the basis for a resolution at the 7th session of the UNCAC Conference of States Parties in 2017 covering corruption involving vast quantities of assets (VQAs).²⁷ Building on the resolution, the Oslo Statement on Corruption involving VQAs contains 64 recommendations formulated by an expert working group convened by UNODC in June 2019.²⁸

A 2011 study of grand corruption cases by the FATF defined grand corruption as occurring “where those at the political, decision-making levels of

government use their office to enrich themselves, their families and their associates” and noted the natural advantages that PEPs, that is, high-level officials, have by the nature of their position for diverting state assets and laundering the proceeds of corruption.²⁹

An initiative of the Global Organization of Parliamentarians against Corruption (GOPAC) in 2013 argued for prosecution of grand corruption as an international crime, drawing on a definition of grand corruption from the U4 Anti-Corruption Resource Centre.³⁰ According to that definition, grand corruption takes place at high levels of the political system when “politicians and state agents entitled to make and enforce the laws in the name of the people, are misusing this authority to sustain their power, status and wealth” using the very economic, social and political systems that should combat it. GOPAC called for the development of a more rigorous definition.

The International Anti-Corruption Coordination Centre (IACCC) was established in July 2017 to coordinate an international response to allegations of grand corruption.³¹ The IACCC selects cases to support which satisfy the following definition of grand corruption:

“ Grand corruption can include acts of corruption by politically exposed persons that may involve vast quantities of assets and that threaten political stability and sustainable development... [it] increases poverty and inequality, undermines good business and threatens the integrity of the financial system.

The description also says that acts which might fall into this category include bribery of public officials, embezzlement, abuse of function and the laundering of the proceeds of corruption.³²

Since then, the OECD has developed a definition of high-level corruption in connection with the pilot of the Istanbul Action Plan 5th Round of Monitoring.³³ According to this definition, high-level corruption

consists of corruption offences which meet both of the following criteria:

- + involving high-level officials in any capacity punishable by criminal law (e.g., as masterminds, perpetrators, abettors or accessories);
- + involving substantial benefits for the officials or their family members or other persons (e.g., legal persons they own or control, political parties they belong to, etc.) and/or significant damage to public interests.

Further, if a “substantial benefit” or “significant damage” is of a pecuniary nature, this shall be understood to mean any such benefit or damage that is equal to or exceeds the amount of 3,000 times the monthly statutory minimum wage as fixed in the respective country.

In a joint statement in 2021, the chairs of six UN human rights treaty bodies wrote that grand corruption “involves large sums of money and typically occurs at the top levels in the public and private sectors, involving individuals that make rules, policies and executive decisions.”³⁴ The treaty bodies also described a wide range of negative impacts of corruption on human rights.

REFERENCES IN NATIONAL POLICIES

Serious corruption involving high-level officials is also referenced in national AML policies, sanctions regimes and transitional justice proceedings.

The US Financial Crimes Enforcement Network’s (FinCEN) 2018 advisory on *Human Rights Abuses Enabled by Corrupt Senior Public Officials and Their Financial Facilitators* provides one example from the AML field. It states:³⁵

“ Grand corruption can include acts of corruption by politically exposed persons that may involve vast quantities of assets and that threaten political stability and sustainable development... [it] increases poverty and inequality, undermines good business and threatens the integrity of the financial system.

In some countries, such as Kosovo³⁶ and Ukraine,³⁷ there are special procedures for tackling corruption of high-level officials involving damage above a certain monetary threshold.

REFERENCES BY PRACTITIONERS, ACADEMICS AND POLICY-MAKERS

The practitioner, academic, and policy communities have over a period of several decades examined the phenomenon of grand corruption as well as its harm and discussed whether it should be considered an international crime.³⁸

Academic discussions of high-level, large-scale corruption extend back to at least the early 1980s.³⁹ In 1995, an academic coined the term “indigenous spoliation” (or “patrimonicide”) defining it as “an illegal act of depredation committed for private ends by constitutionally responsible rulers, public officials, or private individuals”.⁴⁰ The author further explained the offence as “the organized and systematic theft of a state’s wealth and resources by its leaders... involving billions of dollars and causing widespread social and economic devastation.”

Yale law professor Susan Rose-Ackerman wrote in 1996 that high-level or “grand” corruption refers to bribery of leading politicians and public officials and “involves large sums of money with multinational corporations frequently making the payoffs.”⁴¹

In 2000, the Society of Advanced Legal Studies used the term “grand corruption” to describe cases where “massive personal wealth is acquired from States by senior public officials using corrupt means.” According to the authors:⁴²



[Grand corruption is] high-level, large-scale and multi-jurisdictional [and] not only threatens the stability of the country in which the offender is an official, but also represents a security risk to that country's neighbours and touches upon the soundness of the financial sector of the countries through which the illicit proceeds pass.

Ten years later, in 2010, the Italian prosecutor Fabio de Pasquale stated in blunt terms that “[g]rand corruption means high rank officials involved, substantially sized bribes and big deals.”⁴³

By 2016, Transparency International had developed a “layperson’s” definition”, according to which:⁴⁴

Grand corruption is the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society. It often goes unpunished.

More recently, a background paper for the 2022 Canada-Ecuador-Netherlands High-Level Roundtable on Anti-Corruption defined grand corruption colloquially as “the large-scale abuse of office by a nation’s leaders.” The paper recommends developing a definition of grand corruption for application within legal frameworks and in international contexts.⁴⁵

PROPOSED LEGAL DEFINITION

To counter the impunity of those participating in grand corruption schemes, special national and international enforcement measures are needed. This requires a legal definition of grand corruption to determine when these measures apply.

While there is no agreed-upon legal definition of corruption in international law, UNCAC defines specific corruption offences. Grand corruption can in turn be defined based on those offences together with aggravating factors and circumstances.

In 2019, Transparency International convened a group of experts to discuss a potential legal definition, taking as a starting point a draft legal definition that the organisation had proposed in 2016.⁴⁶ The exercise was intended first and foremost to develop a definition with a criminal policy and procedural function, rather than to provide elements of a distinct new offence.

The expert group agreed on the following definition:

Grand corruption means the commission of any of the offences in UNCAC Articles 15-25⁴⁷ as part of a scheme that:

(1) involves a high-level public official; and

(2) results in or is intended to result in a gross misappropriation of public funds or resources; or grave or systematic violations or abuses of the human rights of a substantial part of the population or of a vulnerable group.

The following excerpts from the explanatory notes clarify some of the terminology.

1. “as part of”

“As part of” refers to participation in any capacity, including acting as accomplice, organising, directing, aiding, abetting, facilitating and counselling. It also refers to agreeing with another person to commit a serious corruption crime or taking an active part in the activities of an organised criminal group.⁴⁸

2. “a scheme”

A “scheme” exists when crimes under UNCAC are committed as part of a systematic or well-organised plan of action. A single criminal behaviour (or series of behaviours) may be labelled as a scheme when the amount misappropriated is sufficiently high. In determining whether corruption offences are part of a scheme, consideration should be given to: (i) the number of transactions; (ii) the duration of the offence(s); (iii) the number of participants; and (iv) the amount misappropriated.

3. “involving a high-level public official”

The definition of public official corresponds to the language in UNCAC Article 2 and should also include de facto and shadow public officials.⁴⁹

While there is no international definition of “high-level”,⁵⁰ Transparency International’s definition relies on the language in UNCAC Article 52 which refers to “individuals who are, or have been, entrusted with prominent public functions and their family members and close associates”. It also draws on FATF’s definition of politically exposed persons which states that these individuals include, for example, “Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.”⁵¹

The expert group considered that “involving” should refer to all degrees of participation with the appropriate *mens rea* (criminal intent) and should also include the role of a high-level official as an “unwitting” or “innocent agent”, namely as a person who unknowingly, unintentionally, or under force or coercion commits a criminal act on behalf of another.⁵²

4. “results in or is intended to result in”

The expert group convened by Transparency International favoured reference to the scale of funds diverted and the human rights harm as relevant aggravating factors. This focused on two elements: “gross misappropriation” and “grave or systematic” human rights violations.

Gross misappropriation of public funds

Rather than naming a specific amount of misappropriated state resources measured in terms of a threshold, a share of GDP, or a multiple of daily rates, the expert group opted for the term “gross misappropriation”, which refers to a level that has major adverse consequences. The term can be found in *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective*, which identifies “gross misappropriation of public resources” as having “major adverse economic, social or cultural consequences.”⁵³

The EU has justified sanctions against third countries with reference to misappropriation of state funds that deprives the people of that country of the benefits of the sustainable development of their economy and society, and undermines the development of democracy in the country.⁵⁴ The element of gross misappropriation in the definition provides one basis for the incorporation of grand corruption in the category of an international crime.

Grave or systematic human rights violations or abuses

The harm referred to consists of “grave or systematic” human rights violations or abuses.⁵⁵ This language is taken from the 1999 Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*, and the 2008 Optional protocol to the *Covenant of Economic, Social*

and Cultural Rights. The two Committees overseeing implementation of the respective instruments may examine grave or systematic violations of any of the rights set out in the instruments.

This language includes, but is broader than, the phrase “gross human rights violations”,⁵⁶ which was included in a draft version of Transparency International’s new definition circulated in recent years.⁵⁷ The Office of the UN High Commissioner for Human Rights (OHCHR) has explained⁵⁸ that, although there is no uniform definition of gross human rights violations in international law,

“ it would generally include genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.

Transparency International also includes in the definition any serious negative impact on the exercise of any rights, including civil and political rights, by a substantial part of the population or vulnerable group. It also includes human rights abuses and negative human rights impacts by third parties, including business enterprises and private actors, as described in the UN Guiding Principles on Business and Human Rights.⁵⁹

In the Political Declaration adopted at the 2021 Special Session of the United Nations General Assembly (UNGASS) Against Corruption, member states expressed concern about “the negative impact that all forms of corruption, including the solicitation of undue advantages, can have on access to basic services and the enjoyment of all human rights”.⁶⁰

GRAND CORRUPTION: SERIOUS, ORGANISED & AGGRAVATED

Introducing the definition of grand corruption proposed by Transparency International into national legal frameworks would provide a basis for treating grand corruption offences as serious, organised and aggravated, with associated special operational and procedural measures and penalties.

DESIGNATION OF GRAND CORRUPTION OFFENCES

National legislation often distinguishes categories of serious and organised crime that warrant enhanced enforcement capabilities. Grand corruption offences should be so designated and given the high priority, specialist teams, powers and resources necessary for the investigation and prosecution of such cases.

Serious crime

The UNCAC Legislative Guide refers to “serious transnational crimes”, “serious corruption” and “serious crime”, without defining them.⁶¹ It notes, for example, that “[i]n the context of globalization, offenders frequently try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. This is especially so in the case of serious corruption, as offenders can be very powerful, sophisticated and mobile”.⁶²

In the United Nations Convention Against Transnational Organized Crime (UNTOC), a serious crime is defined as an offence “punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

The classification as a serious crime should help ensure the handling of grand corruption cases with

priority, and the use of special investigative bodies, mandates, techniques, resources and skills.

In the UK, the Serious Fraud Office (SFO) has specialist skills, powers and capabilities for the investigation of “any suspected criminal offence, including bribery and corruption, which appears to involve serious or complex fraud”.⁶³ The SFO decision to allocate enhanced capacity to these cases takes into account the actual or intended harm caused to the public, to the UK’s reputation and integrity as a financial centre, or the harm to the economy and prosperity of the UK. In grand corruption cases, the decision to use special measures should also take into account considerations such as adverse human rights impacts in foreign countries.

Other countries have put in place special enforcement arrangements for high-level corruption. In Kosovo, a law enforcement instruction issued in 2013 provided that special investigation procedures must be used in cases of high-level corruption where the resulting benefit or damage exceeds the amount of US\$1 million.⁶⁴ In Ukraine, the jurisdiction of the High Anti-Corruption Court, established in 2018, extends to cases brought by the National Anti-Corruption Bureau (NABU) and the Specialised Anti-Corruption Prosecutor’s Office (SAPO) against designated high-level officials for a specified set of corruption-related crimes that entail damage in excess of a given monetary threshold.⁶⁵

Organised crime

Grand corruption involves schemes with multiple participants and should be treated as a form of organised crime.

This clearly holds, for example, in cases of complex, multi-jurisdictional corruption involving the highest levels of government and perpetrated, as the United Nations has stated, by “organized networks involving the public and private sectors often operating in both the legal and illicit spheres”.⁶⁶

It is also true of “vertically-integrated, criminal organizations [...] masquerading as governments” that use the tools of state power to steal money for private gain, as described by Sarah Chayes.⁶⁷

Likewise, it applies to a small group of mafia states in which “high government officials actually become integral players in, if not the leaders of, criminal enterprises, and the defense and promotion of those enterprises’ businesses become official priorities”.⁶⁸

It is equally relevant for scenarios of state capture, where firms “shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials.”⁶⁹

UNTOC Article 5 requires states to criminalise two participation offences, both of which are relevant in grand corruption cases. One is an agreement to commit a serious crime to obtain a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group. This roughly corresponds to the common law definition of a conspiracy offence with some additional elements, such as the requirement that the purpose must be to obtain a material benefit. As UNODC points out, it “allows for the prosecution of multiple persons involved in a criminal enterprise, including those who organize and plan a crime but do not themselves execute those plans.”⁷⁰

The other UNTOC participation offence is participation in an organised criminal group, including participation through non-criminal activities. UNTOC defines an “organised criminal group” as a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences under the Convention in order to obtain a material benefit.⁷¹

Addressing grand corruption as a form of organised crime corresponds to the reality of that form of corruption, and in some countries, it can make cases against some or all of the defendants easier to prove. It can also bring a range of procedural benefits. This explains why US prosecutors so often use conspiracy charges in Foreign Corrupt Practices

Act (FCPA) cases.⁷² Furthermore, as with other serious crimes, many countries have special measures, bodies, resources and mandates for the investigation of organised crime.

One scholar has argued that the traditional notions of a hierarchical and structured “organised criminal group”, and of organised crime participation as linked to such a group, are unsuitable for addressing the nature of 21st century transnational criminal networks.⁷³ These networks include “brokers” and “mediators” who are intermediaries controlling channels of information, connecting actors in the network, providing access to resources and offering network flexibility. They may profit more from the network and be more valuable to it than the leaders of organised criminal groups that belong to the network. Legal frameworks should be better interpreted to give more weight to the complex transnational network structures and the key role that brokers play, instead of focusing on the top of the traditional organised crime hierarchy.

Grand corruption has been characterised as an organised crime in numerous proceedings by litigants, prosecutors and by courts.

In the US, there have been several civil proceedings brought by countries and state-owned enterprises under the US Racketeer Influenced and Corrupt Organizations (RICO) Act.⁷⁴ For example, in 1986, the Republic of the Philippines filed a civil RICO claim in a US federal court against the former President Marcos and his wife in a US federal district court, alleging that they conducted a criminal enterprise consisting either of the Philippines government itself or, alternatively, of an association-in-fact.⁷⁵ The Philippines also alleged that the defendants engaged a pattern of racketeering activity to enable the theft of public money. The court found that the Philippines had standing to bring the case and that the allegations constituted RICO claims. This was confirmed on appeal.⁷⁶

In a 2005 landmark decision, the Swiss Supreme Court found that “the structure set up by Sani Abacha and his accomplices constitutes a criminal organisation since its object was to embezzle funds from the Central Bank of Nigeria for private purposes, and to profit from corrupt transactions”.⁷⁷ The court determined that US\$508 million in funds held by associates of former Nigerian dictator Sani Abacha were property of a criminal organisation.

A Swiss investigation into former Egyptian President Hosni Mubarak and 12 associates, initiated after he stepped down in 2011, reportedly included charges of supporting and forming a criminal organisation.⁷⁸

However, the criminal investigation into those charges was dropped in 2015 for lack of evidence and a large sum of frozen funds was transferred to the individuals in question in 2015 and in 2022.⁷⁹

In Brazil, the crime of participation in criminal organisation is usually considered each time that three or more individuals associate to commit crimes, including corruption. Therefore, it is very common in relation to grand corruption schemes that there are charges of participation in a criminal organisation. An example of the unsuccessful use of those charges in Brazil is provided by the charges of corruption, racketeering and obstruction of justice brought in June and September 2017 against then-president Temer.⁸⁰ Two government ministers and three former congressmen were also charged at the same time as the president, accused of “forming an organization responsible for crimes in exchange for kickbacks related to bodies such as Petrobras, Furnas, Caixa Economica, Federal, Ministry of National Integration and the lower house of Congress.”⁸¹ Temer denied guilt and avoided trial in the Supreme Court by twice winning votes in the lower house of Congress on whether to lift his immunity from prosecution.⁸²

After he left office, Temer was arrested in 2019, reportedly on charges of leading a criminal organisation in connection with the construction of Brazil's Angra 3 nuclear plant. The so-called criminal organisation allegedly committed crimes including cartel formation, active and passive corruption, money laundering and fraudulent bidding processes.⁸³ In 2022, following a transfer of the case from a Rio de Janeiro criminal court to the federal court, a federal judge dismissed the complaint against Temer and six others, calling it generic and unfounded.⁸⁴ He also referenced a previous acquittal of the defendants on charges of “the atypical conduct” of forming a criminal organisation. The dismissal was upheld on appeal.⁸⁵

Another example of treatment of organised corruption as a form of organised crime is the 2015 FIFA indictment by the US Department of Justice of 14 people, including nine officials and five corporate executives. They were charged with racketeering, wire fraud and money laundering conspiracies, among other offences, in connection with their alleged “participation in a 24-year scheme to enrich themselves through the corruption of international soccer.”⁸⁶

Further FIFA indictments were subsequently filed, and by 2021, over 50 individual and corporate defendants from more than 20 countries had been

charged, “primarily in connection with the offer and receipt of bribes and kickbacks paid by sports marketing companies to soccer officials in exchange for the media and marketing rights to various soccer tournaments and events”.⁸⁷ In connection with one of the trials, US federal prosecutors announced: “As proved at trial, FIFA and its six continental confederations, together with affiliated regional federations, national member associations, and sports marketing companies, constitute an enterprise of legal entities associated in fact for purposes of the federal racketeering laws. The principal – and entirely legitimate – purpose of the enterprise is to regulate and promote the sport of soccer worldwide.”⁸⁸

In a grand corruption case allegedly involving a former Mozambican minister of finance, the Mozambique prosecutor general brought provisional charges in 2020 against the ex-minister, including the charge of being a member of a criminal association.⁸⁹ In the Namibian “fishrot” corruption case, the former justice minister, the former fisheries minister and other officials have been charged with racketeering and money laundering pursuant to the provisions of the Prevention of Organised Crime Act 29 of 2004, and have also been charged with corruption pursuant to the provisions of the Anti-Corruption Act 8 of 2003 involving a total amount in excess of 317 million Namibian dollars (about US\$23 million) allegedly “siphoned from an unlawful scheme to personally benefit them from fishing quotas allocated by the State.”⁹⁰

More recently, the French National Financial Prosecutor's conducted a preliminary inquiry into the European assets of Lebanon's now-former governor of central bank which reportedly led the prosecutor in July 2021 to file charges of “criminal association” and “organized money laundering”.⁹¹ (See case description in Annex.)

PENALTIES FOR GRAND CORRUPTION

Sanctions are an important deterrent and should be established for grand corruption in line with UNCAC Article 30(1), which calls for taking into account the gravity of the offence in determining sanctions. Grand corruption offences are of the highest gravity in view of the seniority of the public official involved, the high value of the illicit advantage, and the extent of the harm caused. Grand corruption penalties should be comparable to those for serious,

organised and aggravated offences. However, capital punishment should never be a penalty.

National legislation often provides for higher penalties for serious, organised or aggravated corruption offences. The German Criminal Code Article 335 defines “an especially serious case of bribery” as occurring where the offence relates to a “major benefit” or where the offender continuously pays or accepts benefits and the offender is member of a gang whose purpose is the continued commission of such offences.⁹² The Finnish Penal Code defines bribery as aggravated if a gift or advantage of significant value is given and its purpose is to make the recipient act contrary to their duties “to the considerable benefit of the briber or another person or considerable loss or detriment to another person.”⁹³ The French Criminal Code provides for higher penalties for aggravated money laundering.⁹⁴

In some countries, detailed guidance on penalties establishes higher punishments using criteria relevant for grand corruption. Under the US Sentencing Commission’s guidelines, punishment in bribery cases is based on considerations which include the value of the unlawful payment, the value of the benefit received, the value obtained by the public official or loss to the government or consequential damages from the offence.⁹⁵ One criterion for a higher sentence is whether the offence “involved an elected public official or any public official in a high-level decision-making or sensitive position”.⁹⁶

The UK sentencing guidelines under the Bribery Act call for an assessment of the level of culpability and the level of harm, and the highest categories correspond in significant ways to grand corruption scenarios. For example, high culpability includes a leading role where offending is part of a group activity; abuse of position of significant power, trust or responsibility; corruption of a senior official or law enforcement officer; sophisticated nature/significant planning of the offence; or motivated by substantial financial, commercial or political gain.⁹⁷ The highest level of harm (category 1) includes serious detrimental effect on individuals; serious undermining of government functions; and substantial actual or financial gain to the offender or loss caused to others. Among the other aggravating factors are evidence of community and/or wider impact.

All those who participate should face high penalties, whether they are high-level officials, bribe-paying companies, financial institutions or non-financial

service providers helping to launder the proceeds of grand corruption.

Where offenders have different levels of participation in a grand corruption scheme, one approach is to hold all offenders accountable for the conduct of other actors in furtherance of a joint scheme.⁹⁸ Another is to impose higher sanctions on the instigators and organisers of the scheme. No amnesty should be available to those participating in grand corruption.⁹⁹

Custodial sentences for grand corruption should be on a par with those for serious, organised and aggravated offences. The maximum should be considerably higher than the four years imprisonment required by UNTOC’s definition of a serious crime.

In addition, UNCAC Article 30(7) envisages the possibility of disqualification from public office of persons convicted of UNCAC offences “where warranted by the gravity of the offence”. UNTOC Article 32(2)(d) foresees other measures for UNTOC offences such as disqualification from acting as directors of legal persons for a reasonable period of time; national records of those disqualified; and exchange of information regarding the disqualification with other competent authorities.

Monetary penalties should be suitably high. With respect to companies and financial institutions, international anti-corruption conventions require that penalties be effective, proportionate and dissuasive, but there is a great range of approaches across countries in criminal, civil or administrative proceedings.¹⁰⁰ In Australia, certain criminal offences, such as domestic and foreign bribery and false accounting, can be punished through the application of a monetary penalty set as a multiple of the benefit gained. Where the benefit cannot be determined, the penalty can be set as a percentage of the annual turnover of the corporate body in the period the offences occurred.¹⁰¹ Disqualification from public contracting and public benefits are also options in some countries.¹⁰²

In the context of grand corruption, parent companies should be held responsible for introducing adequate measures to prevent foreign bribery and related money laundering in all subsidiaries and controlled entities.¹⁰³ Certain levels of ownership imply both putative control and benefit from the activities of subsidiaries or group members as far as foreign bribery is concerned. Therefore, principles of limited liability and separation of entities should be restricted to encourage economically and socially responsible

parent-subsidary and company group behaviour, especially as regards grand corruption.

In recent years, inadequate sanctions have been imposed in some jurisdictions in settlements or non-trial resolutions with companies or financial institutions in international corruption cases.¹⁰⁴

Other aspects of non-trial resolutions have also raised concerns in some countries, including the lack of admission of guilt and lack of senior-level individual accountability. These issues are particularly problematic in grand corruption cases.

Together with other NGOs, Transparency International has proposed principles for the use of non-trial resolutions in foreign bribery cases, including proposed requirements of transparency, use of dissuasive sanctions, admission of guilt and senior level accountability as well as reparation and inclusion of affected country authorities and victims. The principles also call for judicial review of non-trial resolutions and describe circumstances in which they should not be used, such as in cases of repeat offences and where the company has not self-reported or cooperated.¹⁰⁵ The OECD Council's 2021 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions lends support on some of these topics.¹⁰⁶

The proceeds and instrumentalities of grand corruption, including illicit profits, should be confiscated and kept separate for restitution and compensation claims.

SPECIAL PROCEDURAL MEASURES

The impunity enjoyed by grand corruption offenders points to a need for special enforcement measures at the national level, especially avenues for accountability in other jurisdictions and a role for non-state actors.

Many of the special measures discussed here would be most effective in combination and if collectively based in an international legal framework, as elaborated on in the next section. Some of the special measures would also be appropriate in international corruption cases that do not rise to the level of grand corruption.

A statement on corruption and human rights issued by six UN human rights bodies in 2021 highlights that the obligation to protect human rights requires states to prevent, investigate and punish acts of corruption by state officials and non-state actors and to ensure that victims have access to appropriate and effective remedies.¹⁰⁷

EXERCISE OF UNIVERSAL JURISDICTION

Overcoming the impunity of grand corruption offenders will often depend on the exercise of extensive jurisdiction, including universal jurisdiction in both criminal and civil cases.

This is because the states with the strongest jurisdictional nexus – including states where the proceeds of corruption have been laundered – often will not criminally pursue the offenders, making it important for other states to exercise jurisdiction. Similarly, obstacles to civil claims in some jurisdictions due to dysfunctional justice systems can also be overcome through access to remedies in the courts of other countries.

National-level experience shows a considerable divergence in approaches to the exercise of jurisdiction and a need for greater clarity.

Criminal jurisdiction

Under customary international law, the core criminal jurisdiction of any state, deriving from principles of national sovereignty, is territorial jurisdiction, meaning jurisdiction to apply its law to criminal acts committed within its territory. This is mandatory under UNCAC Article 42(1) and includes jurisdiction over international money laundering offences where acts are committed within a state's borders.

States are also recognised under international law to have nationality jurisdiction, which includes application of their criminal law to criminal acts by their nationals committed outside their borders, such as foreign bribery. This is optional under UNCAC Article 42(2)(b).

These two forms of jurisdiction often suffice to bring grand corruption offenders to justice in countries that are willing and able, especially if territorial jurisdiction is expansively interpreted, as is the case in a few jurisdictions.

Two other recognised forms of jurisdiction are based, respectively, on the passive personality principle and the protective principle. Under the first of these, a sovereign may apply its laws to the conduct of foreign nationals who commit crimes against its nationals outside its territory. This is optional under UNCAC Article (42)(2)(a). This type of jurisdiction was exercised in Belgium in the Habré case, as described in the Annex. Under the second principle, a state may apply its law where there is "harm to the state's national interests".¹⁰⁸ This is also optional under UNCAC Article 42(2)(d) with the

wording where “[an] offence is committed against the State Party”. These additional principles increase the chances of countering impunity in grand corruption cases.

UNCAC Article 42(2)(c) also allows for the exercise of jurisdiction over an offence that is committed outside a state’s territory with a view to committing a money laundering offence within its territory.

The most extensive form of jurisdiction is universal jurisdiction, which has been described by a prominent academic as “a form of extraterritorial jurisdiction exercised by states which do not have a strong nexus with the crime”.¹⁰⁹ The exercise of universal jurisdiction is permitted under the UNCAC. It is optional under UNCAC Article 42(6) and also under UNTOC Article 15(3).

A Special Rapporteur of the International Law Commission described universal jurisdiction in 2006 as “the ability of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state’s own national interests.”¹¹⁰ He observed that universal jurisdiction is now part of customary international law and is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern, and ordinary crimes under national law. Universal jurisdiction legislation exists in most UN member states, especially for serious crimes under international law.¹¹¹

Universal jurisdiction aims at the protection of supranational interests, and the state exercising universal jurisdiction acts as an agent of the international community. The rationale is that “certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim”.¹¹² It helps to ensure that there is no safe haven for the offenders.

This reasoning applies for the serious crime of grand corruption. Thus, the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences proposes that “[i]n addition to the crimes that are currently recognised under international law as being subject to universal jurisdiction, certain other crimes that have major adverse economic, social or cultural consequences – such as acts of plunder and gross misappropriation of public resources, trafficking in human beings and

serious environmental crimes – should also be granted this status.”¹¹³

With respect to UNCAC Article 42(6), which allows for jurisdiction “without prejudice to the norms of general international law”, the UNCAC Legislative Guide explains that “[t]he intent is not to affect general jurisdictional rules but rather for States parties to expand their jurisdiction in order to ensure that serious transnational crimes do not go unprosecuted as a result of jurisdictional gaps.”¹¹⁴ In a study of implementation of UNCAC chapters III and IV, UNODC observed that there was relatively little reliance on Article 42(6), “the most important example obviously being the principle of universal jurisdiction – without prejudice to norms of general international law.”

The African Union Convention on Prevention and Combating Corruption also allows for the exercise of very extensive jurisdiction and, like the UNCAC, can be read to allow for universal jurisdiction.¹¹⁵

Even if the home country of an offender does not cooperate and obstructs accountability, initiating a case in a foreign court would facilitate an international arrest warrant against the offender, thus making it difficult for them to leave the country where they are residing.

The exercise of universal jurisdiction may also prompt criminal proceedings in the country where the offender is residing, since states are required under international law to extradite or prosecute persons present in their territory who have committed serious crimes (*aut dedere aut judicare*).¹¹⁶ In the Hissène Habré case, discussed in the Annex, the Belgian prosecutor considered that without the exercise of universal jurisdiction in Belgium, it would not have come to the criminal proceedings and conviction in Senegal of the former head of state.¹¹⁷ Moreover, where a country hosting an offender fails to comply with the extradite or prosecute principle, provision could be made for a trial *in absentia*, as in the Obiang case (see case description in the Annex).

The US provides the leading example of the exercise of expansive extraterritorial jurisdiction in international corruption cases. With respect to money laundering, the Department of Justice has a very broad interpretation of what constitutes a financial transaction occurring (in part) in US territory, which includes correspondent banking transactions. This provides a very extensive reach given the US role in the international financial system. While US courts have narrowed the extraterritorial application of the FCPA and the wire

fraud statute, the money laundering statute remains a basis for very extensive (extra)territorial jurisdiction.¹¹⁸

If such a broad exercise of territorial jurisdiction were the norm, there would be little need for universal jurisdiction, but there would instead be potential for numerous jurisdictional clashes. However, the US practice is not typical, and in fact, other states sometimes choose not to exercise jurisdiction where they should.

For example, although UNCAC Article 16(2) requires states to consider establishing passive foreign bribery as a criminal offence and the Council of Europe Criminal Law Convention on Corruption requires parties to do so, there are few examples of countries exercising jurisdiction in such cases.

Civil jurisdiction

The exercise of civil jurisdiction in corruption cases relates to any civil claims by and against state officials, states, businesses, groups and individuals. In grand corruption cases, representatives of the harmed state will often be unable or unwilling to bring claims and a dysfunctional justice system in that state may also make it impossible for other victims to bring claims.

The UNCAC contains no provisions specifically about the exercise of jurisdiction over the civil claims foreseen under Articles 34 and 35. The closest, but not a jurisdictional provision, is UNCAC Article 53(b) according to which states must permit their courts to order those who have committed corruption offences to pay compensation to another state party that has been harmed by such offences. There is no equivalent provision for non-state victims.

A European Union regulation on jurisdiction and enforcement of judgments clarifies some jurisdictional issues in relation to civil claims. It provides that a civil suit against a person domiciled in a member state must be brought in that state or, for certain matters, can also be brought in member states with a specified nexus.¹¹⁹ For example, it says that in matters relating to breach of contract, the suit can be brought in the courts of the place where the obligation should have been performed. A civil claim for damages or restitution can be brought in the courts of the place where the harmful event occurred or may occur. Further, if a claim for damages is based on an act giving rise to criminal proceedings, it can be brought in those proceedings, if that court has jurisdiction under its own law to entertain civil proceedings. Finally, courts have

exclusive jurisdiction in a number of cases, regardless of the domicile of the parties. For example, in proceedings which have as their object rights *in rem* in immovable property, jurisdiction must be exercised in the courts of the member state in which the property is situated.

The European Union Agency for Fundamental Rights has observed that “where obstacles to remedies in a jurisdiction mean no effective access is possible there, legal systems commonly allow for an exception to jurisdictional rules to avoid a denial of justice.”¹²⁰ In such cases, a court may exercise jurisdiction, *forum necessitatis*, as long as a reasonable link exists with the forum. This will often be relevant for non-state victims’ claims in grand corruption cases and potentially also for state victims in certain cases.

With respect to claims against companies by victims of business-related human rights harm, a 2016 Recommendation of the Council of Europe Committee of Ministers says that member states should ensure their courts “have jurisdiction over civil claims concerning business-related human rights abuses by business enterprises domiciled within their jurisdiction. The doctrine of *forum non conveniens* should not be applied in these cases.”¹²¹

The Recommendation goes on to say that member states should also consider allowing the exercise of jurisdiction over civil claims against subsidiaries, no matter where they are based, and against business enterprises not domiciled within their jurisdiction “if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned.”

A European Parliament study in 2019 reviewed several case examples and made similar recommendations, calling for amendment of the EU regulation on jurisdiction and enforcement of judgments mentioned above.¹²²

In the US, for the three decades from 1980 to 2013, the Alien Tort Claims Act was interpreted to provide a basis for very extensive extraterritorial jurisdiction over claims by foreign victims of human rights abuses in foreign countries.¹²³ The statute, dating to 1789, provides that federal district courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

However, 2013, the US Supreme Court held that the statute did not apply to conduct occurring outside the territory of the US, based on a presumption

against extraterritoriality where it is not expressly provided for in the law.¹²⁴ US federal courts have also narrowed the application of the statute. For example, some courts have held that economic, social and cultural rights are too indeterminate to be justiciable.

Using the same presumption against extraterritoriality, the Supreme Court also ruled out the extraterritorial application of the civil RICO statute in a case brought by the European Union against a US company.¹²⁵

Under due diligence legislation in some European countries, it would seem that extensive jurisdiction may be available to victims of corporate human rights abuses in third countries. One scholar has observed that national statutes implementing the UN Guiding Principles on Business and Human Rights create substantive and procedural obligations that typically apply to the entire supply chain throughout the world and that the circle of obligated companies often includes all companies – typically, large corporations – doing business in the regulating jurisdiction, not just those domiciled there.¹²⁶

Resolving jurisdictional issues

One scholar has observed that there is a trend to limit universal criminal jurisdiction to cases where the perpetrator is in the custody of the host state, or where either the territorial state or the state of the nationality of the offender is unwilling or unable to act (horizontal complementarity).¹²⁷ Applying this approach in grand corruption cases, “bystander” states would exercise jurisdiction “where the State with the strongest nexus fails to assume its regulatory responsibilities to the detriment of the global interest”.¹²⁸

Given that grand corruption involves complex, cross-border transactions, there might in principle be multiple such bystander states, but the evidence suggests that in practice, only a few states exercise extensive or universal jurisdiction in criminal corruption cases and even fewer in civil cases.¹²⁹ The few that do are well-resourced enforcement authorities.

For the assessment of whether a state with the strongest nexus is unwilling, three alternative criteria are provided in Article 17(2) of the Rome Statute of the International Criminal Court. These are (i) whether any criminal proceedings that were undertaken were intended to shield the person from criminal responsibility; (ii) whether there was

unjustified delay in the proceedings inconsistent with an intent to bring the person to justice; and iii) whether the proceedings were not conducted independently or impartially and were not conducted in a manner consistent with bringing the person to justice.¹³⁰

As to whether a state is unable, the Rome Statute Article 17(3) calls for considering whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”. The category of “otherwise unable” could include situations where a state’s enforcement authorities lack the resources and capacity to carry out proceedings.

These standards could be applied in connection with the exercise of horizontally complementary jurisdiction in grand corruption cases.¹³¹

But the application of these standards may not always be clear and consistent under the national law of states considering the exercise of universal jurisdiction and it also means one state judging another. In the Mozambique “tuna bonds” case, South Africa was put in the position of making a choice between competing extradition claims made by the US and Mozambique (see case description in the Annex).

Moreover, weak capacity in a state with a strong nexus could be addressed through assistance from states with greater capacity and resources and this is to be preferred over assuming extensive jurisdiction. This would bring justice closer to the people and states harmed and could potentially build long-term enforcement capacity in weak jurisdictions.

Where such assistance is not possible, there are strong arguments for the exercise of universal jurisdiction in certain grand corruption cases. However, state authorities and courts may be reluctant given the expense of enforcement, the potential harm to relations with other states, the potential for conflicts of jurisdiction and the likelihood of difficulties in gathering evidence. This reluctance could in some cases be overcome by an international agreement on the subject, discussed in the next section.

LIMITATION PERIODS

Statutes of limitation set deadlines for the investigation or prosecution of criminal cases and

for civil claims. These too can result in impunity in grand corruption, given the difficulties of investigating such cases.

Limitations periods vary greatly across countries. Some countries have no statutes of limitations at all, while in others there are limitation periods, but not for the prosecution of serious crimes. In some of the countries with limitation periods, the length is determined by the amount of the penalty for the crime, and in many countries, there is provision for interruption and suspension of the limitation period under specified circumstances.

With respect to statutes of limitations for corruption offences, a Transparency International study surveying 27 European civil law jurisdictions found a range of practices. It identified good practice examples in several countries, such as the application of statutes of limitation exclusively for the investigation phase of proceedings, or mechanisms to take into account the specificities of corruption cases. The research also showed that statutes of limitations “have particularly important implications for political and grand corruption, cases involving high-level politicians and complex cases which may have a cross-border dimension requiring international cooperation”.¹³²

Another study shows that in all 62 common law jurisdictions, with the exception of the US, there are no statutes of limitation except for minor offences, and many civil law jurisdictions have no time limits for prosecuting serious offences.¹³³ The research analysed 192 states and found that 146 have legislation excluding the applicability of statutory limitations to ordinary or international crimes or both.¹³⁴

There is a general trend towards extending statutes of limitation and increasing the number of serious crimes for which no limitation period applies.¹³⁵ Whatever the rationale for limitation periods in a given country – and this varies across jurisdictions – there is a general understanding that there should be an exception for serious offences. This applies first and foremost to crimes under international law but also to other serious crimes, such as murder, manslaughter rape, terrorism, narcotics offences and certain crimes against life, limb and freedom committed by a holder of public office. In some jurisdictions, there is no limitation period for offences punishable by life imprisonment.¹³⁶

Long or unlimited statutes of limitation are consistent with UNCAC and other international anti-corruption conventions.¹³⁷ At the International Criminal Court, the Rome Statute provides that the

international crimes within the court’s jurisdiction are not subject to any limitation period.¹³⁸

With respect to money laundering, the limitation period is in any case expected to be long, as it usually starts on the day of the last act of investment or concealment of the criminal proceeds.¹³⁹ These acts are likely to be recurring and the limitation period starts anew each time.

Given the serious harm involved in grand corruption cases, the possibility of long concealment of the illicit activities, and the challenges to cross-border investigations and proceedings in these cases, there are strong reasons why there should be no limitations periods for grand corruption offences.

For the same reasons, there should be long statutes of limitation for civil claims. Thirty-year statutes of limitation can be found in some national jurisdictions and should be taken as the minimum length in grand corruption cases.¹⁴⁰

Likewise, there should also be long or no limitation periods for non-conviction-based confiscation of the proceeds of grand corruption, even where the statute of limitation for the underlying offence has expired.¹⁴¹

IMMUNITIES AND JURISDICTIONAL PRIVILEGES

Immunity from investigation and prosecution is another path to corruption impunity for state officials, both domestically and in foreign jurisdictions.¹⁴² UNODC has noted that investigations into high-level corruption may be significantly impeded by claims of political immunity.¹⁴³

In the domestic context, some countries provide for immunity (and inviolability) of a wide range of public officials while in office and/or in the performance of official duties (functional immunity), while others provide for none.¹⁴⁴ At the same time, a 2011 study of European countries showed that in some, there were exemptions from immunity protection for parliamentarians, executive and judicial officials for certain categories of criminal offences, such as “grave crimes”, but not specifically for corruption offences.¹⁴⁵

For domestic officials, UNCAC Article 30(2) calls for “an appropriate balance” between immunities and jurisdictional privileges awarded to a state’s own public officials and “the possibility of effectively investigating, prosecuting and adjudicating offences

established in accordance with the Convention.” This allows for placing the emphasis on removing barriers to effective enforcement, especially in grand corruption cases.¹⁴⁶ This should translate into limitations on the application of immunities in such cases or, where they exist, swift procedures for lifting them. No functional immunity should apply, as discussed below.

Since the domestic justice system is often disabled in cases of grand corruption, the more important question often concerns immunities in foreign jurisdictions.

In foreign jurisdictions, states generally recognise personal immunity (immunity *ratio personae*) for specified foreign public officials during their term in office and functional immunity (immunity *ratio materiae*) for acts performed by public servants in their official capacity and in the exercise of their duties. Personal immunity is a status-related immunity for certain officials, including a few high-ranking officials performing duties relating to their state’s international relations, and it covers both their private and official acts, but only while they are in office. Functional immunity, on the other hand, applies to state officials acting in their official capacity, and continues for those official acts after the termination of their mandate.¹⁴⁷

Personal immunity from foreign criminal jurisdiction is required under international law for some officials during their term in office.¹⁴⁸ The International Court of Justice (ICJ) has named the head of state, head of government, foreign minister and members of special missions, as beneficiaries of such immunity and left open the possibility of others.¹⁴⁹ The International Law Commission’s draft text on this subject mentions only those named officials and does not include other high-level officials.¹⁵⁰ An exception to the ICJ’s rule on personal immunity exists for any public official within the jurisdiction of the International Criminal Court.¹⁵¹

The trend since the end of World War II has been to narrow functional immunities in foreign jurisdictions through exceptions relating to criminality, including corruption.¹⁵² The International Law Commission’s draft text on immunities allows for exceptions relating to functional immunity for certain crimes under international law, and at certain stages of the commission’s discussions, the exceptions have included corruption crimes. Some members have argued that the relevant draft article should focus on “grand” or large-scale corruption.¹⁵³

Another view is that commission of a criminal offence cannot be considered part of official duties,

especially if it harms the state and the population and thus no exemption is needed because the immunity does not apply. Thus, in a case brought by the Republic of the Philippines against former President Marcos, a US federal appeals court observed: “Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law.”¹⁵⁴

More recently, in 2015, the French Court of Cassation denied immunity (personal or functional) to Teodoro Obiang, who had been named vice president of Equatorial Guinea by his father, the president of the country. The court found that the criminal allegations against him (money laundering, extortion, embezzlement) related exclusively to his private life in France and were separate from the exercise of state functions protected by international customary law.¹⁵⁵

The Oslo Statement on Corruption Involving Vast Quantities of Assets (VQA) recommends that “[n]o functional immunity from prosecution should be granted to public officials engaged in corruption involving VQA.”¹⁵⁶ At the same time, there should be safeguards to ensure that immunity is not removed erroneously.

A very specific issue concerns the applicability of immunity with respect to property when public officials use legal vehicles to shield their identity. Swiss courts have made relevant and useful rulings in this regard. In one case, a Swiss investigating judge ordered the seizure of bank records relating to an account held by an offshore company for the benefit of the personal adviser, and agent, of the president of Gabon. The president challenged the seizure on the grounds that he was the ultimate beneficial owner and had personal immunity. The Swiss Federal Tribunal ruled that “an individual who chooses to shield his identity through the use of corporate vehicles is bound by the legal representation that he has himself created and is therefore not entitled to make claims in relation to that property”.¹⁵⁷

In another case involving the Republic of Kazakhstan, the Swiss Federal Tribunal ruled that “assets held by state officials through corporate vehicles are presumed to be managed in a private capacity which implies that they are not protected by the immunity privilege.”¹⁵⁸

PRIVATE PROSECUTIONS IN THE PUBLIC INTEREST

As discussed in the first section, grand corruption impunity can arise when the state authorities responsible for initiating and prosecuting cases are “unable or unwilling” to carry out their functions. One way to overcome this is to allow qualified non-state actors are permitted to bring criminal prosecutions in the public interest, with the necessary broad procedural rights.¹⁵⁹ Many countries provide for such criminal *actio popularis*.

Neither the UNCAC nor other anti-corruption conventions contain provisions relating to private prosecutions. However, in a 1985 Recommendation, the Council of Europe Committee of Ministers stated that “[t]he victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute a private proceeding.”¹⁶⁰

In a subsequent Recommendation in 2000 on the role of public prosecution in the criminal justice system, the Council of Europe Committee of Ministers recommended that not only victims but also “other interested parties of recognised or identifiable status should be able to challenge decisions of public prosecutors not to prosecute either by judicial review or by authorising parties to engage private prosecution”.¹⁶¹ Although the Committee of Ministers stated at the time that corruption offences did not produce identifiable victims, it nevertheless indicated recognition of “the rights of ‘interested parties of recognised or identifiable status’... including associations empowered, or authorised in exceptional circumstances, to defend an area of public interest.”

The private prosecution avenue has also been recommended by the International Bar Association’s Anti-Corruption Committee for asset recovery cases.¹⁶²

The role of non-state actors in criminal proceedings has a historical basis in the Roman law concept of “*actio popularis*” (popular action). This referred to a complaint that could be filed by anyone on behalf of another person, or in the general interest, with a view to imposing a fine as part of the penal law.¹⁶³ It has been translated into national frameworks for private prosecutions in several common law and civil law jurisdictions. There are also frameworks for popular action in administrative proceedings.¹⁶⁴

In the common law jurisdictions allowing private prosecutions, a criminal prosecution can be initiated

by a private person and, alternatively, a private person can assist the state in its prosecution.¹⁶⁵

In the UK, any person can bring a private prosecution under Section 6 of the Prosecution of Offences Act 1985, and judges have commented on an increase in such prosecutions in recent years. One judge observed in 2014 that “[a]t a time when the retrenchment of the state is evident in many areas, including the funding of the Crown Prosecution Service and the Serious Fraud Office, it seems inevitable that the number of private prosecutions will increase.” In 2017, another UK judge noted a growth in private prosecutions and commented that “[o]ne particular area of growth [...] may lie in complex fraud cases: where, in reality, the public authorities sometimes may lack the resources and/or inclination to commence a public prosecution.”¹⁶⁶

In South Africa, there are two types of private prosecution, one for crime victims and one open to any person regardless of whether they are a victim. South Africa’s first private prosecution for environmental crimes led to a conviction of BP Southern Africa in 2020.¹⁶⁷ The Pretoria High Court handed down a landmark ruling in the case following criminal complaints filed by Uzani Environmental Advocacy. As noted by a commentator: “This judgment paves the way for private prosecution of environmental crimes, in instances where the state either lacks capacity or is reluctant to hold environmental transgressors to account.” While this was not a grand corruption case, the same approach should be applied in such cases.

Many civil law jurisdictions permit private prosecutions for minor crimes, and some recognise “auxiliary prosecutors”, whose role is attached to that of a public prosecutor.¹⁶⁸ In 2014, a report by the European Union Agency for Fundamental Rights identified 15 European Union countries with a right to private prosecution, of which 14 were civil law jurisdictions.¹⁶⁹

The Spanish legal system allows an *acusador popular* (a “people’s prosecutor”) to bring a criminal legal complaint (*denuncia penal*) before the courts. Article 101 of the Spanish Criminal Procedure Law establishes that any Spanish citizen can bring a criminal action, even if they are not directly affected by the crime, and be a party to the proceedings.¹⁷⁰ This is anchored in Article 125 of the Spanish Constitution.¹⁷¹

In Portugal, under the 1985 Law on the Right of Procedural Participation and Popular Action, there is

a special regime for citizens and associations to intervene in a prosecution. They are recognised as having the right to make a complaint to the Public Prosecution Service for a criminal violation of interests including public health, environment, quality of life and public domain, as well as a right to constitute themselves as assistants in the process.¹⁷²

A crime victim in Costa Rica can initiate a private criminal complaint against an offender, which gives the victim similar prosecutorial powers to the Prosecutor's Office.¹⁷³ Associations, foundations and other entities whose main objective is social welfare are considered victims when collective interests are affected.¹⁷⁴

Other civil law jurisdictions provide for an active role for victims, including qualified associations, in criminal proceedings. In Belgium, France and Luxembourg for example, they have the possibility of filing complaints and acting as *partie civile* (civil party) in criminal cases.¹⁷⁵ In France, this status confers important rights such as the right of access to the case files, the right of appeal, the right to submit observations and the right to request additional investigative measures.¹⁷⁶ It can help ensure that the authorities follow through on cases. This avenue is also open to state entities, including foreign states.

The law is evolving to allow qualified associations to act as victims because of their public interest purpose. In France, it took years to clarify this, following the *partie civile* complaint filed in France in 2008 by the anti-corruption association Transparency International France calling for an investigation into how luxury assets were acquired in France by three foreign leaders – Denis Sassou Nguesso (Congo-Brazzaville), Omar Bongo Ondimba (Gabon; now deceased), Teodoro Obiang Mbasogo (Equatorial Guinea) – and their relatives. In this case, known as the “Bien Mal Acquis” case, the French Court of Cassation found that the complaint was admissible. It reasoned that a public interest organisation can be *partie civile* if it suffers a direct and personal injury and that as an anti-corruption association, Transparency International France would suffer a direct and personal harm from the laundering of assets financed by embezzled public funds.¹⁷⁷

Another noteworthy case in France is the one initiated by a civil party complaint by the non-governmental organisation Sherpa that led to the conviction of former Syrian Vice President Rifaat al-Assad. He was sentenced to four years in prison for

money laundering and embezzlement of public funds, as well as confiscation of his assets located in France. The conviction was confirmed on appeal by the Court of Cassation in September 2022.¹⁷⁸

Civil society organisations in Benin, Chile, Honduras and Mexico have also been recognised as civil parties in corruption prosecutions.¹⁷⁹

However, the legal standing of qualified public interest associations to present criminal complaints was recognised in a federal court case in Argentina in 2018, taking into account the increasing influence of international law, including human rights law concepts of access to justice and the role of victims.¹⁸⁰ The court held that the public interest association Fundacion Poder Ciudadano could intervene as a complainant in the investigation of a criminal case since the association's statute aimed at the protection of the public administration and of legal rights harmed by the alleged crime.

In the Semlex case in Belgium, involving allegations of foreign bribery, *partie civile* status was granted in 2020 to 55 Congolese citizens and to three human rights groups – the *Réseau panafricain pour la lutte contre la corruption* or UNIS, the *Fédération internationale pour les droits humains* and the *Ligue des droits humains*.¹⁸¹ These organisations have not been designated as victims' representatives but represent themselves under legislation in force since 10 January 2019 allowing non-governmental organisations to file complaints in Belgium when their corporate purpose is violated.¹⁸²

The important role of non-state actors in initiating and promoting enforcement is illustrated in the series of criminal and administrative complaints filed in European countries in 2020 and 2021 concerning allegations of grand corruption in Lebanon. These have prompted enforcement activity in Lebanon, Switzerland, France, Germany, Luxembourg, Belgium, Liechtenstein and the UK, targeting the now-former governor of the Central Bank of Lebanon, Riad Salameh, and a network of companies in which his brother is allegedly involved.¹⁸³ Sherpa and an association of Lebanese victims have *partie civile* status in the cases in France and Luxembourg (see case description in the Annex).

Any framework for private prosecutions in grand corruption cases should include guidelines on qualified public interest representatives; arrangements to have their costs covered; and, potentially, allow for them to make mutual legal assistance requests and initiate proceedings to freeze and confiscate assets.

Given that not only public prosecutions but also private prosecutions may be stymied in some jurisdictions by grand corruption perpetrators, it is of key importance that *actio popularis* or *partie civile* arrangements be available to foreign public interest representatives prosecuting cases outside their home jurisdiction.

REMEDATION OF HARM TO VICTIMS

Grand corruption results in gross misappropriation of public funds or resources, or grave or systematic violations or abuses of the human rights of a substantial part of the population or of a vulnerable group. Usually, it results in both. At the heart of efforts to reverse grand corruption impunity must be remediation of these harms. This is an area still in development.

In these complex cases, there are many perpetrators, many categories of victims and many potential avenues for remediation, whether in criminal, civil or administrative proceedings in domestic or foreign jurisdictions. The offenders will include public officials that embezzled funds or took bribes as well as companies, financial institutions and other actors that paid bribes or laundered funds. The state itself can be deemed to be co-responsible. The remedies can take the form of restitution, compensation, cancellation of contracts, including loan agreements, injunction to perform acts, as well as rehabilitation, satisfaction and guarantees of non-repetition.¹⁸⁴

While there is little question that the state is entitled to recover funds embezzled by public officials where possible, either through compensation claims or establishing title to the property, there are significant challenges to state remediation claims against private actors in foreign bribery or money laundering cases. The hijacking of the state by high-level officials and their associates weakens the state's position in making such claims and it may be necessary to transfer the sovereign claim to other public interest representatives.

Remediation of the widespread harm to the population in these cases is also a challenge because the harm is of a nature and on a scale not commonly handled within existing legal frameworks and processes. An additional complication is that there are usually multiple offenders across many jurisdictions. This calls for new rules and approaches to overcome impunity and increase deterrence.

In view of the complex transnational nature of grand corruption schemes and the greater powers and resources of prosecutors in some jurisdictions to investigate those schemes, a key avenue for victims' remediation is through standing to present compensation claims in criminal proceedings in foreign jurisdictions in foreign bribery and money laundering cases, including in settlement proceedings. The international community in general and those foreign states in particular have an interest in deterring persons domiciled in their jurisdictions from wreaking havoc in countries around the world and ensuring justice for those harmed.

International frameworks for claims

International legal frameworks provide some guidance as to how to handle remediation in grand corruption cases, but fall short of addressing the complexities of these cases. Anti-corruption conventions provide for a victim's right to remedy, both for injured states and for individual victims and groups. Human rights instruments also recognise the right to remedy of victims of abuse of power and violations of human rights.

UNCAC Article 35 is significant in requiring states to ensure that injured entities or persons, including states, can initiate civil proceedings in corruption cases in order to obtain compensation for their damages. Article 32 requires states to protect and enable victims to have their views and concerns presented and considered during criminal proceedings against offenders. Article 34 provides that states may consider corruption a relevant factor in legal proceedings to annul or rescind a contract or withdraw a concession.

Additional provisions on victims' compensation can be found in UNCAC and UNTOC provisions on asset recovery. UNCAC Article 57(3)(c) on return and disposal of assets foresees the possibility in certain cases for the destination jurisdiction to use confiscated assets to pay compensation directly to victims. Under UNTOC Article 14(2), if requested, states should give priority consideration to returning confiscated proceeds of crime or property to the requesting state so that it can give compensation to the victims of the crime or return such proceeds to their legitimate owners.

At the regional level, the Council of Europe Civil Law Convention on Corruption ratified by 34 of 46 Council of Europe member states gives a more detailed framework for victims' compensation in bribery cases.¹⁸⁵ It requires states to provide

effective remedies, including compensation, for persons who have suffered damage as a result of acts of corruption, defined as acts of bribery. Compensation is conditioned on proof of the damage to the plaintiff, causation of the damage and a showing that “the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption”. The compensation may cover material damage, loss of profits and non-pecuniary loss. In addition, states must provide for joint and several liability in case of multiple defendants and a reduction or disallowance of compensation in case of a plaintiff's contributory negligence. The state must be subject to claims for compensation for damage resulting from corruption of its public officials in the exercise of their functions.

The Arab Convention against Corruption's Article 8 requires states parties to give the right to those who suffered damage as a result of corruption to bring an action for compensation for such damage.¹⁸⁶ Article 15 calls for states to establish procedural rules enabling victims to obtain compensation and remedy and, subject to their domestic law, the chance for victims to voice their views and for those views to be taken into account in criminal proceedings. In Article 30 on asset recovery, the Arab Convention foresees the possibility of using confiscated property to compensate victims.

With respect to individual victims and victim groups, the above international frameworks should be read together with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly in 1985.¹⁸⁷ It calls for states to develop and make readily available appropriate rights and remedies for victims of acts constituting serious abuses of political or economic power (paragraph 21).

The Declaration defines victims of crime as “persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power” (paragraph 1). It defines as victims of abuse of power persons who individually or collectively have suffered harm “through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (paragraph 18).¹⁸⁸

In 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, which expands on some of the provisions in the 1985 declaration.¹⁸⁹ This document provides that reparation should be “proportional to the gravity of the violations and the harm suffered” and should include the possibility of moral damages.

In addition, the UN Guiding Principles on Business and Human Rights establishes in its Pillar III that states must take appropriate steps to ensure that victims of human rights abuses have access to remedy.¹⁹⁰ It lists legal barriers as well as practical and procedural barriers to such claims that should be overcome.

While these frameworks provide an important basis for victims' rights and remedies, they do not sufficiently address the many obstacles at the national level to victims claims and more guidance is needed.

National frameworks for claims

In most countries, there are avenues for victims of crime to seek compensation and other remedies through civil or criminal proceedings or both. However, these are not well-adapted to corruption cases in general and especially not to large-scale, transnational corruption schemes involving high-level officials, multiple offenders and harm to large groups of victims. There are many procedural barriers to bringing claims for remediation, starting with definitions of victims and compensable harm. National frameworks also rarely allow for collective claims by harmed groups and populations.

A 2017 survey of UNCAC implementation based on the first cycle of reviews found in relation to Article 35, that national legal frameworks seldom contain a definition of victim of corruption and a considerable number of states have not created a private right of action for those injured by corruption.¹⁹¹

In both civil and criminal proceedings, states generally require that a claimant show a measurable and personal harm directly caused by the defendant, which may be narrowly or flexibly interpreted by the courts. Only a few jurisdictions have thus far recognised non-pecuniary, moral and collective harms from corruption.

With respect to civil remedies, national frameworks provide avenues for seeking compensation for tort (civil wrongs), deceit, breach of contract or unjust enrichment that can in principle be applied in cases

of harm caused by corruption.¹⁹² Recovery by victims may also be based on specific statutes, such as procurement laws. These laws are not designed for grand corruption cases and the experience with them is fairly limited, but there are signs that the law and practice is very slowly evolving, especially with regard to claims against private actors implicated in international corruption schemes.

Frameworks for victims' remediation claims within criminal proceedings vary greatly among countries, whether under criminal procedure codes or statutes relating to crime victims. In a considerable number of civil law jurisdictions, corruption is treated as a crime against the public administration or public interest, which means that only the state has standing to claim compensation in criminal proceedings. In some of these jurisdictions, victims can also potentially include foreign states, and, in bribery cases, some of these jurisdictions also allow claims by business competitors.

Some civil law countries offer extensive procedural rights to crime victims and to representatives of the public interest in criminal proceedings, but these procedures are largely untested for corruption victims.¹⁹³ Civil law jurisdictions with *partie civile* status for victims offer some of the most extensive procedural rights, as discussed in the previous section.¹⁹⁴

Common law countries, on the other hand, often offer victims fewer procedural rights in criminal proceedings and show a preference for complex claims to be handled in civil proceedings. In the US, the federal Crime Victims' Rights Act gives victims the right to notice of court proceedings and of plea bargains or deferred prosecution agreements as well as the right to be heard and to full and timely restitution.¹⁹⁵ In cases where the number of crime victims makes it impracticable to accord all of them these rights, the court is required to fashion a reasonable procedure.¹⁹⁶ However, courts are also permitted to determine that restitution is not practicable due to the number of victims or the complexity of the issues to be determined.

The UK's framework for corruption victims has some notably good elements but also some significant flaws. The UK Sentencing Commission has issued general sentencing guidelines for corporate offenders in bribery, fraud and money laundering cases that require courts to consider a victims' compensation order as a first step.¹⁹⁷ The guidelines also specify that "where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other

financial penalty."¹⁹⁸ In addition, the UK Serious Fraud Office has issued general principles to compensate victims from outside the UK.¹⁹⁹

On the other hand, in the UK, crime victims do not have the right to participate or be heard in criminal proceedings, including at sentencing. This has been criticised by the UK Victims Commissioner²⁰⁰ and may eventually be addressed, at least partially, in the government's first-ever draft Victims Bill, if it becomes law.²⁰¹ Discretion to seek compensation in criminal proceedings lies with the prosecutor and there are very strict limits on compensable harm.

In the context of non-trial resolutions, which are very common in foreign bribery cases, numerous civil and common law jurisdictions provide for victims' compensation as a possibility, though generally this is subject to the same strict limits as in regular criminal proceedings.²⁰² Some countries also provide that mitigation of damages by the offender may be considered as a mitigating circumstance in relation to criminal liability.

Misappropriation of public funds

In Transparency International's legal definition of grand corruption, the misappropriation of public funds refers to their corrupt misuse for private benefit. This may take the form of outright large-scale embezzlement or of bribery schemes influencing expenditures and revenues in cases involving both public officials and private actors.

There is general recognition that the loss to the state from embezzlement is a legitimate claim of the state, whether in proceedings to win compensation or to establish title to diverted assets. State efforts to recover the financial harm it suffers resulting from bribery and money laundering is more contested, especially in foreign jurisdictions on the grounds that the state is co-responsible. This is an area of the law that needs clarification through international standards.

The catch with any of these claims is that the victim state is unlikely to bring them until successor governments have taken over, and this may only happen after a considerable lapse of time. In the meantime, senior officials and their associates hold on to the misappropriated assets.

States have had some success with compensation claims against their own public officials in domestic criminal and civil proceedings. In cases in France, such compensation has included moral damages for harm to the reputation of the state.²⁰³ In Uganda, a former accountant in the office of the prime

minister accused of embezzling US\$26.4 million from a donor-funded programme, was sentenced to 40 years in prison, ordered to pay US\$5.4 million in compensation to the state and had properties seized worth over US\$ million.²⁰⁴ Restitution payments in the millions have been recovered in El Salvador from senior officials alleged to have committed or facilitated corruption, according to a 2019 report.²⁰⁵ However, it is common in foreign bribery cases that there are no enforcement and remediation proceedings against the public officials implicated in enforcement and remediation proceedings against foreign companies.²⁰⁶

In Costa Rica, the multinational Alcatel-Lucent agreed in 2010 to pay US\$10 million to the agency *Instituto Costarricense de Electricidad* (ICE) to settle domestic criminal charges for alleged bribery.²⁰⁷ The company was accused of paying kickbacks to the former Costa Rican President Miguel Angel Rodriguez and other government officials in return for a 2001 contract to supply cellular telephone equipment worth US\$149 million.²⁰⁸ The former president was convicted and sentenced to five years imprisonment in 2011 reportedly as the main instigator of the crime of aggravated corruption. There was no report of him being ordered to pay back the US\$800,000 bribe he allegedly received or to pay damages but it was, however, reported that the state attorney had a pending claim of US\$52 million against all the defendant state officials in that case and this appears to have included claims for social damages.²⁰⁹ However, after several appeals, there was a second trial of the former president in which he was acquitted.²¹⁰ In February 2023, it was reported that the ICE had withdrawn a civil claim against the former president that had been pending since 2004.²¹¹

In the Lava Jato proceedings in Brazil against companies that paid bribes to win contracts with the state-owned oil company Petrobras, as of 2021 Brazilian prosecutors had reportedly recovered about US\$920 million in compensation.²¹² According to a report, Petrobras was seeking compensation composed of material damages, plus a fine equivalent to three times the material losses, as well as moral damages.²¹³

The losses to Petrobras far exceed the recoveries. The Brazilian Federal Police estimated that the total amount diverted from the company through corruption was about US\$8.6 billion and other estimates go as high as US\$17 billion.²¹⁴

Furthermore, Petrobras does not have only victim status in relation to the corruption schemes. In 2018

it agreed to pay US\$3 billion to US shareholders to settle a class action lawsuit relating to misrepresentations by the company.²¹⁵ The company also reached an FCPA settlement in 2018 with the Department of Justice and the Securities and Exchange Commission (SEC) involving disgorgement of US\$933 million, subject to offsets for payments in the class action settlement and a penalty of US\$853 million, most of it payable in Brazil. The SEC's order found that "senior Petrobras executives worked with Petrobras's largest contractors and suppliers to inflate the cost of Petrobras's infrastructure projects by billions of dollars. The companies executing those projects paid billions in kickbacks to the Petrobras executives, who shared the illegal payments with Brazilian politicians who helped them obtain their high-level positions at Petrobras."²¹⁶ The Department of Justice referred to Petrobras's "role in facilitating payments to politicians and political parties in Brazil".²¹⁷ Other investor claims are still pending.²¹⁸

It is unclear how much of the amount Petrobras has recovered is compensation from Petrobras executives and from politicians and how much is from bribe-paying companies. According to reports, Petrobras's director for engineering and services agreed to return US\$100 million stolen from the company and the company's former director of refining and supply confessed to receiving bribes and agreed to pay back US\$23 million.²¹⁹

In Malaysia, enforcement authorities have successfully obtained restitution, compensation and reparations from banks and auditors involved in the massive 1Malaysia Development Berhad (1MDB) corruption scheme. An estimated US\$4.5 billion was misappropriated from the Malaysian 1MDB development fund after it was established in 2009.²²⁰

Malaysian prosecutors filed criminal charges in 2018 against three Goldman Sachs entities relating to their role in three bond transactions that the bank had structured and arranged for 1MDB. The following year the Malaysian finance minister indicated that Malaysia was seeking US\$7.5 billion in compensation from Goldman Sachs. He was quoted as saying: "So we are looking at a sum, a reasonable sum that can compensate the agony and the trauma as well as the losses that we suffered. I think 7.5 billion US dollars is an extremely reasonable figure."²²¹ In 2020, Malaysian prosecutors settled with Goldman Sachs, dropping criminal charges in exchange for the firm's agreement to pay US\$2.5

billion and to guarantee the return of US\$1.4 billion in 1MDB assets seized around the world.²²²

Later in 2020, Goldman Sachs admitted in the US to conspiring to violate the FCPA “in connection with a scheme to pay over one billion dollars in bribes to high-ranking government officials in Malaysia and Abu Dhabi to obtain lucrative business for Goldman Sachs, underwriting approximately \$6.5 billion in three bond deals for [1MDB], for which the bank earned hundreds of millions in fees.”²²³ Under a settlement with the US Department of Justice, Goldman Sachs agreed to pay over US\$2.9 billion in penalties, fines and disgorgement as part of a coordinated resolution with enforcement authorities in the US, the UK, Singapore and elsewhere. According to the plea agreement, of the total amount, the disgorgement was US\$606 million and no order of restitution was made because no victim qualifying for restitution had been identified as of the time of the agreement.²²⁴

In a 1MDB-related civil case against the Malaysian bank AMMB Holdings, the Malaysian authorities reached a settlement in 2020 under which the government was compensated US\$700 million.²²⁵ One of the holding's banks, the AmBank, had been fined about US\$13 million by the Malaysian central bank in 2015 for lapses in relation to banking transactions. The bank had been in the news regarding its handling of bank accounts of the former prime minister Najib, including reports that between US\$700 million and US\$1 billion had flowed through those accounts.²²⁶

The Malaysian authorities have also published information about their civil compensation claims against KPMG partners and Deloitte PLT, which audited the 1MDB accounts.²²⁷ In 2021, KPMG partners agreed to pay US\$80 million to settle a claim of US\$5.6 billion in relation to the KPMG audits in 2010-2012.²²⁸ (KPMG was discharged as 1MDB's auditor at the end of 2013 after it refused to sign off on the fund's 2013 accounts.) Deloitte assumed the auditing function in 2013 and 2014 and also settled with the Malaysian government for US\$80 million over its role.²²⁹

Slovenian prosecutors have also obtained compensation for the state in a 2021 plea bargain with GE Steam Power Systems under which the company agreed to pay €23 million.²³⁰ The prosecutors alleged bribery by a company that GE acquired in relation to a large construction contract with a Slovenian state power company. Earlier in the year, in an International Chamber of Commerce (ICC) arbitration, the company entered into a related

settlement with the Slovenian state and the state power company under which it agreed to pay €261 million.²³¹

In foreign jurisdictions, states have had varied success with claims in civil and criminal proceedings.

Possibly the best-known grand corruption compensation claim against a high-level official in a foreign civil proceeding is the previously mentioned civil RICO case brought in the US by the Republic of the Philippines against former President Marcos and his wife.

As for state claims against companies in foreign civil proceedings, one example is Iraq's unsuccessful civil claim in a US federal court against a group of multinational companies filed in 2008 seeking US\$10 billion in damages. The complaint cited the civil RICO statute, the FCPA and the common law and alleged harm from illicit payments made by the defendant companies in connection with the UN Oil-for-Food programme. In dismissing Iraq's complaint, the federal district court invoked the doctrine of *in pari delicto* (equal fault), according to which a claimant with “unclean hands” is barred from seeking compensation in tort (i.e., for civil wrongs) or for breach of contract (see case description in the Annex).²³²

In another civil lawsuit brought in the US in 2008, Aluminium Bahrain (Alba), a company majority-owned by Bahrain, alleged that the US aluminium producer Alcoa had committed common law fraud and violations of the civil RICO statute and sought US\$1 billion in damages.²³³ Alba claimed that Alcoa had bribed its public officials to win contracts to supply aluminium and had overcharged for raw materials. In this case, the lawsuit was not dismissed but was stayed, pending an FCPA investigation by federal prosecutors that ended five years later with an Alcoa guilty plea, and penalties, forfeiture and disgorgement of profits totalling US\$384 million. Thereafter, Alba settled with Alcoa for US\$85 million.²³⁴

In a third case in the US, an FCPA settlement with Alcatel in 2011, neither the US Department of Justice nor the court supported a claim for compensation by the Costa Rican ICE, the agency whose officials had allegedly been bribed. The court considered that the ICE was a co-conspirator and thus did not qualify as a victim for compensation purposes. The ICE was also not recognised to have standing to appeal the court's decision in the matter.²³⁵ The Department of Justice conceded, however, that in principle a foreign state or state-owned entity could

be considered a victim in an FCPA case (see case description in Annex).²³⁶

A notable and exceptional example of compensation to a state in a foreign bribery criminal proceeding is the 2021 global settlement with Credit Suisse concerning its alleged involvement in a grand corruption scheme in Mozambique. In determining the bank's penalties, the US, UK and Switzerland took into account the bank's forgiveness of a part of Mozambique's debt which had been incurred as a result of the corruption.²³⁷ There is no public information available about how the amount was determined and whether there was any opportunity provided for Mozambique to present a claim in that case (see case description in the Annex).

These four US cases indicate a range of issues to be addressed in the handling of compensation claims in foreign jurisdictions relating to the handling of state claims and the methods for determining compensation in cases of high-level large-scale corruption. They indicate a need for clearer guidelines on state compensation in foreign bribery cases.

In France and Switzerland, *partie civile* status has been granted to foreign states in several cases but compensation has been at best modest. In 2007, in a French money laundering case against a former Nigerian energy minister, the court awarded Nigeria €150,000 as compensation for *prejudice morale* (non-pecuniary) damages.²³⁸

Possibly the biggest success to date for a state claim in a foreign jurisdiction was in the lawsuit of the Libyan Investment Authority (LIA) – Libya's sovereign wealth fund – in the English High Court seeking damages of US\$2.1 billion from the French bank, Société Générale.²³⁹ The claim related to the bank's alleged bribery to procure a series of derivatives trades that harmed Libya financially and was settled for €963 million (approximately US\$1 billion). According to LIA's lawyers, Société Générale also apologised to the LIA and placed on record "its regret about the lack of caution of some of its employees."²⁴⁰

More recently, the Mozambican state has filed civil claims in the UK against several of the entities and persons accused of participation in the "hidden debt" scheme, and the trial is due to begin in September. Mozambique seeks a declaration that it is not liable on the corrupt loans made to two state-owned entities and to holders of the Eurobonds issued. It also seeks damages for costs associated with the loans and for the drop in economic growth following disclosure of the scandal (see case

description in Annex). The trial will start in September 2023.

On the other hand, in the 2023 Glencore foreign bribery sentencing hearing in the UK, the court rejected the Nigerian government's request to present an argument for compensation. The case concerned, inter alia, allegations of Glencore bribery of officials of the Nigerian National Petroleum Corporation (NNPC) in relation to decisions about who could purchase oil from the NNPC.²⁴¹ Under the applicable procedural rules, only the prosecution and defence representatives could speak in the hearing and only the Serious Fraud Office was permitted to seek compensation, which it chose not to do on the grounds that (1) calculating compensation would be extremely complex; (2) it was not possible to identify entities that had suffered quantifiable loss; and (3) in complex cases like this one, compensation claims are more suitably dealt with in civil proceedings.²⁴²

More generally, in foreign jurisdictions, injured states may miss opportunities to submit claims due to a lack of information as well as procedural obstacles to participation of victims, especially when cases are resolved through non-trial resolutions or settlements that are negotiated in secrecy.²⁴³

The victim state may also face disqualification or counterclaims based on concepts of equal fault, contributory negligence, or failure to prevent the harm caused. Under the Council of Europe Civil Law Convention on Corruption, compensation may be reduced or disallowed if the plaintiff contributed to the damage or its aggravation. At the same time, foreign prosecutors and courts may see the "demand side" state as too heavily implicated to be compensated in grand corruption cases.

The difficulty with state claims against the payers of bribes in grand corruption cases is that, as illustrated by the Petrobras claims and liabilities, the state is partly responsible for the harm caused due to the control exercised over it by corrupt high-level officials. At the same time, the state is also a victim, because its assets have been misappropriated to the benefit of state officials and private actors that have paid bribes or laundered misappropriated funds.

If the state is not permitted to claim compensation, then public interest representatives of the sovereign people should be able to do so.

Human rights harms

Grand corruption causes not only pecuniary loss to the state, it also has a devastating impact on human rights, rendering the state unable to fulfil its duty to respect, protect and fulfil those rights and resulting in widespread human rights violations.²⁴⁴ These rights are recognised under international and regional human rights instruments, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²⁴⁵ The rights in question include the rights to life, to liberty, to freedom of movement, expression, assembly and association, to take part in the conduct of public affairs, to equal access to public service, to equality before the law, to health, education, housing and collective rights to self-determination, to freely dispose of natural resources, to development and to a healthy environment.

Thus, apart from state claims, the holders of the rights violated or adversely impacted are entitled to remedies individually and collectively against those whose acts have caused the injury. Yet there is thus far no international consensus on whether and how to remedy the resulting harm.

Moreover, there are numerous legal and procedural barriers to non-state victims, including narrow definitions of harm and victim; immunities of public officials, statutes of limitation for civil claims, and inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures).²⁴⁶

In a 2015 paper, the Human Rights Council Advisory Committee distinguished between three categories of negative impacts of corruption on human rights.²⁴⁷ First, corruption can negatively impact, directly or indirectly, on individual political, civil, economic, social and cultural rights. Second, it can have a collective negative impact on specific identifiable groups of individuals. Third, corruption can have a general negative impact on society at large. For example, corrupt practices divert funds away from development and reduce the resources available for the progressive realisation of economic, social and cultural rights. Corruption also undermines the realisation of democracy and the implementation of the rule of law.

In a similar vein, the Inter-American Commission on Human Rights has described four types of situation in which large-scale corruption impacts the enjoyment and realisation of economic, social, cultural and environmental rights (ESCER), through

diversion of funds intended to realise those rights as well as impairment of public services, with an impact on distinct groups to whom reparation should be made.²⁴⁸ One example given is where the state authorities are pressured by private interests to unduly trim the ability of the state to access sources of funding needed to realise ESCER. The Commission comments that “in this regard, it is vital that fiscal and tax policies be designed and implemented with a human rights perspective, espousing principles upholding participation, accountability, transparency, and access to information.”

Yet another classification of negative human rights impacts of corruption is advanced in a joint report prepared in 2009 by Transparency International and the now-defunct International Council on Human Rights Policy, describing three types of impacts.²⁴⁹ The first is a direct violation, where corruption is deliberately used as a means to violate rights. The second is an indirect violation, where corruption is a necessary condition and an essential factor in a chain of events that leads to the violation of a human right. The third is a remote violation, where corruption is one factor among others. Each of these imply different levels of remedy.

In addition, grand corruption by its nature is associated with a negative impact on the right of a people to self-determination and to development, and can also interfere with collective rights to free disposal of the people’s natural wealth and resources as well as collective rights to a clean, healthy and sustainable environment.²⁵⁰

Examples of the widespread negative impacts of grand corruption are detailed in Transparency International’s series of papers on grand corruption and the Sustainable Development Goals.²⁵¹ These include violations or abuses of rights to life, health, education, livelihood, environment and participation in political life.²⁵²

Grand corruption may have a negative impact on the human rights and welfare of an entire population. One legal scholar has written of a “collective compensation entitlement that differs from all other forms of criminal reparation since with regard to crimes such as corruption that culminate in extreme poverty and famine it is not possible to determine cause and harm on the basis of ordinary tort law [law of civil wrongs]. The violation is usually a continuous one, the effects of which are not immediately obvious and the proof of a link is difficult to establish for each and every dispersed victim.”²⁵³

In this respect, some legal systems recognise collective damages in corruption cases. Costa Rica has pioneered a civil action for social damages for criminal acts that affect collective or diffuse interests, that can be initiated under by the General Prosecutor's Office under Article 38 of the Criminal Procedure Code. Social damage as defined in Costa Rica can be summarised as the impairment of social welfare caused by corruption.²⁵⁴ In a similar vein, in Brazil, the law recognises "collective moral damages," as evidenced by recoveries in a number of *Lava Jato* proceedings. The Peruvian Criminal Procedure Code also recognises crimes that affect collective or diffuse interests.

While damages may be difficult to calculate in cases of widespread, diffuse and collective human rights harm, a range of options could be considered to establish reasonable and predictable results. For example, compensation could be determined using methods similar to those employed for calculating financial penalties in corruption cases based on sentencing guidelines such as those in the US and UK discussed earlier. Those guidelines establish rules for determining the gravity of an offence and associated penalties.²⁵⁵

Academics and civil society groups have presented other approaches for assessing collective damages. The method used in a report on the Mozambique "hidden debt" international corruption case focuses on the damage to the economy. In that case, Credit Suisse bankers and high-level officials allegedly conspired with others to obtain a Mozambique state guarantee for a US\$2 billion loan. The loan was ostensibly intended to finance the purchase of fishing vessels and military patrol boats, but which in fact provided no benefit to the people of Mozambique.²⁵⁶ Upon default, the consequential damage to the economy was enormous, affecting the entire population, especially the most vulnerable, and pushing two million people into poverty. Civil society groups estimated the financial loss to be at least US\$11 billion based on the fall in GDP.²⁵⁷ The result of the default was thus a negative impact on the realisation of economic, social and cultural rights of the people of Mozambique and on their right to development. The report also points out that if Mozambique is forced to service the illicit debt, there will be US\$4 billion more to pay.

A paper produced by the Transparency International chapter *Transparencia por Colombia* on reparation of victims of corruption examines concepts and methodologies for evaluation, taking into account experiences of the Colombian Inspectorate General's Office and the Vortex Foundation's

analysis of macro-corruption networks.²⁵⁸ The paper proposes a method for identifying categories of damage caused by corruption and determining appropriate remediation. In particular, it proposes calculating extra-pecuniary damages in a qualitative way, with ranges of economic penalties based on the assessed seriousness of the macro-social impacts.

In the paper, this approach was applied to corruption in the health sector in Colombia. According to the Health Superintendent, the embezzlement of funds occurs through sophisticated schemes, which include billing for phantom patients and non-existent services, improper payments and misuse of funds (Revista Semana, 2019). In addition, the Inspector General of the Nation raised the alarm in 2019 that healthcare funds were being used to finance campaigns and political parties, through seven "cartels" including the Haemophilia cartel, the Down syndrome cartel, the HIV/AIDS cartel, and the dental fund cartel, among others (Procuraduría General de la Nación. Boletín 507, 2019). *Transparencia por Colombia* formulated a comprehensive remediation response, covering individual, collective and social damages and ranging from financing research programmes to issuing letters of apology to the victims.

Another rather crude approach would be to apply a victims' surcharge in grand corruption cases to remedy the human rights harm caused. Victims' surcharges are regularly levied in Canada in criminal sentencing proceedings, including in corruption cases.²⁵⁹

In addition, confiscated proceeds of corruption could be applied to cover social damages, as discussed in the next section.

It is also sometimes possible to identify groups of victims that have suffered measurable, pecuniary harm caused directly or consequentially by grand corruption. A possible example is provided by the Niko Resources case. In 2003, the Bangladesh state-owned gas company BAPEX awarded the Canadian company Niko Resources a lucrative exploration agreement for two gas fields. Some commentators alleged that the company did not meet the qualification requirements and raised questions about the circumstances of the award.²⁶⁰ Shortly after starting the exploration work in 2005, a major explosion was set off in one of the gas fields being explored by Niko's contractors, with the resulting damage to a village and the surrounding environment. Niko offered a small amount of compensation to the villagers.

In 2011, in Canadian foreign bribery proceedings against Niko, the company pled guilty to bribing the Bangladesh energy minister after the explosion occurred, to obtain a supply agreement with a state-owned firm Petrobangla and also, to “ensure that Niko was dealt with fairly” in relation to claims for compensation for the blowouts, which was under consideration by the government.²⁶¹ The Canadian court made no compensation award either to the Bangladeshi state or to the villagers due to the prosecution’s inability “to prove beyond a reasonable doubt the exact quantum of damage” as well as the fact that the matter was the subject of pending litigation in Bangladesh.²⁶² However, this was a case in which the harm to the villagers, including their rights to health, housing and a safe environment could have been calculated and remedied.²⁶³ In fact, a victims’ surcharge of 30% of the penalty was levied in the case, but was transferred to a Canadian fund for local victims.

In a case brought by the Nigerian NGO SERAP at the Economic Community of West African States (ECOWAS) Court of Justice, the plaintiff argued that embezzlement of education funds by Nigerian public officials led to the deprivation of the right to education of Nigerian school-age children, a distinct group that suffered a relatively direct harm that is susceptible to valuation. SERAP submitted an Independent Corrupt Practices & Other Related Offences Commission (ICPC) report that with evidence from an investigation of corrupt practices in the management of national funds allocated for education. SERAP also contended that “this is not an isolated case but an illustration of high-level corruption and theft of funds meant for primary education in Nigeria.” The Court’s decision in 2010 found that the right to education in Nigeria was justiciable and that “embezzlement or theft of part of the funds allocated to the basic education sector will have a negative impact on education.”²⁶⁴ However, it considered that the alleged embezzlement and alleged state failure to take action against the corruption in question “does not amount to a denial of the right to education without more.”

With respect to the calculation of damages from loss of the right to education, it is interesting to note that in a 2021 case in the UK about the right to education, the court re-confirmed earlier case law recognising the justiciability of that right under the European Convention on Human Rights and established a basis for compensating the loss of that right by the plaintiffs before it.²⁶⁵

The FIFA bribery and money laundering cases brought by the US Department of Justice in US courts provide important examples of an approach to compensation of victims. In one case, the former president of Guatemala’s football association admitted to accepting and laundering thousands of dollars in bribes and in 2017, in addition to sentencing him to a prison term, a US court ordered him to pay US\$415,000 in restitution to the Guatemalan football association, which had been identified as a victim of his crimes.²⁶⁶

In 2021 and 2022, the US Department of Justice announced a process of remitting to victims hundreds of millions in funds forfeited in the FIFA cases, indicating that it would remit up to US\$201 million to a group of victims that had filed a joint petition for remission.²⁶⁷ This group consisted of FIFA itself; CONCACAF, the confederation responsible for football governance in North and Central America, among other regions; CONMEBOL, the confederation responsible for football governance in South America; and various constituent national football federations. This process raises interesting possibilities about compensation payments in other cases, whether to governmental or non-governmental victims’ representatives.

An important signal was also sent in the US in 2022, when an Assistant Attorney General in the Department of Justice’s Criminal Division promised more attention to victims, saying that “considering victims must be at the very center of our white-collar cases [...] Individuals harmed by white-collar crimes can be difficult to identify and their injuries difficult to calculate, but they should nonetheless be an important consideration for prosecutors and defense lawyers.”²⁶⁸ He added: “In some cases, prosecutors also may hold separate plea and sentencing hearings with corporations when executing a settlement agreement, giving individuals who may have been wronged time to come forward.”

Thus far, this new approach has materialised in foreign bribery cases in the US in the form of compensation to shareholders, competitors and investors, as in the OZ, Glencore and Credit Suisse cases.²⁶⁹

The range of potential harms from grand corruption, including human rights impacts, from the more particularised to the diffuse the harm has led one scholar to propose a set of different remedies:

- + compensation, a loss-based remedy applicable to identifiable victims who have suffered ascertainable loss;
- + reparations, which respond to the widespread and diffuse harms suffered by populations *en masse*;
- + restitution, as a gain-based form of remediation that strips ill-gotten gains from corrupt actors and awards them to victims.²⁷⁰

Compensation and reparations aside, other remedies should also be afforded to victims in grand corruption cases, ranging from injunctive relief with respect to the corrupt practices, to provision of community services and infrastructure, to public apologies and a commitment of non-repetition from corruption offenders.

Remedies for victims within their home jurisdiction are unlikely to be available as long as the high-level officials involved remain in office. The alternative option in such cases is to ensure that it is possible bring claims in foreign jurisdictions, preferably where proceeds of corruption have been laundered and where bribe-paying companies and service providers involved in laundering the proceeds of corruption are domiciled.

However, there are numerous obstacles to remedies for the victims of human rights harm from grand corruption. One of these is the lack of generalised recognition of the justiciability of some of the forms of collective victimhood and diffuse harm caused by grand corruption. The recognition of social, diffuse and moral damages in some countries shows that this is possible.

Other challenges to access to justice for human rights victims arise from a combination of legal, practical, and procedural obstacles, and high financial risks and costs. Experts have also emphasised a lack of specialised support, for example in the form of representative actions by civil society organisations, and a lack of effective collective remedy.²⁷¹

Standing for representatives of victims and public interest NGOs

“Standing” (*locus standi*) refers to whether complainants are legally entitled to bring a case to court. Standing for victims’ representatives to bring class, collective and representative actions is essential in grand corruption cases to ensure accountability and remedies, because grand corruption schemes cause harm to large groups

(mass harm) and to diffuse public interests.²⁷²

Individual victims or groups of victims often lack the capacity and resources to bring such claims. The representatives may be victims’ associations, public interest NGOs, or even individual representatives of the public interest or of a class of victims.

In some jurisdictions, non-state representatives of victims can bring compensation claims on their behalf without themselves experiencing direct injury. In Spain, all citizens can invoke the right to reparation in matters that involve the public interest and do not need to show direct, personal harm. The underlying concept could, in principle, be extended to include non-citizens’ claims. Other countries with liberal standing rules for citizens or civil society organisations include Argentina, Colombia, France and South Africa.²⁷³ Such rules have found a particular application in cases of environmental crime.

Several Latin American countries allow standing for NGOs to bring civil claims in cases of collective harm. For example, the Class Action Law in Brazil allows certain categories of associations to bring civil claims in the general public interest for damages to collective rights and public property.²⁷⁴ If a person who has suffered a specific damage brings a separate claim, these actions can be consolidated.

In Chile, both the *Consejo de Defensa del Estado*, an independent government agency, and NGOs, can seek damages for collective injuries caused by corruption.²⁷⁵ In Costa Rica a crime victim can initiate a compensatory civil action for damages against individuals and legal entities in criminal and civil proceedings.²⁷⁶ Associations, foundations and other entities whose main objective is social welfare are considered victims when collective interests are affected.²⁷⁷ They should thus be considered to have standing to bring claims for social damages.

Under the Peruvian Code of Criminal Procedure, in case of crimes that affect collective or diffuse interests, i.e., where an indeterminate number of people are injured or in cases of international crimes, an association may exercise the rights and powers of the persons directly harmed by the crime if the association’s purpose is directly linked to those interests.²⁷⁸

A useful framework is provided by a 2013 recommendation of the European Commission which calls for member states to have collective redress systems that follow certain basic principles for all areas of Union law conferring rights and obligations.²⁷⁹ The recommendation defines

collective redress as a legal mechanism to claim injunctive relief or compensation. With respect to compensation claims, it foresees these being made either (i) by a group of persons claiming to have been harmed in a mass harm situation or (ii) by an entity entitled to bring a representative action (compensatory collective redress).

The latter is brought in the name of the people harmed, but they are not parties to the proceedings. They may be brought by a representative entity, an ad hoc certified entity or a public authority. Legal standing of representative entities to bring a representative action should be based on clearly defined conditions of eligibility. The representative entity should be not-for-profit; its objectives should be related to the rights claimed to have been violated; and it should be required to prove it has the administrative and financial capacity to be able to represent the interest of the claimants in an appropriate manner.

Subsequently, a European Union Directive in 2014 established rules governing actions for damages for infringements of EU competition law. Some of its provisions have possible general application, including in corruption cases. These include rules on disclosure of evidence, quantification of harm, limitation periods, joint and several liability, and persons harmed indirectly.²⁸⁰

The European Union's Representative Actions Directive of 2020 also includes elements that could be used in corruption cases.²⁸¹ It allows for protection of consumer interests through representative actions by qualified entities. These can seek injunctive relief and redress measures.

Aside from the issue of compensation, in some countries public interest organisations have standing to challenge corruption in public contracting by seeking injunctive relief. In Bangladesh, in 2005, public interest groups, including the Bangladesh Environmental Lawyers Association, filed civil proceedings in the Supreme Court (High Court division) seeking the nullification of two government contracts with the Canadian company Niko Resources, discussed above, which had allegedly been obtained through bribery.²⁸² This led the court to order that the company's assets in Bangladesh be frozen and that the government refrain from making payments under a separate contract pending a determination of damages. In 2017, another petition was filed in the same case by the Consumers Association of Bangladesh and the court determined that the two contracts with Niko were illegal because they had been procured

through corruption. The court voided all production agreements and ordered the seizure of the company's assets in the country.²⁸³ (This became the subject of a long-running International Centre for Settlement of Investment Disputes [ICSID] arbitration.²⁸⁴)

Similarly, in India in 2012, a public interest litigation case was brought in the Supreme Court by the Centre for Public Interest Litigation and other organisations challenging the allocation of the 2G spectrum. The court declared the allocation an illegal act and an arbitrary exercise of the government's power and cancelled 122 telecom licences allocated to 11 companies by the former telecom minister in 2008. According to the court the regulator "wanted to favour some companies at the cost of the Public Exchequer" and "virtually gifted away important national asset[s]." Holding that the spectrum was a natural resource, the court said natural resources "are vested with the Government as a matter of trust in the name of the people of India and it is the solemn duty of the state to protect the national interest and natural resources must always be used in the interests of the country and not private interests." ²⁸⁵

Bringing victims cases in foreign jurisdictions will often be the only recourse in the absence of access to justice domestically, but there is a range of associated procedural and practical difficulties, including costs.²⁸⁶ Unfortunately, the UNCAC lacks a provision for non-state actors similar to Article 53(b) which requires states to permit its courts to order corruption offenders to pay compensation for damages to another state.

However, there are a few instances of representation of human rights victims in international corruption cases in jurisdictions foreign to the victims. In one such case in the US, a group of Iraqi Kurds filed a civil class action suit under the federal RICO statute seeking damages from the Australian Wheat Board on behalf of themselves and a class of Iraqi citizens who were the intended beneficiaries of the UN Oil-for-Food Programme.²⁸⁷ The court found that they did not fulfil standing requirements because they did not allege an injury that was "concrete and particularized, actual or imminent".²⁸⁸ Citing case law, the court reasoned that "even in a proceeding which he prosecutes for the benefit of the public the plaintiff must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens." The court also found that any injury to the funds of a state was not "concrete and particularized" for the plaintiffs because their

interest in such funds was an interest “shared with millions of others”, not an interest particular to the plaintiffs as individuals (see case description in Annex).

In contrast to the procedural obstacle to claims in the Iraq case, as noted in the previous section, *partie civile* status has been granted in Belgium to a group of Congolese citizens in the Semlex case and as been granted in France and Luxembourg to the Collective of Victims of Fraudulent and Criminal Practices in Lebanon with respect to that association’s complaint against the now-former Governor of the Bank of Lebanon. It remains to be seen what damages will be awarded in those cases.

Victims’ ombudsperson

In cases of state inaction or ineligibility to make claims and where there have been widespread human rights violations, there may not always be groups in the origin or destination states willing or able to take on a representative role, and victims may not be aware of foreign criminal proceedings or of the possibility of bringing claims abroad. Victims’ representatives may also face practical obstacles to acting in foreign jurisdictions, and there may be multiple victims’ groups seeking to represent the victim population.

For these reasons, procedures should be established for states to appoint an independent ombudsperson in international corruption cases to represent the interests of victims of the diversion of state assets, including foreign victims. The ombudsperson should have the task of ensuring that victims’ interests are represented, and could play a role in choosing between, or consolidating, eligible victims’ representatives. In some cases, it may be necessary to coordinate claims across jurisdictions. This is particularly important in the context of non-trial resolutions or settlements, which, as noted, are often negotiated and concluded in secrecy in foreign bribery and money laundering cases.

In the United States, in March 2022, the US Department of Justice’s criminal division announced that it was “appointing a victim coordinator [...] and is reviewing the tools its litigating units could use to support victims. Companies also will be expected to more fully address the harm to victims as part of presentations their lawyers make to prosecutors when trying to resolve a criminal investigation.”²⁸⁹

Arrangements for transparent and accountable use of awards

Awards of damages to state or non-state victims’ representatives in grand corruption cases necessarily require transparency and accountability standards for the use of those funds, given that grand corruption is at the root of the harm. The fact that a state seeks compensation, does not rule out this need.

There are emerging guidelines for transparency and accountability in the return of assets to be used for the benefit of victim populations and to redress the harm done to them. Such standards include the 2017 Global Forum on Asset Recovery (GFAR) Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases.²⁹⁰ These should also apply with respect to successful compensation claims in foreign jurisdictions in grand corruption cases made by state or non-state victims.

MONEY LAUNDERING AND ASSET RECOVERY PROCEEDINGS

The proceeds of grand corruption are frequently laundered across borders, usually disguised through complex business arrangements and transactions. These proceeds consist of any property or any economic advantage derived from, or obtained from, the offence, including proceeds of embezzlement, bribery, money laundering or other offences.²⁹¹

Sanctioning the money laundering and recovering the assets is a crucial part of countering impunity (see UNCAC Articles 23 and 24). Recovery encompasses stages of tracing, freezing, seizing and confiscation of assets and in international cases this includes international cooperation efforts and cross-border return of assets (see UNCAC Articles 23 and 24 and chapter V). Given the complexity of this field, this section will touch on just a few issues relating to legal and regulatory frameworks in destination jurisdictions rather making a complete survey of legal and operational issues.

However, where high-level officials and others involved in grand corruption hold power, enforcement authorities in their countries are unlikely to initiate or assist enforcement proceedings and asset recovery efforts. Holding them to account depends on action by enforcement authorities, public interest groups and others in

foreign jurisdictions, especially in jurisdictions where the proceeds have been laundered.²⁹²

Several resolutions of the UNCAC Conference of States Parties have noted “the particular challenges posed in recovering the proceeds of corruption in cases involving individuals who are or have been entrusted with prominent public functions, as well as their family members and close associates”.²⁹³

One of the key challenges identified by FATF in investigating (and recovering) laundered corruption proceeds, consists in determining when PEPs are the beneficial owners of corporate vehicles.²⁹⁴ These are commonly used for concealing laundered proceeds of crime.²⁹⁵ For enforcement authorities, lack of speedy access to this information can present a major obstacle to investigations.²⁹⁶ Availability of up-to-date bank records is also an important part of tracing assets.

Other issues include the need for speedy freezing; difficulties in identifying corruption proceeds; and obstacles to proving the predicate offence, where this is required. In addition, legal frameworks may make it difficult to hold financial institutions and DNFBPs to account where they have enabled laundering and often do not address confiscation or disgorgement of the illicit profits of companies involved in bribery of public official or of those enabling the laundering of illicit flows.

UNCAC first cycle reviews also found that, in a considerable number of countries, value-based confiscation is not provided for, or only in relation to particular offences. A UNODC report states: “As a consequence, if the exact property in question has been spent or cannot be traced, there is no immediate redress available.”²⁹⁷ This problem arises despite the language of Article 31(1) which requires each state party to take necessary measures “to the greatest extent possible within its domestic legal system” to enable confiscation of proceeds of crime from Convention offences or property the value of which corresponds to the proceeds.²⁹⁸ UNTOC Article 12(1) contains similar language.

A joint Stolen Asset Recovery Initiative (StAR)/OECD report in 2014 recommended that OECD member states develop asset recovery laws and regulations to accomplish rapid freezing of assets including in the absence of a mutual legal assistance (MLA) request; confiscate assets in the absence of a conviction; permit direct enforcement of foreign criminal or non-conviction-based confiscation orders and international cooperation on these cases; require service providers to collect beneficial ownership information and allow access to it; take

other steps to overcome barriers to asset recovery such as laws introducing presumptions, unexplained wealth or illicit enrichment provisions, extended confiscation and confiscation of equivalent value.²⁹⁹

Implementation of these and other recommendations would facilitate detection and accountability of high-level public officials involved in grand corruption, as well as of companies, financial institutions and individuals participating in grand corruption schemes. A number of approaches are discussed below.

Customer due diligence and record-keeping

Customer identification information, record-keeping and reporting of suspicious transactions by financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) can make a major contribution to the detection and investigation of grand corruption-related money laundering.

UNCAC Article 14 and FATF Recommendations call for states to have an anti-money laundering regime that imposes obligations in those areas on financial institutions and DNFBPs. UNCAC Article 52 spells out that financial institutions should also be required to effectively carry out enhanced scrutiny of accounts held by persons in prominent public functions and should determine the beneficial owners of high-value accounts. FATF Recommendations 12 and 22 contains requirements for financial institutions and DNFBPs to conduct enhanced due diligence for PEPs.

Since corrupt PEPs, their associates and other partners in grand corruption schemes usually use corporate vehicles to obscure their ownership of criminal assets, detection by financial institutions and DNFBPs calls for scrutiny of both PEP accounts and of the accounts of corporate entities, especially high-value accounts, including knowledge of the beneficial owners.³⁰⁰

However, in 2011, FATF found in its study of 32 grand corruption matters that “[c]ase after case shows how financial institutions have failed to follow AML procedures – even where those procedures called for only an ordinary risk-based approach – and have thus given corrupt PEPs continued and unabated access to the global financial system.”³⁰¹

While there may have been improvements since 2011, there are still abundant signs that banks are not taking their due diligence obligations seriously.

By way of example, the Monetary Authority of Singapore (MAS) announced in June 2023 that it had imposed a penalty on Citibank Singapore for breaches relating to two corporate accounts. MAS found that the bank had “failed to adequately understand the control structure of the customers and correctly identify the customers’ beneficial owner (BO), despite having information which suggested that the control structure and BOs declared by the customers were incorrect. Citibank also failed to inquire into unusually large transactions that had significantly exceeded one customer’s past transaction amounts and that had no apparent economic purpose. This included an outflow to a party allegedly involved in fraud.”³⁰² The MAS made similar findings concerning two other banks and although it considered the breaches were serious, it did not find wilful misconduct by any staff of the financial institutions.

More generally, in 2022 the UK’s Financial Conduct Authority (FCA) found that many mainstream banks and smaller banks are failing to carry out adequate customer due diligence and know-your-customer checks, as evidenced by a spate of fines.³⁰³ The FCA referred to use of outdated, incomplete and manual onboarding processes.

The cases discussed in the next sub-section illustrate how lack of due diligence makes possible the laundering of proceeds of grand corruption.

Even where customer identification information is collected, investigations of grand corruption offences are often stymied by the fact that records of financial transactions of relevant actors are frequently disposed of after a relatively short period of time.³⁰⁴ In many countries, these records are only retained for five years after the relationship with the client ends, in line with FATF Recommendation 10, shorter than needed for many international investigations. Moreover, in some countries, the timeline is a fixed number of years from the date of the last transaction, which may be even more problematic.

This means that efforts to reduce impunity for grand corruption must include a requirement for banks to hold for a much longer period of time the records of clients and transactions considered a high risk. The retention period should start after the relationship with the client ends.

Presumption of money laundering and liability for failure to prevent

To overcome obstacles to prosecuting money laundering in complex grand corruption cases, there are two notable emerging approaches.

In France, a rebuttable presumption of money laundering was introduced into the French Criminal Code in 2013. This applies when the material, legal, or financial conditions of an investment, concealment or conversion operation have no other justification than to conceal the origin or the beneficial owner of the property or income discovered.³⁰⁵ This has been described as a presumption of the illicit origin of the funds.³⁰⁶

With this presumption, the burden of proof with respect to money laundering no longer lies on the prosecution but on the defence and it is unnecessary for the prosecution to identify the initial offence that gave rise to the money laundering operation. The legality of this presumption was confirmed by the French Judicial Supreme Court (*Cour de Cassation*) in 2019³⁰⁷ and it has been used in the cases brought against Teodoro Obiang and Rifaat Al-Assad regarding ill-gotten assets.³⁰⁸

The French law is in line with the spirit of UNCAC Article 31(8) and UNTOC Article 12(7) which provide with respect to confiscation that states “may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation” if this is consistent with domestic legal principles. FATF Recommendation 4 also refers to measures that require an offender to demonstrate the lawful origin of the property, to the extent consistent with the principles of domestic law. A similar provision, but limited to serious offences, can be found in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.³⁰⁹ A number of country approaches build on these articles. There are risks, however, in countries lacking strong rule of law.³¹⁰

In principle, this presumption could also be applied to financial institutions and DFNBPs if they make arrangements for clients that appear to have no other purpose than concealment of the origin of funds or their beneficial owner. This would relieve enforcement authorities of the difficult task of proving intent on the part of employees or negligence on the part of the financial institution in

connection with a failure to comply with anti-money laundering regulations.³¹¹

Another approach is to hold financial institutions and their senior management criminally or administratively liable for failure to prevent money laundering. In early July 2023, the House of Lords voted in favour of an amendment to the Economic Crime and Corporate Transparency Bill to add money laundering to the list of proposed new 'failure to prevent' offences, which also includes fraud and false accounting.³¹² The legislation would remove the requirement to prove criminal intent on behalf of the corporate organisation, provided the criminal offence is committed for its benefit, or to benefit another person to whom services are provided on its behalf.³¹³ In its defence, a corporate entity could prove that it had adequate controls and measures in place to prevent the offence.

This would address an issue raised in a 2022 Eurojust report, citing a conclusion reached by law enforcement practitioners that introducing criminal liability for violation of due diligence requirements would help create incentives for compliance.³¹⁴ In practice, in many financial centres, the consequence for a financial institution of due diligence failures is an administrative penalty, often small, imposed by a financial oversight body.

Holding financial institutions and DNFBPs criminally liable for failure to meet due diligence obligations is in fact already possible under existing legislation in some countries in egregious cases.

For example, in 2018, the Netherlands Public Prosecution Service (NPPS) reached a €778 million settlement with ING Group NV, after finding that bribe payments were laundered through the bank. In 2021 the NPPS reached a settlement with ABN AMRO, imposing a €480 million (US\$575 million) fine to resolve money laundering charges. The 2021 case related to tens of millions transferred through the bank's accounts between 2010 and 2017 by two Dutch companies suspected of being involved in a major international money laundering case.³¹⁵

In a US FIFA-related criminal proceeding, the Swiss bank Bank Julius Baer (BJB) admitted in 2021 to conspiring to launder over US\$36 million in bribes through the US to football officials in FIFA and other football federations and agreed to pay US\$79 million in penalties. The US Attorney stated: "BJB and its employees facilitated bribes and its compliance department turned a blind eye to glaring red flags of money laundering... As today's resolution makes clear, financial institutions that

become complicit in their clients' efforts to launder illicit funds face significant penalties."³¹⁶

Also in 2021, in Switzerland, the now-defunct Falcon Private Bank became the first Swiss bank to be convicted of money laundering and was ordered to pay a fine of US\$3.8 million and damages of almost US\$7 million.³¹⁷ This was based on accusations that it failed to set up necessary controls and helped one of its former directors to embezzle from Malaysia's sovereign wealth fund 1MDB. The conviction followed a 2016 disgorgement order imposed on the bank by the Swiss supervisory authority FINMA on the grounds that the bank "has seriously breached money laundering regulations by failing to carry out adequate background checks" into transactions and business relationships associated with the Malaysian sovereign wealth fund 1MDB.³¹⁸ The 2021 conviction was overturned on appeal in July 2023, although according to reports the appeals court found that there had been "criminally relevant disorganisation" at the bank.³¹⁹

Another Swiss bank, Credit Suisse, was convicted in 2022 by the Swiss federal criminal court of failing to prevent money laundering by a Bulgarian cocaine trafficking gang.³²⁰ The court found "deficiencies in the bank... with regard to the management of client relations. These deficiencies enabled the withdrawal of the criminal organisation's assets."³²¹

Freezing and confiscation measures

A range of measures for freezing and confiscation have been introduced by states to make the recovery of assets easier or should be considered. Some of the measures especially relevant for grand corruption cases are highlighted below.

To address the need for speedy action to freeze assets in the absence of a mutual legal assistance request, Switzerland introduced a law in 2015 that allows for proactive, preventive freezing of foreign PEP assets prior to court proceedings where there are reasons to suspect that the assets are proceeds of foreign corruption, applying a balance of probabilities or similar standard.³²² Under the law, there is a presumption that assets are of illicit origin if "a. the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person; b. the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office".³²³ A court can order a proactive freeze for the

purposes of confiscation, for a period of ten years if certain conditions are met.

With some similarities, the United Kingdom's two-part process for Unexplained Wealth Orders (UWOs), introduced in 2017, allows authorities to initiate a freeze and to eventually confiscate assets in cases where the owner's reported income would not be enough to afford those assets or there are reasonable grounds for suspecting that the property has been obtained through unlawful conduct.³²⁴ Australia has also introduced UWOs. Both there and in the UK, the tool has only been used sparingly to date.

Under the Swiss Criminal Code, there is a further statutory presumption that any asset belonging to a person associated with or participating in a criminal organisation is at the disposal of that organisation and thus subject to confiscation.³²⁵ As discussed in a previous section, in a 2005 landmark decision, the Swiss Supreme Court determined that US\$508 million in funds held by associates of former Nigerian dictator Sani Abacha were proceeds of a criminal organisation that had as its object the embezzlement of funds from the Central Bank of Nigeria for private purposes, and to profit from corrupt transactions".³²⁶ The assets were confiscated and repatriated to Nigeria.

Apart from criminal confiscation, many countries have introduced non-conviction-based asset confiscation or forfeiture to overcome challenges in conviction-based confiscation.³²⁷ This type of confiscation, recommended by the OECD/StAR report, is a proceeding against the asset and not against a person and in many jurisdictions, especially common law jurisdictions, there is a lower burden of proof as to their illicit origin. It is an important tool to address grand corruption as it is available in situations where the offender is beyond the reach of criminal justice. This could occur due to immunities, an inability to extradite high-level officials, or because the accused has died or absconded.

Non-conviction-based confiscation brings other benefits, especially relevant for grand corruption cases. It is helpful in cases where those involved in corruption are "so powerful that a criminal investigation or prosecution is unrealistic or impossible".³²⁸ Further, non-conviction-based confiscation "can be directed at assets owned by people in positions of power within criminal organisations. if those assets have the hallmarks of ill-gotten gains".³²⁹

UNCAC Article 54 (1)(c) and FATF Recommendation 4 both encourage states to consider allowing non-conviction-based asset confiscation and, in the 2021 UNGASS Political Declaration, UN member states committed to using both conviction-based and non-conviction-based asset confiscation, in accordance with domestic law (paragraph 47).³³⁰

Two additional approaches recommended by OECD and StAR are the use of value-based and extended confiscation. With value-based confiscation a court imposes a confiscation order "corresponding to the value of the proceeds or instrumentalities of a crime, enforceable against any property of the individual."³³¹ Extended confiscation follows a criminal conviction and involves seizing property derived from criminal conduct, going beyond the direct proceeds of the crime for which a person was convicted and extending to property that the court determines was obtained through other unlawful conduct.

The foregoing measures and more are addressed in a draft EU Directive on asset recovery and confiscation recently approved by the EU Parliament and Council, which will add to the existing EU framework on the subject, once negotiations are completed.³³² It foresees temporary urgent freezing measures, confiscation of property of equivalent value, third party confiscation, extended confiscation, non-conviction-based confiscation, proceedings in absentia, confiscation of unexplained wealth and victims' compensation.³³³

Addressing grand corruption also requires attention to the less visible proceeds of corruption in the form of profits gained through bribery and through laundering the proceeds of corruption.

Among countries that authorise confiscation of the proceeds of bribery, only some include this as a mandatory penalty upon conviction.³³⁴ In non-trial resolutions or settlements in foreign bribery cases, some country frameworks do not provide for confiscation or disgorgement of profits illicitly earned by legal persons, and even where such provision is made, this is not always done.³³⁵ Moreover, where it is done these proceeds are generally not returned in whole or in part to the state or the people where the bribery occurred.

The OECD's 2021 Anti-Bribery Recommendation encourages proactive confiscation of the proceeds of foreign bribery.

There are not many examples of confiscation of the proceeds of corruption from financial institutions and others involved in international money

laundering cases, whether corruption-related or otherwise. This has, however, been done in several recent administrative procedures in Switzerland, where the supervisory authority FINMA ordered the disgorgement of profits by BSI, Coutts and the Falcon Bank in connection with transactions connected to the Malaysia 1MDB case.³³⁶ This is the only type of monetary sanction that FINMA can apply – it is not mandated to impose fines.

Swiss courts granted both Guinea and Tunisia the status of civil parties in prosecutions of defendants alleged to have laundered the proceeds of corrupt acts committed in the two countries.³³⁷

Return of confiscated corruption proceeds and use for victims

UNCAC Article 51 states that return of assets is a fundamental principle of the Convention, but the Article 57 obligation of a destination state to return confiscated assets depends on a request from the origin state that is backed up by a court judgement. Alternatively, under Article 53 the origin state can bring proceedings in another state's court for direct recovery of property via a civil action to establish title to corruption proceeds or for compensation of damages.

In many jurisdictions, state and non-state victims can in principle make compensation claims in relation to amounts confiscated.³³⁸ UNODC noted in a 2017 study that “[e]nsuring that the recovered proceeds of crime are applied to compensate individual victims and to support organizations and programs that cater for victims of crime is becoming an increasing focus of asset recovery practice. [...] More emphasis is being placed on using the proceeds of crime, particularly of corruption, to contribute to sustainable development.”³³⁹ UNODC also wrote that “several international instruments encourage States to prioritize the use of proceeds of crime to compensate victims of crime”.³⁴⁰ The area of asset recovery thus has an interplay with discussions of compensation and social damages in the previous section.

In fact, it is common for European Union jurisdictions to use confiscation mechanisms as a means to provide restitution to the victims of crime generally. Priority is often given to victims over the general treasury or any special confiscation fund. However, the rate of confiscation is low in criminal cases in the European Union.³⁴¹

Moreover, in international corruption cases, destination countries commonly transfer

confiscated proceeds into their national treasuries or share them with other jurisdictions that have cooperated in the criminal proceedings leading to confiscation.³⁴²

Under UNCAC Article 57, the return of confiscated embezzled assets to the country of origin is mandatory where the assets in question were confiscated based on a mutual legal assistance request from the origin country and where the decision to confiscate was based on a final decision rendered in said country. In all other cases, while return of assets is the guiding principle, the UNCAC does not oblige the holding country to return the assets to the origin state. In fact, under Article 57(3)(c), “[requested states] shall give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.”

UNTOC also provides support for compensation. Article 14 on disposal of confiscated proceeds of crime or property states that “[w]hen acting on the request made by another State Party in accordance with Article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.”

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Article 25(2) contains similar language about giving priority consideration to giving compensation to victims.

A 2021 law in France on inclusive development and combating global inequalities created a mechanism for the restitution of “ill-gotten” assets to the dispossessed populations. It provides for the assignment of revenue from the sale of assets confiscated in the context of “ill-gotten gains” by foreign leaders to finance cooperation and development actions for the benefit of the people in the countries concerned.³⁴³ This could equally be done using confiscated corruption proceeds in other international corruption cases, such as foreign bribery cases.

This should apply in case of non-trial resolutions. In this connection, the 2021 UNGASS Political Declaration includes a commitment that “[w]hen employing alternative legal mechanisms and non-

trial resolutions, including settlements, in corruption proceedings that have proceeds of crime for confiscation and return, we will strengthen our efforts to confiscate and return such assets in accordance with the Convention" (paragraph 50).³⁴⁴

In US foreign bribery settlements, disgorgement of profits to the SEC has been a common feature and the agency has collected hundreds of millions of dollars that went into the US Treasury. However, a US Supreme Court decision in 2020 in a case challenging a disgorgement order, has established that while the SEC can seek disgorgement, it should consist in net profits and, at least in some cases, it must be returned to victims.³⁴⁵

However, under a 2021 amendment to the US Victims of Crime Act, the near-empty Crime Victims Fund for US victims is to be replenished by depositing into it "any funds that would otherwise be deposited in the general fund of the Treasury collected pursuant to (A) a deferred prosecution agreement; or (B) a non-prosecution agreement."³⁴⁶ Most foreign bribery and other international corruption cases are resolved with such non-trial resolutions.

Under Italian law in case of conviction or plea bargain for the crime of foreign bribery, there is provision for confiscation to be ordered of the assets constituting the profit or an amount corresponding to the profit.³⁴⁷ This may be used towards compensation. The law also foresees a pecuniary reparation in an amount equivalent to the profit of the offence "in favour of the administration injured by the conduct of the public official, without prejudice to the right to compensation for damage."³⁴⁸

In the UK, disgorgement of profits may be ordered as part of foreign bribery settlements. However, these amounts are often retained by the UK. For example, in the Airbus case, a UK court approved a deferred prosecution agreement requiring the company to pay a total financial sanction of approaching one billion euros (€990,963,712 including costs) made up of disgorged profits of almost €586 million and a penalty of €398 million. These amounts, including the disgorged profits, were to be paid into the UK Consolidated Fund, rather than used for the benefit of the people harmed.

In grand corruption cases, destination states should deposit confiscated funds into an independent account in the national budget, with a view to the prompt use of the funds for victims' compensation and for the benefit of victim populations.

There is a longstanding model for social reuse of confiscated proceeds of corruption in organised crime cases, from which lessons could be drawn. The European Union refers to this in its 2014 directive on freezing and confiscation of the proceeds of crime, which states "Member States shall consider taking measures allowing confiscated property to be used for public interest or social purposes" (Article 10.3).³⁴⁹

According to one analyst, in the organised crime context "the rationale of social reuse of confiscated assets is that serious crimes affect local communities and society as a whole." He also notes that "there is a growing debate on the urgent need to address the damages incurred to local communities per se, in terms of lack of public security, loss of economic opportunities and blocks to social development." Consequently, compensation should not be limited to "formal" victims but also granted to the community involved.³⁵⁰ Experience to date with social reuse takes a variety of forms, direct and indirect.³⁵¹

Asset returns should follow the guidance in the Global Forum on Asset Recovery Principles for Disposition and Transfer of Stolen Assets in Corruption Cases, mentioned in the previous section.³⁵² This outlines a range of principles to follow in making such transfers, including transparency, accountability, civil society participation and "[w]here possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct". Civil society groups have elaborated on these principles in the Civil Society Principles for Accountable Asset Return.³⁵³

In grand corruption cases, where a foreign confiscation takes place without the origin state having initiated any credible criminal, civil or administrative proceedings or made any mutual legal assistance request, the amounts confiscated should only be transferred to them if they make specific commitments to transparent and accountable asset return. This should include support and oversight from an international or regional body, consultation with stakeholders, and a self-funding multi-stakeholder monitoring mechanism, including paid external auditors.

This is especially necessary, if the evidence gathered about grand corruption crimes reveals serious deficiencies in the country's public sector financial management, procurement, public integrity and/or anti-money laundering systems which are

inconsistent with the state's prevention obligations under UNCAC.

In recent years, there have been important initiatives in the area of asset return, including, among others, the GFAR Principles, UNCAC Resolution 8/9 on Strengthening Asset Recovery to Support the 2030 Agenda for Sustainable Development,³⁵⁴ or the Common African Position on Asset Recovery (CAPAR) recently adopted by African Union members.³⁵⁵

All these initiatives call for application of the principles of transparency and accountability in the return and disposition of recovered assets as well as references to Sustainable Development Goals and use for the benefit of victim populations when it comes to the ultimate disposal of returned property. This is especially important in grand corruption cases.

UNCAC second cycle reviews of chapter V on asset recovery have included recommendations to this effect. For example, Italy's second cycle review calls for the country to consider procedures for asset disposal, designed to foster transparency and accountability in asset disposition, and to prevent the re-corrupting of assets transferred (Article 51).³⁵⁶

INTERNATIONAL AGREEMENT & STRUCTURES

While national measures in some countries could help reduce impunity for grand corruption, its complex, networked, cross-border nature means that action to prevent and combat it will be more effective within a comprehensive and coordinated international approach with agreed-upon national measures and international mechanisms.

An international agreement, whether it be a protocol to the UNCAC or a stand-alone instrument, should establish a definition of grand corruption together with agreed-upon special prevention and enforcement measures at the national level along the lines of those discussed in the previous section.

This agreement should also create international bodies and mechanisms to support enforcement against grand corruption.

INTERNATIONAL AGREEMENT ON GRAND CORRUPTION

Some countries may only be willing to introduce the criminalisation and enforcement measures described in the previous section if there is a treaty basis. Other countries may not prioritise implementing such measures without a treaty. Moreover, some of the enforcement measures will work most effectively if introduced on the basis of an international agreement. There would be important benefits from an international agreement against grand corruption, whether a protocol to the UNCAC or a stand-alone instrument.

Such an agreement should introduce a common definition of grand corruption, recognise it as serious, organised and aggravated, and encourage use in grand corruption cases of the special procedural measures discussed in the previous section. This should include an articulation of the

“unable or unwilling” standard in grand corruption cases. It should also address other obstacles to the pursuit of grand corruption cases, such as dual or double criminality requirements that can block mutual legal assistance and extradition requests.³⁵⁷ It should also establish a basis for international cooperation in civil and administrative proceedings, including non-conviction-based confiscation proceedings; outline the circumstances when an international *ne bis in idem* principle applies; and provide for the exchange of data for the verification of asset declarations.

An international agreement could also establish measures for prevention and detection, such as requirements for the establishment of central public registers of the beneficial ownership of legal structures and publicly accessible registers of asset declarations by high-level officials.

INTERNATIONAL ENFORCEMENT MECHANISMS

Since grand corruption generally involves criminal activity in multiple jurisdictions and requires complex investigative and asset tracing processes, international cooperation is essential in such cases.

UNCAC includes a chapter on international cooperation which requires states to cooperate in criminal matters and, where appropriate, to also consider assisting one another in investigations and corruption-related civil and administrative proceedings.

Yet, as frequently observed, international cooperation in enforcement faces numerous obstacles, including differences in legal systems, capacity, resources, prioritisation of assistance, and willingness to cooperate. The need for a high level of

trust between law enforcement agencies in sensitive cross-border cases may also hinder cooperation.

This has led to the creation of a number of international bodies and mechanisms to support investigations and prosecutions of grand corruption, as well as proposals to expand on those and create stronger global bodies. Some proposals are highlighted in the annex to the United Nations 2020 report on addressing global corruption.³⁵⁸ Others have been proposed by the International Bar Association's Anti-Corruption Working Group and by a group of academics that have proposed an international asset recovery mechanism.³⁵⁹

Several international mechanisms and structures are discussed below that could help improve accountability for grand corruption. These range from an international enforcement body to in-country enforcement support to procedures for creating international tribunals in national or regional courts to an international appeals or arbitration body.

International enforcement body

Building on existing institutions and proposals, we suggest elements of the mandate of an international enforcement body, which could be established in stages, subject to political and practical feasibility. The purpose of this body would be to strengthen international information-sharing, cooperation and coordination of proceedings in different jurisdictions.³⁶⁰ A key part of its role would be to help strengthen national justice systems to improve their performance in grand corruption cases and other cases of cross-border corruption.³⁶¹

i. Active facilitation of information-sharing and capacity-building

An international body could assist with proactive and systematic information-sharing among enforcement authorities and with coordinated capacity-building support to enforcement authorities requiring it.

The need for greater information-sharing between national enforcement agencies and courts handling grand corruption-related proceedings has already been recognised through the creation of numerous networks and bodies. These include the recently established Global Operational Network of Anti-Corruption Law Enforcement Authorities as well as the Interpol network, the Egmont Group, and the Camden Asset Recovery Interagency Network

(CARIN). There are also opportunities for exchange alongside UNCAC international cooperation meetings and meetings of the OECD Working Group on Bribery. While these networks have helped in some cases, they do not appear to have made a major dent in tackling the impunity of grand corruption.

The work of a grand corruption body should go beyond that of existing networks for the exchange of information.³⁶² Its mandate should include actively collecting, compiling and disseminating information for enforcement authorities on ongoing and concluded enforcement proceedings, based on information publicly available or voluntarily provided by enforcement bodies.

When requested, the body could help facilitate discussions among national authorities about where charges should be filed and adjudicated to avoid duplication of efforts and competing proceedings. UNCAC Article 42(5) foresees consultation and coordination, in certain cases as appropriate, if state authorities exercise jurisdiction and learn that other states are conducting an investigation, prosecution or judicial proceedings with respect to the same conduct.³⁶³ There are often real challenges in this area of information exchange.³⁶⁴

The enforcement body could also be tasked with coordinating and building capacity in countries willing to act but lacking know-how and resources. Some of the training and capacity-building needed at the national level is provided by a range of international, regional and national agencies.³⁶⁵ An international body could enhance this patchwork of efforts by coordinating and expanding on the offer upon countries' request. The aim would be to help ensure targeted assistance in specific grand corruption proceedings as well as more long-term capacity-building.

This could include, where appropriate, capacity-building and advisory support for the creation of joint investigation teams or to assist communications between enforcement authorities in the case of parallel investigations. These joint bodies, foreseen under UNCAC Article 49 and UNTOC Article 19, can help speed up international cooperation and enable a pooling of resources. The countries that have established these teams them have deemed them helpful, but the evidence suggests that they are seldom used.³⁶⁶

The stated objectives of the StAR initiative, jointly run by UNODC and the World Bank, provides a nascent model for this area of work. It aims to play a role in improving international cooperation efforts

and investigations related to asset recovery cases; increasing capacity of practitioners to conduct asset recovery investigations; and strengthening requesting countries' legal and coordination mechanisms together with their operational capacity to recover stolen assets.³⁶⁷ StAR also compiles data on asset recovery and has set up a database of asset recovery cases.³⁶⁸

ii. Operational, legal and financial support to investigations

The same body should be mandated not only to facilitate international cooperation but to coordinate and provide operational, legal and financial support to enforcement authorities investigating and prosecuting grand corruption cases.

An example of such a body, albeit among a limited number of countries, is Eurojust (the European Union Agency for Criminal Justice Cooperation). This agency coordinates the work of national authorities from EU member states, as well as third states, in investigating and prosecuting serious transnational crime. Their work includes providing operational, legal and financial support for the formation and functioning of joint investigation teams. Each participating EU Member State second a National Member to Eurojust, and these collectively form the College of Eurojust, which is responsible for the agency's operational work. The College, in turn, is supported by the Eurojust Administration, which includes, among others, case analysts, legal advisors and data experts.³⁶⁹

Another model is the International Anti-Corruption Coordination Centre (IACCC), discussed in a previous section, which was established in 2017 to provide operational assistance to enforcement authorities, and focuses on the investigation of grand corruption cases. It brings together seconded members of specialist enforcement agencies "to improve fast-time intelligence sharing, assist countries that have suffered grand corruption and help bring corrupt elites to justice."³⁷⁰ It prepares intelligence packages for countries requesting assistance, provides capacity-building and mentoring for partners and participants specific to grand corruption, and facilitates initial informal conversations that help to speed up investigations.³⁷¹ It currently has a membership of six countries, with nine additional associate members from smaller financial centres. Non-participating countries may refer cases of grand corruption to the IACCC.

Grand corruption, inter alia, is also targeted by the Interpol Financial Crime and Anti-Corruption Coordination Centre (IFCACC) created in 2022. It aims to provide analytical, investigative and operational support as well as capacity-building for the 195 Interpol member countries. Its anti-corruption efforts aim to address areas including the corruption of public officials and grand corruption (involving senior political figures). Interpol states that "IFCACC will strengthen our member countries' ability to combat grand corruption both nationally and internationally."³⁷²

The United Nations' 2020 report on addressing global corruption highlights in its annex a proposal for a mechanism to support national prosecutions in complex corruption cases at the request of member states. According to the United Nations, the mechanism "could be given a mandate to collect, consolidate, preserve and analyse evidence of crimes of corruption." The description references the IACCC as a possible model.

The proposed international enforcement body should work with other relevant international and regional mechanisms to coordinate and provide the operational, legal and financial support to national authorities investigating and prosecuting grand corruption.

iii. Investigations and other proceedings

The same international body should also, in due course, be mandated to play a role itself in investigating and preparing cases, building on experience from investigative work by the United Nations, the World Bank and other international and regional organisations.³⁷³ It could additionally be empowered, subject to agreement, to prosecute cases in national courts of participating countries. Such investigative and prosecutorial mandates, if granted, should be limited to cases where assistance is requested by a state or where no state authorities are willing or able to pursue enforcement proceedings.

A model for such a mandate is the EU's European Public Prosecutor's Office (EPPO), which started work in 2021. This is an EU "independent public prosecution office [...] responsible for investigating, prosecuting and bringing to judgment crimes against the financial interests of the EU".³⁷⁴ A central office is mandated to supervise investigations and prosecutions carried out by delegated national-level prosecutors in national jurisdictions, operating with

complete independence from their national authorities.³⁷⁵

The International Bar Association's Anti-Corruption Subcommittee (now a Working Group) has proposed a specialised international anti-corruption and asset recovery mechanism consisting of an independent entity with a subsidiary responsibility for investigating corruption allegations and enforcing corruption laws in cases where domestic structures fail to do so or have collapsed.³⁷⁶ According to the proposal, sanctions could be criminal and/or civil, including non-conviction-based forfeiture orders that would be internationally enforceable.

The framework could additionally include arrangements for states to request the support of an in-country international body along the lines of the International Commission against Impunity in Guatemala (CICIG), established in 2007 by an agreement between the United Nations and Guatemala.³⁷⁷ It was charged with investigating and prosecuting serious crime in Guatemala.³⁷⁸ For 12 years, the CICIG supported corruption investigations that resulted in the indictment and prosecution of prominent government officials and judges. Its mandate was allowed to expire in 2019 by the country's president who was himself under investigation.³⁷⁹

A similar, shorter-lived commission, MACCIH, was established in Honduras under an agreement with the Organization of American states and provided in-country technical support to investigations and prosecutions of corruption during its rocky mission from 2016 to 20120.³⁸⁰

Along these lines, the 2020 UN report on addressing global corruption describes a proposal to establish country-based or regional anti-corruption commissions "to conduct investigations and support prosecutions of complex corruption cases in courts of competent jurisdiction." The commissions could consist of national investigators and prosecutors, international experts or a combination.

Procedures for international tribunals in national or regional courts

Countries that are able to exercise jurisdiction in grand corruption cases may be willing to do so but lack the capacity. In the case of the exercise of universal jurisdiction, countries may be reluctant due to the expense of taking on those cases and the potential harm to their relations with other states.

In the case of capacity challenges, the solution may be to make arrangements for international financial and technical assistance to a country's court system, upon request. Where the issue is reluctance to exercise universal jurisdiction, this may be addressed by arrangements for international recognition that the courts in question are serving the interests of the international community.

Going a step further, procedures can be established for creating international or regional proceedings in a national court system. Examples of a role for international arrangements in national court proceedings are the Extraordinary Chambers in the Courts of Cambodia established with the assistance of the United Nations³⁸¹ and the Extraordinary African Chambers established within the courts of Senegal for the Habré case under the auspices of the African Union³⁸² (see the Habré case description in the Annex). Both arrangements involved special national legislation, an agreement with an international institution, and a hybrid court with a combination of national and international prosecutors and judges, including investigating judges. These procedures could also provide for technical and financial assistance. The mixed or hybrid tribunals in Sierra Leone, Kosovo, Lebanon and East Timor also provide examples from which lessons can be learned.³⁸³

Another model, aimed at addressing lack of capacity, is the Special Criminal Court of the Central African Republic (CAR) which became operational in 2021. This court was established by national law in 2015 and is not a hybrid court but a special domestic national tribunal with participation of international actors.³⁸⁴ The court is established within the judiciary of the CAR and made up of national and international magistrates, with a mandate to investigate, prosecute and judge serious human rights violations and grave breaches of international criminal and humanitarian law committed on Central African soil since 1 January 2003. It includes two international judges, an international special prosecutor and two assistant special prosecutors.³⁸⁵

Prior to the creation of the CAR Special Criminal Court, the President of the Central African Republic's referred the international crimes committed in the CAR to the International Criminal Court in 2014. The reason for this was lack of capacity of criminal justice institutions in CAR to effectively investigate and prosecute the perpetrators of international crimes in CAR. The creation of the new special court increases that capacity and reportedly will aim at close collaboration with the ICC.

These types of courts offer alternatives to consider compared with proposals that have been made for placing grand corruption under the jurisdiction of the International Criminal Court or establishing an International Anti-Corruption Court with jurisdiction over grand corruption cases in which individual countries are unable or unwilling to prosecute.

A further option would be to establish criminal jurisdiction in regional human rights courts. This is provided for in the Malabo Protocol, adopted by the African Union in 2014, which when it enters into force will replace the African Court on Human and People's Rights with the African Court of Justice and People's Rights, with jurisdiction over criminal and human rights cases.³⁸⁶ The Protocol requires 15 ratifications to enter into force and has thus far been signed by 15 but ratified by none.³⁸⁷ When it enters into force, it will have the power to try persons for crimes including corruption and money laundering. However, no charges can be brought against a serving head of state or government, or other senior state officials based on their functions, during their tenure in office.

International grand corruption arbitration and appeals body

With multiple jurisdictions involved in legal proceedings in grand corruption cases, there may be disputes over procedural issues, such as the exercise of universal jurisdiction or issues relating to the return of assets. An international arbitration mechanism could help resolve such disputes.

In the asset recovery context, a mediation mechanism was proposed by the UN High-Level Panel on International Financial Accountability, Transparency and Integrity (FACTI) Panel in 2021 to assist countries in resolving difficulties related to international asset recovery and return.³⁸⁸ The FACTI Panel proposed that the mechanism be hosted by a multilateral institution and "act as a neutral third party to help the requesting and requested State solve any disputes or difficulties that may arise in the course of proceeding," enabling them to find consensus on how to move forward return of the confiscated assets, ensure that it is fairer and improve compensation to victims.

A mediation function was also part of the International Bar Association Anti-Corruption Working Group's proposal for a specialised international anti-corruption and asset recovery mechanism and the more recent and more

elaborated proposal by a group of academics for a transnational asset recovery mechanism.³⁸⁹

These various proposals for an asset recovery mediation mechanism are evidence of the slow pace and contentiousness that is frequently a feature of international asset recovery processes, especially those involving the return of proceeds of grand corruption. One of the challenges is that if implicated high-level officials and their networks are still in control of the state, there is a high risk that the returned assets will be re-corrupted. At the same time, there is a power imbalance between origin and holding states which means the holding states may be insufficiently motivated to make prompt arrangements for returns.³⁹⁰

Apart from asset recovery issues, a mediation mechanism could also serve to resolve other types of disputes related to enforcement against grand corruption.

UNCAC Article 66 already provides for an arbitration process for settling disputes between states parties about the interpretation or application of the Convention. Only 20 signatory states have registered reservations to this article.³⁹¹ If no arbitration can be organised within six months of a state party's request, any one of the states parties involved can make a request to the International Court of Justice to adjudicate the case.³⁹²

UNTOC Article 35 has a similar provision, which was invoked by Equatorial Guinea against France with respect to its non-recognition of immunities and its seizure of a building. After attempting arbitration, Equatorial Guinea took the case to the International Court of Justice, without success. More recently, as noted above, Equatorial Guinea has claimed that France has failed to meet its obligations under UNCAC's asset recovery chapter.³⁹³

There are thus far no written rules for the conduct of UNCAC Article 66 and UNTOC Article 35 arbitration processes and these should be developed, as a first step towards creation of a permanent UNCAC arbitration mechanism.³⁹⁴ These rules should provide for a mediation option, as suggested by experts, at least with respect to asset recovery processes. The rules should also provide for qualified public interest representatives to have an opportunity to make submissions both in arbitration processes and in appeals as well as to initiate arbitration processes.

Other international mechanisms

Challenges in asset recovery cases, including the power imbalance between requesting and requested states, long delays in recovery processes, and the failure of some origin states to seek the recovery and return of assets, together with the fact that holding states have themselves been insufficiently vigilant in preventing large-scale laundering within their jurisdiction, have led to proposals that confiscated funds should be placed in escrow accounts with regional and international institutions. This is especially suitable with respect to the proceeds of grand corruption.

The FACTI Panel in February 2021 proposed that escrow accounts, managed by regional development banks, should be used to manage frozen or seized assets until these can be legally returned. A similar proposal was mentioned favourably in the United Nations' 2020 report and elaborated on in the paper by a group of academics referenced above, who also suggest that such escrow accounts could potentially be used to hold disgorged profits from foreign bribery cases or even criminal fines.³⁹⁵

In grand corruption cases, the role of institutions holding such escrow accounts should include ensuring that the funds are used for the benefit of the harmed population, based on multi-stakeholder consultation processes. They should also ensure a high level of oversight for the use of returned assets.

A multilateral agreement could also establish other international mechanisms that would help to tackle grand corruption. For example, parties to the multilateral agreement could also commit to become parties to the existing International Treaty on Exchange of Data for the Verification of Asset Declarations, which is open to accession by any state or territory, or the parties could establish a new arrangement along these lines.³⁹⁶ Alternatively, a new agreement on such information could be established by multilateral agreement.

Going a step further, a multilateral agreement could establish a global register of the beneficial ownership of legal structures and assets and a repository of asset declarations by high-level public officials. The 2020 UN report highlights that such registers could help overcome beneficial ownership secrecy and challenges in verifying asset declarations, of the ill-gotten gains of grand corruption offenders.³⁹⁷

CONCLUSIONS

In the UNCAC preamble, states parties express concern about the threats posed by corruption to democracy, ethical values, justice, sustainable development and the rule of law. With grand corruption, these threats are multiplied many times over, and are a matter of concern for the international community. Transparency International proposes that efforts be scaled up to tackle grand corruption and remedy its harms, and invites consideration of the following special national and international measures.

1. Designation of grand corruption offences

States should introduce the Transparency International definition of grand corruption offences into national legislation and designate grand corruption crimes as serious and organised crimes, applying the strongest procedural measures and the highest priority for their investigation and prosecution.

2. Penalties for grand corruption

Grand corruption penalties should be comparable to those for serious, organised and aggravated offences. However, capital punishment should never be a penalty. All those who participate should be subject to these penalties, including persons involved in the decision-making process as well as persons paying bribes and assisting with laundering the proceeds of grand corruption schemes.

3. Exercise of universal jurisdiction

States should provide for the exercise of extensive jurisdiction over grand corruption crimes in a given country even if there is not a national or strong territorial nexus to the country and even if the alleged offender is not located in the country's territory.

States should provide for the exercise of universal criminal jurisdiction over grand corruption offences, applying a horizontal complementarity principle. The exercise of this jurisdiction should be limited to cases where countries with a stronger nexus are unwilling to act or where they are unable to investigate, prosecute and adjudicate the case and it is not possible to assist them. If it is possible to assist a country that is willing but not able to handle the case, then this should be done. The “extradite or prosecute” principle should apply in all grand corruption cases.

States should also provide for the exercise of universal civil and administrative jurisdiction over claims against offenders participating in grand corruption schemes, applying a horizontal complementarity principle.

4. Limitation periods

States with statutes of limitation for the initiation of criminal proceedings should provide that no limitation period applies for grand corruption offences.

The statute of limitations should be 30 years or more for civil claims arising from grand corruption and for non-conviction-based confiscation.

5. Immunities and jurisdictional privileges

States should allow only minimal personal immunity and no functional immunity for public officials in criminal, civil and administrative proceedings in domestic and foreign jurisdictions. In the domestic context there should be swift procedures for lifting any immunities.

In foreign jurisdictions, personal immunity should apply only to the head of government, foreign minister and diplomatic or consular agents during their terms in office to the extent required under

international law. No functional immunity should be recognised with respect to grand corruption offences and no immunity protections should be accorded to public officials with respect to property owned through a legal vehicle used to shield the public officials' identity.

6. Private prosecutions in the public interest

States should provide for private prosecutions in the public interest or *actio popularis* and for extensive *partie civile* procedural rights in grand corruption cases.

They should also establish that qualified non-state public interest representatives, including foreign ones, can act as private prosecutors and *partie civile* in grand corruption criminal proceedings.

Additionally, states should provide private prosecutors with the powers to make mutual legal assistance requests in grand corruption cases and to seek freezing and confiscation of proceeds of grand corruption.

7. Remediation of victims

Countries should establish frameworks for foreign states to make restitution and compensation claims in criminal, civil and administrative proceedings, including settlement proceedings, in relation to their losses from grand corruption schemes involving their high-level public officials. This should be subject to rules on joint liability and oversight of awards transferred.

They should also provide for remediation of human rights harms in grand corruption cases, including harms that are indirect and consequential, collective and diffuse. Compensation awards should include moral, non-pecuniary or social damages.

In addition, states should allow standing for qualified public interest organisations representing victims to make remediation and compensation claims against grand corruption offenders in criminal, civil, administrative and settlement proceedings, in domestic and foreign jurisdictions, including through class and collective actions.

To ensure remediation of victims, states should:

- + ensure adequate procedural rights for state and non-state victims at an early stage in all enforcement proceedings against grand corruption, including in foreign bribery and money laundering proceedings in foreign

jurisdictions. This should include the right to notice to participate and to challenge decisions, including in settlement proceedings;

- + establish rules for the equitable treatment of claimants in case of multiple claims and limited assets;
- + appoint a victims' ombudsperson or coordinator at an early stage in international grand corruption proceedings, including in foreign bribery and money laundering proceedings.

Finally, states should ensure the transparent, inclusive, non-discriminatory and accountable transfer of compensation amounts with adequate oversight mechanisms. The oversight of awards to states should take into account whether implicated high-level officials are still in office and whether genuine criminal and civil proceedings have been initiated against them in the plaintiff country.

8. Identification and recovery of grand corruption proceeds

Countries should require financial institutions and designated non-financial businesses and professions (DNFBPs) to obtain beneficial ownership information and other financial information from corporate structures as well as asset declarations and other financial information from PEPs and their family members and associates for whom they provide services. They should also require financial institutions and DNFBPs to retain records of the financial transactions of PEPs and certain corporate vehicles for substantially longer than the five-year period required by FATF Recommendation 10.

States should introduce a rebuttable presumption of money laundering and of the illicit origin of assets as well as criminal liability for financial institutions based on a duty to prevent money laundering.

States should also establish and use frameworks for proactive preventive freezing of assets suspected of being the proceeds of grand corruption, non-conviction-based confiscation (civil or administrative), extended confiscation and value-based confiscation. To that end, they should:

- + require that the instrumentalities and proceeds of corruption, including illicit profits, are confiscated or disgorged in foreign bribery and international money laundering proceedings;
- + ensure that confiscated and disgorged proceeds of international corruption used for compensation of victims and for the benefit of victim populations;

- + pending the return of confiscated assets and disgorged profits, ensure that funds are kept in separate accounts and that assets are managed transparently;
- + provide for the transparent, inclusive and accountable return of assets and compensation amounts, with oversight mechanisms and involvement of qualified public interest associations.

States should create international or regional funds for the management and disposition of confiscated assets.

Other mechanisms could include a global asset register and a repository of asset declarations of high-level public officials.

9. International agreement on grand corruption

States should conclude an international agreement, whether a protocol to the UNCAC or a stand-alone instrument, that establishes the proposed Transparency International definition of grand corruption, together with associated national prevention and enforcement measures, including those discussed in previous sections.

10. International mechanisms

States should establish new international mechanisms, building on existing ones, to support criminal, civil and administrative proceedings against grand corruption.

This should include establishing a body that:

- + provides capacity-building and facilitates exchange of information;
- + provides coordination, operational, legal and financial support to enforcement proceedings (this should include the possibility of a forming rapid action task force to help countries with pressing needs as well as longer term assistance to countries willing but unable to handle grand corruption cases due to lack of capacity and resources);
- + where needed, conducts investigations and potentially other enforcement activity.

States should establish procedures for the UN or regional bodies to create international or regional grand corruption tribunals in national or regional courts.

States should establish and use mechanisms for arbitration and appeals in international grand corruption cases.

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ANNEX: SELECTED CASES

This section reviews selected cases involving international crimes or international corruption that highlight some of the challenges and some potential solutions in the context of enforcement against grand corruption.

HISSÈNE HABRÉ

The former president of Chad, Hissène Habré, was ousted from power in 1990 and was found guilty of atrocity crimes in 2016 by the Extraordinary African Chambers set up within the Senegalese justice system under the auspices of the African Union.³⁹⁸ Human Rights Watch has prepared a valuable chronology of the case from 1990 through mid-2015.³⁹⁹

Habré was residing in Senegal in 2000 when Chadian victims filed a complaint against him for atrocity crimes in Chad, which led to a prompt indictment in Senegal. After a change in government, however, the Senegalese court of appeals overturned the indictment on the grounds that Senegal had no jurisdiction over acts committed outside its territory. This was upheld by the country's final court of appeals, based on the non-incorporation of the UN Convention against Torture into Senegal's code of criminal procedure.⁴⁰⁰ Chadian victims with Belgian nationality then filed a complaint in Belgium in 2001, after which a Belgian investigating judge conducted a four-year investigation, filed an indictment and issued an international arrest warrant in 2005. The arrest warrant and three extradition requests from Belgium put Senegal under pressure to extradite or prosecute Habré. When the country refused to do either, international and regional courts, the UN Committee on Torture, and regional bodies all issued decisions exerting further pressure.⁴⁰¹ Finally, although Senegal had been reluctant to handle the case, it agreed to do so under the umbrella of a regional initiative and with the costs covered by European states concerned with seeing Habré brought to justice.

The case highlights problems that could also arise in grand corruption cases, notably when neither the state where the crimes were committed nor the state where the accused offender is residing are willing or able to investigate and prosecute the case. It illustrates that non-state actors, such as individual victims and civil society organisations, can play a central role in ensuring accountability through filing complaints, in this case in both Senegal and Belgium (as well as Chad).⁴⁰² It also shows the potential role of exercising extensive or universal jurisdiction and of international bodies in bringing pressure for accountability.

Last but not least, the case demonstrates the possibility of creating extraordinary chambers within a national court system at the request of, and under the auspices of, a regional organisation.

TEODORO NGUEMA OBIANG

In October 2017, Teodoro Nguema Obiang, vice president of Equatorial Guinea by appointment of his father, the country's president, was convicted in a French court on charges of money laundering or diverting corruptly acquired state funds into investments on French territory.⁴⁰³ He was sentenced to a three-year suspended sentence, a €30 million fine, and the confiscation of assets with an estimated value of €150 million purchased

using the proceeds of corruption.⁴⁰⁴ This was rendered final by a judgment of the Court of Cassation in July 2021 rejecting an appeal by Obiang.⁴⁰⁵

The French case was ground-breaking in several respects, starting with a decision of the French Supreme Court (*Cour de cassation*) in 2010 upholding the standing of Transparency International France to file the original complaint as a *partie civile* (civil party) because of its public interest role as an anti-corruption organisation.⁴⁰⁶

Although Obiang had been appointed vice president of Equatorial Guinea in 2016 by his father, the court rejected his immunity claims on the basis that: i) “immunity is limited to persons exercising exclusively the functions of Head of State, Head of Government and Minister of Foreign Affairs”; and ii) the acts subject to the complaint (embezzlement of public funds, money laundering, misuse of social assets and breach of trust) were carried out for personal purposes without any link to the exercise of sovereignty by the state. Consequently, the acts in question could not be considered to be acts that would entitle their originator to immunity from jurisdiction.⁴⁰⁷

In determining the penalty, the court noted that it took account of several parameters, including the social situation of the defendant, the damage caused to the economic and social order, the extent of the damage caused, in particular the harm caused to the people of Equatorial Guinea, the nature of the unlawful conduct, and the circumstances of time, place and manner.

The court noted, however, that its sentence did not “take into account the interests of victims of corruption”, since under existing legislation, confiscated property that was not subject to restitution was attributed to the French state and would go into the French treasury. However, in the case of transnational corruption, “it appears morally unjustified for the State ordering the confiscation to benefit from it without regard to the consequences of the offence”. Consequently, the Paris Correctional Court, in the last sentence of its judgment, made an appeal to the legislator: “it seems likely in this context that the French system of confiscation penalties should evolve with a view to the adoption of a legislative framework adapted to the restitution of illicit assets”.⁴⁰⁸

Thanks to further advocacy by Transparency International France, new legislation has been passed by the National Assembly and the Senate which provides for the funds to be placed in a special budget and used for the benefit of the people of the country of origin.⁴⁰⁹ The Programming Law No 2021-1031 of 4 August 2021 on inclusive development and combating global inequalities created a mechanism for the restitution of “ill-gotten” assets to dispossessed populations, which provides for the assignment of revenue from the sale of assets confiscated in the context of “ill-gotten gains” by foreign leaders to finance cooperation and development actions for the benefit of the people in the countries concerned.⁴¹⁰

The French case illustrates the benefits of according standing to non-governmental organisations to initiate criminal proceedings in the public interest. The French enforcement authorities were initially unwilling to investigate the case, and only the recognition of anti-corruption NGOs triggered any action.

RIAD SALAMEH

In 2020, the Swiss foundation Accountability Now reportedly filed a criminal complaint in Switzerland against Lebanese Central Bank Governor Riad Salameh, which led to a probe by Switzerland’s public prosecutor into more than US\$300 million in fund movements by Salameh and his brother.⁴¹¹ Salameh is alleged to have embezzled hundreds of millions of dollars of public funds, and reportedly 12 Swiss banks received a large part of that amount, up to US\$500 million.⁴¹² The amounts were allegedly transferred using a company registered in the British Virgin Islands. The Office of the Attorney General of Switzerland initiated criminal proceedings for serious suspicion of money laundering in October 2020, and the procedure is still ongoing.⁴¹³

A Swiss request for mutual legal assistance from Lebanon in 2020 led in turn to the opening of a Lebanese investigation into Riad Salameh’s assets. However, reportedly, a related raid planned in January 2021 by Lebanese judge Jean Tannous on four banks in Lebanon was stopped at the last minute following a phone call from Prime Minister Najib Mikati to public prosecutor Ghassan Oueidate.⁴¹⁴

One focus of the investigations is reportedly on commissions which the central bank charged banks upon purchasing government securities.⁴¹⁵ Allegedly, the proceeds of these charges went to Forry Associates, a company controlled by Raja Salameh, Salameh’s brother.⁴¹⁶

In December 2021, Sherpa and the Collective of Victims of Fraudulent and Criminal Practices in Lebanon filed a complaint in Luxembourg in relation to the case and were there given the status of *partie civile*.⁴¹⁷

In April 2021, two criminal complaints related to the Lebanese Central Bank Governor were filed in France by public interest groups.⁴¹⁸ One complaint was filed by Accountability Now, a Swiss foundation, and the other by the public interest association Sherpa and the Collective of Victims of Fraudulent and Criminal Practices in Lebanon.⁴¹⁹ By June 2021, the French National Financial Prosecutor's Office had opened an inquiry into "criminal association" and "organised money laundering" and by 1 July, charges had been filed.

Accusations against the Lebanese Central Bank Governor were also reportedly transmitted to UK enforcement authorities around April 2021 by an activist group of lawyers in London called Guernica37, triggering a preliminary investigation.⁴²⁰

In 2022, the foundation Accountability Now was one of seven Swiss and Lebanese groups to file a complaint with the Swiss financial supervisory authority FINMA seeking an investigation of three Swiss banks in connection with their dealings with Salameh.⁴²¹ This led to a FINMA investigation of 12 banks and enforcement proceedings against two of them.⁴²² US\$250 million had reportedly been deposited into Salameh's personal account with HSBC's subsidiary in Geneva.⁴²³ Other amounts reportedly went to UBS, Credit Suisse, Julius Baer, EFG and Pictet. "Considerable sums" were then allegedly used to buy real estate in several European countries.⁴²⁴

By early 2022, authorities in Germany, Luxembourg, Belgium and Liechtenstein were also conducting investigations into the laundering of alleged illicit assets by the Lebanese Central Bank governor.⁴²⁵

In March 2022, France, Germany and Luxembourg reportedly froze over US\$130 million in assets in relation to the case, and in January and March 2023, a European judicial team from these three countries travelled to Lebanon to liaise with the Lebanese authorities.⁴²⁶ Reportedly, their inquiries were hindered in various ways during their first trip due to high-level backing for Salameh.⁴²⁷ Subsequently, in February and March 2023, Lebanese authorities filed charges against Salameh alleging embezzlement of public funds, forgery, illicit enrichment, money laundering and violation of tax laws.⁴²⁸ According to news reports, in March 2023, on the advice of French judge Buresi, Lebanese authorities also submitted a complaint constituting themselves as a *partie civile* in the ongoing investigation in France.⁴²⁹

In May 2023, both France and Germany issued arrest warrants for Salameh, and Interpol issued a Red Notice citing charges of money laundering, fraud, and participation in a criminal association with a view to committing offences punishable by 10 years of imprisonment.⁴³⁰

Salameh's lawyers reportedly accuse the European investigators of "violating Lebanon's sovereignty".⁴³¹

Some of the complaints in this case were based on revelations on the Lebanese site Daraj and on the investigations of the Organized Crime and Corruption Reporting Project.⁴³²

This example shows the crucial role played by civil society organisations and enforcement institutions initiating cases outside the country where the high-level officials may be participating in corruption.

IRAQI OIL-FOR-FOOD PROGRAMME

Two cases were filed in federal court in the US Southern District of New York seeking damages from companies in relation to alleged bribery and kickbacks in the Iraq Oil-for-Food Programme.⁴³³ In one case, the Iraqi state, under a successor government to the regime of Saddam Hussein, filed a complaint in 2008 seeking US\$10 billion in damages from dozens of companies.⁴³⁴ In the other, a group of Iraqi Kurds filed a civil class action suit under the US RICO statute⁴³⁵ seeking damages from the Australian Wheat Board on behalf of themselves and a class of Iraqi citizens who were the intended beneficiaries of the Oil-for-Food Programme.⁴³⁶

Both complaints were rejected.⁴³⁷ With regard to the Iraqi state's claim, the court found in 2013 that the Republic of Iraq had a concrete, proprietary interest in the funds within the UN escrow account and that wrongful depletion of the UN escrow account could cause both particular and personal harm to Iraq, as required to state a claim. However, it found that Iraq bore responsibility *in pari delictu* for the Hussein regime's corruption of the Oil-

for-Food Programme and thus was precluded from making the claim. The court considered that the programme was undertaken in the purported or apparent execution of official duties, that the kickbacks and bribes were directed into government accounts, and that the regime's conduct was largely "governmental".⁴³⁸ For the same reason, the US Department of Justice did not treat these cases as covered by the FCPA.

The court also rejected Iraq's efforts to seek redress "for harms to its quasi-sovereign interests as *parens patriae* of the Iraqi people". Iraq argued that its people suffered injury because they were "forced to fund the payments of bribes designed to extend the reign of the tyrannical Regime that subjected them."

In the case of the Iraqi Kurds, the court found that they did not fulfil standing requirements because they did not allege an injury that was "concrete and particularized, actual or imminent".⁴³⁹ The court cited case law for the proposition that "[e]ven in a proceeding which he prosecutes for the benefit of the public the plaintiff must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens." The court also cited case law for the proposition that any injury to the state's funds was not "concrete and particularized" for the plaintiffs because their interest in such moneys was an interest "shared with millions of others," not an interest particular to plaintiffs as individuals.

These two cases illustrate some of the challenges to be addressed and overcome in civil claims for damages in grand corruption cases. One challenge is that with the most extreme form of grand corruption involving complete capture of the state and its exploitation for private purposes, a successor government will face barriers to claiming damages against co-perpetrators on the grounds that the acts were governmental.⁴⁴⁰ The other challenge is the harm test used. This frequently excludes claimants seeking damages for diffuse harm to a population, or social damages, or seeking damages on behalf of others without particularised harm to themselves. The reasoning in the two cases together bars any compensation of victim populations when their high-level officials conspire with foreign companies to divert large amounts of state assets.

COSTA RICAN STATE ENTERPRISE

In another US case, in 2011, a claim was brought by Costa Rica's *Instituto Costarricense de Electricidad* (ICE), a state-owned enterprise providing electrical power and telecommunication services. It filed a petition for restitution in a federal district court in Florida in connection with a settlement presented to that court by the US Department of Justice. The settlement was with Alcatel-Lucent S.A. and its subsidiaries and related to an international bribery and corruption scheme conducted by Alcatel.⁴⁴¹

The scheme included bribery of ICE officials to secure contracts for telecommunications network equipment and services.

The court found that ICE was not a victim of Alcatel-Lucent's bribery and was consequently not entitled to restitution. It identified pervasive, constant, and consistent illegal conduct by ICE "principals", determined that ICE was a co-conspirator, and said that they could not be considered a victim under the federal Crime Victims' Rights Act, which defines as a "crime victim" a person directly or proximately harmed by criminal behaviour.⁴⁴² While the Department of Justice opposed ICE's claim, it did concede that in principle a foreign ministry or state-owned entity could be considered a victim in an FCPA case.⁴⁴³

Another significant aspect of the case is that on ICE's appeal of the district court decision, the court of appeals found that a crime victim, as a non-party to the prosecution, is not entitled to appeal the district court's approval of the settlement and its rejection of its restitution claim.⁴⁴⁴

The US case establishes that a state or state entity deemed to be a co-conspirator in a foreign bribery case may be precluded from claiming damages in connection with that case through substantive law and procedural barriers.

The Costa Rican settlement highlights an approach to damages in a large-scale bribery case which takes into account inchoate or diffuse harm and reputational harm.

MOZAMBIQUE TUNA BONDS

In December 2018, the US Department of Justice brought criminal charges against the Mozambican ex-finance minister Manuel Chang and other Mozambican government officials, together with business executives and investment bankers, concerning an alleged US\$2 billion scheme involving fraud, corruption and money laundering. The Department of Justice claimed that more than US\$200 million in bribes and kickbacks were paid to Mozambican government officials and investment bankers in relation to corrupt maritime loans for Mozambique.⁴⁴⁵

Loans and bond issues in the amount of US\$2 billion were granted by the Swiss Bank Credit Suisse and the Russian bank VTB in 2013 and 2014 to finance contracts between three state-owned companies (Special Purpose Vehicles or SPVs) and Privinvest, an Abu Dhabi, United Arab Emirates (UAE)-based holding company consisting of numerous subsidiaries.⁴⁴⁶ Two of the three loans were granted in secret without the required approval of the Mozambique Parliament and were secured by secret Mozambique government guarantees signed by the indicted former finance minister Manuel Chang on behalf of Mozambique.⁴⁴⁷ For this reason they were later declared null and void by the Mozambique Constitutional Court.⁴⁴⁸

A forensic audit by Kroll found that at least US\$500 million in expenditures from the loan amount could not be accounted for. It also found that Privinvest may have inflated prices by US\$713 million and that US\$200 million of the loans were spent on bank fees and commissions.⁴⁴⁹

In the course of 2019, three former Credit Suisse bankers pled guilty in the US to charges of conspiracy to commit money laundering and to violate US anti-bribery laws.⁴⁵⁰ However, at the end of the year, a US jury acquitted the Lebanese businessman Jean Boustani, who was employed by Privinvest and had been charged with conspiracy to commit wire fraud, securities fraud and money laundering for his alleged role in the scheme.⁴⁵¹ Prosecutors had alleged that Boustani helped secure the loans and paid US\$100 million in bribes and kickbacks to high-ranking Mozambican government officials to secure three lucrative contracts for his employer, Privinvest Group, an international shipbuilding firm based in Abu Dhabi. Boustani's lawyer had argued that he could not have known that the payments would pass through the US.⁴⁵²

In 2021 Credit Suisse reached a "global settlement" with authorities in the US, UK and Switzerland, involving US\$547 million in penalties, fines and disgorgement paid to those authorities and US\$200 million in voluntary debt forgiveness to Mozambique.⁴⁵³

The criminal indictment against the former finance minister alleged that he had received at least US\$5 million in bribes and kickback payments from Privinvest from a bank account in the UAE via the United States.⁴⁵⁴ He was charged with separate counts of conspiracy to commit wire fraud, securities fraud and money laundering.⁴⁵⁵

Chang was arrested in South Africa in December 2018 on a US warrant. The US followed with an extradition request at the end of January 2019 and a few days later, Mozambican authorities also made an extradition request, although at the time they had not yet indicted Chang.⁴⁵⁶ A South African magistrate's court ruled that he was extraditable to both countries, and in May 2019 the then-South African minister of justice decided that he should be extradited to Mozambique.

A Mozambican non-governmental umbrella organisation, *Fórum de Monitoria do Orçamento* (FMO), representing 22 civil society member organisations then reportedly filed a court application to overturn the extradition decision.⁴⁵⁷

Before the extradition could be carried out, a new South African justice minister raised in the High Court a question about the extradition decision, since Mr Chang was still a member of parliament and as such was immune from prosecution under Mozambican law. In October 2019, the High Court ruled that the decision to extradite to Mozambique was invalid and remitted the case back to the new minister for his consideration.

A few months later, the Mozambique government made representations to the South African minister of justice that Chang had resigned his parliamentary mandate and was no longer immune from prosecution. However, as of February 2020, Mozambican authorities had still not charged Chang.⁴⁵⁸

According to a May 2020 report, the Portuguese news agency Lusa saw a US submission, dated 27 February 2020, to the South African justice minister that cast doubt on the motivation of the Mozambican extradition request.⁴⁵⁹

The submission reportedly stated: “The United States has evidence that US\$150 million US dollars [€138.1 million] in kickbacks went to Mozambican public officials, including US\$10 million to the Frelimo party in Mozambique and US\$60 million to former president Armando Guebuza and his son...Therefore, the United States is concerned that Mozambique is pursuing the extradition of [Manuel] Chang to possibly protect high-level members of the Frelimo party.”⁴⁶⁰

The US also reportedly argued that although it has no extradition treaty with Mozambique, “the United States can deport Chang back to Mozambique to stand trial [there] after criminal proceedings in the US are completed...On the other hand, if Chang were first repatriated to Mozambique, Mozambican law prevents the extradition of its nationals and, therefore, it would not be possible for Mozambique to hand over Chang to the United States.”⁴⁶¹

In May 2021, the South African government was still divided over the extradition.⁴⁶² Then on 23 August 2021, the South African Ministry of Justice confirmed that it had decided to extradite Chang back to Mozambique and stated that charges had been filed against him in Mozambique for abuse of position and function; violation of budget laws; fraud by deception; embezzlement; passive corruption; money laundering; and criminal association.⁴⁶³

One day later, FMO filed an emergency motion in South Africa to prevent Chang from being extradited, arguing that Chang would not face justice in Mozambique.⁴⁶⁴ On 27 August 2021, the South African High Court blocked the extradition and ordered Justice Minister Lamola, to produce the documents justifying his decision to extradite to Mozambique. In November 2021, after a full hearing, the High Court ruled that the justice minister’s decision was irrational and directed that Chang be extradited to the US. The judge noted that there was no valid Mozambican arrest warrant for Chang or proof that his past immunity had lapsed.⁴⁶⁵

In June 2022, the South African Constitutional Court dismissed an application by Mozambique’s government to appeal against the High Court extradition order.⁴⁶⁶ A final attempt by Chang to appeal the extradition order was dismissed by the Constitutional Court in May 2023.⁴⁶⁷ Chang was deported to the US in July 2023 and pled not guilty at his arraignment.⁴⁶⁸

With respect to other alleged participants in the scheme, in February 2019, Mozambique launched civil proceedings in the UK High Court against Credit Suisse and Prinvest.⁴⁶⁹ It is seeking revocation of a government guarantee for a US\$622 million loan made by Credit Suisse as well as compensation for other debt and economic losses. It seeks a declaration that it is not liable on the corrupt loans made to two state-owned entities and to holders of the Eurobonds issued and it also seeks damages from costs associated with the loans and from the drop in economic growth following the scandals’ disclosure. However, in March 2021, on an appeal brought by Prinvest, the UK Appeals Court ruled that the subject matter relating to that company was covered by the terms of an arbitration clause and handed jurisdiction to two Swiss arbitration courts to examine the complaint against Prinvest.⁴⁷⁰ In a 2022 ruling, the UK Supreme Court held that Mozambique could appeal this decision.⁴⁷¹ According to a report in July 2023, three of Prinvest’s arbitrations were dismissed and a fourth one withdrawn.⁴⁷²

Credit Suisse has filed a counter claim in the London court against Mozambique and has said that its former employees hid their contacts from the bank.⁴⁷³ It reportedly denies that the guarantees were vitiated by the alleged bribery and claims that, even if Credit Suisse employees took bribes, Mozambique is still bound by the guarantees, especially since high-level Mozambican officials were part of the alleged conspiracy. Credit Suisse is also claiming damages against the Prinvest companies and individuals, and other individuals including government officials. In June 2023, the bank applied to the High Court to dismiss the case on the grounds that Mozambique had failed to disclose documents from the office of its president as well as from the country’s state intelligence and security service and that this meant that a fair trial would not be possible.⁴⁷⁴ However, in July 2023, the High Court ruled that the case could proceed as scheduled in October 2023.⁴⁷⁵

In February 2020, the Office of the Attorney General in Switzerland opened a criminal investigation into allegations of money laundering against Credit Suisse in connection with the hidden debt case, following a criminal complaint filed by the NGO Public Eye in April 2019.⁴⁷⁶

In Mozambique, in October 2020, the Attorney General received approval to seek extradition of the three Credit Suisse bankers.⁴⁷⁷ Also in 2020, the Mozambican Constitutional Court declared two loans totalling over US\$1 billion to be void, as well as two government guarantees for the loans. The court made a similar ruling in 2019 on

a US\$850 million Eurobond issued by another state company, Ematum, for the same project, but which had then been restructured into a sovereign bond.⁴⁷⁸

In February 2021, hedge funds VR Capital Group Ltd. and Farallon Capital Partners LP filed lawsuits against both Credit Suisse Group AG and the government of Mozambique over the debt scandal. The two funds together own around US\$30 million of the loans.⁴⁷⁹

This example illustrates the multi-jurisdictional complexities of a case where numerous authorities and actors have initiated enforcement and filed claims. It also provides examples of a case of a state (the United States) taking jurisdiction over the demand side of foreign corruption. It also demonstrates the important role of civil society groups in grand corruption and the need for greater clarity about compensation standards.

ENDNOTES

¹ Transparency International (2004), [Global Corruption Report](#): p. 13

² John Heathershaw et al. provide a definition of transnational kleptocracy: “the cross-border ties, typically in the form of non-state networks, by which authoritarian elites gain and keep power and wealth”. See John Heathershaw, J.C. Sharman and Alexander Cooley (2018), [The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations](#): pp. 39-53

³ A [researcher at the U4 Anti-Corruption Resource Centre described](#) political corruption as involving persons at the highest levels of the political system who use corruption to sustain their hold on power as well as for private and group enrichment. It includes embezzlement and soliciting bribes in procurement, government projects, privatisation processes and in taxation. According to Transparency International’s definition of state capture, it consists in “powerful individuals, groups and organisations undemocratically shaping a nation’s policies, legal institutions and economies to illicitly enrich themselves with impunity.”

⁴ See Financial Action Task Force (FATF) (2011), [Laundering the Proceeds of Corruption](#)

⁵ UN (2020), [The UN Common Position to Address Global Corruption – Towards UNGASS 2021](#): p. 2

⁶ Article 17 of the Statute of the International Criminal Court explains their concepts of “unwilling or unable” in the context of criminal proceedings. Article 17(2): “In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.” Article 17(3): “In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

⁷ UN Commission on Human Rights/Report of Independent Expert (2005), [Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity](#)

⁸ See, e.g., Dr. Franziska Rinke et al. (2019), [Corrupt Judges – Threat to the Constitutional State](#); Dunja Mijatovic (2021), [Corruption undermines human rights and the rule of law](#); Lăzarie Eckeloo (2018), [The Human Rights Committee and its approach to corruption](#) and other contributions to the [International conference: Improving the Human Rights dimension of the fight against corruption](#), organised by the Center for Civil and Political Rights (CCPR). Additionally, according to the Anti-Corruption Working Group of the Society for Advanced Legal Studies (SALS), “countries which are the victims of corruption may fall into a state of political and social collapse following the departure of the official and the looted wealth. There may be no courts capable of dealing with the crimes committed. The government may be reluctant to prosecute such a high-ranking official. The victim country may also lack the resources needed to pursue and recover the funds on its own initiative”. See SALS (2000), [Banking on corruption: the legal responsibilities of those who handle the proceeds of corruption](#), which focuses on the criminal and civil liabilities of those who handle the proceeds of corruption.

⁹ This means that state systems and processes are inconsistent with state obligations under UNCAC Articles 9 and 14, and FATF standards. See UN General Assembly, [United Nations Convention Against Corruption \(UNCAC\)](#) (31 October 2003, A/58/422) and FATF, [The FATF Recommendations](#) (2012, last amended February 2023).

¹⁰ FATF (2011): p. 26. For example, their undue influence may allow them to create companies and prevent reasonable inquiry by financial institutions or regulators regarding the beneficial owners of those companies. They may also be able to capture financial institutions. FATF also singled out the ability of PEPs to use the proceeds of corruption to finance political parties or organisations and, in turn, reinforce their control over government mechanisms. In addition, FATF identified as risk factors “the lack of any prohibition on conflict of interest and self-dealing” and “ready access to sources of state income”.

¹¹ FATF (2023), [Consolidated Assessment Ratings](#)

¹² Organized Crime and Corruption Reporting Project (2019), [‘Laundromats’ explained: How shell companies are used to launder money](#)

¹³ See, e.g., Olatunde Otusanya and Sarah Lauwo (2012), [The role of offshore financial centres in elite money laundering practices: Evidence from Nigeria](#): pp. 336-361

¹⁴ FATF (2011): p. 34. As FATF puts it: “Case after case shows how financial institutions have failed to follow AML procedures—even where those procedures called for only an ordinary risk-based approach—and have thus given corrupt PEPs continued and unabated access to the global financial system”.

¹⁵ See, e.g., Dunja Mijatovic (2021). A Transparency International study of state capture in the Western Balkans and Turkey found that impunity for grand corruption is a result of the judiciary’s lack of independence and inefficiency, as well as judges

and prosecutors “who are motivated more by personal interests than by professional ethics”; see Nieves Zúñiga (2020), *Examining State Capture: Undue Influence on Law-Making and the Judiciary in the Western Balkans and Turkey*

¹⁶ See, e.g., Franziska Rinke et al. (2019), Dunja Mijatovic (2021), Lăzarie Eckeloo (2018) and other contributions to the CCPR’s 2018 [international conference](#).

¹⁷ UNODC also commented that in several countries, the practical capabilities of competent authorities need to be enhanced and the enforcement levels of the relevant provisions improved, including by resolving lack of coordination among competent authorities. It found that in some countries the rate of prosecutions for money laundering was relatively low, that law enforcement agencies were not sufficiently aware of the offence, and that investigators and prosecutors needed to have greater information-gathering powers and better training. UNODC (2017), [State of Implementation of the UN Convention against Corruption: Criminalization, law enforcement and international cooperation](#) (2nd edition). UNODC has estimated that the amount of money laundered globally in one year is 2-5% of global GDP, or US\$800 billion – 2 trillion (see UNODC, overview page [Money Laundering](#)). The fines against banks increased in 2020 to over US\$14 billion in 20 countries, with 12 US fines accounting for US\$9 billion. Some weaknesses in legal frameworks are currently being addressed in the EU. See Sven Stumbauer (2021), [The International Wave of Anti-Money Laundering Enforcement Globally is on the Horizon](#) (The International Banker).

¹⁸ Gillian Dell (2020), [Exporting Corruption 2020: Assessing enforcement of the OECD Anti-Bribery Convention](#) (Transparency International); Gillian Dell and Andrew McDevitt (2022), [Exporting Corruption 2022: Assessing enforcement of the OECD Anti-Bribery Convention](#) (Transparency International).

¹⁹ Early examples included the Lesotho prosecution of multinationals and individuals in the Lesotho Highland Waters case in 2000 and the Nigerian charges against Halliburton, KBR and former US Vice President Cheney, which were dropped in 2010 in favour of a settlement (this followed a US case against Halliburton). See International Rivers (2005), [Lesotho Highlands Water Project: What Went Wrong?](#); Reuters (2010), [Nigeria drops charges against Halliburton, Cheney](#) and [UPDATE 2-Nigeria drops charges against Halliburton, Cheney](#).

²⁰ A 2018 study by the Organisation for Economic Co-operation and Development (OECD) analysed 55 foreign bribery schemes that had led to enforcement against bribe-payers and found that public officials had been sanctioned in only one fifth of those schemes, despite enforcement action in a larger number of cases. In a smaller number of cases, the demand-side countries enforced against both the supply and demand side. This also occurred in a number of cases in supply side countries. OECD (2018), [Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End?](#)

²¹ See, e.g., Gillian Dell and Andrew McDevitt (2022)

²² Samantha Besson (2011), [Sovereignty, International Law and Democracy](#). *European Journal of International Law, Volume 22, Issue 2*: pp. 373–387

²³ This is reflected in the Statute for the International Criminal Court, as well as in criminal proceedings in national jurisdictions against foreign state officials.

²⁴ The Times (2004), [George Moody Stuart: Campaigner against corruption in the developing world](#). George Moody Stuart defined the term in the 1990s as “the abuse of public power by heads of state, ministers and senior officials for private and pecuniary gain”.

²⁵ Jorum Duri (2020), [Definitions of grand corruption](#) (Transparency International and U4)

²⁶ UN Commission on Human Rights (1992), Resolution on [Fraudulent enrichment of top State officials prejudicial to the public interest, the factors responsible for it, and the agents involved in all countries in such fraudulent enrichment](#)

²⁷ UNODC (2017), [Resolutions adopted by the Conference of the States Parties to the United Nations Convention against Corruption](#). Vienna.

²⁸ UNODC (2019), [Oslo Statement on Corruption involving Vast Quantities of Assets](#).

²⁹ FATF (2011): p. 9. The FATF collected data on grand corruption cases which is summarised in a Grand Corruption Case Inventory matrix in Annex 1 of its report. The matrix represents a summary of 32 grand corruption matters from which FATF draws conclusions regarding the nature of money laundering and corruption.

³⁰ GOPAC (2013), [Prosecuting Grand Corruption as an International Crime: Discussion Paper](#) citing the U4 definition in a 2013 paper which has since been updated: U4: The Anti-Corruption Resource Centre (2013). The Basics of Anti-Corruption.

³¹ Law enforcement officers from six countries (Australia, Canada, New Zealand, Singapore, UK, US) are participants, with two more as observers (Germany and Switzerland), and there is also the potential for non-participating law enforcement agencies to refer cases to the IACCC. National enforcement officers from the six countries are seconded to the IACCC. The regional sources of referrals in 2018 were reported as follows: Africa – 10; Americas – 2; Asia – 14; Europe – 1, indicating that the centre and its mission has effectively been endorsed by additional countries. See UK National Crime Agency, [International Anti-Corruption Coordination Centre](#).

³² Ibid. This definition is similar to one proposed by the Government of Peru at the 6th session of the UNCAC Conference of States Parties in 2015 in a Conference Room Paper [Countering Grand Corruption – Paper submitted by the Government of Peru, UN Doc. CAC/COSP/2015/CRP.9](#) (4 November 2015) which states that “Grand corruption consists of offences mentioned in chapter III of UNCAC involving high level officials and a significant amount of money, leading to significant public damage or to the infringement of fundamental rights of at least part of a State’s population.” Peru called for consideration to be given to the concept of grand corruption, taking into account the gravity of its consequences to the international community as a whole. It also called for effective prevention and prosecution of grand corruption cases through measures at the national and international level, and by enhancing international cooperation, to avoid that this crime goes unpunished.

³³ OECD (2021), [Istanbul Action Plan 5th Round of Monitoring: Pilot Performance indicators](#)

³⁴ Chairpersons of Human Rights Treaty Bodies (31 May 2021), [Joint statement on corruption and human rights](#)

³⁵ US Financial Crimes Enforcement Network (FinCEN) (June 2018), [Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators](#). UK legislation on Unexplained Wealth Orders applies where the respondent is a politically exposed person, or there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime or a person connected with the respondent is, or has been, so involved. Politically exposed person is defined in the legislation. See [UK Criminal Finances Act 2017, Part 1, Chapter 1, Section 1](#).

³⁶ Instruction of the Chief State Prosecutor, the Chief EULEX Prosecutor and the Head of the Prosecution Office of the Republic of Kosovo, 13 November 2013.

³⁷ Ivanna Kuz and Matthew Stephenson (2020), [Ukraine's High Anti-Corruption Court](#) (U4).

³⁸ For discussions of corruption as an international crime, see for example, Ndiva Kofele-Kale (1995), [Patrimonicide: The International Economic Crime of Indigenous Spoliation](#) (Vanderbilt Journal of International Law); Ilias Bantekas (2006), [Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies](#) (4 Journal of International Criminal Justice): pp. 466-484; Sonja Starr (2007), [Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations](#) (Northwestern Law Review Vol. 101): pp. 1257-1314; and Naomi Roht-Arriaza (29 May 2019), [Venezuela, Grand Corruption and the International Criminal Court](#) (UC Hastings Research Paper No 340). See also GOPAC (1 November 2013), [Prosecuting Grand Corruption as an International Crime: Discussion Paper](#).

³⁹ See, e.g., Laurence Whitehead, *On presidential graft: the Latin American evidence*, in *Corruption: Causes, Consequences and Control* 146, 154 (Michael Clarke ed., 1983).

⁴⁰ Ndiva Kofele-Kale (1995)

⁴¹ Susan Rose-Ackerman (1996), *Democracy and "Grand" Corruption*, *International Social Science Journal*, vol. 48: pp. 365-380

⁴² SALS (2000): p. 217

⁴³ Quoted in OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Proceedings of the Expert Seminar on "Effective Means of Investigation and Prosecution of Corruption"* (2010): p. 70

⁴⁴ Transparency International, 2020. [Examining state capture: Undue influence on law-making and the judiciary in the Western Balkans and Turkey](#): p. 6

⁴⁵ Discussion Brief – Theme 1 Mapping the Current Framework (2022). The paper also referenced the three generally agreed features of grand corruption identified in TI's 2020 paper on grand corruption definitions: (1) misuse or abuse of high-level power, (2) large sums of money, and (3) harmful consequences.

⁴⁶ The experts participating were Steven Baker, Michael Bowes, Jane Ellis, Carla Ferstman, Tilman Hoppe, Santiago Wortman Jofre, Richard Rogers and Maria Pia Sacco. Others consulted included Kolawole Olaniyan and Jan-Michael Simon. The previous 2016 definition was as follows: "Grand corruption occurs when: A public official or other person deprives a particular social group or substantial part of the population of a State of a fundamental right; or causes the State or any of its people a loss greater than 100 times the annual minimum subsistence income of its people; as a result of bribery, embezzlement or other corruption offence."

⁴⁷ The UNCAC offences listed are: bribery of national public officials; bribery of foreign public officials and officials of public international organisations; embezzlement, misappropriation or other diversion of property by a public official; trading in influence; abuse of functions; illicit enrichment; bribery in the private sector; embezzlement of property in the private sector; laundering of proceeds of crime; concealment; obstruction of justice.

⁴⁸ The [UN Convention against Transnational Organized Crime](#), Article 5 defines offences of agreement with one or more persons to commit serious crimes and participation in an organised criminal group engaged in criminal activity, both of which can include corruption offences. An accessory, in criminal law, is a person who becomes equally guilty in the crime of another by knowingly and voluntarily aiding the criminal before or after the crime. An accessory is one kind of accomplice, the other being an abettor, who aids the criminal during the act itself. Aiding is assisting, supporting, or helping another to commit a crime. Abetting is encouraging, inciting, or inducing another to commit a crime. The UNTOC considers someone to participate in an organised criminal group if they participate in non-criminal activities of the group in the knowledge that their participation will contribute to the achievement of the group's criminal aim.

⁴⁹ With regard to "de facto", by way of example, the US Sentencing Guidelines (2018: p.141) include in the definition of public official a person "who participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party.)" The notions of de facto and shadow public officials can also be transposed from the concept of "de facto director" and "shadow director" in the UK Companies Act 2006. That legislation defines a "de facto director" as a person who performs the functions of a director but who has not been formally appointed as such. It defines a "shadow director" as a person "in accordance with whose directions or instructions the directors of a company are accustomed to act", i.e., someone calling the shots behind the scenes in a company. This applies if third parties considered a person to be a director, because, for instance, they regularly negotiated on behalf of the company. In civil law countries, the concept of "ad hoc" public official could provide a foundation for introducing the broader concepts of de facto or shadow official. An ad hoc official is a public official designated to perform a particular or urgent task but who has not been formally appointed.

⁵⁰ The term "high-level" public official is one often used in the context of national anti-corruption legislation.

⁵¹ [FATF Recommendations, General Glossary](#) (2012): p. 123. Another example is the [European Union Commission Directive 2006/70/EC](#) which defines “politically exposed persons” in its Article 2 para. 1 and 2.

⁵² In that case, the high-level official can be considered to be “involved” but should not be considered an offender unless that official has breached a duty or is strictly liable to the general public because of the position they occupy. In cases of breach of duty or strict liability special consideration should be given to the subjective awareness of the duty, the risk of breaching it, and the likelihood of the foreseeable consequences occurring.

⁵³ African Legal Aid (AFLA) *The Cairo Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective* (Accra, The Hague, Pretoria, 2002). Principle 4 states that “In addition to the crimes that are currently recognised under international law as being subject to universal jurisdiction, certain other crimes that have major adverse economic, social or cultural consequences -- such as acts of plunder and gross misappropriation of public resources, trafficking in human beings and serious environmental crimes -- should also be granted this status”.

⁵⁴ “The Council [of the European Union] further decided to adopt restrictive measures against persons responsible for misappropriation of ... State funds and who are thus depriving the people [of that country] of the benefits of the sustainable development of their economy and society and undermining the development of democracy in the country”. This language was used regarding Egypt ([Council Decision 2011/172/CFSP of 21 March 2011](#)) and regarding Tunisia ([Council Decision 2011/72/CFSP of 31 January 2011](#)).

⁵⁵ The Transparency International expert group’s original formulation used the wording “gross violations”. This was considered by Transparency International to be potentially too narrow. See also UN [Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#) (1999) Article 8 and [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#) (2008) Article 11.

⁵⁶ For uses of the term, see e.g. United Nations OHCHR, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#) (2005); United Nations OHCHR, [Guiding Principles on Business and Human Rights](#) (2011)

⁵⁷ See Geneva Academy (August 2014), [What amounts to a serious violation of international human rights law?](#) for an extensive discussion of the notion of serious human rights violations.

⁵⁸ United Nations OHCHR, [The Corporate Responsibility to Respect Human Rights: Interpretative Guide](#) (2012). For uses of the term “gross violations”, see e.g. United Nations OHCHR, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#) (2005); United Nations OHCHR, [Guiding Principles on Business and Human Rights](#) (2011); According to the International Commission of Jurists, gross violations of human rights have been described as ones which “by their very grave nature, constitute an affront to human dignity. It is understood to affect in qualitative and quantitative terms the right to life and the right to physical and moral integrity of the human person. It includes murder, torture, genocide, forcible transfer of population and systematic racial discrimination. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights”. International Commission of Jurists, [The Right to a Remedy and Reparation for Gross Human Rights Violations, Practitioners’ Guide No 2](#) (Revised Edition, October 2018). A recent scholarly review of the use of the term “gross violations” argues that in practice it has been used to refer to the following: lack of the rule of law; denial of access to education, food, or other socio-economic rights; denial of access to free expression, public affairs, and services of the country; and destruction of properties or looting of a community’s natural resources. Roger-Claude Liwanga, [The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals’ Decisions over the DRC Conflicts](#), (44 Denver Journal of International Law and Policy 67, 2015).

⁵⁹ UN OHCHR, [Guiding Principles on Business and Human Rights](#) (2011). The UN Guiding Principles Reporting Framework states that “a negative human rights impact occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.”

⁶⁰ [UNGASS Political Declaration: Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation](#) (UNGA Resolution S-32/1, 2 June 2021)

⁶¹ UNODC, [Legislative Guide for the Implementation of the UN Convention against Corruption](#) (2nd revised edition, 2012), paragraph 519, p. 139. The Legislative Guide also states at p. 134: “491. In the context of globalization, offenders frequently try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. This is especially so in the case of serious corruption, as offenders can be very powerful, sophisticated and mobile, para 492. The international community wishes to ensure that no serious crime goes unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find safe havens need to be reduced or eliminated.”

⁶² UNODC, [Legislative Guide for the Implementation of the UN Convention against Corruption](#) (2nd revised edition, 2012), p. 134

⁶³ UK Serious Fraud Office, [About us \(website\)](#)

⁶⁴ Instruction of the Chief State Prosecutor, the Chief EULEX Prosecutor and the Head of the Prosecution Office of the Republic of Kosovo, 13 November 2013. The instruction defined high level corruption as specified corruption offences committed by a list of high-level officials.

⁶⁵ Ivanna Kuz and Matthew Stephenson (2020)

⁶⁶ UN (2020), [The UN Common position to address global corruption: Towards UNGASS 2021](#)

- ⁶⁷ Sarah Chayes, *Thieves of State* (2015), cited in: PRI (28 January 2015), [Here is why government corruption can spawn religious extremism around the globe](#). See also: Sarah Chayes (June 2016), [The Structure of Corruption: A Systemic Analysis Using Eurasian Cases](#)
- ⁶⁸ Moses Naim (2012), [Mafia States](#) (Foreign Affairs)
- ⁶⁹ Joel Hellman and Daniel Kaufman (2001), [Confronting the Challenge of State Capture in Transition Economies](#)
- ⁷⁰ UNODC (2018), *E4J University Module Series: Organized Crime, Module 2: Organizing the Commission of Crimes*
- ⁷¹ A review mechanism for UNTOC was only adopted by the Conference of Parties in 2018 and started up in 2020. See UNTOC resolution 9/1, [Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols](#). On the launch, see the analysis by Global Initiative (23 October 2020), [The 10th UN Conference of Parties to the UN Convention Against Transnational Organized Crime](#)
- ⁷² Geoff Martin and John Cunningham (24 February 2016), [Casting a wider net: Conspiracy charges in Foreign Corrupt Practices Act cases](#)
- ⁷³ Santiago Wortman Jofre (2021), *Taking Brokers Seriously: A Network Perspective on the Law of Organised Crime* (doctoral thesis)
- ⁷⁴ 18. U.S.C. Part 1 [Chapter 96, Racketeer Influenced and Corrupt Organizations](#), See especially, 18 U.S.C § 1964 - Civil remedies.
- ⁷⁵ United States Court of Appeals, 9th Circuit [Republic of Philippines v. Marcos](#), (4 June 1987) cited in Jean-Pierre Brun et al, [Public Wrongs, Private Rights](#) (StAR 2015)
- ⁷⁶ United States Court of Appeals, 9th Circuit, [Republic of Philippines v. Marcos](#) (10 February 1988)
- ⁷⁷ Tribunal fédéral, [decision of 7 February 2005](#)
- ⁷⁸ Amwal Al Ghad (2016), [Switzerland resumes investigating organised crime case against Mubarak allies](#)
- ⁷⁹ SRF.ch (2015), [Mubarak-Verfahren: Rückschlag für Bundesanwaltschaft](#)
- ⁸⁰ CNBC (2017), [Brazil's top prosecutor charges President Michel Temer with corruption](#)
- ⁸¹ Folha (2017), [Prosecutor General Accuses President Temer of Leading a Criminal Organization](#)
- ⁸² New York Times (2017), [President Temer of Brazil Faces New Corruption Charges](#); Al Jazeera (2017), [Brazil's Michel Temer survives corruption charges vote](#)
- ⁸³ The Guardian (2019), [Brazil's former president Michel Temer arrested in corruption investigation](#)
- ⁸⁴ Globo.com (5 February 2022), [Juiz federal rejeita denúncia contra Temer, Moreira Franco e mais 6 por corrupção e lavagem de dinheiro](#)
- ⁸⁵ Conjur (21 June 2022), [TRF-1 rejeita denúncia contra Michel Temer e mais 7 por corrupção em Angra 3](#)
- ⁸⁶ US Department of Justice (May 2015), [Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption](#)
- ⁸⁷ US Department of Justice (August 2021), [Justice Department Approves Remission of Over \\$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case](#)
- ⁸⁸ US Department of Justice (2017), [High-Ranking Soccer Officials Convicted in Multi-Million Dollar Bribery Schemes](#)
- ⁸⁹ Club of Mozambique (November 2020), [Hidden debts: Finally, Prosecutors charge former Finance Minister – AIM report](#)
- ⁹⁰ [CASE NO: SA 62/2022](#); Prosecutor-General v [Gustavo and Others](#) (HC-MD-CIV-MOT-POCA-2020/00429) [2023] NAHCMD 274 (17 May 2023)
- ⁹¹ Le Monde (16 July 2021), [L'enquête en France sur Riad Salamé, gouverneur de la banque centrale libanaise, confiée à des juges d'instruction](#)
- ⁹² The [German Criminal Code Article 335](#) On aggravated bribery in the public sector in Germany, see e.g. Stephan Schmidt, [Anti-bribery and corruption guide: Germany](#) (King & Wood Mallesons, 2016) In a similar vein, Estonian law provides for higher custodial sentences in cases of bribery where the same act is committed at least twice, by a group, or on a large scale. [Estonian Penal Code](#) paras 294 and 296
- ⁹³ For example, [The Finnish Penal Code, Chapter 16, Section 14](#) defines the giving of a bribe as aggravated if the gift or advantage is of significant value and its purpose is to make the recipient act contrary to their duties “to the considerable benefit to the briber or to another person or of considerable loss or detriment to another person.” The German Criminal Code Section 335 establishes higher prison sentences in “especially serious cases of taking and giving bribes”, including cases where “the act relates to a major benefit.
- ⁹⁴ See, e.g., Cleary Gottlieb (28 February 2019), [French Criminal Court Orders UBS to Pay a Record EUR 4.5 Billion in Tax Fraud Case](#)
- ⁹⁵ See US Sentencing Commission, [Guidelines Manual 2018, Chapter Two, Part C](#)
- ⁹⁶ “High-level decision-making or sensitive position” means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.
- ⁹⁷ UK Sentencing Council, [Bribery Act 2010, s.1, Bribery Act 2010, s.2, Bribery Act 2010, s.6](#). Other considerations are whether offences are committed across borders, and offences committed to facilitate other criminal activity.
- ⁹⁸ By way of example, the US Sentencing Guidelines state the following: A “jointly undertaken criminal activity” is a criminal plan, scheme, endeavour, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

- (i) within the scope of the jointly undertaken criminal activity;
- (ii) in furtherance of that criminal activity; and
- (iii) reasonably foreseeable in connection with that criminal activity

⁹⁹ See, e.g., Transparency International (2015), [TI Chair asks Mongolia Prime Minister to reject Amnesty Law](#); Reuters (2017), [Tunisia parliament approves controversial amnesty for Ben Ali-era corruption](#); Associated Press (2019), [Romania minister prepares decree to invalidate graft cases](#)

¹⁰⁰ See, e.g., UNODC, [State of implementation of the UN Convention against Corruption](#) (2nd edition 2017): pp. 90-91. Sanctions generally vary, ranging from the most common variants of pecuniary penalties (e.g., up to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence or equal to twice to 10 times the value of the illicit values received, accepted, solicited, agreed or promised), forfeiture and publication of an extract of the judgement. They may also include loss of tax incentives or other benefits, “blacklisting” from public procurement and deprivation of business licences.

¹⁰¹ Parliament of Australia (2017), [Report: ‘Lifting the fear and suppressing the greed’: Penalties for white-collar crime and corporate and financial misconduct in Australia](#). The Attorney-General’s Department argued that this approach that this helps to ensure that the penalty imposed is sufficiently high to deter and punish financial crime and promote good governance, the rule of law and confidence in corporate practices.

¹⁰² See, e.g., UNODC (2013), [Guidebook on anti-corruption in public procurement and the management of public finances](#): Good practices in ensuring compliance with article 9 f the UN Convention against Corruption; Sope Williams (2009), [The mandatory exclusions for corruption in the new EC procurement directives](#)

¹⁰³ See, e.g., Gillian Dell (2020)

¹⁰⁴ In some countries, there are no sanctions or only weak sanctions are imposed in non-trial resolutions, or else sanctions vary in an arbitrary way from case to case. In some resolutions, the defence of “effective regret” is accepted, something consistently criticised by the OECD WGB as undermining the purpose of the Convention. In others, “ability to pay” considerations are taken into account. All of these approaches are of great concern. See: UNCAC Coalition (6 December 2018), [CSO Letter to the OECD on Principles for the Use of Non-Trial Resolutions in Foreign Bribery Cases](#)

¹⁰⁵ Corruption Watch, Global Witness, Transparency International and UNCAC Coalition (6 December 2018), [Principles for the use of non-trial resolutions in foreign bribery cases](#)

¹⁰⁶ OECD Council (26 November 2021), [Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#)

¹⁰⁷ Chairs of the UN Human Rights Treaty Bodies (31 May 2021), [Joint Statement on “Corruption and Human Rights”](#)

¹⁰⁸ See, International Justice Resource Center, [Universal Jurisdiction](#). An effects doctrine may be relevant here. According to one summary of customary international law principles of jurisdiction, they are complex and at times controversial in their application, as they are evolving and adapting to a world where individuals and corporations increasingly act and produce effects across state borders. See The Open University, [Exploring the boundaries of international law: 4.4. Extraterritoriality – protective jurisdiction and the ‘effects doctrine’](#).

¹⁰⁹ See Prof. Cedric Ryngaert in European Parliament Workshop (2018), [Universal jurisdiction and international crimes: constraints and best practices](#)

¹¹⁰ Zdzislaw Galicki (2006), [The Obligation to Extradite or Prosecute: Preliminary \(Aut Dedere, Aut Judicare\)](#), Preliminary report of the Special Rapporteur of the International Law Commission

¹¹¹ Amnesty International (2012), [Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update](#). See also Isidoro Blanco Cordero (2008), [“Universal jurisdiction. General report”](#), Revue internationale de droit pénal, vol. 79, no. 1-2: pp. 59-100. National legislation varies considerably. One example is El Salvador’s law on universal jurisdiction which does not set out a restrictive list of crimes to which such jurisdiction is limited. Instead, it provides that the crime in question must have affected property internationally protected by specific agreements or rules of international law, or must seriously undermine universally recognised human rights. [Report of El Salvador pursuant to UN GA resolution 74/192 \(2020\)](#), The African Union’s [Model National Law on Universal Jurisdiction over International Crimes](#) adopted in 2012 includes trafficking in drugs, thus not limiting universal jurisdiction to atrocity crimes.

¹¹² European Parliament Workshop (2018), [Universal jurisdiction and international crimes: constraints and best practices](#). The African Group initiated discussions about universal jurisdiction underway since 2009 in a working group of the UN General Assembly’s Sixth Committee. See [Statement of the African Group, 3 November 2020](#). The UN Secretary General delivered a [report on the subject to the UN General Assembly in July 2020, summarising country statements and practice](#).

¹¹³ Africa Legal Aid (2002), [Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective](#). The principles were developed at two expert meetings convened by AFRICA LEGAL AID (AFLA), one in Cairo from 30 to 31 July 2001 and one in Arusha from 18 to 21 October 2002. The meetings brought together leading experts from across Africa and elsewhere to develop principles on universal jurisdiction from an African perspective.

¹¹⁴ UNODC (2012), [Legislative Guide for the Implementation of the UN Convention against Corruption](#) (2nd revised edition), paragraph 519, p. 139. The Legislative Guide also states at p. 134: “491. In the context of globalization, offenders frequently try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. This is especially so in the case of serious corruption, as offenders can be very powerful, sophisticated and mobile. 492. The

international community wishes to ensure that no serious crime goes unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find safe havens need to be reduced or eliminated.”

¹¹⁵ Article 13(1)(d) of the [African Union Convention on Preventing and Combating Corruption](#) states that each State Party has jurisdiction including over acts of corruption and related breaches including “when the offence, although committed outside its jurisdiction affects, in the view of the State concerned, its vital interests or the deleterious or harmful consequences or effects of such offences impact on the State Party.” It also states in Article 13(2) that the Convention “does not exclude any criminal jurisdiction exercised by a State in accordance with its domestic law”. This reads like UNCAC 42(6) which allows the exercise of universal jurisdiction.

¹¹⁶ It is a legal obligation of states under international law to either prosecute persons who commit serious international crimes or extradite them to a jurisdiction ready to try them. Galicki, *supra* at footnote 105. As explained by the Special Rapporteur to the International Law Commission, under the extradite or prosecute rule “a state may not shield a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.” (Chapter 2, Article 31). UNCAC Article 42(3) and (4) provide for application of this rule, but this is only mandatory where failure to prosecute is on the grounds that the person is a national. Grand corruption should be regarded as a serious crime for which the rule is mandatory for nationals and non-nationals alike.

¹¹⁷ See Daniel Fransen in European Parliament Workshop (2018), [Universal jurisdiction and international crimes: constraints and best practices](#): p. 10

¹¹⁸ See, e.g., Gibson Dunn (9 January 2020), [Developments in the Defense of Financial Institutions – The International Reach of the U.S. Money Laundering Statutes](#). The money laundering statute in question is at 18 U.S.C. §§ 1956 and 1957.

¹¹⁹ European Parliament and Council, [Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#) (12 December 2012, amended in 2014 and 2015)

¹²⁰ European Union Agency for Fundamental Human Rights (2017), [Improving access to remedy in the area of business and human rights at the EU level](#)

¹²¹ Council of Europe Committee of Ministers (2016), [Business and Human Rights – Recommendation to Member States](#)

¹²² European Parliament DROI (2019), [Access to legal remedies for victims of corporate human rights abuses in third countries](#)

¹²³ The Alien Tort Claims Act (ATCA) was [codified](#) in 1948 as [28 U.S.C. § 1350](#). Aliens action for tort It is also called the Alien Tort Statute.

¹²⁴ US Supreme Court, [Kiobel v. Royal Dutch Petroleum Co.](#) 569 U.S. 108 (17 April 2013). See discussion of the case in American Society of International Law (ASIL) Insights (18 April 2013), [Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries](#)

¹²⁵ US Supreme Court, [RJR Nabisco, Inc. v. European Cmty.](#) 136 S. Ct. 2090 (2016) As for foreign state claims in the US in relation to foreign bribery by US companies, two federal courts invoked the doctrine of *forum non conveniens* in separate 2022 cases brought by a Mexican government agency seeking compensation from US companies in relation to alleged bribery in Mexico. In one of the cases, the court noted that two claims were based on Mexican statutes and one was for fraud based on US and Mexican law. In both cases, the courts considered that Mexico courts were available and the better forum. One of the courts stated that “presumably a foreign-state plaintiff on different facts whose home courts were inadequate could overcome *forum non conveniens* concerns”. Transnational Litigation Blog (2 May 2022), [U.S. Courts Gut Key Provision of U.N. Convention Against Corruption](#); Casatext.com (21 March 2022), [Instituto Mexicano Del Seguro Soc. v. Zimmer Biomet Holdings, Inc.](#); Casatext.com (17 March 2022), [Instituto Mexicano Del Seguro Soc. v. Stryker Corp.](#)

¹²⁶ Nico Krisch (May 2022), [Jurisdiction Unbound: \(Extra\)territorial Regulation as Global Governance](#), (*European Journal of International Law*, Volume 33, Issue 2): pp. 481-514

¹²⁷ See Cedric Ryngaert, [‘Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle’](#) (2008), *Criminal Law Forum* 19, 153; See also Roger O’Keefe, [‘Universal Jurisdiction. Clarifying the Basic Concept’](#) (2004) 2 JICJ 735.

¹²⁸ Cedric Ryngaert, [‘The Concept of Jurisdiction in International Law’](#) (2015) in: Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*.

¹²⁹ Nico Krisch (May 2022)

¹³⁰ International Criminal Court, [Rome Statute of the International Criminal Court](#) (1998) For the determination of “inability” in a particular case, Article 17(3) provides that the ICC shall consider whether “due to the total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out proceedings”.

¹³¹ The Protocol on the Statute of the African Court of Justice and Human Rights, known as the Malabo Protocol, adopted by the African Union in 2014 has an almost identical formulation. African Union, [Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights](#) (June 2014)

¹³² *Ibid.* at p. 11

¹³³ See R.A. Kok, [Statutory Limitations in international criminal law](#) (2007) at pp. 31 et seq. Germany, Poland, Romania, Spain and Sweden are among the civil law jurisdictions where there are no statutes of limitations for very serious offences, such as crimes against humanity and war crimes, or even criminal offences which are exceptionally serious. See, also [European Union, Limitation](#)

[rules in criminal matters](#) (2017) For the situation in the US, see Sydney Goldstein, [Criminal Statutes of Limitations: Time Limits for State Charges](#) (2021). In Germany there is an unlimited period with respect to murder under aggravating circumstances and offences covered by the German Code of Crimes under International Law. See [German Criminal Code](#) Section 78(2) and [German Code of Crimes under International Law](#), Section 5. In Australia, the offences that are not subject to time limits include embezzlement of public money and money laundering. At state level there may be time limits for offences with a low maximum prison sentence. See ICLG, [Australia, Anti-Money Laundering Laws and Regulations 2020](#) (2020)

¹³⁴ Id. R.A.Kok, at p. 44

¹³⁵ Gudrun Hochmayr, [A Comparative Analysis of Statutes of Limitation](#) (2021)

¹³⁶ Id. at p. 728

¹³⁷ UNCAC Article 29 requires a long statute of limitations period for commencing criminal proceedings and an even longer one (or suspension) where the alleged offender has evaded justice. This can be understood to allow but not require unlimited statutes of limitation for complex, cross-border cases or those involving egregious crimes, such as grand corruption. UNCAC does not contain any guidance on statutes of limitation for civil claims for damages. The Council of Europe [Civil Law Convention on Corruption](#) (1999) Article 7(1) requires parties to establish a limitation period of not less than three years from the date when the injured party became aware, and an outside limit for commencing proceedings of not less than ten years from the act of corruption. This leaves open the possibility of a much higher upper limit. It makes no distinction as to the gravity of the case or potential barriers to claims by foreign victims.

¹³⁸ See Article 29 of the [Rome Statute of the International Criminal Court](#). See also the UN [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity](#) which has [56 states parties](#) and the [European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes](#).

¹³⁹ See, for example, in France the Montpellier Appeal Court's reasoning in [CA Montpellier, 18 March 2014, No 13-00480](#).

¹⁴⁰ For example, in Indonesia, the statute of limitations for general civil claims is 30 years, with some exceptions. In Austria there is generally a 30-year limitation period and in Germany it is 30 years for certain serious injuries. In Italy, if a tort is considered a criminal offence, it has the same statute of limitations as for the crime. See, e.g., Thomson Reuters Practical Law, [Limitations Periods](#) (2020)

¹⁴¹ In Germany, for example, there is a 30-year limitation period for independent confiscation that is covered by the German Code of Crimes under International Law. See [German Criminal Code para 76\(b\)](#).

¹⁴² In foreign jurisdictions, this immunity derives from the state's own sovereign immunity under international law for its sovereign acts, with a trend towards exceptions for state functions of a commercial nature. On immunities of states, see the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), which has a Part III on proceedings in which state immunity cannot be invoked. The Convention has not yet entered into force but serves as guidance. See also, Council of Europe, [European Convention on State Immunity](#), signed in 1972 and entered into force in 1976. See, e.g., Tilman Hoppe (2011), [Public Corruption: Limiting Immunities of Legislative, Executive and Judicial Officials in Europe](#); Jon Vrushki (2018), [Immunities for Ministers and Members of Parliament](#) (U4 Helpdesk)

¹⁴³ UNODC, [Technical Guide to the United Nations Convention against Corruption](#) (2009): p. 85

¹⁴⁴ See, e.g., Jon Vrushki (2018)

¹⁴⁵ Tilman Hoppe (2011)

¹⁴⁶ The African Union Convention on Preventing and Combating Corruption Article 7(5) states that "[s]ubject to the provisions of domestic legislation, any immunity granted to public officials shall not be an obstacle to the investigation of allegations against and the prosecution of such officials." This could be construed to apply to foreign public officials.

¹⁴⁷ See e.g., [Council of Europe Concept Note for Seminar](#) (21 September 2022)

¹⁴⁸ This is linked to the customary international law doctrine that states may not prosecute one another in their domestic courts. See Allard International Justice and Human Rights Clinic (2016), [Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?](#)

¹⁴⁹ The ICJ elaborated on personal immunity in the *Arrest Warrant* case, stating that the "holders of high-ranking office in a State [...] enjoy immunities from jurisdiction in other States, both civil and criminal" (ICJ, [Arrest Warrant of 11 April 2000; Democratic Republic of the Congo v. Belgium, Judgment of 14 February 2002 – para. 51](#)). The ICJ reproduced this *obiter dictum* in *Certain Questions of Mutual Assistance in Criminal Matters* (ICJ: *Djibouti v. France, Judgment of 4 June 2008 – para. 170*).

¹⁵⁰ The International Law Commission has been discussing the subject since 2007. See, e.g., International Law Commission, [Report on the work of the sixty-ninth session \(2017\): Chapter VII, Immunity of state officials from foreign jurisdiction \(2017\)](#)

¹⁵¹ See the qualifications regarding the understanding of international law in the article by Maud Perdril-Vaissière, *International Immunities and the Fight against Grand Corruption* (2019) in Open Society Justice Initiative report [Legal Remedies for Grand Corruption \(2019\)](#). See also Statute of the International Criminal Court Article 27(2).

¹⁵² See International Law Commission (2016), [Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur](#), Section 4.C "Corruption as a limitation or exception to immunity", p. 90 et seq. National jurisprudence in several countries indicates that courts do not consider officials accused of crimes involving financial misconduct for personal benefit as entitled to immunity. See also Allard, International Justice and Human Rights Clinic, [Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply? \(Vancouver, 2016\)](#). See further FATF's commentary on PEPs which stated in 2013: "in light of the expanding modern doctrine of immunity, under which criminal activities are not considered to fall within official acts of state and under which even high state officials have personal criminal

responsibility for such criminal activities, criminal immunity should not simply be assumed to exist.” [FATF Guidance: Politically Exposed Persons \(Recommendations 12 and 22\) \(2013\)](#) p. 23

¹⁵³ See, e.g., International Law Commission, [Report on the work of the sixty-ninth session \(2017\): Chapter VII, Immunity of state officials from foreign jurisdiction \(2017\)](#) at page 7.

¹⁵⁴ United States Court of Appeals, 9th Circuit, [Republic of Philippines v. Marcos](#) (10 February 1988). See also other cases cited by Maud Perdriel-Vaissière in *International Immunities and the Fight against Grand Corruption* in the Open Society Justice Initiative report [Legal Remedies for Grand Corruption \(2019\)](#) in Eds. Ken Hurwitz and Richard Messick (2019), [Legal Remedies for Grand Corruption](#)

¹⁵⁵ Cour de cassation, Criminelle, Chambre criminelle, [15 décembre 2015, 15-83,156](#), Publié au bulletin

¹⁵⁶ UNODC, [Oslo Statement on Corruption involving Vast Quantities of Assets \(2019\)](#)

¹⁵⁷ Maud Perdriel-Vaissière in *International Immunities and the Fight against Grand Corruption* in [Legal Remedies for Grand Corruption \(2019\)](#); Paul Gully-Hart, [The Function of State and Diplomatic Privileges and Immunities in International Cooperation in Criminal Matters: The Position in Switzerland](#), *Fordham International Law Journal*, Vol. 23, Issue 5 (1999)

¹⁵⁸ Maud Perdriel-Vaissière in *International Immunities and the Fight against Grand Corruption* in Open Society Justice Initiative report [Legal Remedies for Grand Corruption \(2019\)](#) in Eds. Ken Hurwitz and Richard Messick, [Legal Remedies for Grand Corruption](#) (Open Society Foundations 2019)

¹⁵⁹ In the *Biens Mal Acquis* case, Transparency International France, an anti-corruption NGO, was recognised to have standing to initiate a criminal investigation of corruption as *partie civile*.

¹⁶⁰ Council of Europe Committee of Ministers, [Recommendation \(85\) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure](#) (1985)

¹⁶¹ Council of Europe, Council of Ministers [Recommendation \(2000\)19, The Role of Public Prosecution in the Criminal Justice System](#), paragraph 34 “Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.”

¹⁶² International Bar Association Anti-Corruption Committee, [2nd Submission to UNGASS against Corruption](#) (2020).

¹⁶³ OSCE, [Use of actio popularis in Cases of Discrimination](#) (2016): As the OSCE publication points out, the tool can play an important role in discrimination cases. In the words of the International Court of Justice in the 1966 judgement, an “*actio popularis*” constitutes “A right resident in any member of a community to take legal action in vindication of a public interest”. (ICJ, [South West Africa cases – Ethiopia and Liberia v South Africa, 1966, 47, para 88](#))

¹⁶⁴ In Europe, the *actio popularis* is foreseen for environmental issues in the *Aarhus Convention*. Article 9, paragraph 3, of the Convention requires each State party to the Convention to ensure that “Members of the public may initiate administrative or judicial proceedings to contest the acts or omissions of individuals or of public authorities going against the provisions of their national environmental legislation”. See also *The Free Library, Duke University School of Law, Standing to sue: lessons from Scotland's actio popularis* (2017)

¹⁶⁵ For a description of the UK framework for private prosecutions, see Lexis Nexis, [Private prosecutions—overview](#). See also Open Society Justice Initiative report [Legal Remedies for Grand Corruption \(2019\)](#).

¹⁶⁶ The first comment was made in *R. v Zinga (Munaf Ahmed)* (at p. 57), the second in *D Ltd v A* (at p. 40). Both cases were cited in [Exchange Chambers, The potential pitfalls for a Private Prosecutor](#) (2020)

¹⁶⁷ [Private prosecution for environmental crimes becomes a reality in South Africa](#) (2020)

¹⁶⁸ Rudina Jasini, [Victim Participation in International Criminal Justice](#), Tirana Observatory (2020)

¹⁶⁹ The European Union Agency for Fundamental Rights lists on its webpage, [Challenging the Decision Not to Prosecute](#), the following 14 civil law countries: Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Hungary, Lithuania, Luxembourg, Poland, Slovenia, Spain and Sweden where, as of 2014 a private prosecution could be instituted.

¹⁷⁰ [Spanish Criminal Procedure Law, Art. 101](#). See Rebecca Bowers, [Español jurídico: denuncia; querella](#) (2016)

¹⁷¹ Cortes Generales, [Constitución Española](#) (Spanish), [The Spanish Constitution](#) (English)

¹⁷² Law no. 83/95 de 31 Agosto, [Right of procedural participation and popular action](#), Under Article 2 the holders of the right of popular action are any citizens in enjoyment of their civil and political rights and associations and foundations defending the interests provided for in the previous article, regardless of whether or not they have a direct interest in the claim.

¹⁷³ http://www.navaslaw.com/cms/wp-content/uploads/2015/03/victims_rights_under_costa_rican.pdf

¹⁷⁴ [Costa Rican Code of Criminal Procedure](#) Article 70(d)

¹⁷⁵ *Partie civile* provisions exist in Belgium, France, Spain and other jurisdictions. In the *Biens Mal Acquis* case, described above, TI France, an anti-corruption NGO, was recognised to have standing as *partie civile* to initiate a criminal investigation of alleged money laundering by a foreign public official. Semlex in Belgium is another case where a number of NGOs have applied to be a *partie civile* (International Federation for Human Rights, [Congo's 'PassportGate': FIDH, LDH, UNIS and 51 Victims Initiate Proceedings in Belgian Courts](#) (2020). See also Public Eye, Mozambique's hidden debt: [Public Eye files a criminal complaint against Credit Suisse](#) (2019) and Public Eye, [Glencore in the DRC: Public Eye calls upon Swiss justice to take action complaint against Glencore](#) (2017).

¹⁷⁶ Maud Perdriel-Vaissière, *International Immunities and the Fight against Grand Corruption* in Open Society Justice Initiative report [Legal Remedies for Grand Corruption \(2019\)](#). See for example the Obiang cases in France and Spain. In France there is a procedure of “citation directe” if the victim has evidence. This allows a victim to summon an accused if there is sufficient evidence and a judgement can be made quickly. See French Ministry of the Interior, [Citation directe](#) (2020).

¹⁷⁷ French [Cour de cassation, criminelle, Chambre criminelle, 9 novembre 2010, 09-88.272](#)

¹⁷⁸ Sherpa, [Affaire de Biens Mal Acquis Syriens: Rifaat al-Assad définitivement condamné](#) (7 Septembre 2022)

¹⁷⁹ See, Social Watch Benin, Civil Society Report on the Implementation of Chapter 4 II (Prevention) & Chapter V (Asset Recovery) of the United Nations Convention Against Corruption in Benin (Cotonou, Social Watch Benin, n.d.) p. 14.; [Corpesca: Fundación Ciudadano Inteligente Presenta Querrela por Cohecho contra el UDI Jaime Orpis](#), August 2015; Information cited in unpublished paper by Richard Messick

¹⁸⁰ Sala II de la Cámara Federal de La Plata, Sentencia dictada en el expediente N° CFP 6089/2016/4 (Reg. Int. 9543), disponible en: [Sentencia-de-Cámara-Octubre-2018.pdf](#) Cited in TOJIL, [VÍCTIMAS DE CORRUPCIÓN DE CORRUPCIÓN ¿Qué podemos hacer los ciudadanos víctimas de corrupción?](#) (2022)

¹⁸¹ About the case, see FIDH (13 May 2020), [Congo's 'PassportGate': FIDH, LDH, UNIS and 51 Victims Initiate Proceedings in Belgian Courts](#)

¹⁸² Article 17 para. 2 of the Belgian Judicial Code grants associations a right of legal action when their corporate purpose is violated.

¹⁸³ FAZ (23 May 2023), [Deutscher Haftbefehl gegen Libanons Zentralbankchef](#)

¹⁸⁴ UN General Assembly, [Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#) (Resolution 60/147 1985)

¹⁸⁵ Among those that have not ratified are Denmark, Germany, the Russian Federation, Switzerland and the United Kingdom, as well as Luxembourg and Liechtenstein. The European Union has neither signed nor ratified the Convention and the same is true of the United States, which is entitled to do so even though it is not a member state of the Council of Europe.

¹⁸⁶ League of Arab States, [Arab Anti-Corruption Convention](#) (2010)

¹⁸⁷ United Nations General Assembly, [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) (Resolution 40/34 1985)

¹⁸⁸ Ibid.

¹⁸⁹ UN General Assembly, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#) (General Assembly resolution 60/147, 15 December 2005)

¹⁹⁰ United Nations, [Guiding Principles on Business and Human Rights](#) (2011)

¹⁹¹ UNODC, [State of Implementation of the UN Convention against Corruption](#) (2017)

¹⁹² A wide range of options for compensation of victims of corruption were analysed in the 2016 UNODC report, [Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation](#); A 2019 OECD report on non-trial resolutions in foreign bribery cases outlined the opportunities for direct compensation to victims in such cases in 27 jurisdictions. OECD, [Resolving Foreign Bribery Cases with Non-Trial Resolutions](#) (2019), especially 4.5.4 Compensation to victims

¹⁹³ For example, in Estonia, the crime victim's extensive rights include the right to be a party to the proceedings; to file a civil action for compensation through an investigative body or the Prosecutor's Office; to obtain access to the criminal file; to present an opinion concerning the charges, the punishment and the damages set out in the charges and the civil action; to give or refuse consent to settlement proceedings; and to present an opinion on the damages. [Estonia Code of Criminal Procedure](#), paras 37 -38

¹⁹⁴ UNODC, [Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation](#) (2016)

¹⁹⁵ [18 U.S.C. § 3771](#)

¹⁹⁶ See eg. [18 U.S.C § 3663A](#)

¹⁹⁷ United Kingdom Sentencing Council, [Corporate Offenders: fraud, bribery, moneylaundering](#)

¹⁹⁸ Furthermore, the Crown Prosecution Service (CPS) [Victims' Right to Review \(VRR\) scheme](#) enables victims in England and Wales to seek a review of certain CPS decisions not to start a prosecution or to stop a prosecution.

¹⁹⁹ UK Sentencing Council, [Corporate Offenders: fraud, bribery and money laundering](#); Serious Fraud Office, [Compensation Principles to Victims Outside the UK](#)

²⁰⁰ Victims' Commissioner for England and Wales, [2020/2021 Annual Report](#) (2021)

²⁰¹ UK Ministry of Justice, [Press release: Landmark reform for Victims](#) (9 December 2021) As announced, the law would include, among other things, a requirement for prosecutors to meet with victims before making a charging decision, in order to understand the impact and the possibility of community impact statements, about the collective impact of an offence, including in cases where there is no clear victim

²⁰² OECD (2019), [Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention](#), in particular 4.5.4., Compensation to victims

²⁰³ See, e.g., [4 May 2006 decision by the French Cour de Cassation](#). In this decision, relating to a corruption-related offence involving a public official working for the Ministry of Defence and a private company, the Supreme Court granted the French State the sum of €10 000 as compensation for its non-pecuniary damage, on the grounds that the offences committed by the defendants "have brought discredit on all the civilian and military personnel of the Ministry of Defence and constitute a factor of weakening of the authority of the State in public opinion."

²⁰⁴ The East African (25 September 2021), [Uganda court jails official for 40 years, demands \\$5.4 million for graft](#). The same public official was [previously convicted in 2017](#).

²⁰⁵ [Report to Congress on Corruption in El Salvador, Guatemala and Honduras](#) (2019)

- ²⁰⁶ OECD (2018), [Foreign Bribery: What Happens to the Public Officials on the Receiving End?](#)
- ²⁰⁷ Reuters (2010), [UPDATE 1-Alcatel-Lucent to pay \\$10 mln in Costa Rica case](#)
- ²⁰⁸ According to court documents in a [case brought in the US](#), the company's subsidiary Alcatel CIT won three contracts in Costa Rica worth over US\$300 million as a result of corrupt payments to government officials, from which it gained a profit of over US\$23 million.
- ²⁰⁹ Inquirer.net (28 April 2011), [Costa Rican ex-president found guilty of corruption](#); The Tico Times (5 August 2015), [Alcatel-Lucent makes \\$10 million payment to Costa Rica's ICE in corruption settlement](#); The Costa Rica News (14 March 2010), [Settlement reached in the Alcatel bribery case](#)
- ²¹⁰ The former President's conviction was overturned on appeal in 2012, this in turn was reversed by the Supreme Court in 2014 and the matter referred back to the court of appeals; and finally in a subsequent trial the President was acquitted, which was confirmed on appeal in 2016. RTVE (28 April 2011), [Former Costa Rican President Rodríguez, sentenced to five years for corruption](#); The Tico Times (8 August 2013), [Prosecutor's Office files embezzlement charges against former Costa Rican President Miguel Ángel Rodríguez](#); Nacion (6 February 2023), [ICE elimina demanda civil contra expresidente Rodríguez y cierra caso ICE – Alcatel](#)
- ²¹¹ The State Attorney was reported to be satisfied with having received over US\$22 million in the process. Nacion (6 February 2023)
- ²¹² OCCRP (3 March 2021), [Brazil's Petrobras Recovered Over \\$920 Million it Lost to Graft](#)
- ²¹³ Oil and Gas Innovation, [Petrobras goes to court to seek compensation against executives and contractors cited in "Lava Jato" probe](#)
- ²¹⁴ BH Compliance (2 July 2021), [Petrobras recovered more than US\\$ 1.2 billion diverted through corruption](#)
- ²¹⁵ BH Compliance (2 July 2021); OCCRP (3 March 2021)
- ²¹⁶ SEC (2018), [Petrobras Reaches Settlement with SEC for Misleading Investors](#)
- ²¹⁷ US Department of Justice (27 September 2018), [Petróleo Brasileiro S.A. – Petrobras Agrees to Pay More Than \\$850 Million for FCPA Violations](#)
- ²¹⁸ <https://www.dandodiary.com/2023/08/articles/international-d-o/dutch-court-enters-interim-merits-judgment-in-favor-of-petrobras-investors/>
- ²¹⁹ <https://www.britannica.com/event/Petrobras-scandal>
- ²²⁰ <https://www.reuters.com/article/cnews-us-malaysia-politics-scandal-exclu-idCAKCN1IG0GL-OCATP>
- ²²¹ <https://www.cnbc.com/2019/01/14/7point5-billion-from-goldman-sachs-over-1mdb-is-reasonable-malaysia.html>
- ²²² <https://www.reuters.com/article/malaysia-politics-1mdb-goldman-idUSKBN25V0KG>
- ²²³ <https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion>; <https://www.reuters.com/article/us-malaysia-politics-1mdb-goldman-idUSKCN1UZ0DI>
- ²²⁴ https://www.justice.gov/d9/press-releases/attachments/2020/10/22/goldman_malaysia_plea_agreement_0.pdf
- ²²⁵ <https://www.mof.gov.my/portal/en/news/press-release/ammb-holdings-berhad-to-pay-rm2-83-billion-to-the-malaysian-government-for-1mdb-related-settlement>; <https://www.reuters.com/article/us-malaysia-politics-1mdb-ammb-idUSKBN2AQ1XF>
- ²²⁶ <https://www.asiamoney.com/article/b1h9vbbgz1z8x0/why-1mdb-still-troubles-ambank>; <https://www.theguardian.com/world/2016/mar/01/more-than-1bn-deposited-malaysian-prime-minister-account-najib-razak>
- ²²⁷ The first auditor in 2009 was Ernst & Young, which reportedly declined to sign off on the 2010 financial statements and was discharged. <https://www.malaymail.com/news/malaysia/2022/04/20/ex-cfo-famous-in-news-1mdb-was-scrambling-to-find-new-auditor-in-2013-deloit/2054605>; <https://www.malaysiakini.com/news/440095>
- ²²⁸ The plaintiffs alleged that about USD3.2 billion were misappropriated from 1MDB and its subsidiaries during the period KPMG served as the firm's auditor. The amount was part of a larger sum of USD5.64 billion allegedly siphoned from 1MDB between 2009 and 2014 and the plaintiffs alleged the losses could have been avoided if KPMG had obtained sufficient evidence to support its audit findings, <https://www.reuters.com/business/finance/kpmg-denies-alleged-breaches-negligence-after-reported-1mdb-lawsuit-2021-07-09/>; <https://www.reuters.com/business/malaysia-says-auditor-kpmg-pay-80-million-1mdb-settlement-2021-09-16/>; <https://www.mof.gov.my/portal/en/news/press-release/malaysia-receives-rm340-92-million-from-kpmg-as-1mdb-settlement>
- ²²⁹ <https://www.mof.gov.my/portal/en/news/press-citations/deloitte-to-pay-rm324-mln-to-malaysian-govt-for-1mdb-src-settlement>; <https://www.reuters.com/business/finance/deloitte-pay-malaysia-80-mln-settle-claims-linked-state-fund-1mdb-2021-03-03/>
- ²³⁰ The construction costs reportedly ballooned from EUR 640 million to about EUR 1.41 billion <https://sloveniatimes.com/alstom-successor-strikes-plea-bargain-in-tes6-trial/>
- ²³¹ <https://www.hse.si/en/hse-and-tes-receive-eur-261-million-settlement/>; <https://sloveniatimes.com/alstom-successor-strikes-plea-bargain-in-tes6-trial/>
- ²³² The federal district court considered that the programme was undertaken in the purported or apparent execution of official duties. It noted that the kickbacks and bribes were directed into government accounts, and the regime's conduct was largely "governmental". The court cited case law of the U.S. Court of Appeals for the Second Circuit has held that a "governmental act" is an act "physically taken by persons capable of exercising the sovereign authority of the foreign nation," as long as the persons "purported to act in their official capacity." "In determining whether an act was within the authority of an official or an official body, or was done under colour of such authority..., one must consider all of the circumstances, including whether the affected

parties reasonably considered the action to be official, whether the action was for public purpose or for private gain, and whether the persons acting wore official uniforms or used official equipment. If a government is alleged to act pursuant to its official duties or for an official purpose, those acts should be attributed to the sovereign. Iraq offered three permutations of this argument: (1) Hussein's conduct was private, self-serving conduct and thus not governmental conduct that can be attributed to Iraq; (2) the Hussein Regime was not the legitimate government of Iraq and therefore its actions cannot be imputed to Iraq; and (3) the Hussein Regime committed unlawful conduct that, because it is unlawful, cannot be attributed to Iraq. The Court rejected each of these arguments because it said none demonstrated that the alleged conduct of the Hussein Regime was not governmental.

²³³ US Department of Justice (9 January 2014), [Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \\$223 Million in Fines and Forfeiture](#)

²³⁴ USA Today (2014), [Alcoa unit pleads guilty to Bahrain bribery](#); CNBC (2012), [UPDATE 1-Alcoa paying \\$85 mln cash to settle with Bahrain's Alba](#)

²³⁵ UN OHCHR, [Corruption and human rights](#)

²³⁶ Marcus Asner and Daniel Ostrow, [A New Focus On Victims' Rights in FCPA Restitution Cases](#), New York Law Journal (2015), S3: "On the other hand, ICE makes good sense if we shift focus to the ultimate victims: the people of Costa Rica. Under that view, ICE, as a corporate 'person,' had been tasked with serving the people, but instead operated akin to a bribe-taking machine, putting its own interests (and the interests of its corrupt officials) before the interests of its principals (the people of Costa Rica). As a 'co-conspirator,' ICE would not be a victim entitled to restitution. Rather, restitution would be due to the people".

²³⁷ Club of Mozambique, [Hidden Debt: Credit Suisse forgives 200 million dollars of Mozambique's debt – AIM report](#) (21 October 2021)

²³⁸ StAR (2014), [Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery](#)

²³⁹ Reuters (2017), [French bank SocGen settles dispute with Libyan Investment Authority](#)

²⁴⁰ Enyo Law (2015), [Enyo Law Acts for the Libyan Investment Authority in 2.1 billion claim against Société Générale](#)

²⁴¹ [In the Matter of the Application for a Compensation Order](#) (26 October 2022); The Serious Fraud Office v. Glencore Energy UK Ltd, [Sentencing Remarks of Mr Justice Fraser](#) (3 November 2022); Reuters, [Nigeria loses compensation bid over Glencore bribery](#) (October 2022). The Crown Court in that case wrote that it is "not a suitable venue for hearing representations from the wide range of victims (or those who submit that they are victims) who may want to have compensation orders made in their favour. There would be a risk of deluging the criminal justice system were that to be permitted. Compensation orders are ancillary; they are not the main purpose of sentencing."

²⁴² [In the Matter of the Application for a Compensation Order](#) (26 October 2022); The Serious Fraud Office v. Glencore Energy UK Ltd, [Sentencing Remarks of Mr Justice Fraser](#) (3 November 2022); Reuters, [Nigeria loses compensation bid over Glencore bribery](#) (October 2022).

²⁴³ See StAR, [Fact Sheet "Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery"](#)

(2014) See also, European Parliament, [Access to legal remedies for victims of corporate human rights abuses in third countries](#) (2019)

²⁴⁴ UN OHCHR, [Corruption and human rights](#)

²⁴⁵ [International Covenant on Civil and Political Rights](#) (1966); [International Covenant on Economic, Social and Cultural Rights](#) (1966); UNODC, Knowledge tools for academics and professionals, [Module 7: Corruption and Human Rights](#)

²⁴⁶ UN OHCHR (2011), [Guiding Principles on Business and Human Rights](#): p. 30

²⁴⁷ Human Rights Council, [Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights](#) (2015)

²⁴⁸ Inter-American Commission on Human Rights, [Corruption and Human Rights in the Americas: Inter-American Standards](#) (2019) The first scenario is where funds allocated to realise economic, social and cultural rights are diverted. A second scenario is when public services designed to realize ESCER are impaired by "macro-corruption" so that it is no longer possible to adequately satisfy the rights of the citizens who depend on those services. These include social security, health, housing, education, pension, and other systems. Here, the Commission says, "distinct groups can be made out, to whom reparation must be made." A third scenario is when a public service or social programme intended to give effect to ESCER is co-opted by private interests, that cause it to deviate from its proper functions or goal, such as when poor quality medicines or defective medical equipment is supplied. The fourth scenario is when authorities are pressured by private interests to unduly trim the ability of the State to access the sources of funding needed to realize ESCER.

²⁴⁹ International Council on Human Rights Policy and Transparency International, [Corruption and Human Rights: Making the Connection](#) (2009)

²⁵⁰ International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; General Assembly [resolution on the right to a clean, healthy and sustainable environment](#) (July 2022); [African Charter on Human and People's Rights](#) (1981)

²⁵¹ Transparency International, Grand Corruption and the SDGs: [Selling the country's future – the island sales scheme in the Maldives](#) (2019); [Putting a country's health at risk: high-level corruption in Guatemala](#) (2019); [The visible costs of Mozambique's hidden debts scandal](#) (2019); [Belo Monte and the devastating impact of corruption in the Amazon](#) (2020)

²⁵² See [International Covenant on Civil and Political Rights](#) and [International Covenant on Economic, Social and Political Rights](#)

²⁵³ Ilias Bantekas, [Corruption as an International Crime and a Crime against Humanity: An Outline of Supplementary Criminal Justice Policies](#), Journal of International Criminal Justice (July 2006)

²⁵⁴ Social damage is defined as “the impairment, impact, detriment or loss of social welfare caused by an act of corruption and suffered by a plurality of individuals, whereby their material or immaterial diffuse or collective interests are [adversely] affected.” Social welfare is defined as the legally protected interest involved and refers to “the material and immaterial satisfaction that certain material conditions produce on people and communities, which relates not only to income levels, but also to other important dimensions of human existence such as health, education, infrastructure, housing, safety, environment,” etc. The Conference of Ministers of Justice of the Ibero-American countries held in Madrid in 2011 agreed to use [Costa Rica’s proposal to create a concept of social damage](#). See also Juanita Olaya (2019), [Dealing With the Consequences: Repairing the Social Damage Caused by Corruption](#)

²⁵⁵ Calculation of social damages could be defined by a clear set of rules whether a formula (for example, an amount per capita with an upper limit) or based on a multiple of the “illicit gains and profits” of a state official, company, bank or other accomplices or accessories. This approach calls for methods more flexible than required in ordinary corruption cases where the plaintiff generally has to prove the defendant’s breach of duty, the occurrence of damage, and the causal link between the corruption and the damage. For example, for victim standing in a US federal court the following must be shown: (1) injury-in-fact, which is a ‘concrete and particularized’ harm to a ‘legally protected interest’; (2) causation in the form of a ‘fairly traceable’ connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief.

²⁵⁶ US Department of Justice, [Three Former Mozambican Officials etc.](#) (2019) Spotlight on Corruption, [Mozambique and the Tuna Bond Scandal](#) (2021)

²⁵⁷ Edson Cortez et al. [The Costs and Consequences of the Hidden Debt Scandal of Mozambique](#) (CIP, CMI May 2021)

²⁵⁸ Transparencia por Colombia, [Reparation of the Victims of Corruption in Colombia: Approaches to concepts, legal roadmaps and valuation methodologies](#), Summary version (December 2020)

²⁵⁹ [Her Majesty the Queen and Niko Resources: Agreed Statement of Facts](#). In Canada, a [federal victim surcharge](#) of 30 per cent of the fine is levied in many criminal cases and is possible in foreign bribery cases. To date, the victim surcharge helps to fund programmes, services and assistance to victims of crime within the Canadian provinces and territories – but in principle could also be used to assist victims outside Canada. Likewise, in Australia, a victims’ levy is provided for in South Australia consisting of 20 per cent of fines imposed and there is a similar system in Australian Capital Territory.

²⁶⁰ David Montero, [Bangladesh: The Blowback of Corruption](#) (PBS 2009) Niko first entered Bangladesh in 1997 with just 10 years’ experience in the field by participating in the bidding on the second round Production Sharing Contract for oil and gas exploration. According to the Bangladesh Daily Star and PBS, the firm failed to qualify in the bidding both on technical and financial grounds. It would only have been permitted to operate in a “marginal” field. According to news reports and commentators, Petrobangla officials received direct instructions from Prime Minister Khaleda’s office to execute a contract with Niko granting them the gas fields requested and to do so without any competitive bidding. The law minister sent a legal opinion supporting this request. The legal opinion concluded that Chhatak East was a marginal and abandoned gas field despite contrary views held by geologists in BAPEX and Petrobangla. See Moin Ghani, [The fascinating Niko graft case](#), (Dhaka Tribune 11 November 2018)

²⁶¹ Niko obtained the GPSA in 2006 and the company reportedly offered US\$525,000 to local villages and US\$100,000 to fund additional services but did not respond to a formal demand for compensation from the Government of Bangladesh. OECD WGB, [Canada Phase 3 Follow-Up Report](#) (2013) p. 18; <https://www.lawnow.org/international-corporate-political-corruption-the-case-of-niko-resources-ltd/>; <https://www.pbs.org/frontlineworld/stories/bribe/2009/08/bangladesh-a-dirty-deal-back-fires.html>

²⁶² OECD WGB, Canada Phase 3 Follow-Up Report (2013) p. 18; <https://www.pbs.org/frontlineworld/stories/bribe/2009/08/bangladesh-a-dirty-deal-back-fires.html>

²⁶³ Since then, Canada has introduced a legislative framework for remediation agreements, which includes extensive provisions on victims’ rights and compensation, but a court decision in relation to the first remediation agreement under this framework suggests that recoveries will be very limited. <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch21.html>; <https://www.dwpv.com/en/Insights/Publications/2022/First-Remediation-Agreement-under-Canadian-Criminal-Code>; <https://mcmillan.ca/insights/take-two-canadas-second-court-approved-remediation-agreement/>

²⁶⁴ ECOWAS Community Court of Justice, [CW/CCJ/JUD/07/10 The Registered Trustees of the Socio-economic and Accountability Project \(SERAP\) v. Nigeria & UBEC](#) (30 November 2010)

²⁶⁵ The court took note that as of January 2021, the Ombudsman usually recommended a payment of £200–£600 per month of missed education, <https://caselaw.nationalarchives.gov.uk/ewhc/admin/2023/489> See also, <https://tvedwards.com/news-and-blogs/news/obtains-damages-for-breach-of-childrens-rights-to-education/>

²⁶⁶ New York Times (25 October 2017), [Guatemalan Soccer Executive Gets 8 Months in FIFA Corruption Case](#). See also US Department of Justice (27 September 2017), [High-Ranking Soccer Officials Convicted in Multi-Million Dollar Bribery Schemes](#); US Department of Justice (29 August 2018), [Former FIFA Executive, President of CONMEBOL and Paraguayan Soccer Official Sentenced to Nine Years in Prison for Racketeering and Corruption Offenses](#)

²⁶⁷ US Department of Justice (24 August 2021), [Justice Department Approves Remission of Over \\$32 Million in Forfeited Funds to Victims in the FIFA Corruption Case](#); US Department of Justice (30 June 2022), [Justice Department Announces Additional Distribution of Approximately \\$92 Million to Victims in FIFA Corruption Case](#). Under [US law relating to remission](#), the Attorney

General or the seizing agency may return forfeited property to an owner, lienholder or to a victim of the crime underlying the forfeiture. A victim is a person who has suffered a specific pecuniary loss as a direct result of the crime underlying the forfeiture or a related offence. The federal regulations governing remission are at 28 C.F.R. § 9.

²⁶⁸ Dylan Tokar, Wall Street Journal, [Justice Department to step up focus on white collar crime victims](#), (3 March 2022)

²⁶⁹ See eg. Jody Gody, [Och-Ziff Unit sentenced to repay victims \\$135 mn in African bribery case](#) (Reuters 5 November 2020); US Department of Justice, [Credit Suisse Resolves Fraudulent Loan Case in \\$547 Million Coordinated Settlement](#) (19 October 2021); Chris Dolmetsch [Glencore Must Pay Almost \\$30 million to Bribery Victim Crusader Health](#) (Bloomberg 23 February 2023)

²⁷⁰ Samuel Hickey, [Remediation in Foreign Bribery Settlements: The Foundations of a New Approach](#) (Chicago Journal of International Law, 2021)

²⁷¹ See eg. European Agency for Human Rights, [Business and Human Rights – Access to Remedy](#) (2020)

²⁷² On mass harm and collective interests, see for example, Directive (EU) 2020/1828 of 25 November 2020 on [Representative actions for the protection of the collective interests of consumers](#)

²⁷³ Open Society Justice Initiative, [Legal Remedies for Grand Corruption](#) (2019)

²⁷⁴ Global Compliance News, [Competition Litigation in Brazil](#)

²⁷⁵ Mauricio Duce, Cristián Riego, Valentina Zagmutt y Bastián Martínez, *El Sistema de Justicia Penal Y Su Lucha Contra la Corrupción En América Latina: Informe de Chile*, (Espacio Público, Santiago, 2019) pp. 86 -93. Cited by Richard Messick in an unpublished paper.

²⁷⁶ Navas Law, [Victim's rights under Costa Rican law](#)

²⁷⁷ [Costa Rican Code of Criminal Procedure](#) Article 70(d)

²⁷⁸ [Peruvian Code of Criminal Procedure](#) Article 94

²⁷⁹ European Commission, [Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law](#) (2013) The

Recommendation also provides that where a dispute concerns natural or legal persons from several member states, member states should ensure that a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems.

²⁸⁰ European Parliament and Council of the European Union, [Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union](#) (26 November 2014)

²⁸¹ European Parliament and Council of the European Union, [Directive on representative actions for the protection of the collective interests of consumers](#) (25 November 2020)

²⁸² Dawn.com (13 September 2005), [BD govt asked to freeze Canadian firm's accounts: Damage to gas field](#)

²⁸³ The court reportedly determined that "the assets of Niko Resources in Bangladesh have been obtained through a corrupt scheme and are to be treated as proceeds of crime" and that the "assets of JVA and GPSA shall revert back to the state".

<https://www.bnnbloomberg.ca/how-niko-resources-fell-from-tsx-high-flier-to-delisting-1.1228241>;

<https://bdnews24.com/bangladesh/2017/08/24/hc-scraps-niko-gas-deals-with-petrobangla-bapex>

²⁸⁴ <https://jusmundi.com/en/document/decision/en-niko-resources-bangladesh-ltd-v-bangladesh-petroleum-exploration-production-company-limited-bapex-and-bangladesh-oil-gas-and-mineral-corporation-petrobangla-award-friday-24th-september-2>

²⁸⁵ [Centre for Public Interest Litig. & Others](#), 3 S.C.R. 235

²⁸⁶ See European Parliament, [Access to legal remedies for victims of corporate human rights abuses in third countries](#) (2019)

²⁸⁷ [Karim v. ABB Ltd. \(SDNY 2008\)](#)

²⁸⁸ To be "concrete and particularized," an "injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n. 1. That is, "standing cannot be predicated upon an injury the plaintiff suffers in some indefinite way in common with people generally."

²⁸⁹ Dylan Tokar, Wall Street Journal, [Justice Department to step up focus on white collar crime victims](#), (3 March 2022)

²⁹⁰ Global Forum on Asset Recovery, [GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases](#). The principles were agreed among six states in 2017.

²⁹¹ Asset recovery involves several stages, identification (detection), tracing, freezing, confiscation (including forfeiture) and return. All of these stages are complicated and require international cooperation. Criminal confiscation occurs upon a conviction at the end of proceedings about the original criminal act and/or in relation to the laundering the proceeds. An easier path is non-conviction-based confiscation, which is a civil proceeding with a lower standard of proof.

²⁹² Jean-Pierre Brun et al, [Public Wrongs, Private Rights](#) (StAR 2015) page 189 et seq. A report of the Stolen Asset Recovery Initiative has detailed how the direct damage to the state can be calculated in foreign bribery cases.

²⁹³ See the preambles to Resolutions 3/3, 4/4, 5/3 and 6/3, United Nations, [Conference of the States Parties to the United Nations Convention against Corruption](#): Third, Fourth, Fifth and Sixth Sessions.

²⁹⁴ FATF noted in 2013 that effective implementation of the politically exposed person (PEP) requirements in its Recommendations "has proven to be challenging for competent authorities, financial institutions and DNFBPs worldwide." FATF, [Politically Exposed Persons \(Recommendations 12 and 22\)](#) (2013), page 4 In 2021 FATF recognised that its current recommendations on beneficial ownership disclosure were not delivering the results needed and subsequently introduced some changes. FATF, [Outcomes FATF Plenary 22,23 and 24 February 2021](#), Delegates explored potential amendments to further strengthen the FATF requirements on beneficial ownership.

²⁹⁵ The problem of the misuse of corporate vehicles, is well-understood for over 25 years. A 2001 OECD report noted that “in recent years, the issue of the misuse of corporate entities for illicit purposes has drawn increasing attention from policy makers and other authorities.” The illicit purposes listed included bribery, corruption and money laundering. OECD, [Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes](#) (2001) National central public registers that are well-resourced and proactive can significantly help to address this problem, as recognised in a 2019 FATF report. This would enable law enforcement, to more easily access such information. The report also noted that “[o]ther information agents and the public can also gain access to the information on beneficial ownership for cross-checking and verification”. FATF, [Best Practices on Beneficial Ownership for Legal Persons](#) (2019), p. 16. Several FATF country reports recognise the importance of beneficial ownership registers. Evaluators acknowledge in one of the reports that the establishment of a beneficial ownership register is, or would be, an important step to address deficiencies related to timely access to beneficial ownership information, FATF evaluators found a public beneficial ownership register can be a powerful tool for verifying beneficial ownership information as it allows citizens, civil society, journalists, business and reporting entities to review the data and pinpoint inaccuracies.” A Transparency International report in 2019 showed that countries perform better in meeting the objectives of the FATF recommendations when they record beneficial ownership information in at least one register, and where competent authorities have direct access to the information, instead of having to request it from the register authority. Transparency International, [Who is Behind the Wheel? Fixing the Global Standards on Company Ownership](#) (2019). The OECD Working Group on Bribery has also recognised that central, public registers of the beneficial ownership of companies and trusts would reduce bribery and money laundering opportunities and enhance detection and investigation of cases involving those offences. See OECD Working Group on Bribery reports on the [United Kingdom](#) and [Czech Republic](#). See also, Gillian Dell (2020): p. 18

²⁹⁶ Eurojust concluded in a 2022 report that “clarity in the rules on beneficial ownership is of the utmost importance in money laundering and other cases.” Eurojust, [Eurojust Report on Money Laundering](#) (October 2022)

²⁹⁷ UNODC, [State of Implementation of the UN Convention against Corruption](#) (2nd edition, 2017), page 128

²⁹⁸ By contrast, the [Council of Europe Criminal Law Convention on Corruption](#) Article 19 (3) does not include qualifying language. It states: Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds. The African Union Convention Article 16 requires legislative measures to enable confiscation of the proceeds [of corruption] or property, the value of which corresponds to that of such proceeds, derived from offences under the Convention.

²⁹⁹ StAR/OECD (2014), [Few and Far: The Hard Facts of Stolen Asset Recovery](#): p. 42

³⁰⁰ In its 2011 paper on laundering the proceeds of grand corruption, the FATF observed that “corrupt PEPs have a greater need than others to ensure that specific criminal assets cannot be identified with or traced back to them. Corporate vehicles thus provide one of the most effective ways to separate the origin of the illegal funds from the fact that the PEP controls it. FATF (2011): p. 19

³⁰¹ FATF (2011): p. 34

³⁰² Monetary Authority of Singapore, [MAS Penalises 3 Banks and an Insurer for Breaches of Anti-Money Laundering Requirement](#) (21 June 2023) The lapses related to the German company Wirecard. See Nikkei Asia (21 June 2023), [Singapore punishes Citi, DBS, OCBC over Wirecard scandal](#)

³⁰³ <https://riskscreen.com/blog/fca-outdated-and-manual-onboarding-processes-are-the-cause-of-many-banks-failing-to-meet-aml-requirements/>; <https://www.fca.org.uk/publications/multi-firm-reviews/financial-crime-controls-at-challenger-banks>

³⁰⁴ Statement by interviewee with relevant law enforcement experience

³⁰⁵ French [Criminal Code Article 324-1-1](#)

³⁰⁶ UNODC, [UNCAC Travaux Préparatoires](#): p. 221 footnote 18

³⁰⁷ [Cass.Crim. December 18, 2019, n°19-82.496](#)

³⁰⁸ <https://www.asso-sherpa.org/teodorin-obiang-definitivement-condamne-dans-laffaire-des-biens-mal-acquis-une-decision-qui-clot-le-chapitre-de-la-confiscation-et-ouvre-celui-de-la-restitution>; <https://www.bbc.com/news/world-europe-53077818>; <https://www.asso-sherpa.org/condemnation-of-rifaat-al-assad-for-money-laundering-and-embezzlement-confirmed-by-french-supreme-court>

³⁰⁹ This calls for parties to adopt legislation or other measures to require that “in respect of a serious offence”, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.” Council of Europe [Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism](#) (2005)

³¹⁰ See eg. Guilherme France (2022), [Non-conviction based confiscation as an alternative tool to asset recovery](#) (Transparency International Anti-Corruption Helpdesk Answer)

³¹¹ Id. p. 11

³¹² <https://www.pinsentmasons.com/out-law/news/2023/07/lords-back-new-failure-to-prevent-money-laundering-offence>

³¹³ Denton’s, [UK government set to introduce new Failure to Prevent offences](#) (3 April, 2023)

³¹⁴ Eurojust, [Eurojust Report on Money Laundering](#) (October 2022) page 11

³¹⁵ <https://www.prosecutionservice.nl/latest/news/2021/04/19/abn-amro-pays-eur-480-million-on-account-of-serious-shortcomings-in-money-laundering-prevention>

³¹⁶ <https://www.justice.gov/usao-edny/pr/bank-julius-baer-admits-laundering-over-36-million-bribes-fifa-case>

³¹⁷ <https://www.swissinfo.ch/eng/business/falcon-bank-fined-for-money-laundering--former-ceo-acquitted/47194680>

³¹⁸ <https://www.finma.ch/en/news/2016/10/20161011-mm-falcon/>

³¹⁹ <https://www.finews.ch/news/banken/58130-falcon-bundestrafgericht-ceo-bank-freispruch>

³²⁰ <https://www.bbc.com/news/business-61957774>

³²¹ <https://www.reuters.com/business/finance/court-convicts-credit-suisse-money-laundering-case-2022-06-27/>

³²² Switzerland's 2015 Foreign Illicit Assets Law regulates the freezing, confiscation and restitution of illicitly acquired assets of foreign PEPs and their close associates. It aims to address situations where foreign leaders have, in all probability, enriched themselves by misappropriating assets through corruption or other felonies and by transferring them to other countries. Under this law, a court can order a proactive freeze for the purposes of confiscation, for a period of ten years if certain conditions are met. The Swiss model may be used where "the country of origin is unable to satisfy the requirements for mutual legal assistance (MLA) owing to the total or substantial collapse, or the impairment, of its judicial system (failure of state structures)". In that case, the freeze can continue for ten years. The model also provides for confiscation of assets based on a presumption that certain assets are of illicit origin. UNODC Open-ended Intergovernmental Working Group on Asset Recovery, [Foreign Illicit Assets Act \(FIAA\) of 18 December 2015](#) and StAR/OECD, [Few and Far: the Hard Facts of Stolen Asset Recovery](#) (2014) page 44

³²³ Section 2 of the legislation provides that during a change of power in a state with a high degree of corruption, where it appears likely that the assets were acquired through acts of corruption, criminal mismanagement or other felonies, the government may order a preventive freezing of assets in order to bolster cooperation in mutual legal assistance with the state of origin. If the legal assistance process fails, the government may at a later stage decide to freeze assets with a view to confiscation. One of the conditions for proactive freezing is that "the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable". Another is that "the safeguarding of Switzerland's interests requires the freezing of the assets". Further, persons or institutions who hold, manage or know of assets of persons affected by an asset freeze must immediately report these assets to the Money Laundering Reporting Office of Switzerland (MROS). See Swiss Federal Department of Foreign Affairs, [Freezing of assets](#)

³²⁴ [UK Criminal Finances Act 2017, Unexplained wealth orders](#) Under this legislation, law enforcement can apply for a court order requiring someone to explain their interest in a property and provide evidence of legitimate acquisition. If that person fails to comply, law enforcement may then apply to the court for a civil recovery order (CRO) with the benefit of a presumption that the property should be confiscated. This is a two-part process wherein: i) an Interim Freezing Order is required to freeze the assets *ex parte* and prevent them from being disposed of; and ii) the UWO process determines whether the asset is recoverable because the owners cannot provide evidence of legitimate acquisition.

³²⁵ [Article 72 of the Swiss Criminal Code](#) provides: The court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organisation. In the case of the assets of a person who participates in or supports a criminal organisation (Art. 260^{ter}), it is presumed that the assets are subject to the power of disposal of the organisation until the contrary is proven.

³²⁶ Tribunal fédéral, decision of 7 February 2005 [1A.215/2004 /col\), par. 9.1.](#)

³²⁷ European Commission (2019), [Analysis of non-conviction-based confiscation measures in the European Union](#)

³²⁸ World Bank, [Stolen Asset Recovery: A Good Practices Guide to Non-Conviction Based Asset Forfeiture](#) (2009)

³²⁹ See eg. Guilherme France (2022) citing Council of Europe (2020), [The use of non-conviction based seizure and confiscation](#)

³³⁰ [UNGASS Political Declaration: Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation](#) (UNGA Resolution S-32/1, 2 June 2021); FATF Recommendation 38 and the 2005 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime and on the financing of terrorism (the Warsaw Convention) call for international cooperation with respect to requests made on the basis of non-conviction-based confiscation. [FATF Recommendations](#) (amended 2020). A mistaken argument against certain forms of non-conviction-based confiscation partially reverse the burden of proof, is that they violate basic human rights and infringing the right to property. However, in *Gogitidze and Others v Georgia* (12 May 2015) the European Court of Human Rights ruled otherwise with respect to a confiscation based on a civil action in rem linked to a prior criminal charge against a public official. The case aimed at the recovery of assets wrongfully or inexplicably accumulated by the public officials concerned and their close entourage. The court found that the forfeiture had legitimate compensatory and preventive aims of restoring the injured party to the status prior to the unjust enrichment and in combatting corruption in the public service by sending a signal that public officials would not secure a pecuniary advantage from wrongful acts, even if not pursued in the criminal justice system. The court noted international standards encouraging this kind of confiscation. It also observed that "the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings in rem". See ECHR, [Case Of Gogitidze And Others V. Georgia \(Application no. 36862/05\)](#) (12 May 2015)

³³¹ Carmen Cristina-Cirlig, [Revision of the EU rules on asset recovery and confiscation](#) (European Parliament, March 2023)

³³² <https://data.consilium.europa.eu/doc/document/ST-9314-2023-INIT/en/pdf>;

<https://www.consilium.europa.eu/en/press/press-releases/2023/06/09/freezing-and-confiscating-criminal-money-council-agrees-negotiating-position-for-new-eu-law/>

³³³ <https://data.consilium.europa.eu/doc/document/ST-9314-2023-INIT/en/pdf>

- ³³⁴ See for example, David Weiss, [The Foreign Corrupt Practices Act, Sec Disgorgement of Profits](#), and the Evolving International Bribery Regime: Weighing: Weighing Proportionality, Retribution, and Deterrence (Michigan Journal of International Law 2009) The article is from 2009 thus the information may be out of date.
- ³³⁵ OECD, [Resolving Foreign Bribery Cases with Non-Trial Resolutions](#) (2019)
- ³³⁶ FINMA, [BSI in serious breach of money laundering regulations](#) (2016). FINMA, [FINMA reassess disgorgement of profits in BSI case](#) (2020); <https://www.finma.ch/en/news/2017/02/20170202-mm-coutts/>; <https://www.finma.ch/en/news/2016/10/20161011-mm-falcon/>
- ³³⁷ Arrêt du 17 Octobre 2017 Guinea and ATF 129 IV 322 c. 2.2.4, Tunisia. Cited in unpublished paper by Richard Messick
- ³³⁸ UNODC, [Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets](#) (2017)
- ³³⁹ Ibid.
- ³⁴⁰ Ibid. UNODC study at page 42 stating that Article 35 of UNCAC and Article 25 of UNTOC both provide for the return of recovered proceeds to prior legitimate owners and for compensating victims, as a priority over payment to the State. The study also cites the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism which requires that confiscated property be disposed of in accordance with the 2012/42/EU requires that if, “[a]s a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure”, Member States must ensure that confiscation measures do not prevent such victims from seeking compensation for their claims. In the EU all member states have put in place mechanisms to ensure have put in place mechanisms to ensure that victims of crime can be compensated. Although the mechanisms differ greatly, it is common for jurisdictions to use confiscation mechanisms as a means to provide restitution to the victims of crime. Priority is given to victims over the general treasury or any special confiscation fund. If sufficient assets exist to satisfy a confiscation judgment and a restitution order, the confiscated assets are generally used to benefit the government only after the victims receive restitution.
- ³⁴¹ https://www.europarl.europa.eu/doceo/document/A-9-2023-0199_EN.html
- ³⁴² The framework in France provided for the proceeds to be included in the general national budget, but legislation recently passed provides for confiscated proceeds of international corruption to be placed in a fund to be used for the benefit of the people of the country where the proceeds were generated. In the United States and other countries, proceeds confiscated in foreign bribery proceedings go into the national treasury. On the other hand, the [US Kleptocracy Asset Recovery Initiative](#) aims to “forfeit the proceeds of foreign official corruption and, where appropriate, to use those recovered assets to benefit the people harmed by these acts of corruption and abuse of office”. The US Department of Justice maintains an asset forfeiture fund that may make equitable sharing payments for assistance in forfeiture, reflecting the degree of direct participation in law enforcement efforts resulting in forfeiture. See DOJ, [Assets Forfeiture Fund](#)
- ³⁴³ The Programming Law No 2021-1031 of 4 August 2021; Human Rights Watch, [France: Pass bill enabling return of stolen assets](#) (1 March 2021); Transparency International, [France adopts new provision for returning stolen assets and proceeds of crime: a step forward with room for improvement](#) (3 March 2021)
- ³⁴⁴ [UNGASS Political Declaration: Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation](#) (UNGA Resolution S-32/1, 2 June 2021) FATF
- ³⁴⁵ [Liu v. SEC](#), 591 U.S. (June 23, 2020). See also, <https://www.jonesday.com/en/insights/2020/06/us-supreme-court-allows-profitsbased-sec-disgorgement-awards>
- ³⁴⁶ [https://uscode.house.gov/view.xhtml?req=\(title:34%20section:20101%20edition:prelim\)#effective-date-amendment-note](https://uscode.house.gov/view.xhtml?req=(title:34%20section:20101%20edition:prelim)#effective-date-amendment-note); Prosecutors should be aware that pursuant to the VOCA Fix to Sustain the Crime Victims Fund Act of 2021 (Pub. L. 117-27), <https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8>
- ³⁴⁷ [Italian Penal Code](#) Article 322 ter
- ³⁴⁸ [Italian Penal Code](#) Article 322 quarter
- ³⁴⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042>
- ³⁵⁰ Stefano Montaldo, Directive 2014/42/EU and Social Reuse of Confiscated Assets in the EU: Advancing a Culture of Legality (New Journal of European Criminal Law, June 2015)
- ³⁵¹ Barbara Vettori and Boban Misoski, [Social Reuse of Confiscated Assets in the EU: Current Experiences and Potential for its Adoption by Other EU and Non-EU Countries](#). The key social reuse experiences within the EU are in Belgium, France, Hungary, Italy, Luxembourg, Scotland and Spain.
- ³⁵² Global Forum on Asset Recovery, [GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases](#). The principles were agreed among six states in 2017.
- ³⁵³ [The Civil Society Principles for Accountable Asset Return](#) submitted to UNGASS by CiFAR include principles of transparency, integrity, accountability and victim restitution.
- ³⁵⁴ UNODC, [Eighth session of the Conference of the States Parties to the United Nations Convention against Corruption](#) (2019)
- ³⁵⁵ African Union, [African Union Member States Adopted Unified Position On The Recovery Of Illicit Assets](#) (2020)
- ³⁵⁶ UNODC, [Review of implementation of the United Nations Convention against Corruption, Italy](#) (2019)
- ³⁵⁷ See e.g., UNODC, [Manual on Mutual Legal Assistance and Extradition](#) (2012)
- ³⁵⁸ UN (August 2020), [The UN Common Position to Address Global Corruption – Towards UNGASS 2021](#): p. 2
- ³⁵⁹ Laurence Helfer, Cecily Rose and Rachel Brewster, Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism (117 American Journal of International Law, forthcoming, October 2023)

³⁶⁰ In its second submission to the UNGASS against Corruption, the International Bar Association Anti-Corruption Working Group proposed a Specialised International Anti-Corruption and Asset Recovery Mechanism. This would be an independent entity with a subsidiary responsibility for investigating corruption allegations and enforcing corruption laws in cases where domestic structures have collapsed or fail to do so. Sanctions could be criminal and/or civil, including non-conviction-based forfeiture orders that would be internationally enforceable. See IBA Anti-Corruption Committee, [2nd Submission to UNGASS against Corruption](#) (2020).

³⁶¹ See Transparency International's [Submission to the UNGASS against Corruption - Proposals on the international legal framework and infrastructure to address grand corruption impunity](#) (2020) which listed six options.

³⁶² See e.g. UNODC, [Anti-corruption networks and organizations](#)

³⁶³ UNODC's study of implementation of the UNCAC found that "most states appear to be in compliance with their Article 42(5) obligations", but trust and competition obstacles may impede the required information-sharing and consultation in practice, and in many countries there is a lack of transparency in settlement proceedings until or even after they are completed. UNODC, [State of Implementation of the UN Convention against Corruption](#) (2nd edition, 2017), page 192; StAR, [Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery](#)" (2014)

³⁶⁴ StAR, [Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery](#)" (2014)

³⁶⁵ See e.g. UNODC, [Technical Assistance in support of the UN Convention against Corruption](#) pp. 8 et seq (7th session of the UNCAC Conference of States Parties, 2017)

³⁶⁶ According to UNODC's 2017 UNCAC Implementation report, there were relatively few such agreements and only 16 countries had actually created a coordination body. Moreover, creation of such joint bodies requires considerable trust between the participating jurisdictions and is nearly impossible in some common law jurisdictions. UNODC, [State of Implementation of the UN Convention against Corruption](#) (2nd edition, 2017), page 254. The report says that 38 States parties are parties to agreements allowing the establishment of joint investigation bodies, of which 27 are members of the European Union, party to EU agreements.

³⁶⁷ StAR, [Theory of Change](#) (web page)

³⁶⁸ StAR, [Asset Recovery Watch Database](#)

³⁶⁹ Eurojust, [Who we are](#) (web page)

³⁷⁰ The IACCC provides intelligence sharing through a Joint Working Platform; intelligence development by highly experienced officers from across the globe; dissemination of composite information packages to overseas partners; and providing an enhanced picture of international grand corruption. See UNODC [Open-ended Intergovernmental Working Group on Asset Recovery, IACCC](#) (12th session, 2018)

³⁷¹ Elizabeth David-Barrett and Slobodan Tomic (2022), [Transnational governance networks against grand corruption: Cross-border cooperation against law enforcement](#)

³⁷² Interpol (January 2022), [Interpol's Financial Crime and Anti-Corruption Centre \(IFCACC\)](#)

³⁷³ The World Bank Office of Suspension and Debarment is an example of an international body with its own investigative capacity to probe allegations of fraud and corruption in the projects it finances. An example of an international investigation conducted under UN auspices is the 75-member UN Independent Inquiry Committee created in 2004 to investigate corruption in the UN Oil-for-Food Programme. It cost US\$30 million and found US\$1.8 billion in kickbacks to the Iraqi government together with unchecked smuggling, that amounted to US\$8.4 billion in profits to Hussein and lucrative insider contracts for companies in favour with the Iraqi dictator's regime. See New York University School of Law, [An Inquiry on the U.N. Iraq Oil-for-Food Programme](#) (2006). Another example is the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC formed in June 2000. The UN Security Council Presidential Statement (S/PRST/2000/20), June 2, 2000) created the Panel with the mandate (i) to follow up on reports and collect information on all activities of illegal exploitation of natural resources and others forms of wealth in the DRC, including violation of the sovereignty of that country; (ii) to research and analyse the links between the exploitation of the natural resources and others forms of wealth in the DRC and the continuation of the conflict; and (iii) to revert to the council with recommendations. See UN News, [DR of Congo: UN panel on plunder of resources publishes final report](#) (2003). A country-focused example of a UN investigation is the [Independent Investigative Mechanism for Myanmar](#), established by the Human Rights Council in 2018 through [Resolution 39/2](#). <https://undocs.org/en/A/HRC/RES/39/2>. It is mandated to collect evidence of the most serious international crimes and violations of international law in Myanmar, and to prepare files for criminal prosecution in national, regional or international courts or tribunals.

³⁷⁴ EPPO, [Missions and tasks](#)

³⁷⁵ The EPPO's central level consists of the European Chief Prosecutor, its two Deputies, and 22 European Prosecutors (one per participating EU country), two of whom are Deputies for the European Chief Prosecutor and the Administrative Director. The decentralised level will consist of European Delegated Prosecutors located in the participating EU countries. The central level will supervise the investigations and prosecutions carried out at the national level. As a rule, it will be the European Delegated Prosecutors who will carry out the investigation and prosecution in their EU country. European Commission, [European Public Prosecutor's Office \(the EPPO\)](#).

³⁷⁶ IBA Anti-Corruption Committee, [2nd Submission to UNGASS against corruption](#) (2020)

³⁷⁷ <https://dppa.un.org/en/mission/cicig>

³⁷⁸ Its mandate included conducting investigative work, supporting the work of domestic institutions in investigating, supporting the Public Prosecutor's Office in criminal prosecutions, participating as a complementary prosecutor (*querellante adhesivo*) and making administrative complaints against public officials. See UN, State of Guatemala, [Agreement to Establish the International Commission against Impunity in Guatemala \(CICIG\)](#)

³⁷⁹ <https://www.wola.org/analysis/cicigs-legacy-fighting-corruption-guatemala/>

³⁸⁰ https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-003/20

³⁸¹ Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC). See Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea. Phnom Penh, 6 June 2003, [UN Treaty Series, Vol. 2329, p. 117 et seq.](#) The Cambodian authorities requested the assistance of the United Nations and the UN General Assembly had requested the UN Secretary-General to hold negotiations to conclude an agreement with the Government of Cambodia.

³⁸² See [Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990](#) (translation by Human Rights Watch)

³⁸³ See, e.g., United Nations and the Rule of Law, [International and Hybrid Criminal Courts and Tribunals](#); [Kosovo Specialist Chambers and Specialist Prosecutor's Office](#); and [Special Panels for Serious Crimes, East Timor](#).

³⁸⁴ <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational>;
https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf

³⁸⁵ <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational>;
https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf

³⁸⁶ African Union, [Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights](#) (June 2014)

³⁸⁷ The fifteen countries are Benin, Chad, Comoros, Congo, Equatorial Guinea, Ghana, Guinea Bissau, Guinea, Kenya, Mozambique, Mauritania, Sierra Leone, Sao Tome & Principe, Togo and Uganda.

³⁸⁸ FACTI Panel (2021), [Financial Integrity for Sustainable Development](#)

³⁸⁹ Laurence Helfer, Cecily Rose and Rachel Brewster, Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism (117 American Journal of International Law, forthcoming, October 2023)

³⁹⁰ Laurence Helfer, Cecily Rose and Rachel Brewster, Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism (117 American Journal of International Law, forthcoming, October 2023)

³⁹¹ The following twenty states registered reservations to the dispute settlement process in Article 66(2): Algeria, Azerbaijan, Bangladesh, China, Colombia, Cuba, Indonesia, Iran, Israel, Moldova, Pakistan, Panama, Qatar, South Africa, Tunisia, UAE, the USA, Uzbekistan, Vietnam and Yemen.

³⁹² For example, the ICJ can in principle rule on immunities of state officials in foreign jurisdictions if the jurisdictional basis is provided. This subject was raised in [Equatorial Guinea v. France \(Immunities and Criminal Proceedings\), Summary 2018/3](#), and later in [Summary 2020/4](#). The subject-matter of the dispute, as summarised by the minority in 2018, was whether France – by prosecuting the Vice-President of Equatorial Guinea for the offence of money laundering and by imposing measures of constraint on a building which Equatorial Guinea claimed was State property – acted in a manner consistent with the principles of sovereign equality of States territorial integrity and non-intervention in the internal affairs of another State. On the question of the personal immunity of the Vice-President there was no agreement between Equatorial Guinea and France that could provide the ICJ with jurisdiction over such issues. Equatorial Guinea therefore attempted to argue that jurisdiction could be based on Article 4 of the Palermo Convention, but the ICJ rejected this argument. The court limited itself in 2020 to a discussion of the designation by Equatorial Guinea of certain property as forming part of the premises of its diplomatic mission and whether that property had acquired the status of “premises of the mission” under the Vienna Convention on Diplomatic Relations. By contrast, see this press release on Democratic Republic of the Congo v. Belgium from 2002: UN, [ICJ Rejects Belgian Arrest Warrant For Foreign Minister](#).

³⁹³ See, Cecily Rose, [Equatorial Guinea v. France \(No. 2\): A First Attempt at International Litigation on Stolen Asset Recovery](#) (EJIL 18 October 2022)

³⁹⁴ Examples of international dispute settlement processes include the [International Centre for Settlement of Investment Disputes](#), a mechanism involving state and private parties, and the [World Trade Organization's dispute settlement process](#).

³⁹⁵ Laurence Helfer, Cecily Rose and Rachel Brewster, Flexible Institution Building in the International Anti-Corruption Regime: Proposing a Transnational Asset Recovery Mechanism (117 American Journal of International Law, forthcoming, October 2023)

³⁹⁶ [International Treaty on Exchange of Data for the Verification of Asset Declarations](#). For more information, see the [website of the Regional Anticorruption Initiative](#).

³⁹⁷ UN (August 2020), [The UN Common Position to Address Global Corruption – Towards UNGASS 2021](#): p. 2

³⁹⁸ Habré was found guilty of rape, sexual slavery, and ordering the killing of 40,000 people during his tenure as Chadian president and sentenced to life in prison. Senegal and the African Union signed an agreement creating “Extraordinary African Chambers” to try Habré, with African judges appointed by the African Union presiding over his trial. (They were appointed in 2015, one from Burkina Faso and two from Senegal.) Having already passed legislation in 2007 allowing Senegalese jurisdiction to try atrocity crimes even if committed outside Senegal, in 2012 the Senegalese National Assembly adopted the laws establishing the Extraordinary African Chambers within the Senegalese court structure. The Extraordinary African Chambers

were inaugurated in Dakar in the same year. The European Union agreed to pay the costs of € 8.6 million. See HRW (2015) below; see also BBC, [Profile: Chad's Hissène Habré](#) (30 May 2016).

³⁹⁹ Human Rights Watch, [Chronology of the Habré case](#) (2015). The chronology describes twelve years of much-criticised Senegalese refusal to either prosecute or extradite Habré.

⁴⁰⁰ Human Rights Watch, [The Trial of Hissène Habré: Time is Running Out for the Victims](#) (2007)

⁴⁰¹ Complaints by victims to the UN Committee against Torture, the Court of Justice of the Economic Community of the West African States (ECOWAS) and the International Court of Justice led to rulings against Senegal by all three of those bodies for its refusal to extradite or prosecute. In addition, in 2000, the UN Special Rapporteur on the Independence of Judges and Lawyers, and the Special Rapporteur on Torture criticised the decision to dismiss the original indictment and surrounding circumstances. The African Union got involved starting in 2006 following a request from Senegal for advice about the competent jurisdiction to handle the case. The African Union responded, based on a recommendation of an African Union Committee of Eminent African Jurists and a ruling by the United Nations Committee Against Torture, called on Senegal to prosecute Hissène Habré "on behalf of Africa".

⁴⁰² Complaints were also filed in Chad but it remained inactive. The complaints filed in Belgium were filed by Belgian citizens.

⁴⁰³ https://www.lemonde.fr/societe/article/2017/10/27/biens-mal-acquis-teodorin-obiang-condamne-en-france-a-trois-ans-de-prison-avec-sursis_5206654_3224.html; <https://www.cmi.no/publications/7248-150-million-euros-confiscated-following-vice-president-obiangs-conviction-in-france>

⁴⁰⁴ <https://www.rfi.fr/fr/en-bref/20210728-biens-mal-acquis-le-vice-pr%C3%A9sident-de-guin%C3%A9e-%C3%A9quatoriale-teodorin-obiang-d%C3%A9finitivement-condamn%C3%A9-cour-de-cassation>

⁴⁰⁵ <https://web.lexisnexis.fr/LexisActu/Cass.crim.,28juill.2021,n%C2%B020-81.553F-D.pdf>

⁴⁰⁶ In France, the civil party is the person who considers himself the victim of a criminal offence and who intervenes in a procedure in order to obtain compensation for his damage. French Directorate for Legal and Administrative Information, [Criminal trial: what is a civil party?](#) (2020)

⁴⁰⁷ <https://onpolicy.org/teodoro-nguema-obiang-mangue-and-the-case-of-mistaken-property-what-scope-for-governance-in-africa/>

⁴⁰⁸ Dorothee Goetz, [Teodoro Obiang condamné, une première dans l'affaire des « biens mal acquis](#) (Dalloz 2017)

⁴⁰⁹ Human Rights Watch, [France: Pass bill enabling return of stolen assets](#) (1 March 2021); Transparency International, [France adopts new provision for returning stolen assets and proceeds of crime: a step forward with room for improvement](#) (3 March 2021)

⁴¹⁰ French Ministry of Justice, [Guide for the Recovery of Criminal Assets in France](#) (2023)

⁴¹¹ <https://www.fdd.org/analysis/2023/06/02/top-us-lawmakers-want-action-against-lebanons-corrupt-central-bank-chief/>; <https://www.reuters.com/business/swiss-regulator-investigates-12-banks-lebanese-central-banker-corruption-case-2023-02-27/>

⁴¹² <https://www.swissinfo.ch/eng/politics/media--alleged-embezzled-millions-from-lebanon-ended-up-in-swiss-banks/48317236>

⁴¹³ <https://www.swissinfo.ch/eng/politics/media--alleged-embezzled-millions-from-lebanon-ended-up-in-swiss-banks/48317236>

⁴¹⁴ <https://www.thenationalnews.com/mena/lebanon/2022/01/12/lebanons-pm-denies-meddling-in-judiciary-over-financial-probe/>; <https://www.thenationalnews.com/mena/2022/02/25/groups-lodge-complaint-against-riad-salameh-in-switzerland/>

⁴¹⁵ <https://www.reuters.com/markets/europe/exclusive-contracts-show-lebanons-central-bank-observed-recipients-commissions-2022-02-21/>

⁴¹⁶ <https://www.reuters.com/world/middle-east/lebanons-central-bank-governor-set-end-his-tenure-wanted-man-2023-05-26/>

⁴¹⁷ <https://www.asso-sherpa.org/une-information-judiciaire-est-ouverte-au-luxembourg-pour-faire-la-lumiere-sur-les-biens-mal-acquis-des-dirigeants-libanais>

⁴¹⁸ https://www.lemonde.fr/international/article/2021/06/06/une-enquete-ouverte-en-france-sur-riad-salame-gouverneur-de-la-banque-centrale-libanaise_6083085_3210.html; <https://www.dailysabah.com/business/finance/france-launches-probe-into-lebanese-central-bank-chiefs-wealth>

⁴¹⁹ <https://www.asso-sherpa.org/sherpa-et-le-collectif-des-victimes-des-pratiques-frauduleuses-et-criminelles-au-liban-deposent-plainte-devant-le-parquet-national-financier-dans-une-nouvelle-affaire-de-biens-mal-acquis-libanais>

⁴²⁰ <https://odiaspora.org/britischer-bericht-riad-salameh-leitet-eine-kriminelle-bande/>; <https://libnanews.com/apres-la-suisse-la-france-et-le-luxembourg-lallemagne-annonce-louverture-dune-enquete-contre-riad-salame/>

⁴²¹ <https://www.thenationalnews.com/mena/2022/02/25/groups-lodge-complaint-against-riad-salameh-in-switzerland/>

⁴²² <https://www.reuters.com/business/swiss-regulator-investigates-12-banks-lebanese-central-banker-corruption-case-2023-02-27/>; <https://www.swissinfo.ch/eng/politics/media--alleged-embezzled-millions-from-lebanon-ended-up-in-swiss-banks/48317236>

⁴²³ <https://www.france24.com/en/live-news/20230226-embezzled-lebanese-cash-in-swiss-banks-media-report>

⁴²⁴ <https://www.france24.com/en/live-news/20230226-embezzled-lebanese-cash-in-swiss-banks-media-report>

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⁴²⁶ <https://apnews.com/article/lebanon-central-bank-governor-riad-salameh-corruption-d3c66d4ad986b1f7bb6d6f469b1f40ff>

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⁴³⁰ <https://www.reuters.com/world/middle-east/lebanon-verbally-informed-by-germany-an-arrest-warrant-against-central-bank-2023-05-23/>; <https://www.reuters.com/world/middle-east/lebanons-central-bank-governor-set-end-his-tenure-wanted-man-2023-05-26/>

⁴³¹ <https://www.aljazeera.com/news/2023/5/16/france-issues-warrant-for-lebanon-central-bank-chief-riad-salameh>

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⁴³³ [Iraq versus ABB et al, \(SDNY 2014\)](#); as well as [Karim v. ABB Ltd. \(SDNY 2008\)](#).

⁴³⁴ Reuters, [Iraq sues companies over oil-for-food kickbacks](#) (1 July 2008)

⁴³⁵ 18. U.S.C. Part 1 [Chapter 96, Racketeer Influenced and Corrupt Organizations](#). See especially, 18 U.S.C § 1964 - Civil remedies.

⁴³⁶ By way of background, according to the statement of facts, in 1979, Saddam Hussein seized power in Iraq via a military coup. The administration he put in place wielded absolute control over Iraq and violently suppressed all opposition. Under the UN Oil-for-Food Programme, established in 1995, money from the sale of oil was put into an escrow account and could be used to buy basic necessities, such as wheat, medicine and humanitarian needs, under supervision of the United Nations. The aim was to prevent the regime from purchasing military equipment in line with UN sanctions. The final report of a UN Independent Inquiry Committee in October 2005 found that over half of the 4500 participating companies paid kickbacks and illegal surcharges that transferred foreign currency to the government of Iraq in contravention of UN sanctions. See Independent Inquiry Committee, [Manipulation Of The Oil-For-Food Programme by the Iraqi Regime](#) (2005). See also, Council on Foreign Relations, [Iraq: Oil for Food Scandal](#) (2005); The Guardian, [AWB made secret payments worth US\\$220m to Saddam's Iraq, court hears](#) (12 October 2015); The New York Times, [Panel Says Australian Company Paid Bribes](#) (28 November 2006); Gilbert and Tobin, [AWB "oil for wheat" scandal – the duty of directors to investigate](#) (21 December 2016).

⁴³⁷ [Iraq versus ABB et al, \(SDNY 2014\)](#); as well as [Karim v. ABB Ltd. \(SDNY 2008\)](#).

⁴³⁸ The U.S. Court of Appeals for the Second Circuit has held that a "governmental act" is an act "physically taken by persons capable of exercising the sovereign authority of the foreign nation," as long as the persons "purported to act in their official capacity." In determining whether an act was within the authority of an official or an official body, or was done under colour of such authority..., one must consider all of the circumstances, including whether the affected parties reasonably considered the action to be official, whether the action was for public purpose or for private gain, and whether the persons acting wore official uniforms or used official equipment. If a government is alleged to act pursuant to its official duties or for an official purpose, those acts should be attributed to the sovereign. Iraq offered three permutations of this argument: (1) Hussein's conduct was private, self-serving conduct and thus not governmental conduct that can be attributed to Iraq; (2) the Hussein Regime was not the legitimate government of Iraq and therefore its actions cannot be imputed to Iraq; and (3) the Hussein Regime committed unlawful conduct that, because it is unlawful, cannot be attributed to Iraq. The Court rejected each of these arguments because it said none demonstrated that the alleged conduct of the Hussein Regime was not governmental.

⁴³⁹ To be "concrete and particularized," an "injury must affect the plaintiff in a personal and individual way." Id. at 560 n. 1. That is, "standing cannot be predicated upon an injury the plaintiff suffers in some indefinite way in common with people generally."

⁴⁴⁰ In some cases, legislation may legalise certain forms of misappropriation of funds.

⁴⁴¹ United States v. Alcatel-Lucent, S.A. Court Docket Number: 10-CR-20907, [Petition for Relief and Objection to Plea Agreements and Deferred Prosecution Agreement](#) (2011), Guerra King, [Instituto Costarricense De Electricidad Files Objection To Alcatel-Lucent, S.A.'s Criminal Settlement](#) (5 November 2011).

⁴⁴² United States V. Alcatel-Lucent, S.A. Court Docket Number: 10-CR-20907, [Court-Ordered Response of the United States of America to Petitions for Writs of Mandamus](#).

⁴⁴³ Marcus Asner and Daniel Ostrow, [A New Focus On Victims' Rights in FCPA Restitution Cases](#). New York Law Journal (2015), S3: "On the other hand, ICE makes good sense if we shift focus to the ultimate victims: the people of Costa Rica. Under that view, ICE, as a corporate 'person,' had been tasked with serving the people, but instead operated akin to a bribe-taking machine, putting its own interests (and the interests of its corrupt officials) before the interests of its principals (the people of Costa Rica). As a 'co-conspirator,' ICE would not be a victim entitled to restitution. Rather, restitution would be due to the people".

⁴⁴⁴ United States v. Alcatel-Lucent, S.A. Court Docket Number: 10-CR-20907, [Government Appellate Brief](#).

⁴⁴⁵ US Department of Justice, [Mozambique's Former Finance Minister Indicted](#) Alongside Other Former Mozambican Officials, Business Executives, and Investment Bankers in Alleged \$2 Billion Fraud and Money Laundering Scheme that Victimized U.S. Investors (7 March 2019); Mamello Mosiana, [Unaccountable 00020: Credit Suisse- An enabler of mega-looting in Mozambique?](#) (Open Secrets 9 February 2021); Mamello Mosiana, [Unaccountable 00025: The Russian Bank that took Mozambique for a ride](#) (Open Secrets, 20 May 2021)

⁴⁴⁶ <https://www.justice.gov/opa/press-release/file/1447316/download>; <https://www.spotlightcorruption.org/mozambique-and-the-tuna-bond-scandal/>

⁴⁴⁷ <https://www.justice.gov/opa/press-release/file/1447316/download>; <https://www.spotlightcorruption.org/mozambique-and-the-tuna-bond-scandal/> <https://allafrica.com/stories/202010200761.html>; <https://www.petersandpeters.com/leading-cases/the-republic-of-mozambique-and-the-2-billion-tuna-bond-scandal/>

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- ⁴⁴⁹ <https://www.ft.com/content/809c1c52-3b62-11e9-b72b-2c7f526ca5d0>; <https://www.spotlightcorruption.org/mozambique-and-the-tuna-bond-scandal/>
- ⁴⁵⁰ <https://allafrica.com/stories/201909130748.html>
- ⁴⁵¹ Some legal commentators suggest that the acquittal reflect court decisions restricting the extraterritorial reach of the FCPA. In the Second Circuit's 2018 decision in *United States v. Hoskins* 902 F.3d 69 (2d Cir. 2018) the court determined that non-resident foreign nationals operating entirely outside the United States could not be prosecuted as aiders-and-abettors or co-conspirators under the FCPA unless they could be liable under the statute as an employee, director, or "agent" of a United States company. See, e.g., [DLA Piper commentary](#) citing the Second Circuit's observation that finding otherwise would "transform the FCPA into a law that purports to rule the world." 902 F.3d at 92.
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- ⁴⁵³ <https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global-club-of-mozambique>, [Hidden Debt: Credit Suisse forgives 200 million dollars of Mozambique's debt – AIM report](#) (21 October 2021)
- ⁴⁵⁴ <https://www.occrp.org/en/daily/9090-mozambique-charges-18-in-tuna-bonds-scandal>
- ⁴⁵⁵ [United States of America against Jean Boustani et al Ematum Indictment](#) (19 December 2018)
- ⁴⁵⁶ South African Government, [Justice and Correctional Services confirms extradition of Mr Manuel Chang](#) (23 August 2021)
- ⁴⁵⁷ Club of Mozambique, [Manuel Chang extradition: It's a small win – Mozambican civil society after SA court dismisses appeal](#) (10 June 2022)
- ⁴⁵⁸ Reuters, [Mozambique drops court appeals to extradite ex-minister from South Africa](#) (10 February 2020)
- ⁴⁵⁹ Club of Mozambique (6 May 2020), [US Department of Justice accuses Maputo of "pursuing" Chang's extradition to protect politicians – report](#)
- ⁴⁶⁰ Ibid.
- ⁴⁶¹ Ibid.
- ⁴⁶² <https://www.reuters.com/article/us-mozambique-credit-suisse/mozambique-to-fight-for-extradition-of-former-finance-minister-over-debt-scandal-idUSKCN1UQ2A8>; <https://www.dailymaverick.co.za/article/2021-05-03-sa-government-divided-over-extradition-of-former-mozambican-minister-implicated-in-2bn-scam/>
- ⁴⁶³ South African Government, [Justice and Correctional Services confirms extradition of Mr Manuel Chang](#) (23 August 2021)
- ⁴⁶⁴ Spotlight on Corruption, [Mozambique and the "Tuna Bond" Scandal](#) (9 February 2021)
- ⁴⁶⁵ <https://mg.co.za/politics/2023-05-25-constitutional-court-closes-door-on-manuel-chang-extradition-tussle/>
- ⁴⁶⁶ Club of Mozambique, [Manuel Chang extradition: It's a small win – Mozambican civil society after SA court dismisses appeal](#) (10 June 2022)
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- ⁴⁷⁰ The Africa Report, [Mozambique's 2bn scandal with shipping company Prinvest and Credit Suisse](#) (20 April 2021)
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