

# TACKLING GRAND CORRUPTION IMPUNITY

Written submission to the 10th UNCAC CoSP

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# GRAND CORRUPTION SHOULD BE A COSP PRIORITY<sup>1</sup>

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 harm. 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.<sup>2</sup>

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.<sup>3</sup>

Grand corruption is a blight with many names and forms from political corruption to state capture to kleptocracy.<sup>4</sup> It flourishes where there are weak checks on the exercise of state executive power and on private undue influence on the branches of government.<sup>5</sup> 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 threaten 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 to self-determination and development.<sup>6</sup>

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. Transparency International's working paper on grand corruption 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 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.

## PROPOSED DEFINITION OF GRAND CORRUPTION

The basis for the proposed measures is Transparency International's definition of grand corruption:

*Grand corruption means the commission of any of the offences in UNCAC Articles 15-25 as part of a scheme that: (1) involves a high-high level public official; and (2) results in or is intended to result in a gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group.*

## RECOMMENDED MEASURES AT THE NATIONAL LEVEL

States should consider including the following in their legal frameworks:

- Introduce Transparency International's definition of grand corruption and designate grand corruption offences as serious and organised crimes, applying the strongest procedural measures and the highest priority for their investigation and prosecution.
- Ensure that penalties for grand corruption are at least as high as those for serious, organised and aggravated crimes and apply to all those who participate, including persons paying bribes and laundering grand corruption proceeds.
- Provide for the exercise of extensive jurisdiction over grand corruption crimes even if there is no strong territorial or nationality nexus and the alleged offender is not located in the territory. This should include the possible exercise of universal jurisdiction, applying a horizontal complementarity principle using an "unable or unwilling" standard.
- Countries with statutes of limitation for the initiation of criminal proceedings should provide that no limitation period applies for grand corruption offences due to their gravity. 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 grand corruption 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 grand corruption cases.
- Provide for foreign states to make restitution and compensation claims in criminal, civil, or administrative proceedings, including settlement proceedings, in relation to grand corruption crimes involving their high-level public officials.
- Allow standing for qualified public interest organisations representing victims to bring remediation claims against grand corruption offenders in criminal, civil, administrative and settlement proceedings in domestic and foreign jurisdictions, including through class and collective actions.
- Provide for the remediation of human rights harms in grand corruption cases, including indirect and consequential, collective and diffuse harms. Compensation awards should cover moral, non-pecuniary and social damages.
- Ensure the transparent, inclusive and accountable transfer of compensation to claimant states or victim groups, 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 of assets suspected of being the proceeds of grand corruption as well as for non-conviction-based, 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.

## RECOMMENDED MEASURES AT THE INTERNATIONAL LEVEL

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

- Through an international agreement, whether a protocol to the UNCAC or a stand-alone instrument, establish a grand corruption definition and associated special prevention and enforcement measures.
- In the agreement, clarify the “unwilling or unable” standard; align double criminality requirements; establish a basis for international cooperation in civil and administrative proceedings, including non-conviction-based confiscation; outline 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 national enforcement efforts in grand corruption cases.
- Establish mechanisms for mediation, arbitration and appeals to address disputes relating 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 exchanging 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.

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# ENDNOTES

<sup>1</sup> This is an excerpt from Transparency International's working paper, *Tackling Grand Corruption Impunity: Proposals for a Definition and Special Measures*, available at: <https://www.transparency.org/en/publications/tackling-grand-corruption-impunity-proposals-for-definition-and-special-measures>. The paper is based on Transparency International's written submission to the CoSP.

<sup>2</sup> Transparency International, *Global Corruption Report 2004*, available at: [https://images.transparencycdn.org/images/2004\\_GCR\\_PoliticalCorruption\\_EN.pdf](https://images.transparencycdn.org/images/2004_GCR_PoliticalCorruption_EN.pdf)

<sup>3</sup> John Heathershaw et al., *The Rise of Kleptocracy: Laundering Cash, Whitewashing Reputations*, 2018, available at: <https://www.journalofdemocracy.org/articles/the-rise-of-kleptocracy-laundering-cash-whitewashing-reputations/> Transnational kleptocracy is defined as "the cross-border ties, typically in the form of non-state networks, by which authoritarian elites gain and keep power and wealth."

<sup>4</sup> Political corruption has been described 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. See, Inge Amundsen, U4, *Political Corruption*, 2006, available at: <https://www.cmi.no/publications/2565-political-corruption>. Transparency International defines state capture as "powerful individuals, groups and organisations undemocratically shaping a nation's policies, legal institutions and economies to illicitly enrich themselves with impunity."

<sup>5</sup> See Financial Action Task Force (FATF), *Laundering the Proceeds of Corruption*, 2011, available at: <https://www.fatf-gafi.org/en/publications/Methodsandtrends/Launderingtheproceedsofcorruption.html>.

<sup>6</sup> United Nations, *The UN Common Position to Address Global Corruption – Towards UNGASS 2021*, 2020, available at: [https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/UN\\_Common\\_Position\\_to\\_Address\\_Global\\_Corruption\\_Towards\\_UNGASS2021.pdf](https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/UN_Common_Position_to_Address_Global_Corruption_Towards_UNGASS2021.pdf)

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