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¹ The present document is processed in the form in which it was received.



Making grand corruption a priority Transparency International Submission to the 7th UNCAC COSP in Vienna

This submission supplements Transparency International (TI) *Recommendations for robust action against grand corruption* submitted to the Sixth UNCAC Conference of the States Parties (CoSP).¹ It calls on the UNCAC CoSP to prioritize grand corruption, mandate UNODC to prepare a study, introduce special procedures and collaborate with other international anti-corruption and human rights bodies to counter impunity for grand corruption. It also calls on States Parties to consider the adoption of an offence of grand corruption in their national legislation with special measures to ensure crimes of grand corruption are detected, investigated and prosecuted.

Prioritizing grand corruption

Grand corruption should be a matter of priority for the international community and the UNCAC CoSP because of

- the great harm caused, including human rights violations and cross-border economic harm
- the impunity resulting from the capture and thwarting of domestic justice systems by those committing grand corruption (Using ICC language, the State is “unable or unwilling” to genuinely investigate or prosecute)
- the great incidence of grand corruption, including the most extreme forms of state capture and the frequency with which it goes unpunished

Additionally, given the limited resources and capacity available for UNCAC implementation and monitoring it is essential for the CoSP to prioritize forms of aggravated corruption.

Recommendation: The UNCAC CoSP should prioritize grand corruption.

Grand corruption involves violations of fundamental human rights

In the common understanding, grand corruption represents an abuse of high-level power for the benefit of the few at the expense of the many. High-level officials and private actors are involved in large-scale bribery, embezzlement of state assets and other UNCAC corruption offences, causing widespread harm and violations of fundamental human rights. The looting of the public treasury and large-scale corruption in public services leads to poverty, disease, and low life expectancy among affected populations.

The United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators (2004) says:

“Grand corruption” is an expression used to describe corruption that pervades the highest levels of government, engendering major abuses of powerThe essential difference between grand corruption (“state capture”) and petty corruption (day-to-day administrative corruption) is that the former involves the distortion of central functions of government by senior public officials; the latter develops within the context of functioning governance and social frameworks.²

Grand corruption is a human rights crime and deserves adjudication and punishment accordingly. The Office of the High Commissioner for Human Rights has recognised interlinkages between human rights and corruption, pointing out that the

¹ <http://www.unodc.org/documents/treaties/UNCAC/COSP/session6/V1507500e.pdf>.

² <https://www.unodc.org/pdf/crime/corruption/Handbook.pdf>.

consequences of corrupt governance are multiple and touch on all human rights — civil, political, economic, social and cultural, as well as the right to development.³

Recommendation: The UNCAC CoSP should recognize that grand corruption involves violations of fundamental human rights.

The need for action to address grand corruption is widely recognized

There is a widespread awareness among legal scholars and practitioners of the seriousness of the problem of grand corruption and the need for special measures to tackle it. In the last 10–15 years there have been numerous articles on the subject, primarily focused on whether it should be treated as an international crime under the jurisdiction of the International Criminal Court and whether a special international court should be created to handle it.⁴

At international level a number of agencies have put a spotlight on grand corruption:

- The **Financial Action Task Force** produced a 2011 report which focused on laundering related to grand corruption and included a Grand Corruption Case Inventory.⁵
- The **Stolen Asset Recovery Initiative (StAR)** created a database of grand corruption cases in 2012.
- The newly established **International Anti-Corruption Coordination Centre** established by Canada, the US, UK, Australia, New Zealand and Singapore defines its purpose in terms of tackling allegations of grand corruption.⁶

In September 2017, the **European Parliament** adopted a resolution which called on the European Union

“to develop principles to combat grand corruption as a crime in national and international law, address ongoing cases of impunity for grand corruption by stronger enforcement of anti-corruption laws, and implement reforms to close the systemic gaps in national legal frameworks that allow the proceeds of grand corruption to cross borders and evade the oversight of national financial regulators and tax authorities.”⁷

Recommendation: The UNCAC CoSP should build on existing research and initiatives concerning grand corruption.

Defining grand corruption

TI has developed a legal definition of grand corruption based on UNCAC offences, focusing on the scale of harm done and the link to violations of fundamental human rights.⁸ It gives legal relevance to the harms and the victims.⁹

³ <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx>.

⁴ See for example: Should ‘grand corruption’ be a crime against humanity? <http://www.fcpablog.com/blog/2012/8/22/should-grand-corruption-be-a-crime-against-humanity.html>; « Extraordinary Crimes At Ordinary Times: International Justice Beyond Crisis Situations (August 2012); 101 Nw.U.L.Rev, pp. 1257 – 1314 “ (2007); Corruption as an International Crime and Crime Against Humanity – An Outline of Supplementary Criminal Justice Policies, *Journal of International Criminal Justice*, 2006, n° 4, pp. 466 – 484) (2006)

⁵ <http://www.fatfgafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf>.

⁶ <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-anti-corruption-coordination-centre>.

⁷ European Parliament resolution “Corruption and human rights in third countries” 13 September 2017, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0246+0+DOC+XML+V0//EN#title1>.

⁸ https://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it.

⁹ By way of comparison, in some countries, such as Finland, Germany and Sweden, there exist aggravated or gross bribery and embezzlement offences.

This offence could be included in a statute designed to introduce special measures to combat grand corruption. The elaboration of such a statute should also take into account the role of patterns of criminal conduct, criminal conspiracy¹⁰ and organized criminal activity in the manifestation of grand corruption, TI is preparing sample model legislation for the use of interested governments.

Recommendation: UNCAC States Parties are encouraged to consider introducing a grand corruption offence in their national legislation.

Defining adequate measures

The benefit of introducing a grand corruption offence is derived from associated special measures designed to thwart impunity and prevent grand corruption.

As described in our Sixth CoSP submission, the measures could include extraterritorial jurisdiction, increased sanctions, extended statutes of limitation, lifting of immunities, possibility of private prosecution, special remedies for victims in criminal and civil proceedings, and denial of entry. Other measures to consider include Unexplained Wealth Orders¹¹, trial in absentia, special measures in connection with the management and return of the proceeds of corruption and arrangements for joint investigations to foster cooperation among affected countries.

Prevention measures should include introduction of public registers of the beneficial owners of companies and trusts; stronger anti-money laundering measures; and publication of information on people with prominent public functions (Politically Exposed Persons) through national-level public registers as well as requiring them to file comprehensive asset declarations, making them publicly available and facilitating international exchange of data for their verification.

Recommendation: The CoSP should request UNODC to prepare a report on the most effective criminal and civil measures and remedies against those responsible for grand corruption.

Introducing new procedures

International and regional anti-corruption and human rights bodies should work closely together to tackle the grand corruption problem.

In 2013 the then United Nations High Commissioner for Human Rights flagged the need for greater coordination to implement international human rights conventions and the United Nations Convention against Corruption. She also called for stronger policy coherence and collaboration between United Nations offices, civil society and the intergovernmental processes in Vienna, Geneva and New York.¹²

Recently, the Council of Europe's anti-corruption review body GRECO adopted a new rule of procedure which introduces an ad hoc evaluation procedure to be used in exceptional circumstances, to allow GRECO to act more flexibly in serious cases.¹³ The UNCAC would benefit from such an early warning mechanism.

Recommendations: The UNCAC CoSP should request its Secretariat to collaborate closely with international and regional anti-corruption and human rights bodies to develop a procedure for ad hoc evaluations to be made in cases of serious violations of the convention.

¹⁰ The doctrines of joint enterprise or joint criminal enterprise could be considered for inclusion in such a statute.

¹¹ https://www.transparency.org/news/feature/unexplained_wealth_orders_how_to_catch_the_corrupt_and_corrupt_money_in_the

¹² <http://www.un.org/apps/news/story.asp?NewsID=44357#.Wekuj2ipXIU>.

¹³ Rule 34 “If GRECO or the Executive Secretary receives reliable information from the Head of delegation of a GRECO member that an institutional reform, legislative initiative or procedural change by that member may result in that member’s serious violation of a Council of Europe anti-corruption standard which has been the subject of any GRECO evaluation round, GRECO may make an ad hoc request for information to such member.” <https://rm.coe.int/rules-of-procedure-adopted-by-greco-at-its-1st-plenary-meeting-strasbo/168072bebd>.

More specifically, we join the UNCAC Coalition in requesting that the UNCAC CoSP mandate work to be carried out on (1) terms of reference for a communications and reporting procedure for serious non-compliance and lack of effective enforcement of UNCAC obligations; (2) a report on the advisability and feasibility of establishing a single international mechanism for resolving transnational and grand corruption offences, prepared in consultation with relevant intergovernmental organisations; and (3) a report on options for improving coordination with the review processes of other anti-corruption conventions (UNCAC Article 63(7))

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