

Let Us Get Serious about Grand Corruption: An Indispensable Priority for the 2021 UN General Assembly Special Session

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1. The Upcoming United Nations Special Session on Corruption

The first ever United Nations General Assembly Special Session ('UNGASS') on corruption is scheduled to take place at UN Headquarters in New York 26-28 April 2021,¹ 18 years after the UN Convention against Corruption ('UNCAC' or 'the Convention') entered into force.² This high-level meeting provides an important opportunity to identify priorities and take the required next steps to tackle corruption globally.

The level of corruption exposed over the last few years – especially in the so-called 'Panama Papers', 'Paradise Papers', 'Lux Leaks' and 'Luanda Leaks' – presents a bleak picture of the current international efforts to prevent and counter the type of corruption that fills up the bank accounts of individuals in high positions, at the expense of ordinary people. International experts agree that such large-scale, high-level corruption deprives governments of resources required to provide vital public services such as health care, education, housing, food and basic infrastructure.³ It is difficult to see any other crime resulting in more victims globally than corruption of this kind, which is often referred to as 'grand corruption'.

Corruption and elite capture of power have for years been identified among the most predominant factors impeding institutional change.⁴ A recent World Bank report demonstrates a clear link between aid disbursements and illicit enrichment by the political elite in aid-recipient countries. As much as 15 per cent of aid intended for the poorest in the most aid-dependent countries end up in financial centres known for bank secrecy and wealth management.⁵

Corrupt public leaders or kleptocrats often enjoy impunity for

grand corruption because the national judicial system is unable or unwilling to hold them accountable. When the corrupt and powerful escape justice, it signals to others in high political positions that it is not only possible, but also acceptable, to enrich yourself with public funds.

The term 'grand corruption' has been widely used even though it has never been defined by the UN or any other international body.⁶ It is generally agreed that a strict monetary threshold alone cannot define the most serious forms of corruption. However, cases running in the millions – sometimes billions – of American dollars, involving individuals who have been entrusted with prominent public functions, fall within the scope of such notion.⁷ Grand corruption normally requires deep-rooted corruption at high levels of government that results in significant misappropriation of wealth and widespread social distortion.⁸ Further, this form of corruption often contains an element of cross-border transactions, which means that it may also blemish those involved in making such transactions happen.

The States Parties to UNCAC agreed in a resolution in 2017 to:

increase their efforts and to take measures to prevent and counter [...] acts of corruption that involve vast quantities of assets [...] and thereby contributing to the achievement of the Sustainable Development Goals.⁹

With less than ten years to the 2030 Sustainable Development Goals deadline, it is high time to take bold steps to increase global anti-corruption efforts to make sure that funds intended for education, healthcare, and other essential services are used for their intended purposes rather than to enrich those in power.

A self-evident priority for the Special Session should be to develop concrete obligations to prevent and combat grand corruption, which is currently a loophole in the international anti-corruption framework. While a stronger focus on curbing corruption at the highest level of governments could meet opposition among a

¹ Special Session of the General Assembly against Corruption, UN Doc. A/RES/73/191, 17 December 2018, and Draft resolution titled "Special Session of the General Assembly against Corruption", recommended by the eighth Conference of the States Parties to the UNCAC for adoption by the General Assembly.

² UN Convention against Corruption, 31 October 2003 (<http://www.legal-tools.org/doc/7640fb/>).

³ Lima Statement on Corruption involving Vast Quantities of Assets, 5 December 2018 ('Lima Statement') (see *infra* note 25).

⁴ United Kingdom, Department for International Development, "Using Drivers of Change to Improve Aid Effectiveness", 2005.

⁵ Jørgen Juel Andersen, Niels Johannesen and Bob Rijkers, "Elite Capture of Foreign Aid Evidence from Offshore Bank Accounts", Policy Research Working Paper No. 9150, 2020.

⁶ Transparency International has been working with a broad range of stakeholders on a definition of grand corruption for years, see Statement Submitted by Transparency International, a Non-Governmental Organization in Consultative Status with the Economic and Social Council, UN Doc. CAC/COSP/2019/NGO/1, 12 December 2019.

⁷ Lima Statement, see *supra* note 3.

⁸ Ben Bloom, "Criminalizing Kleptocracy: The ICC as a Viable Tool in Fighting against Grand Corruption", in *American University International Law Review*, 2014, vol. 29, no. 3, pp. 627-671.

⁹ UNCAC Conference of the State Parties ('COSP'), Resolution 7/2, 10 November 2017 ('Resolution 7/2').

few UN Member States, it is difficult to see any real argument for opposing obligations that aim to prevent and counter grand corruption. Reluctance to focus on the most serious forms of corruption has nothing to do with political ideology. It is about protecting the self-interests of those in powerful positions.

If UNGASS agrees to concrete measures to prevent and combat grand corruption, as well as to study different mechanisms to support national investigations and prosecutions, it could have a positive impact on ending impunity for such crimes, thus strengthening democracy and ensuring sustainable development.

2. The United Nations Convention against Corruption and Grand Corruption

It was a milestone in international anti-corruption efforts when the international community agreed to UNCAC in 2003. The Convention is the only legally binding international anti-corruption treaty with a global scope, and it has contributed to establishing robust legislation and institutions to prevent and combat corruption in numerous countries.

The Convention includes a catalogue of offences that all States Parties are *required* to criminalize in their domestic legislation ('mandatory offences', such as bribery of a public official and embezzlement of public funds), and offences that Member States are *encouraged* to criminalize ('non-mandatory offences', such as trading in influence, abuse of function, illicit enrichment and private sector bribery). The relatively high number of non-mandatory crimes is an obvious weakness of the Convention.

The Convention does not categorize different forms of corruption and covers all of its forms, from petty to grand. However, the Convention does not contain any specific obligations related to grand corruption. Analysing the implementation of the Convention 18 years after it entered into force, and taking into account the numerous recent grand corruption scandals in countries that have implemented UNCAC, it is clear that more specific obligations related to grand corruption would be an important improvement.

The principles of transparency, accountability, integrity and sound management of public affairs are integrated throughout the UNCAC Preamble and its chapter on prevention. Unfortunately, the Convention says little about the mechanisms needed to enforce such principles.¹⁰ Without referring to it as such, the Convention does nevertheless acknowledge grand corruption as a serious problem in its preambular paragraph 3:

Concerned further 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.¹¹

A study by the U4 Anti-Corruption Resource Centre, which analyzes whether UNCAC can address grand corruption, concludes that "its limitations in addressing the political nature of corruption must be recognized" and that the Convention's "provisions on political corruption are weak".¹² It is clear that a more robust international system of international obligations is needed in order to assist States in preventing and combatting grand corruption.

3. Can 'Grand Corruption' Be Successfully Prosecuted at the International Criminal Court as a Crime Against Humanity?

Anti-corruption expert Martin Kenney has argued that an International Anti-Corruption Court is not necessary because grand corruption can be prosecuted at the International Criminal Court ('ICC') as a crime against humanity.¹³ While it is theoretically possible to make the case that grand corruption fulfils the contextual requirements of Article 7(1) of the Rome Statute and can be considered a crime against humanity under sub-paragraph (k),¹⁴ it is highly unlikely that the ICC Prosecutor would pursue a grand corruption case.

The phrase "[o]ther inhumane acts of a similar character intentionally causing great suffering" in article 7(1)(k) establishes that an act needs to be comparable to acts mentioned in sub-paragraphs from (a) to (j), which cover, for instance, murder, enslavement and torture. A common aspect for all criminal acts in sub-paragraphs from (a) to (j) – except (h), persecution – is that they refer to crimes that directly injure human beings physically, while the crime of grand corruption is a financial crime that indirectly affects large groups of people in ways that are not necessarily physical. Therefore, it is questionable that grand corruption could be considered as an act "of a similar character", unless it is part of a campaign of persecution against members of a group. It is also unclear whether those committing grand corruption "intentionally" cause great suffering, as the intention behind such crime is predominantly self-enrichment.

Furthermore, the *travaux préparatoires* show that financial crimes were never seriously discussed during the negotiations of the Rome Statute. The principle of legality, expressed in Article 22 (2) of the Rome Statute, stipulates that "in case of ambiguity, the definition shall be interpreted in favour of the person being investigated".¹⁵ Consequently, it is highly unlikely that grand corruption cases would be considered admissible for prosecution at the ICC.¹⁶

For grand corruption to be considered as an international crime under international criminal law, it would have to be defined properly through the negotiation of a new convention, or through an amendment or an additional protocol to an existing convention.

4. Is the United Nations Ready to Take on Grand Corruption?

During the negotiations of UNCAC, several delegations wanted to include grand or political corruption, but finding consensus proved to be difficult.¹⁷ At the final stage of the negotiations, leading judges and prosecutors from around the world, prominent public figures and non-governmental organisations expressed the need for national and international measures to combat the devastating impact of high-level corruption and the impunity that facilitates it.¹⁸

¹³ Martin Kenney, "An International Anti-Corruption Court Is a Fine Idea, but Not Necessary", *The Globe and Mail*, 10 June 2016. For a more in-depth analysis with the same conclusion, see Bloom, 2014, see *supra* note 8.

¹⁴ Rome Statute of the International Criminal Court, 17 July 1998, Article 7(1)(k) (<https://www.legal-tools.org/doc/9c9fd2/>).

¹⁵ *Ibid.*, Article 22(2).

¹⁶ Cf. Ilias Bantekas, "Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 3, pp. 9-10; Sonia B. Starr, "Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations", in *Northwestern University Law Review*, 2007, vol. 101, pp. 1278-1280.

¹⁷ U4 Report, see *supra* note 10.

¹⁸ Transparency International, "UN Convention Must Take Steps to Coun-

¹⁰ Hannes Hechler *et al.*, "Can UNCAC Address Grand Corruption? A Political Economy Analysis of the UN Convention against Corruption and its Implementation in Three Countries", U4 Report No. 2011:2, 2011 ('U4 Report').

¹¹ UNCAC, see *supra* note 2.

¹² U4 Report, see *supra* note 10.

Unfortunately, neither grand or large-scale corruption nor political corruption made it into the final text.

Without the possibility to prosecute grand corruption at the ICC, and with UNCAC's above-mentioned weakness, it is time to explore possibilities to supplement and support states' efforts to prevent and combat grand corruption. And, while the topic is still considered sensitive within the UN, numerous recent developments over the last few years have shifted the weight towards establishing effective measures against grand corruption.

In recent years, investigative journalists have exposed grand corruption at an unprecedented level. Starting with the 2016 investigation into the offshore finance industry that was published as the 'Panama Papers', journalists have exposed numerous retired and current prime ministers, presidents and other high-level public officials with dubious accounts and connections to secrecy jurisdictions. In most cases, the origin of the undocumented assets of these individuals in power cannot be explained by anything other than (grand) corruption.

At the sixth Conference of the States Parties to UNCAC in 2015, the Government of Peru presented a Conference Room Paper that explained the difference between grand corruption ('state capture') and petty corruption (day to day administrative corruption). The last paragraph conveys the following key message:

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. [...] The effective prevention and prosecution of corruption in all its forms, such as grand corruption cases, must be ensured by taking measures at national and international levels and by enhancing international cooperation, in order to avoid that this crime goes unpunished.¹⁹

Building on the Peruvian non-paper on grand corruption from 2015, Norway initiated another effort to complement UNCAC with new commitments for states to prevent and combat grand corruption in 2017. A draft resolution titled "Preventing and Combating Large-Scale Corruption" was presented to the seventh Conference of the States Parties by Chile, Norway and Peru in October 2017.

Following challenging negotiations, the UNCAC States Parties finally reached consensus on 10 November 2017 on the first-ever resolution focusing on corruption involving vast quantities of assets.²⁰ Although weakened from its original version, the adoption by consensus and co-sponsorship by 19 countries²¹ marked an important step forward in acknowledging the seriousness of grand corruption. Through the resolution, the Conference

urged States parties to redouble ongoing efforts to prevent and combat corruption in all its forms and regardless of scale [...] giving the necessary focus to, among others, acts of corruption that involved vast quantities of assets [...] and thereby contributing to the achievement of the Sustainable Development Goals.²²

Following the adoption of the resolution, the United Nations

ter 'High-Level Corruption and the Levels of Impunity that Facilitate It', Says Paris Declaration", 18 June 2003.

¹⁹ Countering Grand Corruption, UN Doc. CAC/COSP/2015/CRP.9, 4 November 2015.

²⁰ Resolution 7/2, see *supra* note 9.

²¹ Resolution 7/2 was co-sponsored by Chile, Guinea, Honduras, Indonesia, Iraq, Israel, Jordan, Kazakhstan, Liberia, Libya, the Netherlands, Nigeria, Nicaragua, Norway, Palestine, Peru, Sweden, Switzerland and the United Kingdom.

²² Resolution 7/2, see *supra* note 9.

Office on Drugs and Crime ('UNODC') organized two international expert meetings to discuss, analyse and make recommendations for preventing and combatting corruption involving vast quantities of assets. At the first Expert Meeting in Lima, the experts recognized corruption involving vast quantities of assets as a threat to global peace and security, the enjoyment of human rights, a liveable climate and biodiversity, and encouraged the development of innovative ways to adequately investigate, prosecute and sanction individuals involved large-scale corruption.²³ At the second Expert Meeting in Oslo, a comprehensive list of recommendations on preventing and combating such type of corruption was adopted.²⁴ The 64 recommendations cover a broad range of perspectives including, but not limited to, preventive measures, recommendations directed at enablers of grand corruption (lawyers, corporate formation agents and banks), international co-operation, protection of anti-corruption bodies along with whistle-blowers, and recommendations on sanctions. The recommendations, which the eight UNCAC Conference of States Parties took note of in Resolution 8/12, form by far the most comprehensive and progressive document developed by international experts on the topic of grand corruption.²⁵

The General Assembly resolution that established the first ever UNGASS against corruption was initiated by Peru and Colombia, the same countries that have voiced support for studying the establishment of an International Anti-Corruption Court²⁶ to support States in tackling grand corruption.²⁷ At the International Expert Meeting on Corruption Involving Vast Quantities of Assets in June 2019, Colombia's then Foreign Minister Carlos Holmes Trujillo articulated that Colombia supported the establishment of an International Anti-Corruption Court based on the ICC's principle of complementarity (that allows prosecutions internationally only if states are unable or unwilling). Colombia reiterated the message at the eighth Conference of the States Parties to UNCAC in December 2019. It is to be expected that the sponsors of the special session of the General Assembly on corruption, Colombia and Peru, with the support of other states, will work towards tangible results in the area of grand corruption.

In February 2020, United States Congresswoman Jackie Speier and Congressman Jim McGovern introduced a House Resolution entitled "Opposing kleptocracy around the world and supporting efforts to develop an effective, independent International Anti-Corruption Court".²⁸ While a proposal before Congress does not mean that the United States will put its weight behind the proposal, it indicates that ambitious initiatives to combat grand corruption are being considered in legislative bodies around the world.

5. How Can the Special Session Contribute to Combatting Grand Corruption?

One top priority for the 2021 UN Special Session against corruption should be to recognize grand corruption as a serious global challenge and potentially as an international crime. The Session

²³ Lima Statement, see *supra* note 3.

²⁴ Oslo Statement on Corruption involving Vast Quantities of Assets, 14 June 2019 ('Oslo Statement') (see *infra* note 25).

²⁵ UNODC, "Preventing and Combating Corruption Involving Vast Quantities of Assets", 2019.

²⁶ Judge Mark L. Wolf, "The Case for an International Anti-Corruption Court", in *Governance Studies at Brookings*, 23 July 2014.

²⁷ Joint Statement by the Presidents of Colombia and Peru, 27 May 2019 ('Colombia-Peru, 2019').

²⁸ United States, Opposing kleptocracy around the world and supporting efforts to develop an effective, independent International Anti-Corruption Court, House of Representatives Resolution No. H.Res.856, 12 February 2020.

could have a significant impact if it declared preventing and combatting grand corruption a priority for the coming years. Stating clearly that it is unacceptable that state budgets are plundered and end up in bank accounts in secrecy jurisdictions would itself send an important signal. Coming up with practical solutions and obligations for states to comply with could potentially be a game-changer.

The high-level meeting provides an opportunity for a few world leaders to take the lead against kleptocracy and grand corruption. The membership of the UN should come together and state clearly that the international community will hold accountable those who use their positions to enrich themselves at the expense of the population they are supposed to serve.

The “concise and action-oriented political declaration”²⁹ expected to be adopted by the UN Member States will highlight international anti-corruption priorities for years to come. It is likely that such a declaration will be divided into different chapters, similar to the document of the 2016 UN Special Session on the world’s drug problem.³⁰ One chapter of the political declaration of the Session should be dedicated to grand corruption, as the Convention has not proved itself sufficiently efficient in tackling such corruption. Other chapters could be organised around the second, third, fourth and fifth chapters of UNCAC on preventive measures, criminalization and law enforcement, international co-operation, and asset recovery.

The political declaration should give an honest description of ‘grand corruption’, to spread awareness about what it actually constitutes, how it affects the masses and global prosperity, and that it is a serious threat to the achievement of the 2030 Sustainable Development Goals. It should also stress that impunity for grand corruption cannot continue and that enforcement measures are needed to support states in achieving justice.

The Presidents of Peru and Colombia – both countries with a history of major internal corruption challenges – have emerged as high-level advocates in the global fight against grand corruption. They introduced the resolution that established the Special Session on corruption and jointly called on states to consider an international anti-corruption mechanism.³¹ When countries that have experienced challenges in taking on grand corruption at the national level introduce an idea to establish an international body to support states, it is only reasonable that such a proposal is thoroughly analysed and studied by UN Member States.

Although there are solid arguments in favour of moving towards defining grand corruption as an international crime and establishing an international court to support prosecutions, as Colombia and Peru are calling for, such initiative also has its counter-arguments and opponents.³² It is unlikely that the Special Ses-

sion will mandate the establishment of such a court, as this needs extensive studies and involvement of international criminal law experts in addition to anti-corruption experts. Taking into account the need for international support to fight impunity for grand corruption, a potential middle ground could be to establish a working group to study the issue and make recommendations for ways to address it.

Recommendations from such a working group could include the establishment of an International Anti-Corruption Court through an additional protocol to UNCAC or by extending the jurisdiction of the ICC with an additional protocol to the Rome Statute. Another alternative would be to study the possibility of establishing extraterritorial jurisdiction for grand corruption in line with international law.

A recent Transparency International blog post presents possible alternative solutions to address grand corruption when countries themselves are unable or unwilling to pursue them. It deserves careful study and consideration. The post presents possible solutions to address impunity, including regional anti-corruption courts, international or regional anti-corruption prosecutors or enforcement agencies, international or regional investigative agencies, *ad hoc* international anti-corruption courts, and *ad hoc* international prosecutions or investigative functions.³³

Concrete actions to prevent and combat grand corruption should not only rely on future efforts of a potential working group. International experts have already analysed the various drivers and enablers of corruption that involves vast quantities of assets, and made concrete recommendations to prevent and combat the phenomenon.³⁴ UN Member States could already at the 2021 UN Special Session against corruption endorse the recommendations issued in the Oslo Statement or use them as the basis for operational recommendations to prevent and combat grand corruption.

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LTD-PURL: <https://www.legal-tools.org/doc/4xunlu/>.

²⁹ Special Session of the General Assembly against Corruption, UN Doc. A/RES/74/276, 1 June 2020.

³⁰ UNODC, Outcome Document of the 2016 UNGASS on the World Drug Problem, 19-21 April 2016.

³¹ Colombia-Peru, 2019, see *supra* note 27.

³² Matthew C. Stephenson, Sofie Arjon Schütte, “An International An-

ti-Corruption Court? A Synopsis of the Debate”, U4 Brief No. 2019:5, 2019.

³³ Gillian Dell, “Addressing Impunity for Grand Corruption”, 2 June 2020 (available on Transparency International’s web site).

³⁴ Preventing and Combating Corruption Involving Vast Quantities of Assets, UN Doc. UNCAC/COSP/2019/13, Annex II, 1 October 2019.